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Relevant Aspects of the New Mexican Competition Law: Agencies, Legal Institutions and Proceedings

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RELEVANT ASPECTS OF THE NEW MEXICAN COMPETITION
LAW: AGENCIES, LEGAL INSTITUTIONS
AND PROCEEDINGS.

Xavier Ginebra-Serrabou and J. Abel Rivera-Pedroza*

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I. Introduction

The new Mexican Competition Act, officially called the *Federal Law of Economic Competition* (hereinafter “FLEC”), was published in the *Official Gazette*

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of the Federation (hereinafter “OGF”) on May 23, 2014.¹ This new law introduces several new features to update the competition law institutions, but above all it is the development of the constitutional amendment on competition and telecommunications published in the OGF on June 11, 2013 (hereinafter “the constitutional amendment”). Thus, this new law is also part of a complex political process committed to a series of profound reforms² aimed not only to initiate the potential of the Mexican economy but also to notably improve the legal system as a whole.

The constitutional amendment is perhaps the most significant constitutional change concerning competition and telecommunications affairs during the life of our Constitution (enacted and in force since 1917). Hence, although enacted together, the constitutional amendment has two parts: (i) one part devoted to competition law institutions, and (ii) a second part devoted specifically to regulation on telecommunications and broadcasting.³ Of course, the second part deserves a specific essay by itself, but this article will not focus on that part. It will focus only on the competition law part.

The constitutional amendment has been questioned because of the excessive volume of rules introduced into the Constitutional text,⁴ as the rules could have been introduced into secondary legislation. However, the explanation is legal and political: a rule introduced into the Constitution eliminates the risk of being challenged before the courts alleging that the rule is unconstitutional, facilitating the enforcement of the antitrust law by the agencies and reducing the volume of litigation.

Article 28 of the Constitution was the most affected provision.⁵ That provision was extended in a surprising way mainly due to the text devoted to regulating the new federal competition agencies: the *Federal Economic Competition Commission* (hereinafter “FECC”) and the *Federal Telecommunications Institute* (hereinafter “FTI”).⁶ Both of them, as federal autonomous agencies of the *United Mexican States*, are not part of the Administration under the President of the Republic.⁷ More importantly, the extended article 28 of the Constitution also includes new competition law institutions as “barriers to competition,” an adapta-

¹ In force since July 7 2014.

² Since December 2012, i.e. the beginning of the presidency of Enrique Peña Nieto, the Federal Congress has approved the reform on competition and telecommunications, the energetic reform, the financial reform, the educative reform, the tax reform and the political reform. For instance, as result of that, we have 5 new federal autonomous agencies and enforcers.

³ It includes for instance: regulation on interconnection services, the “must carry” and “must offer” obligations in open and restricted TV, the “market power” declaration (i.e. dominance declaration) and the new institution called “preponderance” declaration and its associated asymmetric regulation, licenses and permits to use radio spectrum, and other issues specific to the regulation of telecommunications and broadcasting.

⁴ For instance, the whole text of the competition and telecommunications reform is longer than the American Constitution.

⁵ *Constitución Política de los Estados Unidos Mexicanos [C.P.]*, as amended, Article 28, *Diario Oficial de la Federación [DO]*, 5 de Febrero de 1917 (Mex.).

⁶ *Id.*

⁷ *Id.*

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tion of the “essential facilities” doctrine, and a new design of legal proceeding before the FECC.⁸

In essence, the aims of the constitutional amendment were: (i) to update the competition law institutions as a mean to improve the efficiency and detonate the innovation in the Mexican economy, (ii) to improve the enforcement of competition law in favor of public interest (especially in telecommunications and broadcasting sectors) by creating two new enforcement agencies and (iii) to accelerate the enforcement of the remedies imposed by the agencies by reducing the litigations against its decisions.

II. The “Expanded” Purpose of the FLEC

The new FLEC purpose declaration⁹ is: “promote, protect and ensure free concurrence and economic competition, as well as prevent, investigate, combat, effectively chase, severely punish and eliminate monopolies, monopolistic practices, unlawful mergers, barriers to free competition, and other restrictions on the efficient functioning of markets.”

A first point to note is the conceptual precision. The former Competition Law spoke of *free competition*, but now the FLEC establishes along itself the terms: *free concurrence and economic competition*, which is a more logical and accurate sequence.¹⁰ Indeed, first, a firm tries to *enter* the market (market access, concurrence) and once the firm has entered, one can speak of *economic competition* and displacement practices.

