NEW
ANTITRUST/COMPETITION LAW
MEXICO

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MEXICO

New Federal Economic Competition Law (NFECL)

(Enters into force in July 7th, 2014)

Implications for corporations

By Miguel Flores Bernés

1. - Origin.

The new law derives from the 2013 Constitutional amendment on telecommunications and competition/antitrust matters. With this amendment:

- The former competition authority was transformed into a new agency with constitutional autonomy (COFECE) and a new regulator on Telecommunications and Broadcasting was vested with authority on antitrust matters related to those industries (IFT)
- All Commissioners of both authorities were renewed.
- A new Competition Prosecutor, independent from the Commissioners, was created (both in the IFT and in the COFECE).
- COFECE and IFT were granted with the authority to issue regulation (laws and technical criteria).
- It was determined that only an “indirect Amparo” (Constitutional protection similar to the “Habeas Corpus”) proceeds against resolutions of the new authorities, without injunction (except for fines cases and divestiture orders from the COFECE).
- Specialized Federal Tribunals on Competition, Telecommunications and Broadcasting Affairs were created.
- New powers were granted to the new authorities such as the power to order measures to eliminate “competition barriers”, to regulate the access to “essential

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2 For its acronym in Spanish.
inputs”, and to order the divestiture of assets, rights, social parts or shares of the economic agents, in the proportions necessary to eliminate anticompetitive effects.

- An instruction to review criminal matters in economic competition issues was incorporated.

2. – NFECL

In general, the law maintains the principal functions of a competition authority, i.e., to pursue absolute monopolistic practices (cartel conduct); relative practices (dominance abuse) and merger control.

Some changes were made in order to adjust these procedures to constitutional provisions and certain legislative innovations were included. The most important changes derive from the creation and regulation of new powers for the competition authorities, in particular those regarding to competition barriers and essential inputs regulation, besides criminal matters. The main changes will be briefly described following the structure of the NFECL.

2.1 “Organization and Operation”

- The purpose of the law is reflected in its text and will remain to be seeking for more efficiency in the markets (i.e. enhancing consumer welfare).
- The law incorporates a new Article with definitions, including the definition of competition barriers, which does not have any precedent either at national or international level and that reads as follows:

  “Any structural characteristic of a market, as well as any event or act of the Economic Agents which has as an object or effect to hinder the access to competitors or to limit their capacity to compete in the markets, or which hinder or distort the process of competition and free concurrence; as well as the legal dispositions issued by any governmental order which improperly hinder or distort the process of competition and free concurrence."

- The law maintains the current exemptions on the application of competition law to those economic areas which are reserved to the Mexican State (such as electricity, oil, and nuclear energy), as well as issues related to trade unions and intellectual property rights. The general provision which allows the establishment of maximum prices in goods and services (prior declaration of an absence of effective competition) is preserved.
• A new “Competition Prosecutor” (Autoridad Investigadora), appointed by the Commissioners (five votes) with exclusive powers to initiate investigations and with technical independence, is created.
• A new Internal Audit Office, appointed by the House of Representatives (Cámara de Diputados), is created.

2.2. - “Anticompetitive Conducts”

2.2.1 Cartel conduct (Absolute Monopolistic Practices)

• Absolute Monopolistic Practices (cartel conduct) consist in agreements among competitors to fix prices, allocate markets, control supply or bid-rigging.
• A potentially dangerous new provision states that a mere information exchange between competitors -not including additional elements for collusion- would be punishable.
• Fines may be up to 10% of the annual net income of a company in Mexico.
• Article 254 bis of the Federal Criminal Code has been modified in order to increase the prison time applicable from 5 to 10 years (whereas before it was from 3 to 10 years), including cases of information exchange between competitors.
• Company directors who participate in these conducts may be subject to administrative sanctions, including a prohibition to perform the same functions in other companies for a period up to five years.

2.2.2 Abuse of dominant position:

In Mexico, it is not illegal to be a dominant firm; however the Law has a catalogue of strategies for the displacement of competitors that, if carried out by an agent with substantial market power\(^3\), may be sanctioned, provided that their effects are more negative than beneficial for the consumers (i.e. rule of reason). This list includes the following activities:

- Exclusive Distribution
- Establishment of resale price (conditions)

\(^3\) Enough market power to raise prices or control supply without the possibility that other competitors can counteract such power.
- Exclusivity agreements
- Tied Sales
- Denial of treatment
- Predatory pricing
- Price discrimination
- Crossed subsidies
- Boicots
- Raising rivals costs

- This new law incorporates two new practices to this list, both linked to the “essential facilities (inputs)” doctrine.
- The new sections includes:

  - XII. The refusal, restriction of access or access in discriminatory terms and conditions to an essential facility (input) from one or various Economic Agents, and
  - XIII. The narrowing of margins, consistent in the reduction of the existing margin between the access Price to an essential input provided by one or various economic agents and the price of the good or service offered to the final consumer by these same economic agents, using the same input for their production.

