

## An interview with Luis de la Calle

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Analysis Group's **Almudena Arcelus** talked with **Luis de la Calle**, who worked on Mexico's negotiations in the World Trade Organisation and the North American Free Trade Agreement, about the likely impact on cross-border markets and litigations of Mexico's recent reforms and President Donald Trump's push for NAFTA changes.

In 2013, Mexico underwent a wide-ranging telecommunications and competition constitutional reform that created new autonomous agencies and vested them with powers to correct historical competitive distortions and to make dominant players accountable for their competitive behavior. These powerful independent entities, staffed by technical professionals, are now called to lead the country in the construction of markets ruled by the competitive process.

Luis de la Calle is managing director of De la Calle Madrazo Mancera, an economic consulting firm in Mexico City that focuses on competition policy, antitrust litigation and trade issues. In his government service, he headed Mexico's negotiations for bilateral trade agreements and regional multilateral negotiations in the World Trade Organisation, and also actively participated in the design, promotion, and implementation of NAFTA.

**Arcelus:** As things stand now, should companies that do business across North America expect a radically different type of antitrust enforcement from Mexican authorities?

It's important to keep in mind that Mexico's antitrust laws are substantially modeled, in many aspects, after more mature jurisdictions. US legal and economic thinking have been an important influence on Mexican law and court practices. It's not only that notions of microeconomics and industrial organisation concepts that are widely accepted as having informed antitrust practice in the US have been adopted by economists and lawyers in Mexico.

Best practices for enforcing laws and regulations in this field – such as the 2010 horizontal mergers guidelines and landmark US Supreme Court decisions – have also permeated Mexico’s own rules and administrative and judicial activity. This means that American firms looking to do business in Mexico can expect that the antitrust regime and its enforcement will not vary substantially from what they have encountered at home.

Moreover, the degree of integration of the three North American economies, which is much deeper than people realise, will in the end result in a convergence of all sorts of practices, including antitrust. As a matter of fact, it is now difficult to find an antitrust case in Mexico where parties will not use US precedents in litigation, and where the Federal Economic Competition Commission (COFECE) and Federal Institute of Telecommunications (IFT) will not consult their US and Canadian counterparts for advice.

**Considering the recent constitutional reform and enactment of the new competition law, where would you say that COFECE and IFT are headed in terms of antitrust enforcement?**

Enforcement will likely be more stringent, more technical, and more widespread in this new antitrust regime’s early stage of development, where a new toolkit – the ability to declare the existence of essential facilities, to order divestitures, etc – to enforce competition laws has only recently become available.

My perception is that Mexican regulators are taking decisive steps to correct historical competitive distortions, targeting cartels that have thrived in the past, and raising their standards when it comes to merger review. This also means that they are garnering more experience, becoming more technically sophisticated in their economic analysis, and engaging with firms more often, which consequently allows them to be more fair.

The larger challenge for COFECE will be to assist the Mexican government in accomplishing the ambitious goal of transitioning from an energy sector with two large and mostly inefficient monopolies – Pemex and Comision Federal de Electricidad – to a functioning energy market. For IFT, the challenge is to eliminate historical competitive distortions and, at the same time, establish a framework conducive to more – not less – investment by all parties in the telecommunications sector.

**How have recent judicial developments in the way evidence is weighed impacted antitrust cases in Mexico, and what are the implications for companies doing business there?**

In Mexico, as in the US, economic notions are cutting deep into antitrust legal analysis. Regarding cartels in Mexico, the difficulty of obtaining direct evidence of collusive behavior has led enforcers and the courts to rely on indirect or circumstantial evidence to determine that an illegal agreement has occurred. This is chiefly accomplished through economic analysis undertaken by the antitrust agencies. In a recent decision, Mexico’s Supreme Court of Justice found a group of pharmaceutical companies liable for fixing the prices of insulin and several other medications, mainly based upon the economic analysis undertaken by COFECE.

For firms doing business in Mexico, this means that they can be found to engage in “absolute monopolistic practices”, even in the absence of direct evidence of an agreement, based only upon the economic analysis undertaken by the authorities. As most firms are naturally deterred from engaging in illegal conduct anyway, this is hardly a disincentive to do business in Mexico.

**Turning to the issue of trade, do you think that eventual revisions to key provisions of NAFTA are likely to have an impact on competition within the Mexican market – for instance, curtail its intensity in certain sectors due to more limited access for US players into these markets? Do you foresee any other anticompetitive effects due to these much-talked-about revisions?**

Revisions to NAFTA will not have a direct impact on antitrust practice in the region. The only exception could be in the intersection of antidumping and countervailing duty (AD/CVD) cases and competition policy. Article 1907 of the original NAFTA encourages the three parties – Canada, Mexico, and the US – to explore eliminating dumping cases in the region and establishing a substitute system based on antitrust. It seems far-fetched that the US Congress might entertain such an ambitious change, but you never know.

An alternative could be to begin in sectors where the integration is very deep, such as autos, steel, electronics, or to introduce antitrust elements in AD/CVD cases. For instance, a middle-ground idea could be put on the table, in which price-taking exporters would be exempted from dumping margins, while firms with market power would be prevented from becoming AD/CVD petitioners.

**What are some of the demands that Mexico can expect from its North American partners during this revision process related to competition? Is Mexico in a position to comply with them?**

It appears the US is seeking to make antitrust and competition procedures more transparent in Mexico. It is also seeking to ensure that US companies are guaranteed basic rules of procedural fairness to submit a solid defence strategy. This might include pre-trial discovery that is not used in Mexico, which Mexican litigants would most likely welcome.

As was stated in the summary of objectives for the NAFTA renegotiation issued by the US Trade Representative in July, the US will ask that its partners guarantee levels of transparency in the processes by which they craft regulations and enforce their antitrust laws that are on a par with those in force in the US.

**What about state-owned enterprises in the energy sector that historically have been isolated from competition?**

In the field of competition, Mexico has already taken important steps in this direction. For instance, the recently enacted competition law has significantly narrowed the exemption that state-owned energy enterprises enjoyed from antitrust liability. Pemex (oil) and CFE (electricity) can now be found in breach of the antitrust laws in any of their dealings with competitors, providers, distributors, and final consumers – excluding only the actual extraction of hydrocarbons from the ground, the planning of the layout of the national electrical grid, and the provision of power services. NAFTA 2.0 could be an opportunity to underline the commitment that state-owned enterprises do not engage in unfair commercial practices.