III. The New Competition Authority: The FECC and the IFT

A. Legal Status and Structure

There is an inclination of lawmakers in Mexico to what we may call “Mexican fever of creating autonomous agencies.” This “fever” is based on the idea that this so-called solution remedies public policy problems and ensures a better law enforcement (despite being only an institutional design shift).¹¹ The autonomous agencies are part of the Mexican State at federal level but they are not part of the Administration under the President.¹² The autonomy can only be established by the Constitution.¹³

The former *Federal Competition Commission* was an agency under the structure of the Ministry of Economy, which is part of the Administration under the President (as well as the former *Federal Telecommunications Commission*).¹⁴

⁸ *Id.*

⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 2, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁰ *Id.*

¹¹ XAVIER GINEBRA SERRABOU & VÍCTOR MANUEL CASTRILLÓN, *La Nueva Ley Federal de Competencia Económica* 45 (2014).

¹² *Id.*

¹³ *Id.*

¹⁴ Former Telecommunications Law (1995), section 1.

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Now the FECC and the FIT, both with powers to enforce competition law (referred jointly as “competition authority”), are autonomous agencies only subjected to the Constitution, the Laws, and the Federal Courts’ judicial control.¹⁵ This also means that the handling of competition policy in Mexico is not the responsibility of the President of the Republic or the agencies under him; it is responsibility of the two new agencies: the FECC and the FTL.¹⁶

The FTL has the power to enforce the FLEC only in telecommunications and broadcasting sectors and markets, so the procedural and substantive issues referred to here are completely applicable to its enforcement activities.¹⁷ If there were a conflict between the FECC and FTL on competence to hear a case, a Federal Collegiate Court of Circuit specializing in Competition and Telecommunications will ultimately resolve the conflict.¹⁸

The following bodies comprise the institutional design of the new FECC:¹⁹

1. The Plenum
2. The Investigation Authority
3. Internal Comptroller

Herein we provide description of said bodies.

1. *The Plenum*²⁰

The plenum is the decision-making body of the FECC.²¹ Its makeup consists of seven Commissioners supposedly extremely trained in the application of competition law.²² The FLEC clarifies various Plenum operating issues and obligations of Commissioners.²³ That is very important because under the life of the previous law these issues were interpreted by the Commissioners and other officials and therefore generated controversial decisions and doubtful transparency practices.²⁴

Regarding the Plenum decisions, all Commissioners must vote, so that no Commissioner may abstain from voting; the decisions are taken by majority un-

¹⁵ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Article 28, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 5, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁹ A parallel structure is designed within the FTL.

²⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 18 - 21, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

²¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 3-XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

²² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 10, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

²³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 18 - 21, 51, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

²⁴ Ref. Original decision ruled an administrative liability of Telcel case (Commission vs Telcel 2011).

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less the specific assumptions stated in article 18 of the FLEC;²⁵ if a Commissioner is not present during the session, he must issue his vote in writing.²⁶ It is very positive for transparency purposes the provision in FLEC regarding the publicity of the Plenum sessions and its decisions (except those parts containing confidential information).²⁷ The Plenum also has to issue a stenographic version of its meetings.²⁸

The objection to the Commissioners cannot be granted on the basis of an expression of a technical review, public explanation of the rationale of a decision, or issuing a separate opinion to the decision.²⁹ The causes of impediment for hearing a case (for a Commissioner) are grounded on the basis of the existence of a direct or indirect interest on the case³⁰.

Another novel aspect of Plenum regulation is the so-called “interview” between commissioners and economic agents’ representatives. In fact, these “interviews” are legal, *ex parte* meetings (parallels to the official hearings of the proceeding).³¹ Although totally unregulated, these *ex parte* meetings had been performing since 1993.³²

Unlike American legal practice, *ex parte* meetings in Mexico are not completely frowned upon in legal proceedings, whether before Courts or administrative agencies.³³ Because the characteristic of the proceeding before the former *Federal Competition Commission* was not of an adversarial one but of an inquisitorial one,³⁴

²⁵ According to article 18 of the FLEC, such assumptions are meant to be measures to determine the existence of “barriers to competition” and essential inputs, the decisions on divestiture, as well as the approval of regulatory provisions, shall be taken at least by 5 Commissioners.

²⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 18, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 30 - 33, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

³⁰ According to Article 24 of the FLEC, by direct or indirect interest it shall be understood: (i) The Commissioner has family relationship with one of the interested parties or their representatives; (ii) The Commissioner has interest (personal, family or business) in the case, including those that may be of some benefit for himself, his spouse or relatives; (iii) The Commissioner, his spouse or any of his relatives are heir, legatee, donee or guarantor of any of the interested parties or their representatives; (iv) The Commissioner has been witness or expert witness, attorney or representative in the case in question, or has previously managed the case in favor or against any of the interested parties, and (v) The Commissioner has publicly and unequivocally set the direction of his vote before the Plenum decides the case.

³¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 83, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

³² The authors conclude said statement from personal observations during their own performances at the former Competition Commission during said period of time

³³ This statement does not necessarily include the legal practice in commercial arbitration.

³⁴ By inquisitorial we understand a legal proceeding where the Court or Agency or a part of it is actively involved in investigating the facts of the case, as opposed to an adversarial proceeding where the role of the Court/Agency is primarily that of an impartial referee between the prosecution and the defense. The new proceeding before the FECC is closer to an adversarial one it was thought the regulation of *ex parte* meetings was completely unnecessary.

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In a proceeding more similar to an adversarial one, there are clearly identified parties (the Investigation Authority and the respondent), so that the figure of *ex parte* meeting is fully applicable. However, the legalization of the *ex parte* meetings leaves out the rights of: (i) the petitioners because they are not recognized as a party in the proceeding but as an assistant of the Investigation Authority, and (ii) the consumers not officially recognized as a party in the proceeding.³⁵ Neither of them will be represented during the *ex parte* meetings.

Hence, the FLEC provides that to the legalized *ex parte* meetings called “interviews,” all Commissioners must be summoned.³⁶ However, the “interviews” can be held with the presence of only one of them.³⁷ The FECC must form a record at least containing the place, date, start time and end time of the interview, as well as the full names of all persons who were present for the interview and the issues covered during it.³⁸

2. *The Investigation Authority (hereinafter “IA”)*³⁹

Since investigation and the decision-making functions are completely separated in the FLEC, the IA is the FECC’s body responsible for conducting the investigations (a “public antitrust prosecutor”) acting as a party to the proceeding.⁴⁰ In exercising its powers, the IA is endowed with technical and managerial autonomy to decide on its operation and decisions.⁴¹

The head of the IA is appointed and removed by the Plenum, by a majority of 5 commissioners (4 years in office and can be re-elected).⁴² According to the FLEC,⁴³ the head of the IA should be “independent in his decisions and performance, professional and impartial in his actions”, and is subjected to legal principles of lawfulness, objectivity, honesty, exhaustiveness and transparency, as well as to the “contact rules.”⁴⁴

It is problematic that the FLEC requires “impartiality” to the head of the IA, given that the IA is officially a party to the proceeding as the complainant. The requirement of impartiality for the Plenum can be understood, because it is the

³⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 83, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

³⁶ *Id.*

³⁷ *Id.*

³⁸ This information should be published on the website of the CFCE. Article 25.

³⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26 - 36, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26 - 27, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26 - 29, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 30 - 33, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴⁴ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 34 - 35, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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decision-making body of the FECC, but the requirement is not logical for the IA. The role of the IA should be clearly partial since its function is to file a formal accusation against the respondent grounded in the gathered evidence. It is assumed that the head of the IA represents a public-interest position because the whole society is interested in the existence of markets where competition conditions exist. Thus, it is not appropriate to require impartiality to the complainant inasmuch as its logical behavior is to argue in favor of its own interests (public-interest in the case of IA).

3. *Internal Comptroller*⁴⁵

The Internal Comptroller is a body of supervision and administrative control headed by a chief appointed by the Chamber of Representatives.⁴⁶ The chief is appointed to terms of 4 years in office and can be reelected.⁴⁷ The functions of this body are: (i) the control of income and expenditure of the FECC and (ii) the enforcement of the regulations on administrative liability of public officials.⁴⁸ These functions are not relevant regarding the substantive application of competition law. Therefore, the Internal Comptroller is not discussed in detail in this Article.

