OXFORD UNIVERSITY PRESS
Journal of European Competition Law & Practice

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Journal:	*Journal of European Competition Law & Practice*
Manuscript ID:	Draft
Manuscript Type:	International Developments
Date Submitted by the Author:	n/a
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Keywords:	Mexico, Mexican, Economic Competition, Competition Law, Antitrust, Telecommunications

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Mexico – New Antitrust Authorities and a New Federal Economic Competition Law

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Key Words

- An amendment to the Mexican Constitution modified the telecommunications and antitrust legal frameworks in Mexico, aiming to encourage competition in the markets and specifically, in the telecommunications and broadcasting sectors
- Two new antitrust authorities were created as autonomous constitutional entities, one with exclusive jurisdiction over the telecommunications and broadcasting sectors and a second one with jurisdiction in all other sectors
- A new Competition Law has been enacted, modifying proceedings followed by the antitrust authorities and granting them new powers
- The figure of "preponderant economic agents" in the telecommunications and broadcasting sectors is introduced

I INTRODUCTION

On June 12, 2013, an amendment to the Mexican Federal Constitution regarding antitrust and telecommunications became effective (the "Constitutional Amendment"). Among other things, the Constitutional Amendment provided (i) the creation of two new antitrust authorities in charge of enforcing antitrust regulation, the Federal Institute of Telecommunications (*Instituto Federal de Telecomunicaciones*, the "FIT") and the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*; the "FECC" and jointly with FIT, the "Antitrust Authorities"); (ii) the creation of new specialized federal courts in economic competition, telecommunications and broadcasting; (iii) the obligation of the FIT to determine "preponderant economic agents" in the telecommunications and broadcasting sectors; (iv) the obligation of the Federal Congress to issue a new Competition Law (the "New Competition Law"); and (v) the obligation of the Federal Congress to amend the Federal Criminal Code with respect to absolute monopolistic practices.

The spirit behind the Constitutional Amendment was to provide the Antitrust Authorities with sufficient powers to effectively regulate and enhance competition in Mexico and to break-up market power held by dominant economic agents in highly concentrated markets such as the telecommunications and broadcasting industries,

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not only through the creation of the Antitrust Authorities as autonomous constitutional bodies (which aims to guarantee independence of their decisions) but also, through the addition of certain concepts new to Mexican legislation, such as the preponderant statements, regulation on essential inputs and barriers to entry, as well as allowing Antitrust Authorities to order the divestiture of certain economic agents as a "last resource" when other measures imposed by the Antitrust Authorities have been proven ineffective.

Due to the numerous modifications, this article does not attempt to be exhaustive and only provides a general description of the main modifications to Mexican legal framework with respect to economic competition.

II NEW ANTITRUST AUTHORITIES

The Constitutional Amendment created the FIT as a new a new autonomous constitutional body with exclusive jurisdiction over the telecommunications and broadcasting sectors, including competition matters[4], and transformed the former Federal Competition Commission (*Comisión Federal de Competencia*, the "Former FCC") into the new FECC, with exclusive jurisdiction over competition issues in all areas and industries other than the telecommunications and broadcasting sectors. The foregoing is the result of an attempt on behalf of the Federal Government and the Congress to provide the Antitrust Authorities with the required autonomy in order to be able to take the required actions to enhance competition, which in many cases imply standing up against companies with an important political and economic power.[5]

It should be noted that while FECC replaced the Former FCC, IFT not only replaced COFETEL but also acquired all of the Ministry of Communications and Transportations' authority in the telecommunications and broadcasting sectors, including the assignment of concessions (such as spectrum concessions).

III NEW SPECIALIZED FEDERAL COURTS

[4] FIT replaced the former Federal Telecommunications Commission (*Comisión Federal de Telecomunicaciones*, the "COFETEL"), which was a decentralized entity of the Ministry of Economy *Secretaría de Economía*) without any authority in competition matters.

[5] Both Antitrust Authorities are governed by a Plenum composed of seven commissioners (as opposed to the Former FCC and COFETEL, which were composed of five commissioners). Their appointments follow a proceeding by which an evaluation committee selects those candidates who meet the requirements and achieve the highest scores in the corresponding exams and forward a list stating three candidates for each position available to the President of Mexico, who will in turn select a candidate for each available position and submit the name of the candidate to the Senate for its ratification.

