

# AMENDMENTS TO THE FEDERAL ECONOMIC COMPETITION LAW AND THE CREATION OF THE NATIONAL ANTITRUST COMMISSION

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In line with the constitutional reform of December 20, 2024, referred to as the “organic simplification” reform—aimed at eliminating constitutionally autonomous bodies such as the Federal Economic Competition Commission (“COFECE”)—and following revisions by both the Senate and the Chamber of Deputies, the Decree that amends, adds, and repeals various provisions of the Federal Economic Competition Law (the “Law”) and the Federal Law of Parastatal Entities has been passed to the Federal Executive for constitutional purposes. This Decree introduces significant changes in competition law and establishes the new National Antitrust Commission (the “New Commission”), which will replace COFECE.

While the reform retains the core of Mexico’s economic competition policy and the basic organizational structure of COFECE—and also complies with Mexico’s international treaty obligations—it introduces substantial modifications that may materially affect businesses and their operations in the country.

Key changes introduced by the reform include:

- (i) The New Commission will be a decentralized public body of the Federal Public Administration, aligned with the Ministry of Economy, with legal personality, its own assets, management autonomy, and technical and operational independence in its decisions, organization, and operations.
- (ii) The number of Commissioners will be reduced from seven to five, without specifying whether they must pass a selection process or knowledge examination.
- (iii) The number of behaviors classified as violations under the Law is increased.
- (iv) The thresholds for notifying mergers are lowered.
- (v) Certain exceptions to notification obligations are eliminated.

- (vi) Deadlines in administrative proceedings are shortened.
- (vii) Penalties and enforcement measures are significantly increased.
- (viii) The New Commission will assume competition authority in the telecommunications and broadcasting sectors.
- (ix) State-owned companies exercising exclusive functions in strategic sectors will no longer be subject to certain provisions of the Law, though they are still not considered monopolies.
- (x) Activities by State-owned enterprises and those expressly allowed by federal legislation will not be deemed monopolistic.

The changes to the structure, powers, and responsibilities of the New Commission will result, among other things, in a greater burden of cases to investigate and resolve. We highlight some important challenges for the New Commission:

- (i) Preserve COFECE’s human capital with training and experience in economic competition matters;
- (ii) that the Commissioners selected have the technical knowledge necessary to perform their

duties;

(iii) maintain operational systems and online procedures;

(iv) take care of and maintain the confidentiality and reserve of information in the files;

(v) that in practice their management autonomy and technical and operational independence are respected; and

(vi) that it be provided with the necessary resources to fulfill its powers and obligations.

Below we describe the changes to the Law in greater detail:

## BACKGROUND AND GENERAL COMMENTS

- On December 20, 2024, the Official Gazette of the Federation (DOF) published a constitutional reform initiative regarding organic simplification, aimed at eliminating seven constitutionally autonomous bodies, including COFECE. The purpose was to reallocate public resources previously assigned to these entities towards increased investment in social programs and policies.
- After approval by both legislative chambers, the Decree amending the Federal Economic Competition Law and the Federal Law of Parastatal Entities was submitted to the Federal Executive for constitutional processing.
- The new Law does not substantially alter the country's economic competition policy or the principles of free market participation, and remains consistent with Mexico's obligations under international agreements such as the USMCA and treaties with the OECD.

## STRUCTURE OF THE NEW COMMISSION

The New Commission, which replaces COFECE and the Federal Telecommunications Institute (IFT) in matters of economic competition and antitrust, will be known as the National Antitrust Commission.

It will be a decentralized agency of the Federal Public Administration under the Ministry of Economy, with its own legal personality, assets, management autonomy, and technical and operational independence in its decisions, structure, and functions.

Similar to COFECE, the New Commission maintains the separation between the Board and the Investigative Authority, enhancing independence in case assessments and preventing conflicts of interest.

The number of Commissioners is reduced from seven to five, and the President's term is limited to three years, renewable once.

## TELECOMMUNICATIONS AND BROADCASTING POWERS

- The New Commission is granted new powers in the telecommunications and broadcasting sectors, including:
  - Limiting national and regional concentration of frequencies, concessions, and cross-ownership in media serving the same market or geographic zone.
  - Determining dominant economic agents and imposing necessary measures to preserve competition.
  - Declaring whether effective competition exists and adjusting obligations of dominant agents accordingly.
  - Requiring structural separation to reduce dominance below 50% market share.
  - Coordinating with the Telecommunications Regulatory Commission and the Digital Transformation and Telecommunications Agency.
  - Evaluating and potentially approving structural separation plans submitted by dominant agents.

The ability to share information and establish coordination mechanisms with the Telecommunications Regulatory Commission and, where appropriate, with the Digital Transformation and Telecommunications Agency is important.

## EFFECTIVE DATE AND TRANSITION

Ongoing investigations and procedures will continue to be governed by the previous law.

COFECE and its current Commissioners will remain in office until the new Commission is fully formed.

The head of COFECE's Investigative Authority will continue serving in the same role in the New Commission to ensure continuity.

