

### Proposed Bill - Federal Antitrust and Competition Act

Mexico City, February 21, 2025

#### 1. Overview

As discussed in prior memoranda, constitutional amendments enacted to simplify the organization of government in December 2024 required to draft, amongst others, the legislation in matters of competition and telecommunications. The constitutional amendment in those matters (contained in article 28 of the Mexican Constitution) will enter into force once the respective pending legislation takes effect. Once it does, the dissolution of the Federal Competition Commission ("COFECE") and the Federal Telecommunications Institute ("IFT") will effectively take place, while their functions will be taken in by the new entities set forth in the new legislation.

On February 18, 2025, Congress published the preliminary bill proposing the Federal Antitrust and Competition Law (*Ley Federal Antimonopolio y de Competencia Económica*, "FACL"), which would replace the Federal Competition Act ("FCA") and will be discussed in the upcoming days (the "Bill").

#### 2. Justification

The Bill claims to seek a redistribution of wealth, arguing that competition policy should be a "welfare policy" that hinders market power in favor of fair prices to consumers. It also seeks to push a distribution of opportunities and favor inclusive economic development in Mexican society.

The Bill quotes some economic sectors as examples where there is allegedly a clear lack of competition, such as transportation, government purchases, basic goods (e.g., *tortillas*, chicken, and gas, banking, healthcare, amongst others), and it goes on to justify a stronger competition authority that promotes market efficiency.



As was the case prior to 2014, the new competition authority will again have jurisdiction over telecommunications and broadcasting markets in competition matters, thus avoiding jurisdiction conflicts between COFECE and IFT.

### **3. International Treaties**

The Bill stresses that Mexico, being a party to several trade agreements –amongst which are the World Trade Organization (“WTO”) and the United States-Mexico-Canada Agreement (“USMCA”)– will strengthen its compliance with its international obligations by enacting the proposed norms and by strengthening the new competition authority. This seems to be supported in the content of the Bill, which introduces the concept of Neutrality (as described below) and also seems to remark that even key sectors where national champions (state owned companies) exist, these will not be outside the scope of the new FECL insofar as their activities are not related to constitutional strategic activities.

### **4. Policy goals**

Amongst other measures, the Bill proposes shortening legal terms in investigations, reducing the Board of Commissioners from 7 to 5 members, higher fines, stronger sanctions, and lower merger-control thresholds.

Finally, being no longer constitutionally autonomous, the new competition authority shall be aligned with the National Development Program and applicable sectoral plans, favoring the State stewardship over the economy, particularly, as referred, in those areas or markets that are considered strategical.

### **5. Proposed legislation**

#### ➤ *New authority*

The new competition authority would be the National Agency for Competition and Economic Welfare (the “National Competition Agency” or “NCA”), a decentralized entity with legal personality and its own patrimony, with technical and operative independence in its decisions, but no longer be autonomous in its budgetary exercise and must propose a preliminary draft budget.

The new authority’s annual program will not be presented before the Executive and Legislative branches. The annual program will now be approved by the Agency (proposed

by its Chair), which as referred, must be aligned with the National Development Program issued by the Executive.

The members of the Agency's Board of Commissioners will be appointed by the Executive, via an Independent Committee composed of 3 well-known members coming from the academic field, two representatives of organizations from the civil society with experience in regulation and competition, and two accomplished professionals from the public and private sectors with technical knowledge in competition, administration, or regulation. The proposed commissioners will no longer be subject to a technical evaluation. The committee will determine whether a technical evaluation is applied to the candidates.

The Executive will appoint a commissioner from 5 final candidates proposed by the referred Independent Committee and will appoint the Agency's Chair.

Commissioners will be appointed for a 7-year period (previously 9), with no possibility of being appointed after their term expires. The Chair position will be held for a period of 3 years.

The appointment of Commissioners under such process seems to ensure and support the NCA's technical independence.

➤ *Capacity to issue its own regulations*

Like its predecessor, the NCA would be able to issue regulations according to its functions. Previously, as an autonomous entity in the Constitution, COFECE had the power to issue these provisions to define the scope of the competition law. This was the case since no other branches had faculties to issue legislation in the matter without curtailing COFECE's constitutional sphere. The Bill limits the National Competition Agency's capacity to issue general regulations that define the scope of the FACL (a legislative prerogative of the Executive branch), but gives the NCA power to issue guidelines on competition and market neutrality.

The NCA retains COFECE's capacity to issue its own organizational statute.

Matters where the NCA will have new faculties to issue specific regulations are, amongst others, merger filings, investigation procedures, procedures to examine attorney-client communications, fine reduction and leniency programs, injunctive relief powers in cases of monopolistic practices and illegal mergers, amongst others.

Some of these were limited to guidelines under de FCA, while now, as regulations, they appear to have a higher normative rank, a distinction that remains unclear. The capacity to issue guidelines is now open to any matter related to the enforcement of the FACL.

