Impact Of NAFTA On Recent Developments Of Mexican Antitrust Policy

The Editor interviews Ignacio Dominguez-Torrado, Partner in the Mexico City office of Uhthoff, Vega & Uhthoff, S.C., a firm that works closely with King & Spalding LLP.

Editor: Tell our readers about your law firm.

Dominguez-Torrado: Our law firm has been around for 106 years with our core business being intellectual property. Twelve years ago we opened the corporate department. In total, we have 60 professionals with 150 supporting staff. Ninety-five percent of our practice is patent and trademark filing for foreign companies and related litigation and consulting. Like the U.S., Mexico is a signatory to the Berne Convention on copyrights. We litigate unfair competition activities reserved to the government. The Editor interviews Impact Of NAFTA On Recent Developments Of Mexican Antitrust Policy November 2011 The Metropolitan Corporate Counsel Page 25

Editor: Who composes the Federal Competition Commission?

Dominguez-Torrado: The Commission is a decentralized administrative body, part of the Ministry of Economy, and has technical and economic autonomy. There are five commissioners, including the President of the Commission. They decide the enforcement actions by majority vote. Commissioners are not allowed to be absent during the sessions sessions must issue their vote within five working days after the session. The commissioners are named by the President of Mexico and approved by the Congress for a ten-year term. The President of the Commission is also nominated from the commissioners by the President of Mexico and approved by the Congress, but only for four-year, once renewable terms, after which she or he reverts to being a member of the Commission for the balance of his or her ten-year term. This system results in non-synchronous terms with that of the President of Mexico, who is limited to one six-year term.

Editor: Would it remain as President of the Commission that would indicate a change of policy?

Dominguez-Torrado: In Mexico there have been no changes to the head of the Federal Competition Commission since five years ago. According to the applicable Mexican law, Mr. Eduardo Pérez-Motta will remain in office for ten years, so he will remain as President of the Commission until 2016. Mr. Pérez-Motta has been pressuring legislators to improve the regulation of economic competition. In fact, under his term big companies, from industries ranging from telecommunications, entertainment to beverage companies, have received exemplary fines for monopolistic practices.

Editor: Have the recession and other recent trends in the economy of Mexico affected antitrust?

Dominguez-Torrado: Although the recession did not hit Mexico as hard as some other countries, the proximity and the close business dependency with the U.S. cer-tainly slowed economic growth and foreign investment in Mexico. In addition, the President has been struggling with Con-gress to pass major legal reforms that will allow sustainable economic growth. These reforms include fiscal, labor, eco-nomic competition and energy policies. Due to this backlog small and medium-size firms in strategic sectors, such as energy and telecommunications, cannot qualify to bid for many government contracts, specifically with Mexican government-owned petroleum company, Petroleos Mexicanos.

Editor: Are there any traps or assumptions that a U.S. company might make about Mexico’s antitrust laws that might expose it to enforcement in Mexico?

Dominguez-Torrado: We do not believe that many U.S. or other foreign companies think so. They are more interested in the opportunity to compete in areas that were previously limited to a few Mexican companies or even the state-owned companies, including the telecommunications services, will show us where we are headed. The last resolutions from the Commission have been harsh against big companies that are monopolies. These new rules will allow foreign investment in areas that were previously closed.

Editor: Would you hazard to guess that this would also be true with regard to the energy sector?

Dominguez-Torrado: I believe that right now with these changes of the law, and certainly what is happening in the country, the change in areas that were previously limited to the state-owned companies, including the telecommunications services, will show us where we are headed. The last resolutions from the Commission have been harsh against big companies that are monopolies. These new rules will allow foreign investment in areas that were previously closed.

Editor: Tell our readers about your background.

Dominguez-Torrado: While in law school, I started at the firm as a law clerk and, after graduation in 2000, became an associate. I went to the University of Virginia for my LLM and then came back to the corporate department, becoming a partner in 2007.

Editor: It would help our readers to give a brief history of competition or antitrust policy in Mexico.