- Legal acts and procedures initiated by COFECE or IFT prior to the New Commission's formation will retain their legal validity under prior law.

## EXEMPTION FROM MONOPOLIES

- Companies responsible for performing functions that the State exercises exclusively in strategic areas defined by the Constitution, while still not considered monopolies, will no longer be subject to the provisions of the new Law regarding other actions.
- Activities carried out by State-owned public enterprises and those expressly provided for by laws enacted by Congress will not be considered monopolies.

## CONSULTATIONS BY THE FEDERAL EXECUTIVE

- The Federal Executive, through the Ministry of Economy, is granted the authority to notify the New Commission regarding matters of national interest in the field of competition. In such cases, the New Commission is obligated to issue a response regarding the matter within a period of 10 days.

## ELIMINATION OF THE INTERNAL CONTROL BODY OF THE NEW COMMISSION

- The Internal Control Body (Órgano Interno de Control, OIC) of COFECE will be dissolved upon the formation of the Plenary of the New Commission. Its pending matters, proceedings, case files, and records will be transferred to the Internal Control Body of the Ministry of Economy, which will assume responsibility for their processing and resolution. This results in increased involvement by the Ministry of Economy. The former body was responsible for overseeing and sanctioning administrative misconduct, auditing the management of federal resources, filing criminal complaints before the Special Prosecutor's Office for Combating Corruption, and handling procurement-related disputes regarding acquisitions, leases, and services.

## CHANGES TO THE REQUIREMENTS FOR THE HEAD OF THE INVESTIGATIVE AUTHORITY

The requirement that candidates for the position of Head of the Investigative Authority of the New Commission must demonstrate the technical knowledge necessary to perform the role has been eliminated.

## ELIMINATION OF THE EVALUATION COMMITTEE FOR THE COMMISSIONER CANDIDATES

- The amended law no longer refers to the Evaluation Committee for Commissioner Candidates, which was previously responsible for issuing calls for applications, receiving applications, selecting and assessing candidates, classifying confidential information, and—together with the support of other authorities—compiling and submitting shortlists to the Executive Branch.
- Its organizational structure and budget are eliminated, along with all of its functions related to issuing calls for applications, receiving and evaluating applications, classifying information, and submitting candidate lists to the Executive Branch.

## CHANGES TO THE POWERS OF THE INVESTIGATIVE AUTHORITY AND THE CHAIRPERSON OF THE NEW COMMISSION

### • Inspections and Data Collection

In addition to requesting information, under the new Law the Investigative Authority may now carry out inspections and collect data using any tool, without defining the meaning or scope of "inspections" and "data collection."

### • Opinions on Public Policy

Although previously non-binding, the New Commission's authority to issue opinions on adjustments to programs and public policies that may affect free market participation, legislative initiatives, draft regulations or decrees relating to competition, as well as laws, regulations, agreements, circulars, and general administrative acts related to free market participation and economic competition, has been eliminated.

### • Constitutional Controversies

- The obligation of the competition authority to inform the Federal Executive, through its Legal Counsel, about state, municipal, or Mexico City acts or regulations that may violate the Constitution in matters of economic competition is eliminated.

- The duty of the Legal Counsel of the Federal Executive to publish the reasoning behind any decision not to initiate a constitutional controversy based on a report submitted by the competition authority is also removed.
- The power of both the New Commission and its Chairperson to file constitutional controversies against acts or provisions issued by autonomous bodies, the Federal Congress, or the Federal Executive is eliminated.

## • International Cooperation

A new power is added allowing the establishment of cooperation and coordination mechanisms with foreign competition authorities, under international agreements and in coordination with the Ministry of Foreign Affairs. This includes the exchange of all types of information for investigations and proceedings under the Law.

## AMENDMENTS TO ANTICOMPETITIVE PRACTICES

- **Per se Anticompetitive Practices (Absolute Monopolistic Practices):** These practices now include conduct not only between current competitors, but also among potential competitors.
- **Rule of Reason Anticompetitive Practices (Relative Monopolistic Practices):**
  - A new object or effect is added: unduly limiting the ability of other economic agents to compete.
  - The concept of joint substantial market power is elevated to statutory level.

It will be important to see, in due course, how the New Commission interprets these two new provisions.

## MERGERS AND ACQUISITIONS (CONCENTRATIONS)

- The three notification thresholds have been reduced by approximately 12% to 17%, and the first part of the second threshold is lowered to 30% of assets or shares (previously 35%).
- The resolution period is shortened from 60 to 30 business days from the date the New Commission has received all the required information. This period may be extended, except when the Federal Executive explicitly notifies the New Commission

of a matter of national interest.

The statute of limitations to investigate unnotified concentrations is extended from one to three years from the date of consummation.

- Stricter requirements are established regarding efficiency gains resulting from a concentration. Economic agents must now also demonstrate that the efficiency gains: (i) will continuously outweigh the potential anticompetitive effects; and (ii) will result in improved consumer welfare.
- Two exceptions to the notification requirement have been eliminated: (i) transactions conducted abroad that do not result in control or accumulation of market share in Mexico; and (ii) acquisitions by investment funds for speculative purposes where there is no overlap in the same relevant market.