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Additionally, the Constitutional Amendment also ordered the creation of specialized federal courts with exclusive jurisdiction over economic competition, broadcasting and telecommunications (the "Specialized Courts").

The Specialized Courts are comprised by two District Courts and two Circuit Courts, all located in Mexico City, which initiated activities in August, 2013.

These Specialized Courts are now the judicial authorities in charge of ruling on constitutional appeals (*amparo indirecto*) filed by economic agents which are sanctioned in any way by any of the Antitrust Authorities. It is worth pointing out that as consequence of the Constitutional Amendment, all procedures before the Antitrust Authorities may only be appealed through the *amparo indirecto* and that it may only be filed against the final resolution issued by the Antitrust Authorities (as opposed to inter-procedural resolutions).

IV PREPONDERANT ECONOMIC AGENTS

One of the novelties of the Constitutional Amendment is the creation of the preponderant statement figure. In this regard, the Constitutional Amendment required FIT to determine the preponderant economic agents in the telecommunications and broadcasting sectors in those cases in which an economic agent has, directly or indirectly, more than 50% of users, subscribers, audience, network traffic, or used network capacity on a national basis[6], imposing to such preponderant economic agents asymmetric regulations which are described further below.

As a consequence of such preponderant statements, preponderant economic agents would be subject to several obligations in order to enhance competition in benefit of consumers such as (i) sharing of infrastructure with competitors allowing them to benefit from the existing infrastructure; (ii) prohibition of acquiring relevant television contents on an exclusive basis in the broadcasting sector, aiming to increase other broadcasters' market share; and (iii) the imposition of fixed interconnection rates on behalf of the FIT (in the case of telecommunications) aiming to eliminate margin squeezing on behalf of the preponderant economic agents, among others.

[6] It should be noted that a preponderant statement is independent of market power or dominant position, therefore, a preponderant agent may have or not market power, as well as a dominant economic agent may or may not be declared as a preponderant economic agent.

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On March 6, 2014, the FIT issued the preponderant statements declaring (a) Televisa and 34 broadcasters subsidiaries, affiliates or controlled by Televisa (the "Televisa Group"), as preponderant economic agents in the broadcasting sector (the "Broadcasting Preponderant Statement"), and (b) América Móvil, Telmex, Telcel, Grupo Carso, and Grupo Financiero Inbursa (the "América Móvil Group") as preponderant economic agents in the telecommunications sector (the "Telecommunications Preponderant Statement").

The Broadcasting Preponderant Statement imposed several obligations to the Televisa Group, including among others:

(i) The obligation to allow access to and shared-use of passive infrastructure on behalf of other other broadcasting concessionaires under the same terms and conditions applicable to Televisa Group's own operations;

(ii) A prohibition to acquire exclusive rights for the broadcasting transmission in Mexico of "relevant contents" determined by the FIT (excluding exclusive rights previously acquired), namely:

   a. Matches of the Mexican soccer national team;

   b. Inauguration and closing ceremonies of summer Olympic Games organized by the International Olympic Committee;

   c. Inauguration and farewell ceremonies of the FIFA World Cup tournaments, as well as matches corresponding to quarter finals, semi-finals and finals of such tournaments; and,

   d. Final matches of the first division tournament organized by the Mexican Football Federation known as "Liga MX";

(iii) An obligation to carry out the sale of advertising spaces under none-discriminatory terms.

It should be noted that the asymmetric regulation set forth above, as of the date in which this article is being written, is being challenged by the Televisa Group through a constitutional appeal (*amparo action*) and therefore, subject to modifications if ordered by a Federal Court.