➤ *Competition in telecommunications and broadcasting markets*

The Agency may impose limits on national and regional concentration of frequencies and order asset divestment to comply with said limits, following the FACL's provisions.

The FACL includes the formal procedure for biannual resolutions, which include public consultations and impact analysis according to relevant case precedents.

Preponderant economic agents must abstain from entering into government contracts granted directly to them, without a public bidding process, amongst other limits (i.e., contractual obligations, mandatory presence in priority areas, limited range of market practices).

Open periods for reviewing asymmetric regulation, no longer tied to trimestral reviews.

No specific mention is included of when preponderance ends for a preponderant economic agent.

➤ *New focus on market Neutrality*

The Bill includes provisions previously absent from competition legislation, such as the concept of Neutrality. This concept will apply to economic agents with public participation. The Agency must issue guidelines on this matter, considering transparency, access to inputs, accounting separation, taxes, subsidies, amongst others. This does not impede the State from offering goods or services.

The Bill does include an express impediment to obtain market advantages from subsidies or public transfers destined to social ends or welfare, which seem reminiscent of state aid issues addressed in other jurisdictions, and which strengthen the assumption that the FECL will be compliant vis-à-vis competition and free trade clauses in international treaties, as well as signaling that even state owned or participated companies will also be within the scope of application of the FECL..

➤ *Antitrust Prosecutor*

The previous Investigation Authority is renamed as Antitrust Prosecutor. This officer (as well as the Technical Secretary) will be proposed to the Board of Commissioners by the National Competition Agency's Chair. The FACL adds a procedure to challenge this authority in case of suspected conflict.

Investigations may initiate at request of the Executive (directly or through the Ministry of Economy, the new telecommunications authority, or the Consumer Protection Agency). The Bill refers that these investigations will have preference over others but does not specify what will such preference entail.

The Bill includes a novel concept referred as citizen complaints, which require few formalities, to denounce what may be perceived as FACL violations, even without legal standing and on an anonymous basis. "Formal" complaints remain the same.

Citizen complaints are intended to be easily accessible and will maintain strict confidentiality of the plaintiff's identity.

It incorporates the possibility of complaints regarding mergers that were authorized or conditioned based on false information.

Formal complaints that fail to comply with certain legal requirements may be considered citizen complaints.

➤ *Investigations*

The 4 additional investigation periods after the first 120 period are reduced from a maximum of 120 days each to a maximum of 90 days each.

It opens the possibility to voluntarily cooperate with the Antitrust Prosecutor, even without the authority formally requesting cooperation.

In dawn raids, the Bill grants the express faculty to the Antitrust Prosecutor to impose enforcement measures indistinctly in case of hindering or opposition to verification proceedings. In these cases, where access is impeded to the NCA's officials, or in cases of altering or destroying documentation, the Antitrust Prosecutor can order a 36-hour administrative arrest for which police force assistance shall be requested by visitors.



Period for issuing opinion on probable cause of an anticompetitive conduct is reduced from 60 to 45 days.

➤ *Illegal conducts*

Absolute monopolistic practices are also referred to as “cartel practices” and relative monopolistic practices are referred to as “abuse of dominance”, in accordance with international standard criteria.

Inclusion of a new precept for abuse of dominance, consisting of directly or indirectly imposing prices or other exchange conditions that are not equitable. While this is in principle similar to the current precept regarding discriminatory prices, the new precept would add the “indirect” factor as well as prohibiting any other kind of non-equitable “transaction conditions”. This intends to widen the scope of abuse of dominance and may affect different forms of business practices such as tiering suppliers or dealing with sale forces or commercial intermediaries.

➤ *Merger control*

Merger control thresholds are generally reduced. They are reduced from 18,000,000 UMAs to 14,000,000 UMAs (a reduction of 23%) for the first and second thresholds under article 86 of the current FCA; from 8,000,000 UMAs to 5,000,000 UMAs (a reduction of 38%) for the first part of the third threshold under article 86 of the current FCA, and 48,000,000 UMAs to 40,000,000 UMAs (a reduction of 17%) for the second part of this third threshold.

The Bill introduces a fourth threshold for joint ventures in which the parties’ sales are over 14,000,000 UMAs. It is to be expected that if the Bill is successful, the inclusion of this fourth threshold may result in some issues for parties seeking to know whether their joint venture is subject to a merger control analysis, as joint ventures were generally already being assessed in light of the other thresholds, particularly the third one.

Other relevant additions include:

- Possibility to impose enforcement measures for formalizing transactions before the Agency’s resolution.
- Notifications that are filed after acts of execution will be dismissed and instead be treated under a verification proceeding.

- Specific rules for non-competes and non-solicitation clauses, which must comply with necessity criteria and must be narrow in their duration, product, service, and geographic scopes, although with little detail or safeguards.
- Parties may exhibit any documentation to demonstrate efficiency gains until after the Agency notifies the transaction's possible risks to competition.
- Fast track notifications give 15 days (previously 5) to the Board of Commissioners to determine if it is clear that the proposed transaction is notably low risk to competition. This may reopen the possibility of using the fast-track notification process (now obsolete) and make it feasible.
- Extension of deadline to investigate mergers for gun-jumping, from 1 year to 3 years.