## INVESTIGATIONS

- The investigation period of the Investigative Authority is limited to a maximum of three periods of up to 120 days each.
- Once the investigation period ends, the Investigative Authority will have 30 days to submit its findings to the Plenary of the New Commission.
- After the findings are submitted, a period of 10 business days is established for the Plenary to decide whether to initiate a formal proceeding or to close the case file.

## INTRODUCTION OF THE CONCEPT OF JOINT SUBSTANTIAL MARKET POWER

- The concept of joint substantial market power is added to the list of analytical criteria.
- To determine whether two or more economic agents possess joint substantial market power, the New Commission will consider:
  - a. Common incentives or strategically interdependent behavior that distinguish those agents from the rest of the market; and
  - b. Patterns of similar conduct among them.

It will be important to observe how the New Commission interprets and applies this new concept, as it could have significant implications.



## **QUALIFICATION PROCEDURE**

- The right of economic agents to request the exclusion from the case file of information and documents related to communications with their external legal counsel—obtained by the New Commission or provided by the economic agents—for the purpose of obtaining legal advice, is now elevated to statutory level.

## **IMMUNITY AND LENIENCY PROGRAM**

- **Relative Monopolistic Practices or Unlawful Mergers**
  - Depending on the timing and conditions, the economic agent under investigation for a relative monopolistic practice or unlawful concentration may receive full leniency or a reduction in the amount of the fine, without the imposition of liability, or may be granted a reduction of up to 50% of the fine that would have otherwise been imposed.
- **Absolute Monopolistic Practices**
  - Only the first economic agent to provide the New Commission with compelling evidence that allows it to presume the existence of an absolute monopolistic practice—prior to the initiation of a formal investigation in the relevant market—and who also: (i) cooperates fully and continuously during the investigation and the adversarial proceeding, and (ii) undertakes all necessary actions to cease participation in the unlawful practice, will be subject to the minimum applicable fine.
  - Other economic agents who: (i) cooperate fully and continuously during the investigation and the adversarial proceeding, and (ii) take all necessary actions to cease their participation in the unlawful practice, may obtain a reduction of the fine by up to 50%, 30%, or 20% of the maximum allowed fine, provided that they also contribute additional evidence to that already possessed by the Investigative Authority that supports a presumption of the existence of an absolute monopolistic practice.

## **CERTIFICATION OF COMPETITION COMPLIANCE PROGRAMS**

The New Commission may certify compliance programs implemented by companies in matters of

economic competition for a period of three years. The existence of such a program may be considered a mitigating factor in the event of violations.

## **SANCTIONS AND ENFORCEMENT MEASURES**

- **Enforcement Measures**
  - A daily fine of up to approximately MXN \$900,000 may be imposed for delays in complying with orders issued by the New Commission.
  - A fine of up to approximately MXN \$3,400,000 may be imposed for unjustified failure to appear at a hearing before the authority, for refusing to answer questions, or for providing vague or ambiguous answers.
  - A fine of up to approximately MXN \$22,600,000 may be imposed for obstructing or hindering the conduct of an on-site inspection.
  - A daily fine of up to approximately MXN \$1,130,000 may be imposed for failing to comply with a disqualification order.
  - The New Commission may now impose enforcement measures independently of any corresponding criminal or administrative sanctions. In other words, it is no longer required to exhaust enforcement measures before initiating other sanctioning procedures.

### **Increase in Sanction Amounts**

The maximum amounts of sanctions are increased across the board, including:

- For absolute monopolistic practices: from 10% to 15% of the economic agent's income.
- For relative monopolistic practices: from 8% to 10% of the economic agent's income.
- For carrying out a concentration that exceeds notification thresholds without prior authorization: from 5% to 8% of the economic agent's income.
- For unlawful concentrations: from 8% to 10% of the economic agent's income.

### **New Sanction**

- Temporary disqualification (either directly or through an intermediary) from participating in public procurement processes, for up to 5 years.

## **RECIDIVISM**

A final administrative resolution issued by the New Commission is now considered a prior sanction for purposes of recidivism.

- **Damages**

- Individuals who suffer damages as a result of a monopolistic practice or an unlawful concentration may file the corresponding individual or collective judicial actions in defense of their rights as soon as the New Commission issues the relevant resolution—without the need for the resolution to become final and binding.
- The New Commission itself may now also file such individual or collective judicial actions.

- **Federal Law of State-Owned Entities**

- A paragraph is added to Article 5 of the Federal Law of State-Owned Entities establishing a special regime for the New Commission as an exception to the general rules governing state-owned entities.
- As a result, the New Commission will be governed—regarding the structure of its governing body, administrative units, organization, operations, functioning, development, and oversight—by the provisions of the new Law and its internal regulations. Only in matters not addressed by these instruments will the Federal Law of State-Owned Entities apply.

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