General Overview of Mexico's New Federal Competition Law

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This GT Alert provides a general overview of a bill passed by the Mexican House of Deputies, with the previous approval of the Senate, to issue a new Federal Competition Law (the Federal Competition Law) as well as to amend and add certain articles to the Federal Criminal Code on competition grounds (the Competition Bill). The Competition Bill is the result of a discussion held over the bill, initially sent by the Executive Branch to Congress on February 19, 2014. This GT Alert complements the Alert distributed in March 2014, on this subject matter (the Previous Alert).

The Competition Bill was passed by the Congress and sent to the Executive Branch on April 29, 2014, to be enacted and published.

As pointed out by the Previous Alert, among other aspects, the Competition Bill derives from the constitutional reform on telecommunications, broadcasting and economic competition published on the Official Gazette on June 11, 2013 (the Constitutional Reform), which, among other things, extinguished the former...
The Constitutional Reform also extinguished the former Federal Telecommunications Commission and created the Federal Telecommunications Institute (IFT) as an autonomous agency in its capacity as regulator and competition authority for the telecommunications and broadcasting industries.

In consequence, the Competition Bill sets forth, without limitation: (i) organic and operational provisions for the integration and operation of the COFECE, as well as for the appointment of the commissioners that integrate such agency; (ii) new internal areas, such as the “investigating authority” and the “controller’s office”; (iii) the way the commissioners may be in contact with interested parties (by means of hearings and interviews to be held under certain rules); and, (iv) mechanisms to resolve questions or conflicts concerning the powers and jurisdiction of the COFECE and the IFT.

The Competition Bill contains other relevant aspects, including without limitation the following:

- The COFECE is further empowered to, inter alia (i) impose measures to eliminate barriers to competition and free access to markets; (ii) determine the existence and regulate access to essential facilities; (iii) issue an order to divest assets, rights, or equity interests as may be deemed necessary to eliminate anti-competitive effects; (iv) issue and publish regulatory provisions that are necessary to fulfill its duties (including, matters related to the imposition of sanctions; monopolistic practices; determination of individual or collective (joint) substantial power; determination of relevant markets; barriers to competition and free access to markets; essential facilities, and divestiture of assets, rights, or equity interests); (v) issue guidelines and technical criteria, after public consultation, on mergers clearance or concentrations, investigations, reduction of sanctions, suspension of conducts featuring probable monopolistic practices or illicit mergers or concentrations, among others; and, (vi) request independent studies evaluating COFECE’s performance.

- Concerning monopolistic practices (horizontal practices), new conducts subject to sanctions are added, including: (i) the establishment, agreement or coordination of proposals or refraining from submitting proposals in private biddings and auctions (not only in public biddings and auctions as previously set forth in the competition law that is being abrogated); and, (ii) the exchange of information among competitors with the purpose or effect of fixing, agreeing or manipulating prices; restricting supply; segmenting or assigning markets; and, coordinating proposals in public or private biddings and auctions (under the former law, information exchange is penalized only in connection with prices).

- Regarding relative monopolistic practices (vertical practices), concerning the essential facility concept, the following penalized conducts are added: (i)
denial, restriction or discriminatory access to an essential facility; and, (ii) margin squeeze in connection with an essential facility.

- The existence of an essential facility shall be determined by the antitrust authority considering: (i) whether or not the essential facility is under the control of one or more economic agents that either have substantial power or are dominant (preponderance) pursuant to a decision issued by the IFT; (ii) whether or not the reproduction or replication of the facility by other economic agent is not technically, legally or economically viable; (iii) whether or not the facility is vital to provide goods or render services in one or more markets considering, as applicable, if such facility has any close substitutes; (iv) the circumstances under which the economic agent(s) gained control of the facility; and, (v) any other criteria that may be set forth in the regulatory provisions to be issued by the COFECE under its authority.

- Certain special proceedings are set forth or complemented in order to: (i) determine an essential facility or competition barriers; (ii) resolve on market conditions; (iii) issue opinions or resolutions in the process of granting or awarding licenses, concessions and permits; (iv) reduce sanctions; and, (v) request the competition authority to issue a formal opinion on free access to markets and competition, concerning the emergence of new or unsolved questions in connection with the application of the Federal Competition Law.