B. Powers⁴⁹

Beyond its classic powers of prosecuting and sanctioning monopolistic practices and the powers related to control of mergers, the powers of the FLEC that should be highlighted for its relevance and novelty are:

- Regarding “barriers to competition” and essential inputs⁵⁰: (i) order the necessary measures aimed to eliminate “barriers to concurrence and free competition” and (ii) determine the existence and regulate access to essential inputs such as divestiture of assets, shares, rights or company parts in the necessary proportions to eliminate anticompetitive effects.
- “Formal-opinion” and “General Guidance” on competition affairs⁵¹: (i) resolve a specific issue placed under its consideration through the “Formal-opinion requests” and (ii) provide “General guidance” on competition law affairs as requested by any person.

⁴⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 37 - 46, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 37 - 40, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴⁷ *Id.*

⁴⁸ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 37, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁴⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-II, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XVI, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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- Regulatory provisions⁵²: issue and publish (after public consultation) regulatory provisions on: (a) Imposition of sanctions, (b) Monopolistic practices, (c) Market power determination (dominance), (d) Relevant market determination, (e) Barriers to competition, (f) Essential inputs and (g) Measures on divestiture of assets, shares, rights or company parts.
- Directives, Guidelines, and Technical Criteria⁵³: issue and publish (after public consultation) soft-law provisions on: (a) Mergers, (b) Investigations, (c) Commitment decisions (settlement agreements), Leniency program and reduction of fines; (d) Suspension of acts constituting probable monopolistic practices or unlawful mergers, (e) Bail to suspend the application of interim and precautionary measures, (f) Requests for dismissal of criminal proceedings in cases referred by the *Federal Criminal Code*, and (g) The ones necessary for the effective competition law enforcement.
- Class actions⁵⁴: according to the *Federal Civil Procedures Code*, the FECC has standing to file class actions before Federal Courts in order to claim antitrust damages as class representative.

IV. Anti-Competitive Practices

A. Absolute Monopolistic Practices (Horizontal Restraints)

Since the former 1993 competition Law was passed, the cartels or horizontal restraints to competition have received in Mexico the name of “absolute monopolistic practices” (AMPs).⁵⁵ Parties are not permitted to plead the efficiency defense against allegations raised under the law, so they are illegal *per se*.⁵⁶ The AMPs are: (i) price fixing and exchange of information with the purpose or effect of price fixing, (ii) supply manipulation, (iii) market allocation/segmentation and (iv) bid rigging between competitors.⁵⁷

The new FLEC makes a shift regarding the exchange of information between competitors. The FLEC establishes as an autonomous AMP “the exchange of information with any of the purposes or effects”⁵⁸ referred to above, such as price fixing, supply manipulation, market allocation and bid rigging.⁵⁹ Thus, the scope and consequences of the exchange of information between competitors are broad-

⁵² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XVII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XXII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵⁴ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XXVIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 8 - 10, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵⁷ *Id.*

⁵⁸ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53-V, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁵⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

ened. So, economic agents exploring mergers should be careful not to incur this new AMP during the negotiations of their operations.

B. Relative Monopolistic Practices (Vertical Restraints)

Vertical restraints to competition, or abuses of dominance, are known in Mexico as relative monopolistic practices (RMPs).⁶⁰ They are not illegal *per se* since it is possible to plead the efficiency defense.⁶¹ Although the new FLEC preserves the fundamental system on RMPs of the former Law, the following changes are worthy to be highlighted.

1. Related Markets

What had been only a logical deduction of the analysis under the force of the former Law now is explicitly recognized by the FLEC.⁶² The market power should be held over the relevant market in which the RMPs take place, and not in any other market (even though there can be any inferred relationship given by any similarity, i.e. product similarity).

However, unlike the former Law, it is now clearly recognized that the RMPs may affect not only the relevant market but also related markets.⁶³ This effect is seen in unlawful displacements of competitors, impairment of market access or establishment of exclusive advantages favoring only some economic agents.⁶⁴

Due to Mexico's very formalistic legal tradition and strict application of the written law, this explicit recognition of related markets is very important. As the former Law did not explicitly refer to related markets as potentially affected by anti-competitive behavior, the decisions of the former *Federal Competition Commission* referring to those effects were criticized due to lack of legal certainty.⁶⁵

2. Efficiency Gains

Grounded in the economic rationale, a vertical restraint to competition is acceptable if the resulting efficiency gains outweigh its anticompetitive effects. According to the new FLEC⁶⁶, the efficiency gains must: (i) favorably affect

⁶⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 55, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 54, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 55, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶⁴ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 54, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶⁵ The only reference to related markets was established in Article 16 of the former law but it was only applicable to mergers and acquisitions. Art 16 of former Competition Law.