In merger-control matters, several rules were directly incorporated from the current Regulatory Provisions of the FCA ("Regulatory Provisions"), such as rules for acquisitions by several sellers or buyers belonging to the same economic interest group; incorporation of timeframe for issuing statement of no objection in cases of automatic approval for lack of resolution (*afirmativa ficta*); opt-out rules for filing proceedings; rules to amend or modify proposed remedies; 30-day period to submit closing notice form the closing date, and detailing stages of gun-jumping proceedings.

➤ *Special proceedings*

In the case of divestment of assets, it is considered that economic agents may propose alternative divestment plans.

The competition authority will no longer be able to file constitutional proceedings before the Mexican Supreme Court of Justice.

In proceedings to determine market conditions, the term for the Antitrust Prosecutor to issue the statement of objections once the investigation concluded was reduced from 30 to 15 days.

The qualified majority required to order regulatory measures or asset divestiture is reduced from 5 to 3 votes.

➤ *Fine reduction program*

The deadline for entering this program is no longer the date of issuance of the statement of objections but the date of conclusion of the investigation.



➤ Attorney-client communications

New chapter recognizing the confidentiality of attorney-client communications and the designation of an administrative unit in charge of examining said information so as to not predispose the Agency's investigators or enforcers.

➤ Accessibility measures

New rules to provide accessibility to non-Spanish speaking people, providing necessary adjustments for indigenous people.

➤ Enforcement measures

Higher fines for typical non-compliance (from up to 3,000 UMAs to up to 5,000 UMAs).

New enforcement measures for ignoring summons or citations (up to 50,000 UMAs) and for hindering or undermining dawn raids (up to 250,000 UMAs).

➤ Fines and sanctions

Higher fines for giving false information (from 175,000 UMAs to 250,000 UMAs).

A relevant change being proposed consists of sanctioning cartel practices. When incurring in cartel practices, the fine not only increases from 10% to 20%, but now the basis of the fine would be the total income of all the economic interest group of the relevant economic agent. This is significantly higher than the previous 10%, but more importantly, the fine will no longer be calculated based on the responsible economic agent but based on the income of its whole economic group. This raises several questions, including in cases where the economic group is an international conglomerate.

Other increases include: 8% to 10% of the total income of the economic agent who incurs in abuse of dominance or illegal merger, and 5% to 8% of the total income of the economic agent who incurs in gun-jumping.

Fining the whole economic group, instead of only the responsible economic agent, is also proposed in cases of non-compliance with conditions for merger approval; cases of non-compliance with conditions for under the fine reduction program; cases non-compliance





with regulation on essential inputs, non-compliance with injunction relief measures imposed by the Agency; and non-compliance with imposed preponderance regulation.

The Bill also increases fines for participants in illegal conducts in name or representation of another; when assisting in the violation of the FACL, and for notary publics that formalize gun-jumping transactions.

➤ Damages

Changes to the timing from which a victim can file a claim for damages. Where the FCA stated that COFECE's resolution must be judicially firm, the Bill proposes the possibility to claim damages from the date of the Agency's resolution.

➤ Regulatory rules acquiring legal status

Several additions to the FACL are existing rules that are already set forth in the current Regulatory Provisions, which would now acquire legal status.

Amongst these are rules regarding summons to testify; procedural rules for issuing opinions in public biddings processes; rules to determine legal standing; procedural rules for binding opinions; rules regarding incidental proceedings, and rules regarding essential facilities proceedings (which include deadlines and a proportionality test to justify the proposed regulatory measures).

## **6. Bill's transitory regime**

The Bill will take effect 60 days after its publication. The first transitory provision also states that these 60 days would replace the 180 days established by the constitutional amendment referred to above.

While this would indeed bring more certainty to the transition process, it is hard to consider the fact that a transitory provision issued by congress could override such a provision that has been issued by the constitutional assembly. This could also bring lawsuits reasonably arguing for the non-existence of the new entity.

Proceedings initiated under previous legislation will continue with the new authority under the rules in place when the proceeding started. This is typically interpreted to be applicable only when the new provisions are not beneficial to the parties (*pro-personae*).

The Executive has 6 months to publish the FACL's rules. Until then, the Regulatory Provisions will be in force except when contrary to the new legislation.

The Agency's organizational structure must be published within 30 days of the Bill entering into force. The Bill states that the staff for the NCA will be taken from COFECE's current staff, thus trying to ensure certain continuity to the NCA.

The new Board of Commissioners must be appointed within 60 days of publication of the Bill and their duration will be initially staggered.

COFECE's and IFT's resolutions will remain valid.

The treasury must adjust to guarantee COFECE's functions during the transition period.

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