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## Amendments to Improve the Mexican Competition Law

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### I. INTRODUCTION

In April 2010, President Felipe Calderon sent the Mexican Congress a bill to amend the Federal Law of Economic Competition (“LFCE”) and other statutes, in order to strengthen competition policy and law enforcement. This bill has been approved with some minor changes and additions by the House of Representatives and probably will be discussed and approved by the Senate in its next legislative session (September-December).

In general terms, the proposed amendments are aimed to increase sanctions for illegal conducts, including criminalization of absolute monopolistic practices,<sup>2</sup> and to strengthen the Federal Competition Commission’s (“CFC” or “Commission”) powers to investigate and punish said conducts.

According to the bill, the proposed core lines of action are:

1. To facilitate compliance of competition legislation and to focus CFC’s attention and resources on relevant cases;
2. To improve effectiveness, efficiency, and transparency of CFC’s operations; and
3. To achieve a more efficient competition policy through the adoption of effective instruments to investigate and sanction anticompetitive practices.

The most relevant amendments are discussed below.

### II. JOINT SUBSTANTIAL MARKET POWER

According to the LFCE currently in force, substantial market power is an economic agent’s ability to unilaterally fix prices or to substantially restrict supply in the relevant market, without competing agents being actually or potentially capable of counteracting such ability.

The bill proposes to incorporate the concept of joint substantial market power into the LFCE. Accordingly, the CFC would be empowered to investigate and sanction relative monopolistic practices<sup>3</sup> performed by two or more legally and economically independent undertakings.

In order to justify this amendment, the bill states that some other jurisdictions have incorporated the concept of joint market power in their respective laws and, thus, it is consistent with international practice. Notwithstanding, considering the specific circumstances of Mexican markets, this amendment might not represent a great step forward in competition policy. It is

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<sup>2</sup> Absolute monopolistic practices are certain agreements between competitors in order to eliminate competition between them (horizontal restraints or collusive agreements in other jurisdictions).

<sup>3</sup> Actions by economic agents with substantial market power to unduly displace other agents from the market (abuse of dominance and vertical restraints in other jurisdictions).

well known that the most important cause of lack of competition in Mexico is the existence of many important markets where a single economic agent has a dominant position<sup>4</sup> (e.g. telecommunications, cement, retail...).

We consider this amendment is inappropriate. On one hand, there are just a couple of markets where the incorporation of the joint substantial market power concept would help to solve competition problems. On the other hand, the amendment would cause a high degree of uncertainty on those undertakings that do not enjoy a dominant position and perform certain activities which might be categorized as relative monopolistic practices but, in fact, are in answer to a natural inertia of the markets or follow the conduct of the dominant agent and, furthermore, do not abuse any power. It is important to mention that the House of Representatives modified this proposed amendment in order to add some elements that must be reviewed when analyzing joint substantial market power, specifically: the existence of a similar and sustained behavior, implicit or explicit, of those undertakings under investigation; the existence of entry barriers to the group of undertakings performing the conduct; and the existence of an actual or potential harm to the competition process.<sup>5</sup> However, we consider the modifications made by the House of Representatives insufficient to eliminate the referred-to uncertainty.

Considering the low impact in solving competition problems and the uncertainty generated by the incorporation of the concept of joint substantial market power to the LFCE, from our point of view the Senate should eliminate this amendment; or, at least, modify the bill in order to incorporate, not only as one of the elements to be reviewed when analyzing this concept but as an essential requirement to impose a sanction, the existence of an agreement between the accused undertakings to act in a coordinated manner.

### III. PRECAUTIONARY MEASURES

Currently, the LFCE empowers the CFC to order a firm to cease an illegal practice or concentration, but only after adopting a final resolution on the corresponding procedure.<sup>6</sup>

The bill proposes to empower the Commission to order the temporary suspension of the investigated conduct or concentration at any time after the issuance of the official communication of probable liability<sup>7</sup> and before the issuance of the final resolution.

Even though these kind of measures are used in various countries and even in Mexico in other fields (e.g. judicial procedures, intellectual property), this amendment to the LFCE might bring constitutional issues since, unlike the measures used in other fields, precautionary measures introduced in the bill are not aimed to preserve the matter of the case, but to change the *status quo*.

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<sup>4</sup> In its diagnosis section, the bill states, “Structural factors that currently exist in our country are the cause of the low economic growth. One of these factors is the lack of competition in the Mexican economy. Various markets are highly concentrated...”

<sup>5</sup> These elements must be analyzed in addition of those related to the unilateral substantial market power (market shares, entry barriers, access to inputs, among others)

<sup>6</sup> This final resolution can be challenged by the affected parties by means of an administrative appeal, filed before the CFC and, then, the corresponding resolution can be revised by means of a constitutional trial (*amparo*), filed before Federal Courts. In both instances, it is possible to suspend the final resolution effects.

<sup>7</sup> The official communication of probable liability is the document by which the CFC summons an economic agent once the investigation procedure concludes that a relative monopolistic practice or an illegal concentration has taken place.