⁶⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 55, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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competition process, (ii) clearly outweigh the anticompetitive effects, and (iii) lead to an improvement of consumer welfare.

Additionally, the former Law required the efficiency gains should not result in: (i) a significant increase in the price, (ii) a significant reduction in the available choices to consumers, or (iii) an important deterrence of innovation in the relevant market.⁶⁷ However, these three clear and specific controls over the efficiency gains are now excluded from the FLEC.⁶⁸

One might think such exclusion is not significant as the above controls should be included within the concept "improvement of consumer welfare."⁶⁹ Nevertheless, a wider interpretation allows the practitioners to allege the existence of an improvement of consumer welfare despite evident and significant: (i) price increases, (ii) reduction of choices to consumers or (iii) innovation deterrence.⁷⁰ So, the changes on the efficiency gains standard are likely to favor the interests of the economic agents rather than the public interest.

3. Changes in the Description of RMPs

*Tying*⁷¹

Slight change in wording, the word "additional" is eliminated.

Former Law	New FLEC
Sale or transaction conditional on purchase, acquire, sell or supply another additional good or service, usually different or distinguishable, on reciprocity basis.	Sale or transaction conditional on purchase, acquire, sell or supply another good or service, usually different or distinguishable, on reciprocity basis.

⁶⁷ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 11 - 13, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶⁸ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-III, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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*Predatory pricing*⁷²

Change of reference cost, the words “systematic” and “occasional” are eliminated:	
Former Law	New FLEC
<p>The <i>systematic</i> selling of goods or services at prices below its average total cost or <i>occasional</i> below its average variable cost when there are grounds for believing that these losses will be recovered through future price increases.</p> <p>In the case of goods and services produced jointly or that are indivisible for marketing, the average total cost and average variable cost shall be distributed among all co-products.</p>	<p>Selling below its average variable cost or its average total costs but above its average variable cost, if there are elements to presume that will allow the economic agent recover its losses by future price increases [...].</p>

The consequence of such change is that selling below average total cost shall be predatory. Probably, the change might facilitate the investigation of the prosecutor but also might inhibit discounts to consumers; the words “systematic” and “occasional” were not only ornaments on the former Law but were part of a well-accepted standard.⁷³

*Discriminatory treatment*⁷⁴

“Equality of conditions” is replaced by “equivalent conditions”.	
Former Law	New FLEC
<p>The establishment of different prices or conditions of sale or purchase for different buyers or sellers situated in the same conditions.</p>	<p>The establishment of different prices or conditions of sale or purchase for different buyers or sellers situated in equivalent conditions.</p>

Such change is positive, and its adoption into Law was probably encouraged due to *Radiomovil Dipsa (Telcel-America Movil)—Interconnection Service for call termination on mobile phones* (DE-037-2006). While a *Telcel* user produced

⁷² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-VII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁷³ *Id.*

⁷⁴ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-X, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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his call on-net and paid a rate x , a mobile operator (competitor) produced the call off-net and paid a rate $x+1$ (with the repercussions on the rates to competitors users).⁷⁵ So, it was clearly convenient being a *Telcel* user if most of the calls were ended on-net. The former *Federal Competition Commission* held that *Telcel* was charging different rates to buyers situated in the *same conditions*.⁷⁶

Indeed, this case involved what in other jurisdictions is known as *margin squeeze*.⁷⁷ Inasmuch as the rate charged to a competing operator ($x+1$) is higher than the rate charged to an internal user, the competing operator cannot match the final rate charged by *Telcel* to its users.⁷⁸ Notwithstanding, as the margin squeeze practice was not provided in the former law, the former *Federal Competition Commission* had to frame the conduct of *Telcel* as a discriminatory treatment.

Telcel, *inter alia*, held that: (i) *Telcel* users and mobile operators requesting interconnection were not in equal circumstances and (ii) it was natural that *Telcel* users paid better rates than competing operators, precisely because their conditions were different.⁷⁹ Certainly the change on the wording “equivalent conditions” by the FLEC, expands the scope of the legal hypothesis and allows a broader legal interpretation in favor of the prosecutor.