- Regarding merger clearance and concentrations, the parties involved would not be able to consummate and close the transaction without having obtained the previous authorization from the competition authority (in terms of the former law, the parties, under their own responsibility, could consummate the transaction as long as they had not been issued a stop action order from the competition authority).

- One of the several criteria that determine whether a merger or transaction must be filed to and authorized by the COFECE is the value of the assets and annual sales volume of the economic agents involved in the transaction. Such criterion is now limited to the value of those assets and annual sales volume that the economic agents involved in the transaction have within Mexican territory, no longer considering the value of such indicators abroad, as the former law provided for.

- Also, in connection with merger control and concentrations, the term for the antitrust authority to resolve a matter is extended to 60 business days instead of the 35 business days set forth under the former law, following the reception of the notification or the additional information that might be requested by the antitrust authority to the parties, as the case may be. Such term can still be extended for another 40 business days.

- Concerning sanctions, in addition to those that were already covered by the former competition law (including but not limited to sanctions applicable in cases of absolute monopolistic practices; relative monopolistic practices; illicit mergers or concentrations; false declarations or information, among others), certain aspects are added such as: (i) the imposition of measures to regulate access to essential facilities under the control of one or more economic agents;
(ii) the imposition of restrictions to individuals to act as board member, manager, director, executive, agent, representative or attorney-in-fact of an entity for a period of up to 5 years, in addition to the imposition of fines, upon participating, whether directly or indirectly, in a monopolistic practice or an illicit merger or concentration, on behalf of or representing an entity; (iii) the imposition of fines to public notaries and commercial notaries that intervene in acts regarding a merger or concentration that might have not been authorized by the antitrust authority; (iv) the imposition of fines to an economic agent that fails to comply with regulation concerning essential facilities or with an order to eliminate barriers to competition; and, (v) the imposition of orders to divest assets, rights, or equity interests, as may be deemed necessary to eliminate anticompetitive effects, in case of recurring offenders and under the terms provided for in the Federal Competition Law; such sanction may only be imposed upon resolution of the amparo proceedings that might be initiated by any given interested party, as applicable.

- The COFECE has the obligation to make available to the public, both in the Official Gazette as well as on its Website, the transcription of the plenary sessions along with the agreements and resolutions issued by such commission, as applicable, always respecting the confidentiality, reserve and secrecy of the corresponding information, investigations and procedures.

- Concerning criminal matters, consistently with the conducts that the Federal Competition Law deems as absolute monopolistic practices, the Competition Bill adds to article 254 bis of the Federal Criminal Code, another conduct that is penalized (in addition to fixing, agreeing or manipulating prices; restricting supply; segmenting or assigning markets; and collusive bidding): (i) the establishment, agreement or coordination of proposals or refraining from submitting proposals in private biddings and auctions (not only in public biddings or auctions as set forth in the previous law); and, (ii) the exchange of information among competitors with the purpose or effect of fixing, agreeing or manipulating prices; restricting supply; segmenting or assigning markets and, collusive bidding in public or private biddings and auctions (under the former law and former article 254 bis of the Federal Criminal Law, information exchange is penalized only in connection with prices).

- On the same grounds, article 254 bis of the Federal Criminal Code provides for an increase in the penalties that are applicable for incurring in absolute monopolistic practices, which shall be prosecuted only upon a criminal complaint brought by the COFECE or the IFT, as applicable. Such complaint may only be formulated based on the determination of probable responsibility issued by any of such authorities within the scope of their powers and duties, in accordance with the Federal Competition Law.

- Furthermore, article 254 bis 1 is incorporated to the Federal Criminal Code, setting forth imprisonment and financial sanctions to any person that, during a verification visit, either directly or indirectly, whether totally or partially, alters or destroys, documents, images or electronic files containing information or data, in order to divert, obstruct or prevent investigations or administrative proceedings.
The Competition Bill shall enter into force 45 calendar days following its publication in the Official Gazette.

The Competition Bill abrogates the existing federal competition law.

The COFECE shall adopt its Organic Statute to the provisions of the Competition Bill, within a period no greater than 30 days after such Competition Bill enters into force.

The COFECE shall publish the regulatory provisions necessary for the fulfillment of its duties no later than six months after the Competition Bill enters into force.

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