

**RELEVANT ASPECTS REGARDING THE
AMENDMENTS TO THE FEDERAL
ECONOMIC COMPETITION LAW IN
MEXICO**

One of the most discussed topics in the Mexican legal realm is the enactment of amendments to the Federal Economic Competition Law as of June 28, 2006, effective on June 29, 2006 (the law shall be understood as the “FCL”; the FCL together with the amendments shall be referred to as the “New FCL”).

The purpose of this document is to provide you with a general overview on some relevant aspects embodied in the New FCL.

The New FCL results from a long and intense discussion held by several actors, including Government offices, business organizations and legal experts. It is worth mentioning that the New FCL attends some principles and best practices deriving from different forums and studies conducted and sponsored by the Competition Committee as well as by the Competition Division of the Organisation for Economic Co-operation and Economic Development (OECD). Some of those principles may be reviewed on different papers available on http://www.oecd.org/maintopic/0,2626,en_2649_201185_1_1_1_1,00.html, under the subject “competition”.

1. Economic Agents Subject to the FCL

The New FCL expands the definition of “economic agent” subject to the law, including individuals or entities with no lucrative purpose as well as business chambers. With the referred inclusion, the FCL considers as economic agents, besides the two criteria indicated above, the following: offices and entities of the Federal, State, and Municipal Government; associations; professional organizations,

trusts, or any other form of participation in economic life.

This definition suggests that the scope of the FCL reaches beyond the boundaries of Commercial Law, since the concept of economic agent is not limited to those individuals or entities that take part in, or undertake acts of commerce, but it also includes those individuals or entities who participate in economic life in any form.

A novel development in the New FCL is that it holds individuals jointly and severally liable with their companies, for monopolistic practices and all conducts sanctioned by the FCL. This joint liability includes individuals who make the decision to undertake the conduct or practice, as well as individuals who actually implement such conducts or practices.

2. State Imposition of Maximum Prices to Products and Services

The New FCL provides that the power of the Ministry of Economy to impose maximum prices to certain products and services shall be exercised, provided that no conditions of effective competition exist in the corresponding market. In such case, the Federal Competition Commission (“FCC”) is empowered to issue a declaration acknowledging that the respective market does not have conditions of effective competition, so that the imposition of prices by the Ministry of Economy can be implemented.

In such terms, the Ministry of Economy shall at all times require either a previous opinion or a declaration by the FCC in order to impose maximum prices in certain markets for goods and services.

3. Relative Monopolistic Practices

No relevant amendments were introduced to the section of the FCL dealing with absolute monopolistic practices (horizontal practices). However, in terms of relative monopolistic practices (vertical practices); some important changes have been introduced.

The criteria for what constitutes a relative monopolistic practice has been expanded, to expressly include certain practices that were originally set forth in the Regulations to the FCL (“RFCL”), and that had been challenged on constitutional grounds for exceeding the scope of the original text of the FCL.

Upon such background, under the New FCL it shall be considered to be relative monopolistic practices, any contract, act, covenant, procedure or combination with the purpose or effect to unduly displace other competitors; substantially prevent other economic agents from accessing a relevant market; or establish exclusive advantages in favor of one or more persons, by way of:

- i) Arrangements between or among competitors to fix, impose or establish the exclusive commercialization or distribution of goods or services on the basis of: the identity of the distributor, the geographic area or a given period of time. It also includes imposing the obligation to refrain from producing or distributing goods or rendering services for certain period of time;
- ii) The imposition of prices or conditions upon which distributors should do the commercialization or distribution of goods and services;
- iii) The sale or transaction subject to reciprocity conditions or to additional terms;
- iv) The sale, purchase or transaction subject to the condition to refrain from using,

acquiring, selling, commercializing or providing goods or rendering services to any third party;

v) The unilateral decision not to sale, commercialize, or provide to certain persons goods and services that are otherwise available and that are offered to other persons on a regular basis;

vi) The call or arrangement between or among some economic agents to inflict pressure on another economic agent, or to refrain from selling, commercializing or acquiring from such agent any good or service, with the purpose of dissuading that agent towards adopting certain conduct, or applying pressure measures against it, or forcing such agent to act in a given way;

vii) The practice of price predation, meaning the systematic sale of goods or services below total medium cost, or the occasional sale of goods or services at prices below variable medium cost, with the expectation to recoup losses by a future increase in prices;

viii) The establishment of exclusivity discounts or incentives for buyers not to use, acquire, sale, commercialize or provide goods or services that are produced, processed, distributed or commercialized by any third party; or in the case of sales and transactions that are subject to the condition to refrain from selling, commercializing or providing to third parties, goods or services that are subject to such sales or transactions;

ix) The implementation of cross subsidization, which means the use of income obtained from the sale, commercialization or rendering of a good or service, for purposes of financing or subsidizing the losses derived from the sale, commercialization or rendering of another good or service;

x) The imposition of price discrimination, referring to the establishment of different prices and sale conditions to buyers or sellers that are situated in equal conditions; and,

xi) The conduct by one or several economic agents with the purpose or effect, whether direct or indirect, to increase the costs, or obstruct the productive process or reduce the demand of its competitors.