With respect to the Telecommunications Preponderant Statement, the América Móvil Group is now subject, among others, to the following asymmetric regulations:

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(i) The prohibition to acquire exclusive rights for the transmission in Mexico of "relevant contents" determined by the FIT (excluding exclusive rights previously acquired);

(ii) Specific interconnection obligations, including *inter alia*, the provision of interconnection links and services as requested by other concessionaires;

(iii) The requirement to submit the terms and conditions included in its interconnection services agreements to the FIT's approval;

(iv) The obligation to provide "bulk roaming" to other concessionaires in all its coverage area, enhancing participation on behalf of mobile virtual network operators ("MVNOs");

(v) The obligation to sell to MVNOs who request it, devices and SIM cards and allow the use of devices and SIM cards sold by MVNOs on its network;

(vi) The obligation to offer MVNOs the same service quality offered to its own users;

(vii) The obligation to allow the access to and the shared-use of passive infrastructure on behalf of other telecommunications network concessionaires;

(viii) The obligation to allow MVNOs to migrate to other concessionaires' telecommunications networks without imposing penalties or way-out conditions;

(ix) The obligation to inform its plan users on every bill the penalty for early terminating their agreement;

(x) An express prohibition of tied-sales to its customers;

(xi) The obligation to comply with specific billing and invoicing provisions, such as including a description on the specific services billed to each user on a disaggregated manner;

(xii) The obligation to unlock terminal equipment (cell phones) for free, unless reported stolen, and to deliver unlocked phones when purchased on a prepaid form;

(xiii) The prohibition to charge roaming services when its users use its own network, disregarding if such Users are in a different local service area or region than that in which the service was hired;

(xiv) An obligation to comply with the reduced interconnection rates which have been approved by FIT; and,

(xv) The obligation that its plan and prepaid services' tariffs originated and ended on its network must be replicable (the average rates must be higher than the interconnection rates for traffic termination),

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eliminating any risk of margin-squeeze conduct, allowing other economic agents to effectively compete.

As it is also the case with the Broadcasting Preponderant Statement, the asymmetric regulation imposed by the FIT in the Telecommunications Preponderant Statement, as of this date, is being challenged by the América Móvil Group through a constitutional appeal (*amparo action*) and therefore, subject to modifications if ordered by a Federal Court.

V THE NEW COMPETITION LAW

The New Competition Law was enacted on May 23, 2014, becoming effective on July 7, 2014. Although the New Competition Law reinstates most of the legal framework provided in the former Competition Law, it does include several relevant modifications, aiming to empower the Antitrust Authorities in order to enhance effective competition and prevent concentrations and practices on behalf of economic agents which could have anticompetitive effects.

Essentially, the most relevant amendments consist of (i) modifications to the merger control proceeding; (ii) new relative monopolistic practices (abuse of dominance); (iii) a new absolute monopolistic practice; (iv) elimination of the regulation of joint market power (although the figure still remains); (v) a new regulation on essential inputs; (vi) modifications on the way in which the Antitrust Authorities carry out investigation proceedings (including the creation of a new investigatory authority); (vii) additional powers for the Antitrust Authorities when carrying out dawn raids; (viii) new special proceedings; and (ix) new and increased criminal sanctions for incurring in absolute monopolistic practices.

A. Merger Control

The substantive analysis of transactions notified to the Antitrust Authorities remains unaltered in its essence with respect to the former Competition Law, however, certain relevant procedural aspects have been modified, including *inter alia*, the following:

(i) Monetary thresholds that trigger the obligation to submit a pre-merger filing are the following:

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a. if the transaction or series of transactions that give rise to the concentration, notwithstanding the place of execution, represent within Mexico, directly or indirectly, a value greater than MX$ $1'211,220,000 pesos (approximately US$93.2 million[7]);[8] and/or

b. if the transaction or series of transactions giving rise to the concentration, result in the acquisition of 35% (thirty five percent) or more of the assets or shares of an economic agent which total assets or annual sales located/originated in Mexico are worth more than MX$1'211,220,000 pesos (approximately US$93.2 million); and/or

c. if the transaction results in (1) an accumulation within Mexico of assets or capital stock in excess of MX$565'236,000 pesos (approximately US$43.4 million), and (2) the assets or annual volume of sales of the economic agents involved in the concentration (on a worldwide basis), jointly or separately, are worth more than MX$3'229,920,000 pesos (approximately US$248.45 million). This threshold is the only one which is modified in the New Competition Law, providing that item (2) will only consider assets located in Mexico or revenues originated in Mexico, as opposed to on a worldwide basis as provided in the former Competition Law.