- In this regard, the law introduces the concept of “essential input”. In order to define an essential input, the law provides that the competition authority may consider:

  - If the input is controlled by a dominant agent or agents.
  - If its reproduction is not feasible from a technical, legal or economic point of view.
  - If the input is necessary for the provision of goods or services by competitors.
  - The circumstances under which the dominant firm was able to control the input.
  - Any other criteria issued by the authority (authorities may issue such criteria in the term of six months).

- In relation to essential inputs, “margin squeeze” has been a debatable matter around the world. The difference between a duty to deal and a margin squeeze has also been discussed and absent a duty to deal, some jurisdictions do not consider the margin squeeze as a competition offence. In fact, in some jurisdictions it has been
considered that a regulator would be better placed than a competition authority to deal with these cases. It is questionable whether margin squeeze is a single abuse, or if it’s connected to other more common types of monopoly power or market power abuse.

- Economic fines were not modified (8% of the annual net income), however directors or personnel who participate in a practice on behalf of an undertaking may be subject to an order of disqualification for up to five years.

- Additionally, the authority has the power to impose precautionary measures, at any moment of the investigation, consisting in interim orders to temporary stop performing certain conducts.

2.2.3 Merger control

Competition authorities commonly impose prior notification procedures and analysis of large mergers and acquisitions (there is a determined threshold) to prevent damages to competition (such as the creation of substantial market power or coordinated effects among competitors). Most of the changes to the law were related to the merger control procedure.

- An important modification is that all mergers, subject to prior notification, will not be able to be finalized before the authority issues a final resolution.

- The term for the resolution has increased from 35 working days to 60 working days.

- These changes may affect international transactions having effects in Mexico.

- A merger can be approved by a competition authority subject to remedies that can reduce competition problems or concerns; however the new law does not provide a transparent procedure to submit remedies and discuss alternatives with Commissioners.
2.3. “Procedures”

2.3.1 Investigation of cartels and abuse of dominance procedures.

- The competition authorities may initiate an investigation procedure on their own or upon request of any interested person. Also, the Government, through the Ministry of Economy and the Consumers Agency -PROFECO- can request the authorities to initiate the procedure; these types of investigations will have a preferential treatment.

- The investigation will be carried out by the new “Competition Prosecutor” who will have the authority to:
  - Collect any type of evidence.
  - Order “dawn raids”.
  - Send information requests to companies.

- Destroying evidence in the process of a “dawn raid” is now considered a federal crime.

- Once the investigation is concluded, the Competition Prosecutor will issue a recommendation to the Commissioners, who will decide if a formal accusation is issued against the company or persons under investigation. In case of cartel conduct, the competition authority will present a formal complaint with the Federal General Attorney so that criminal procedures can initiate.

- The general procedure has become an adversarial procedure, that is, the accused party will have the right to defend before the Commissioners who will be acting as an Administrative Tribunal.

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4 Procuraduría Federal del Consumidor.
2.3.2 “Special Proceedings”

2.3.2.1 Market investigations to consider the existence of “competition barriers” and the existence of “essential facilities/inputs” that need to be regulated

The procedure starts at the initiative of the competition authority or upon request of the Government, when it is considered that a market might not be subject to “effective competition”. The objective of this procedure is to determine the existence of “competition barriers” that need to be dismantled or of “essential facilities/inputs” that need to be regulated. However, these concepts are not precisely defined in the law.

- The Competition Prosecutor carries out the investigation and issues a preliminary finding.
- The concerned parties have a right of defense and can submit arguments and evidence.
- The Commissioners will issue a final resolution in which they can decide to:
  - Recommend an authority (Federal, Local or Municipal) to proceed to eliminate the barrier to competition.
  - Order an undertaking to eliminate the competition barrier.
  - Determine the existence of essential facilities/inputs and issue guidelines to regulate the access, prices or rates, technical conditions and quality of such inputs.
  - Order a company the divestiture of assets, rights, or shares in the necessary proportions to eliminate the anticompetitive effects.

2.3.2.2 Market investigation to establish maximum prices or to declare an undertaking to be dominant.

This is not a new procedure; it has been used to declare the existence of dominant agents or to state that there are no effective competition conditions, for example in the LP Gas or Telecommunications sectors. The final decision of the Commissioners allows the authority to regulate maximum prices or to impose a specific regulation to an undertaking.
2.3.2.3 Favorable opinions on competition matters to participate in certain tenders to provide public services.