It is important to mention that, although the New FCL expressly includes as relative monopolistic practices those that had been originally set forth in the RFCL, the last criterion referred to in the previous paragraphs (that is xi) and which actually survived the amendments to the FCL, remains too broad and general, a fact that has been challenged on constitutional grounds under the original FCL.

- The New FCL sets forth the obligation for the FCC, to analyze efficiency gains derived from any alleged relative monopolistic practice subject to investigation, in order to determine whether such practice should be sanctioned in terms of the FCL.

Efficiency test was originally included in the RFCL, but the FCC could consider it only if the corresponding parties did provide elements to evidence such efficiency. In the New FCL, the FCC is in principle obliged to apply the efficiency test and to evaluate any evidence thereon.

Although the efficiency test gives further elements to the FCC in order to determine whether a conduct should be sanctioned under the FCL, it is also true that under the New FCL the FCC retains discretionary criteria to decide on whether a practice actually infringes the FCL. For example, the New FCL does not provide further guidelines to determine what should be understood as “unduly displace” a competitor from the

market, or to “substantially impede” the competitor access to a market, among other similar terms that are essential to decide on the relative monopolistic nature of a conduct.

4. Concentrations

- The New FCL includes further elements to be considered by the FCC, for purposes of determining whether any concentration should be challenged or sanctioned.

Additions in this ground include: i) the effects of the concentration in the relevant market with respect to other competitors, and with regards to the demand side, as well as in relation to other markets and related economic agents; ii) the participation of the economic agents involved in a concentration in other economic agents, and the participation of other economic agents in those agents involved either directly or indirectly in the relevant market or in related markets; iii) any elements provided by the economic agents involved, in order to evidence more efficiency in the market stemming from the concentration, and also to evidence that such efficiency will favorably impact the economic competition process; and, iv) any other criteria or instruments that shall be set forth in the RFCL¹.

- The New FCL raises the monetary thresholds used to determine whether a concentration should be filed for authorization of the FCC before actually taking place.

This change makes more selective the range of concentrations that must be filed before the FCC, facilitating the signing and closing of transactions and business operations that would not fall within the monetary thresholds for an obligatory filing.

¹ The Regulations to the FCL must be issued within 180 days starting on June 28, 2006, the date of publication of the New FCL.

- The New FCL includes the case when economic agents may voluntarily notify a concentration to the FCC, even when there is no obligation to do so, because the corresponding transaction does not meet the monetary thresholds for an obligatory filing.

The incentive to make voluntary filings is for economic agents to eliminate risks or to build a *bona fide* record in the FCC.

5. Additional Powers for the FCC

- The New FCL sets forth additional powers to the FCC, from which the following could be pointed out:

i) The FCC may request a judicial authority to perform verification visits and to request the disclosure of documents, books, files and information generated through different media, including electronic or optic means, or any other technology, for purposes of assuring whether the corresponding economic agent has conducted itself according to the terms of the FCL and other applicable provisions.

In this respect, the New FCL sets forth the rules under which such verification visits shall be performed, deriving from the power vested in the FCC to obtain information when conducting investigations in terms of the FCL;

ii) The FCC has the power to issue resolutions on the grounds of effective competition, substantial power in the relevant market, and other aspects related to the process of economic competition and free concurrence to the market.

In this regard, the New FCL includes the procedure to be conducted before the FCC whether *ex parte* (by petition from the Government or any interested party) or *ex officio*, in order for the FCC to resolve on

matters of effective competition, substantial power in the relevant market or any other analogous matter in terms of the FCL;

iii) The FCC may issue binding opinions addressed to offices and entities of the Federal Government, regarding changes to programs and policies, when such programs and policies could have an impact or adverse effects in the process of economic competition in Mexico;

iv) The FCC may also issue opinions regarding projects and decrees to amend laws and regulations. Such opinions would not be binding and would need to be published by the Commission;

v) The FCC may issue binding opinions addressed to offices and entities of the Federal Government, regarding rulings, regulations, and other official government acts, when such acts may have adverse effects to the process of economic competition or may infringe the principles embodied in the FCL.