It is important to point out that when the CFC is analyzing a relative monopolistic practice an effects-based approach is followed. Unilateral conduct is never prohibited *per se* under Mexican law. In this regard, these kind of practices may be deemed illegal only if: (i) the conduct is carried out by an economic agent with substantial market power and (ii) the conduct's purpose or effect is to: unduly displace other economic agents from the market; substantially preclude their access to the market; or create exclusive advantages in favor of one or several persons. Additionally, efficiency gains favoring consumer's welfare may be alleged to sustain the legality of a relative monopolistic practice.

From the reasons given above, it seems that the Commission is not empowered to order an economic agent not to perform any conduct, without proving the aforementioned assumptions. Otherwise the Constitutional right to perform any legal activity can be violated.

#### **IV. SANCTIONS**

The bill proposes to substantially increase fines for companies performing monopolistic practices, and introduces criminal penalties<sup>8</sup> for executives who lead their companies into absolute monopolistic practices.

Under the reforms, companies found guilty of an illegal conduct would face fines as follows: (i) absolute monopolistic practices, up to 10 percent of their annual turnover; and (ii) relative monopolistic practices and illegal concentrations, up to 8 percent of their annual turnover. Currently, the highest fine than CFC can apply is up to US\$7 million for an absolute monopolistic practice.

Additionally, with the amendments the CFC would be empowered to file criminal complaints for the perpetration of felonies against free competition and to ask the Attorney's General Office to dismiss the prosecution of said felonies.

The increase of fines is adequate from our point of view, since it follows international best standards and most other competition authorities around the world apply similar amounts.

On the issue of criminalization of absolute monopolistic practices, although it is considered that the amendments could inhibit the implementation of such practices with some effectiveness, it is also regarded as necessary to limit the faculties of the Commission in this matter, since, in terms of the amendment, these faculties are too broad, giving the authority a disproportionate power by leaving to its discretion both the complaint and the dismissal of prosecution for felonies in any economic competition matter.

#### **V. HOME VISITS**

When the LFCE was last amended in June 2006, a faculty to file a petition before the Federal Courts in order for them to perform home visits was granted to the CFC. The visits may only be performed to obtain data or documents that had previously been requested in written by the Commission.

In August 2006, the General Prosecutor filed an unconstitutionality motion before the Supreme Court regarding said faculty, among other constitutional issues of the amendment. The motion was resolved on May 10, 2007 when the Supreme Court stated that there was no need

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<sup>8</sup> An amendment to the Federal Criminal Code establishes jail time of three to ten years for the celebration, order, or execution of any arrangement that results in an absolute monopolistic practice.

for the CFC to file a petition in order to perform home visits and that this faculty could be performed by itself as an administrative authority empowered to enforce the LFCE.

It is in this context the bill empowers the Commission to perform home visits. However, even when the constitutionality of this visit itself is hardly to be challenged, some new constitutional issues may be raised since substantial changes for this faculty are being introduced with the amendment. The terms in which the home visit are to be regulated under the amendments make this faculty look more like a criminal inspect order—that only a judge is empowered to issue—than an administrative task.

## **VI. ANTICIPATE DISMISSAL OF INVESTIGATIONS**

The decree project introduces the possibility for the Commission to dismiss an investigation of relative monopolistic practices or illegal concentrations under a non-litigious procedure (i) without making any statement about the responsibility of the economic agent subject to said investigation, and/or (ii) depending on particularities of the case, applying up to 50 percent of the corresponding fine.<sup>9</sup>

In order for this non-litigious procedure to take place, the investigated economic agent must compromise itself to suspend, withdraw, correct, or not perform the illegal relative monopolistic practice or illegal concentration.

This proposal is aimed to speed up the solution of competition problems, minimize the use of CFC's resources, and avoid litigious procedures and unnecessary fines. However, from our point of view, the risk of being fined that is introduced with the amendment makes it inadvisable to file a petition of this kind, especially for those economic agents not convinced of their responsibility. In this regard, it is better to leave this non-litigious procedure as it is currently in force or amend it only in the part that clarifies that no responsibility statement has to be resolved.

## **VII. TRANSPARENCY**

On this topic the amendment proposes to incorporate in the LFCE the obligation for the Commission to issue its criteria on several matters in order to provide greater certainty to the economic agents subject to the application of the Law. It must perform a public evidentiary hearing for this purpose.

The incorporation of this obligation will certainly guarantee more transparency on CFC's actions. However, considering that transparency is a fundamental vehicle to ensure that the actions of the Commission are objective and impartial, we believe the following modifications should also be included:

- Eliminate the prohibition against parties accessing the investigation file.
- Disclose the name of parties under investigation in the official document in which the CFC announces the beginning of an investigation procedure.
- Publish the name of the economic agents filing a concentration, in addition to publicizing the documents about the transaction and its effects while safeguarding confidential information.

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<sup>9</sup> Under the LFCE currently in force, under the aforementioned non-litigious procedure, the Commission is empowered to apply a minimum fine (general minimum wage in force in the Federal District, approximately US\$5.00), but it does not expressly states that the responsibility issue may be unresolved.

It is considered that the amendments above described will generate better counterweights to and greater transparency within the Commission.