*Increasing costs to rivals / impeding production process to rivals / reducing demand to rivals*⁸⁰

Rewording	
Former Law	New FLEC
The action of one or more economic agents, whose object or effect, direct or indirect, is to increase costs or obstruct the production process or reduce the demand faced by their competitors.	The action of one or more economic agents, whose object or effect, direct or indirect, is to increase costs or obstruct the production process or reduce the demand faced by other economic agents .

The economic rationale of the rewording is to anticipate the conduct of firms preventing the entry of new firms, and by doing so, eliminating potential competition. The new firms that are not yet participating in the market cannot yet be

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Ley Federal de Competencia Económica [L.FCE] [Federal Antitrust Law], Article 56-XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁷⁸ *Id.*

⁷⁹ This is one of the problems to which is addressed the asymmetric regulation over “preponderant” economic agents in telecommunications and broadcasting sector. This asymmetric regulation is grounded in the constitutional amendment, the new Federal Law of Telecommunications and Broadcasting (published in the OGF the July 14, 2014) and the regulatory decisions of the FIT against America Movil and Grupo Televisa, both of them issued on May, 2014.

⁸⁰ Ley Federal de Competencia Económica [L.FCE] [Federal Antitrust Law], Article 56-XI, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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considered as “competitors” or “rivals,” but they can be obviously considered as “other economic agents.”⁸¹

Under the force of the former Law, it was required the conduct was directed against competitors. However, the rewording (“other economic agents”) also matches with the recognition of related markets (and its participants) as potentially affected by a RMP. So, not only rivals in the relevant market might be affected, but also economic agents participating in related markets.

C. New RMPs: The Essential Input and the Margin Squeeze⁸²

Perhaps one of the most important things in the new FLEC is the incorporation of two new RMPs.

On essential input, the FLEC provides that “denial, access restriction or access on discriminatory terms and conditions to an essential input by one or more economic agents” is a RMP.⁸³ Of course, the essential input institution has its origin in the essential facilities doctrine.⁸⁴

Regarding the margin squeeze, the FLEC defines it as: “reducing the margin between the access price to an essential input supplied by one or more economic agents and the price of the good or service supplied to the final consumer by the same economic agents using to its production the essential input.”⁸⁵

As provided above, the lawmaker produced this legal wording of margin squeeze from the facts of the *Telcel* case. However, the wording, as approved, involves a mix between a refusal to deal and the essential input. The refusal to deal or the discriminatory treatment was already covered by the former Law, and in our view, the change in its wording (“equivalent conditions” instead of “equality of conditions”) could have solved the interpretation problem raised in *Telcel*.

The mix between refusal to deal and essential input will become a very complex issue to handle for both the IA and the firms.

V. “Barriers to Competition,” Essential Inputs and Regulatory Remedies

A. “Barriers to Competition”⁸⁶

The FLEC orders the competition authority to assure “the prevention and removal of barriers to free concurrence and economic competition in the necessary

⁸¹ *Id.*

⁸² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-XII, XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁸³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56 Fraction XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁸⁴ See Genebra-Serrabou and Castrillon, *supra* note 11 at 65 – 66.

⁸⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56 Fraction XI, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁸⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 57, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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proportions to eliminate its anticompetitive effects.”⁸⁷ This new concept in the Mexican law, as far as we are concerned, is unparalleled in the international antitrust practice. At least not as a legal institution as defined by the FLEC: “any structural feature of the market, that is: fact or action of the economic agents with the purpose or effect of: (i) preventing access of competitors or limiting their ability to compete in markets, (ii) preventing or distorting the process of free competition, (iii) as well as the enactment of legal provisions issued by any level of government that unduly impede or distort the process of free competition.”⁸⁸

This new legal institution is highly questionable and its careless application would be dangerous. First, a “structural feature of the market” is an abstraction by itself, not a conduct. A purpose is pursued by a subject, and a cause or effect is also pursued by a subject. A purpose is not pursued by an abstraction.

What is a “structural feature of the market”? It basically has to do with 3 things: (i) number of players on the market and their market share, (ii) degree of differentiation of the good or service, and (iii) the existence of barriers to entry and exit.⁸⁹ In this way, we speak of monopoly, oligopoly, monopolistic competition, monopsony and so on. However, these structures are not always a result of the behavior of firms or the regulatory framework.