(ii) The merger control review process will be suspensive in all cases and the waiting period –which formerly allowed the parties to close a transaction before clearance if no stop order was issued– was eliminated; thus, the parties will now be allowed to close a transaction after receiving clearance by the Antitrust Authorities;

(iii) The term for the Antitrust Authorities to issue a resolution is increased from 35 to 60 business days, counted from the date in which the Antitrust Authorities have a complete file;

(iv) The term for the Antitrust Authorities to issue a request for basic information, is increased from 5 to 10 business days following the date in which the filing was submitted, while the term to issue a request for additional information remains in 15 business days counted from the date of the filing or from the date in which the request for basic information is fulfilled;

(v) If the parties offer remedies or conditions in order to dissipate any possible concerns the Antitrust Authorities may have after the submission of the pre-merger filing, the 60 business days for the Antitrust Authorities to issue a decision will be restarted; moreover, the Antitrust Authorities have the

[7] At an exchange rate of MX$13.00 pesos per US Dollar.
[8] This refers to the price allocated to Mexico, as per the relevant agreement between the parties.

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opportunity to inform to the parties of their concerns with at least 10 business days prior to including the file in the Plenum's agenda in order for the parties to submit remedies or conditions which may dissipate such concerns. As mentioned earlier, the clock for the Antitrust Authorities to issue a resolution will be restarted as of the date in which such remedies or conditions are submitted.

It should be noted that many aspects of the New Competition Law, especially with respect to the merger control proceeding, will be detailed and specified in the regulatory provisions and guidelines to be issued in the coming months by the Antitrust Authorities.

B. Relative Monopolistic Practices

Relative monopolistic practices are similar to conducts analysed under the rule of reason in other jurisdictions. In order for relative monopolistic practices to be deemed as illegal, (i) the economic agent or agents carrying out the conduct must have market power (individually or jointly) in the relevant market, (ii) the object or effect of the conduct must be to improperly displace other economic agents from the relevant market or any related market, to substantially hinder them from entering the market, or to establish exclusive advantages in favour of one or more persons and (iii) that efficiencies generated by the conduct do not outweigh its anticompetitive effects. This definition has in its essence, been preserved in the New Competition Law and the only change was that in the Antitrust Authorities shall also analyse the effects in related markets (and not only in the relevant market) in order to determine if a relative monopolistic practice should be deemed as illegal.

Article 54 of the New Competition Law provides that conduct classified as relative monopolistic practices are (i) territory or customer allocations between non-competing agents; (ii) resale price maintenance; (iii) tied sales; (iv) exclusive dealership; (v) price discrimination; (vi) refusal to deal; (vii) boycotts; (viii) predatory pricing; (ix) discounts and incentives subject to exclusivity; (x) crossed-subsidizing; (xi) price discrimination; (xii) increasing competitors' costs; (xiii) deny access to or access under discriminatory terms to essential inputs; and (xiv) margin squeezing.

These practices were already provided in the former Competition Law, except for the access to essential inputs and margin squeezing, which are new conducts included in the New Competition Law.

C. Absolute Monopolistic Practices

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Absolute monopolistic practices or cartel activities are considered illegal without taking into account market share or possible efficiencies. It should be noted that in Mexico, only horizontal restraints between competitors may be considered absolute monopolistic practices. Article 53 of the New Law considers as absolute monopolistic practices conduct which has the object or effect of (i) price fixing, (ii) offer or demand restriction, (iii) territory or customer allocation, (iv) bid rigging, and (v) the exchange of information for any of the foregoing purposes. Furthermore, absolute monopolistic practices will be void and will not produce legal effects.

The former Competition Law already provided these absolute monopolistic practices, however, the exchange of information was only deemed illegal if such exchange was related to price fixing, which is now also considered illegal for the remaining practices.

D. Joint Market Power

Joint market power was a concept already provided for in the former Competition Law, however, the New Competition Law eliminates the specific rules included in the former Competition Law. In this regard, the New Competition Law only includes the possibility of joint market power on behalf of the economic agents incurring in a relative monopolistic practice without any further details, which implies that the enforcement of this figure will depend on the regulatory provisions which have not been issued yet.

