

Mexican Price-Squeeze Tie-Breaker

Law360, New York (August 16, 2011) -- Two years ago, the U.S. Supreme Court lay to rest price-squeeze as an independent cause of action under U.S. antitrust law in *Pacific Bell vs. linkLine*. One year later, in *Deutsche Telekom vs. European Commission*, the European Court of Justice (ECJ) resurrected the theory. Mexico soon will add its vote to this global debate.

Earlier this year, Telcel, the largest provider of wireless phone service in Mexico, was handed a record-setting \$1 billion dollar (\$12 billion peso) fine by Mexico's antitrust enforcers at the Federal Competition Commission (Cofeco) for an apparent price-squeeze. According to Cofeco's preliminary opinion, Telcel charged its wireless and wireline competitors more for necessary inputs (i.e., wireless terminating access) than it charged its own retail customers for wireless phone service.

Soon, Cofeco will issue its final order on the subject. Cofeco has some interesting issues with which it must grapple, some of which have been addressed by the USSC and ECJ, and some of which have not.

In the new issue category, Mexican regulation gives the carrier customers for interconnection services the option of entering into voluntary agreements with other carriers or, if unable to reach agreement, requesting that Cofetel, the Mexican telecom regulator, intervene and set the terms, including price. In the current case, many of the charges that are the focus of Cofeco's antitrust investigation resulted from voluntary agreements between the carriers and Telcel.

The fact that the complaining carriers did not seek Cofetel's intervention raises the interesting question of whether Cofeco ultimately will accept complainants' apparent theory that, under Mexican law, a firm may choose its regulator by (a) seeking Cofetel's intervention on disputed terms of interconnection, or (b) accepting the other party's terms and then complaining to Cofeco.

In the United States, inappropriate entry into the regulatory sphere was one of the institutional reasons cited by the U.S. Supreme Court why recognizing a price-squeeze theory of antitrust liability was a bad idea. Based at least on its preliminary order, Cofeco appears willing to cross that line and assume that role.

A related issue derives from the fact that Cofetel does in fact already regulate Telcel's provision of terminating access. Thus the obvious question: should it be a defense to an antitrust cause of action that the complained of conduct is subject to regulation? Cofeco has indicated, at least preliminarily, that so long as the elements of the antitrust violation can be satisfied, the fact that the alleged "price-squeezer" has been compelled to offer the service and is subject to price regulation is of no consequence. This overlap of legal obligations promises to raise vexing issues when firms find themselves faced with the dilemma of complying with a regulatory mandate or the antitrust laws.

And what exactly are the elements of a price-squeeze? Among the institutional concerns cited by the U.S. Supreme Court was the lack of any easily defined standard or “safe harbor” to which firms could conform their conduct. Cofeco may be attempting to cure that infirmity by urging a requirement that the party supplying the necessary input do so at cost. Such a requirement is “regulatory” in nature; moreover, as most economists would agree, it threatens to chill efficiency-enhancing conduct and innovation.

Finally, as the U.S. Supreme Court acknowledged, the biggest risk of recognizing a price-squeeze cause of action may be that, in order to avoid potential price-squeeze liability, firms will raise their retail prices or refrain from aggressive price competition. Providing a different perspective on the relative goals of competition law, the ECJ did not care that Deutsche Telekom’s wholesale prices were set by the German regulators; the ECJ advised that DT still could have avoided price-squeeze liability simply by raising its already above-cost retail prices.

Mexican consumers have much at stake in how Cofeco, and ultimately the Mexican courts, resolve this tradeoff between consumer welfare and competitor welfare. And although Cofeco’s order is subject to judicial review, it is necessary reading in the interim for companies doing and considering doing business in Mexico.

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America Movil, parent company of Telcel, is a client of Tucker Ellis & West.

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