There are markets that hold only one or few players, either by large investments needed, scarcity of inputs (e.g. radio spectrum), the minimum efficient scale to be profitable (e.g. refineries) or because of natural monopolies (operation of an airport or a highway).⁹⁰ Moreover, there is already sectorial regulation focused precisely to the concern of lack of competition in certain markets due to structural features (ports, airports, telecommunications, and so on).⁹¹

Second, defining the “barriers to competition” as any fact or action of economic agents, without describing precisely what is the unlawful conduct, makes this institution likely to be unconstitutional. This construction is most likely contrary to legal certainty, an important feature and requirement in our formalistic legal system.

Perhaps, the only positive aspect of this institution is that it alludes to public regulation as a barrier to competition (attributable to the government).⁹² At least in Mexico, many markets with problems on competition may be explained due to an erroneous design of regulation, such as telecommunications, which is expected to improve its functioning due to new regulation.⁹³

⁸⁷ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Fraction IV, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁸⁸ *Id.*

⁸⁹ Luque de la Torre María de los Ángeles, et al. *Curso Prácticos de Economía de la Empresa, un Enfoque de Organización*. Editorial Pirámide, Madrid, 2001. Parte V, Capítulos 17 y 20.

⁹⁰ *Id.*

⁹¹ For instance, Mexican Telecommunications Law.

⁹² Comisión Federal de la Competencia (1997), *In-Depth Examination of Competition Policy in Mexico (1995-96)*, submitted to OECD Competition Law and Policy Committee, 21 January 1997.

⁹³ *Id.*

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B. Essential Input⁹⁴

As provided above, the essential input has its origin in the essential facility doctrine. Rather than a monopolistic practice by itself, the essential facility doctrine has been used, in the United States and in Europe, as a special or exceptional circumstance in determining the relevant market and market power.⁹⁵ Thus, it can be used as a refusal to deal or as a discriminatory treatment by denying access to the facility previously determined as essential.⁹⁶ Thus, essential facility/essential input is a circumstantial element rather than a behavioral one.

From the perspective of the civil law tradition, the essential facility doctrine means that an imposition to negotiate contracts is pursued to compensate a weak competitive market structure attributed to the existence of an essential facility.⁹⁷ Despite not being a solution to the market structure, essential facility is pursued to keep or create competition through the forced contractual instruments.⁹⁸ So, the competition principle prevails over the contractual freedom principle.

According to the FLEC, in order to determine the existence of an essential input, the FECC should consider:

- i. If the essential input is controlled by one or more economic agents holding market power or they have been declared as “preponderant” economic agents by the FTI;
- ii. If its reproduction by another economic agent is not viable from a technical, legal or economic viewpoint;
- iii. If the input is indispensable to the provision of goods or services in one or more markets, and has no close substitutes;
- iv. The circumstances under which the economic agent came to control the input; and
- v. Other criteria, if any, established in the FECC Regulatory Provisions.

The first thing that stands out is that the declaration of essential input implies an *ex ante* market power determination. This and the other characteristics reveal a clear influence of the European jurisprudence rather than the American one.⁹⁹

⁹⁴ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 60, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁹⁵ See Ginebra-Serrabou and Castrillon, *supra* note 11, at 68 – 70.

⁹⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Fractions XII - XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

⁹⁷ See Ginebra-Serrabou and Castrillon, *supra* note 11, at 68 – 70.

⁹⁸ *Id.*

⁹⁹ Though the essential facility doctrine originated in American jurisprudence, it has not been confirmed by the U.S. Supreme Court and its scope is far from having been definitely set. Maybe, the most important U.S. Supreme Court case is *Verizon Communications v. Law Offices of Curtis v. Trinko*, [540 U.S. 398 (2004)], where the Court rejected the doctrine as established Law and refused to invoke it as long as there is specific regulation providing the proper remedy, normally access.

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In Europe, the essential facility doctrine has been invoked since the 90s by the European Commission).¹⁰⁰ There are 4 leading cases worthy to be reviewed as they have been inspirational for the Mexican lawmaker.