6. Investigations for Absolute or Relative Monopolistic Practices

- The New FCL sets forth further details on the terms under which investigations for monopolistic practices shall be conducted. Also, the new provisions aim for investigations to be more dynamic and efficient, by including for example new terms to issue resolutions, and the obligation to decree the closing of the file, upon the lack of activity by the FCC, regardless of any accountability attributable to FCC's officers.

- The New FCL provides three criteria to classify the information that is available in FCC's files corresponding to investigations and other procedures. In this respect, information is classified as "reserved" (available only to the parties to a procedure),

“confidential” (available only to the owner or provider of the information) and “public” (information subject to public disclosure).

- The New FCL describes with more detail the administrative procedure that follows investigations for monopolistic practices, provided that enough elements are found that support the presumptive responsibility of an economic agent for such practices (the original FCL originally included the term “probable responsibility”).

The New FCL sets forth expressly the content that should be included in the official communication upon which the FCC services process to an economic agent considered as presumptively responsible for monopolistic practices. This details where originally stated in the RFCL but their inclusion in the actual text of the FCL gives more legal certainty to the procedure and to the party being held presumptively responsible.

7. Procedure to Resolve on Effective Competition and Substantial Power

- The New FCL includes a procedure that could be initiated *ex parte* (either by the petition of the Government or of an interested party) and *ex officio*, in order for the FCC to issue resolutions on effective competition (regarding whether maximum prices should be imposed by the Federal Government in some markets); substantial power in the market, or other analogous aspects.

Pronouncement by the FCC shall be published in the Official Gazette, and the matter shall be resolved by the FCC seating *en banc*.

8. Opinions and Authorizations Involving Concessions and Permits

- The New FCL includes a procedure upon which the FCC would issue opinions,

authorizations or other acts regarding the granting of concessions, permits and other matters involving concession and permit regimes.

9. Voluntary Suppression of Monopolistic Practices and Prohibited Concentrations

- The New FCL sets forth a new scheme based on which any economic agent subject to a procedure before the FCC, shall have the choice to enter into a voluntary commitment to suspend, suppress, correct or refrain from carrying out a monopolistic practice or an infringing concentration.

In such case, the FCC may only impose up to two thirds of the fine that would have otherwise been applied.

For this to happen, the economic agent shall demonstrate that all the measures proposed to amend its conduct will be adequate and economically viable to suppress the monopolistic practice or the prohibited concentration.

10. Reduction of Pecuniary Sanctions upon Collaboration

- One of the most commented additions to the FCL is the inclusion of the reduction of sanctions for the benefit of participants in absolute monopolistic practices to be imposed reduced fines when collaborating with the FCC. Such collaboration would be in the form of providing evidence and information to uncover or disclose such practices and identify those parties that could be held accountable.

This mechanism represents a new development in the building of an Economic Competition culture in Mexico that follows the example of other legislations abroad, such as the case of the U.S., the European Union and Australia. However, the role of the FCC

will be determinant to actually incentive individuals or companies to disclose absolute monopolistic practices.

11. Additional Monetary Sanctions and Increase in the Amounts of the Fines

- The New FCL provides more cases under which monetary sanctions may be imposed. Likewise, it raises the maximum amount for which fines can be imposed.

One new hypothesis for sanctions is the case when an economic agent breaches any of the conditions imposed by the FCC to implement a concentration.

Also, a relevant addition in the New FCL is that the FCC may impose monetary sanctions to individuals that decide on, induce, collaborate, or participate in monopolistic practices or infringing concentrations, or any conduct that may affect the normal dynamics of the market, according to the FCL.

Also, another criterion subject to sanction has been added, regarding the failure to comply with a resolution issued by the FCC, provided that the corresponding economic agent had signed a commitment to suspend, suppress, correct or refrain from incurring in the monopolistic practice or the unduly concentration.

12. Repeat Offenders and Divestiture

- Another aspect that represents very important changes in the FCL, is the power vested in the FCC to order the divestiture of repeat offenders, which means economic agents that had been sanctioned two or more times for monopolistic practices or for prohibited concentrations.

Divestiture shall be up to the proportion where a monopoly could be prevented, that is

the proportion where the economic agent does not hold substantial power in the market.

Although this provision represents stronger measures to prevent monopolies in Mexico, procedural matters might represent difficulties to actually execute such an order. However, it is being seen as a dissuasive mechanism.

13. Damages

- Finally, the New FCL makes clear that a resolution from the FCC that had become final and conclusive (which means that it could no longer be judicially contested) is a condition *sine qua non* in order for economic agents to bring actions claiming damages derived from monopolistic practices or infringing concentrations.

It is our hope that you may find this information useful and look forward to attending any question or comment you may have on this matter.

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