Dominguez-Torrado: The Mexican Federal Law of Economic and Competition was first published in the Federal Official Gazette on December 24, 1921, and last reformed on June 28, 2006. In its first provision it states that this law regulates article 28 of the Constitution regarding economic competition, monopolies and free market competition. It is binding in the entire Mexican Republic and applies to all sectors of economic activity. As antitrust constitutional provisions preceding the Constitution of 1857 (one after the Mexican Revolution), we found the Constitution of Cádiz, which gave exclusive privileges to inventors and authors for a limited time and the Constitution of 1867 that contained a written prohibition of monopolies in its article 28 that was essential to upgrade the economic law to reflect Mexico's new vision. The 1992 law underwent amendments in 2006 and 2011.

Editor: Would it be fair to say that NAFTA has been a driving force in competition policy among Mexico, the U.S. and Canada?

Dominguez-Torrado: Absolutely, and it should be noted that our Supreme Court has ruled that international treaties trump federal law and have the same legal effect as the provisions of our Constitution.

Editor: Would it also be fair to say that NAFTA operates as a moderating template in the sense that none of the three signatory nations is free to enact legislation or regulation that conflicts with the principles in the compact?

Dominguez-Torrado: It has established the framework for us.

Editor: Has there been increased convergence of the antitrust laws of the U.S. and Mexico? Have penalties increased?

Dominguez-Torrado: Since the beginning, the current Mexican Antitrust Law adopted some language, trends and ideas from the Clayton Act, the Sherman Act and the Federal Trade Commission Act, including International Treaties. On May 10, 2011 our Competition Act was reformed to include the possibility of class actions and increased fines, hence increasing the convergence between the U.S.'s and Mexico's laws. However, the legal environment is imposed for engaging in monopolistic conduct have increased, and today a company may be fined ten percent of its taxable income for a long period of time for engaging in monopolistic conduct (agreements between competitors) and ten percent for abuse of dominant power. In addition, certain activities are now characterized as criminal, e.g., price fixing, conspiracy to restrain trade or colluding in public bids, and are punishable with jail time ranging from three to ten years. The Commission has new powers to investigate the illicit conduct, such as the ability to conduct surprise inspections and, in the event that there may be criminal damage, to impose injunctive relief orders.

Editor: That sounds like a serious increase in enforcement.

Dominguez-Torrado: It remains to be seen how FTC will act in a strict fashion. We still have monopoly or duopoly power in certain sectors, such as telephony. However, after the reform a significant fine was levied against Telmex.

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Editor: Have there been any recent changes in the Commissions that would indicate a change of policy?

Dominguez-Torrado: In Mexico there have been no changes to the head of the Federal Competition Commission since five years ago. According to the applicable Mexican law, Mr. Eduardo Pérez-Motta will remain in office for ten years, so he will remain as President of the Commission until 2016. Mr. Pérez-Motta has been pressuring legislators to improve the regulation of economic competition. In fact, under his term big companies, from industries ranging from telecommunications, entertainment to beverage companies, have received exemplary fines for monopolistic practices.

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Editor: How does Mexico treat companies that have become dominant in their markets?

Dominguez-Torrado: If a Mexican company gains dominance because of better business and financial practices than those of its competitor(s), it will not be sanc-tioned by the laws of Mexico. The actions that are prohibited are specifically included in the law, for example, mergers that result in a monopoly. To avoid this, some mergers have to be previously authorized by the Commission.

Editor: Are there any final thoughts that you have?

Dominguez-Torrado: I believe that right now with these changes of the law, and certainly what is happening in the country, the change in areas that were previously limited to the state-owned companies, including the telecommunications services, will show us where we are headed. The last resolutions from the Commission have been harsh against big companies that are monopolies. These new rules will allow foreign investment in areas that were previously closed.

Editor: Would you hazard to guess that this would also be true with regard to the energy sector?

Dominguez-Torrado: It is changing, allowing private companies now to pro-duce energy that was reserved to the state, so more and more companies are starting to come into Mexico. One example is the French company Alstom, which is building a huge energy plant. This is good for Mex-ico because the company is starting to change from the state-owned service com-panies to privately owned energy services that certainly are cheaper. I read yesterday that one of the big automobile companies is building a new plant here. Their kilowatt-hour cost is going to drop from seven pesos per kilowatt hour to four-and-a-half pesos. But the petroleum monopoly is still reserved to PEMEX.

Please email the interviewee at ignaciodomtor@uhthoff.com.mx with questions about this interview.