E. Regulation on Essential Inputs

Regulation on essential inputs was introduced in the New Competition Law as a consequence of the Constitutional Amendment.

The existence of an essential input may now be determined by the Antitrust Authorities following an administrative proceeding in which the involved economic agent or agents may submit arguments in their favour.

In order to consider if there is an essential input, the Antitrust Authorities shall consider if the input is controlled by one or several economic agents with market power, if such input may be replicated from a technical, legal and economic perspective, if the input is indispensable for the provision of goods or services in one or more

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markets and does not have any close substitutes, and the circumstances under which the economic agent or agents in control came to acquire control over such input. This may be further detailed in the regulatory provisions when they are issued.

Once the Antitrust Authorities determine the existence of an essential input following the corresponding proceeding, they may (i) issue recommendations to public entities in order to amend those legal provisions which result anticompetitive; (ii) order the controlling economic agent or agents to eliminate an anticompetitive barrier; (iii) provide regulation for the access of the essential input on behalf of other economic agents, including prices, technical and quality conditions; or (iv) divestiture of the controlling economic agent or agents. It should be noted that the divestiture will only be applied when other measures prove to be insufficient or ineffective in granting access to the essential inputs.

F. Investigation Proceedings

Regulation applicable to investigation proceedings has been subject to important modifications. Among other things, the New Competition Law provides the following:

(i) A formal separation between the staff conducting investigations and the Plenum of the Antitrust Authorities, aiming to encourage a non-biased decision on behalf of the corresponding Plenum;

(ii) Meetings held by the Plenum of each of the Antitrust Authorities shall be public, without disclosing information that shall be classified as confidential;

(iii) The statute of limitation for the Antitrust Authorities to investigate and sanction an illegal conduct has been increased from 5 to 10 years, counted as from the date in which the conduct was carried out or ceased; and

(iv) The Antitrust Authorities will no longer have to publish in the Official Gazette of the Federation the beginning of an investigation.

G. Dawn Raids

The New Competition Law allows the Antitrust Authorities to interview employees and representatives of the economic agents under investigation regarding facts, information and documents related to the inspection. This

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is a relevant difference with the former Competition Law which is aimed to enhance the effectiveness of the Antitrust Authorities' investigations.

Furthermore, due to the fact that the Antitrust Authorities will no longer publish the beginning of their investigations, economic agents will not know if an investigation involving them is being conducted and therefore, thus this will allow the antitrust authorities to effectively carry out surprise dawn raids.

It should be noted that in all cases, dawn raids shall begin in working days and hours, however, the Antitrust Authorities may authorize dawn raids to be continued in non-working days and hours.

H. New Special Proceedings

In addition to the proceeding for the determination of essential inputs, the New Competition Law also allows economic agents to request formal opinions to the Antitrust Authorities in connection to certain issues not provided for in the New Competition Law, which shall be binding upon the Antitrust Authorities.

I. Increased Criminal Sanctions

The Federal Criminal Code was amended in order to include as a criminal offense, the exchange of information among competitors with the purpose or effect of incurring in any absolute monopolistic practices. Furthermore, the minimum imprisonment term is increased from 3 to 5 years, and the maximum term remains in 10 years, which sets the statute of limitation to 7.5 years as from the date in which the conduct was committed or ceased.

It should be noted that in case the Antitrust Authorities determine to file criminal charges, such action may only be initiated after the probable responsibility of the corresponding economic agent is determined, allowing both the criminal and the proceeding by the Antitrust Authorities to be carried out simultaneously.

VI CONCLUSION

The Constitutional Amendment and the New Competition Law set the basis to implement important modifications to the Mexican legal framework, initiating a new era in Mexican antitrust enforcement.

These modifications aim to provide the Antitrust Authorities with enough powers to effectively investigate and impose sanctions to economic agents incurring in anticompetitive conduct.

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Furthermore, the asymmetric regulations imposed as a consequence of the preponderant statements will allow other competitors to effectively compete with the preponderant economic agents, aiming to provide customers with real options in the telecommunications and broadcasting sectors.

Lastly, it should be noted that the implementation of the new competition framework will depend greatly on the way in which the Antitrust Authorities enforce it, as well as the scrutiny to be carried out by the new Specialized Courts.

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