Some administrative laws, require a favorable opinion of the Competition Authority in order to participate in public tenders to provide a service that the law considers to be a public service (airports, ports, railroads, TV and Radio, telecommunications, among others) or to use a federal public good (such as the electromagnetic spectrum). The analysis is very similar to a merger analysis and the same laws and criteria will apply. There are no relevant changes to this procedure.

2.3.2.4 Early termination procedures applicable to abuse of dominance investigations.

This procedure applies for relative monopolistic practices investigations (abuse of dominance and prohibited mergers). Once a company is under investigation it has the right to present to the competition authority commitments to suppress and correct the practices in exchange for a reduction of a possible fine.

Under the previous law, this procedure could be initiated at any time before the issuance of a final decision of the competition authority. However, the new law only allows it to commence before the formal accusation is issued. This new feature may discourage the use of this mechanism, which has been proved to be successful in the past to avoid long and cumbersome procedures and eliminate risk of negative media reports.

2.3.2.5 Leniency program

The leniency program is applicable to monopolistic absolute practices (cartel conduct). An individual or a corporation that participates in cartel conduct may obtain the benefit of reduction of fines if:

- The individual or company cooperates with the authority; and
- The individual or company is the first to submit enough evidence to either initiate an investigation; or to simply presume the existence of cartel conduct. In this regard, the new law is reducing the evidentiary burden since the previous statute required that the evidence presented had to be sufficient to actually prove the existence of the cartel conduct.
The “first to tell” will have a 100% reduction of its fine, however those that arrive later on, and provide the authority with new evidence, might also be candidates to obtain reductions from 50% to 20% of the fines.

A major benefit is that all participants in the leniency program will have immunity on criminal matters.

Since 2006, the leniency program has been successful in Mexico and we can foresee that it will continue to be the most important tool for Mexican competition authorities in their fight against cartel conduct.

### 2.3.2.6 Request for opinions and general orientation to the authorities

The new law creates a procedure to request the opinion from the competition authorities with regards to new or unsolved matters relating with the interpretation and application of the law.

The competition authority may answer such requests by issuing a formal opinion if it considers them as a relevant topic for the market and has the possibility to gather all necessary information. We do not foresee that this procedure will be very helpful since the law incorporates complex requirements in order for the procedure to start.

### 2.3.2.7 Fines, recidivism and divestiture of assets

The level for fines was not modified in the new law and remains up to 10% of the income for cartel conduct and 8% for abuse of dominance position.

An important innovation is the possibility to ban the individual from acting as a counselor, director, manager, executive, agent, general or special representative in a corporation for up to five years; which can be applicable to those who participate (directly or indirectly) in cartel conduct or in a conduct considered to be an abuse of dominance in representation or on behalf of a corporation.

In addition, the law now introduces a generic concept for recidivism or “second time offender”. Now, any breach of the law would qualify as recidivism even if the conduct was different.

The order for divestment of assets or shares as an administrative measure applicable to an undertaking that has breached the law existed in the former law; however with the new law
such measures would be applicable with the second breach and without being necessary that the conduct affects the same relevant market.

2.3.2.8 Private action

Competition authorities impose fines on undertakings that have incurred in anticompetitive conduct. However, any injured party affected by such infringement is entitled to compensation for any harm caused.

To claim damages an injured party must initiate a private action in court. In Mexico procedural rules are not clear. In 20 years only two injured parties have sued in court to recover damages and both have failed.

An efficient system of private enforcement will make offenders think twice before breaking the law.

The new Law incorporates special rules to claim compensation in courts. Any loss or damages derived from the infringement of the competition law shall be claimed before the Specialized Courts on Competition, Telecommunications and Broadcasting Matters. This would apply to individual actions and class actions. All claims may be presented once the competition authority has issued a final decision on the matter.

3. - Main implications for corporations doing business in Mexico

The new law may generate uncertainty not only for corporations doing business in Mexico that have high participations in the market; but also for those which participate in markets with few players due to the existence of entry barriers.

The competition authorities still need to develop administrative practice concerning diverse matters including merger control; the interpretation of the new types of monopolistic practices incorporated in the law (cartel and abuse of dominance conduct); and the definition of concepts such as: “essential facilities/inputs” and “competition barriers”. Among other things and in the short term, competition authorities will need to issue guidelines and technical criteria to provide more legal certainty in the application of the law.

Criminal law related to competition matters has become harsher. The new crime of information exchange between competitors generates great uncertainty since any sporadic exchange, even because of an error, may be translated into a very high punishment (5 to 10
years of jail). The threat of disqualification to directors and representatives of an undertaking results also in a new risk.

Corporations doing business in Mexico would need to evaluate these new risks and consider reviewing their policies and strategies to avoid unnecessary complications.

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