In *Magill*,¹⁰¹ the *European Court of Justice* (hereinafter “ECJ”) ruled that under exceptional circumstances it should be given access to goods/services even though they are protected by intellectual property rights.¹⁰² This would occur when a refusal to deal is accompanied by 3 factors decreasing competition: (a) the firm reserves to itself a secondary market excluding any potential competition; (b) the firm precludes the emergence of a new product for which there is demand in the market; and (c) the firm refuses to deal without objective justification.¹⁰³

In *Oscar Bronner*,¹⁰⁴ the ECJ added that the exceptional circumstances required in *Magill* mean: (a) the refusal to deal is likely to eliminate all competition in the relevant market (in which participates the firm requiring access) and (b) the facility is essential for the business inasmuch as there is no actual or potential substitute and there is no substitute. Having no substitute means that i) there is no plausible alternative to the facility, including a poor quality alternative, and ii) the inability to duplicate the facility is objective, and is due to *technical, economic or legal obstacles*, not to the limited capabilities of the competitor requiring access.¹⁰⁵

In *IMS Health*,¹⁰⁶ the ECJ confirmed the standard used in the *Magill Oscar* and *Bronner* rulings that a refusal to deal is abusive inasmuch as the essential facility controlled by the dominant firm is indispensable for competitors to have effective access to the market.

In *European Night Services*¹⁰⁷ the *European Court of First Instance* held two important points: (i) the doctrine cannot be invoked by a company that has a strong presence in the relevant market and it is just trying to strengthen it, and (ii) the doctrine cannot be enforced against a company that does not have a dominant position in the relevant market.

C. Proceeding and Regulatory Remedies

According to the FLEC,¹⁰⁸ the proceeding to determine the existence of “barriers to competition” and essential facility has regulatory purposes whose impor-

¹⁰⁰ Calvo Alfonso-Luis, et al. *La Doctrina de las Infraestructuras Esenciales en Derecho Antitrust Europeo*. Madrid, 2012.

¹⁰¹ Case C-241 & 242/91 P, *Radio Telefis Eriann v. Commission*, 1995 E.C.R. I-743.

¹⁰² *Id.*

¹⁰³ See Alfonso-Luis, et al. *supra* note 100.

¹⁰⁴ Case C-7/97, *Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co.*, 1998 E.C.R. I-779.

¹⁰⁵ *Id.*

¹⁰⁶ Case C-418/01, *IMS Health v. NDC Health*, 2004 E.C.R. I-05039.

¹⁰⁷ Accumulated cases T-374/94, T-375/94, T-384-94 & T-388/94 [1998] ECR-II-3141.

¹⁰⁸ *Ley Federal de Competencia Económica [LFCE]* [Federal Antitrust Law], Article 94, *Diario Oficial de la Federación [DO]*, 24 de Julio de 2014 (Mex.).

tance is hard to ignore due to its implications over the markets. This regulatory proceeding seems to be a key turning point of a Mexican “devotion,” apparent over the last three decades, to deregulation and acclamation of the minimal government intervention in markets.

The proceeding is initiated *ex officio* or by the request of the President of the Republic if there are elements suggesting a lack of effective competition in a market.¹⁰⁹ In concluding the investigation, the IA shall propose to the Plenum: (i) a preliminary decision containing proposals of corrective actions to remove restrictions to the efficient functioning of the market under investigation or (ii) the closure of the case.¹¹⁰

After the preliminary ruling, the IA must notify the economic agents who may be affected by regulatory remedies likely to be issued with the final decision.¹¹¹ According to the FLEC, only economic agents with legal interest, a highly restricted procedural standing, may make statements, present memorials and evidence, and if appropriate, also propose suitable and economically feasible measures to eliminate the identified competition concerns.¹¹²

Notwithstanding, in our opinion, economic agents operating in related markets and consumer associations are excluded from participating in the proceeding, despite having legitimate interest in the proceeding, because they can also be affected indirectly by the regulatory measures imposed by the FECC. It is worth mentioning that Mexican courts have ruled that there is a constitutional right to participate in markets where there is effective competition, which is applicable to both firms and consumers.¹¹³ Additionally, the legitimate interest, a less restricted procedural standing, whether individual or collective, is also protected by the Constitution; indeed, in constitutional litigation (“writ of amparo”) and other administrative proceedings the legitimate interest is fully recognized as procedural standing.¹¹⁴

The final decision is adopted by the Plenum, and might contain the following remedies:

- (a) Recommendations for public authorities when there is regulation restricting competition;
- (b) Regarding “barriers to competition,” an order to economic agents to remove a barrier that unduly restricts the competition process;

¹⁰⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 68 Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹¹⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 68 – 85, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹¹¹ *Id.*

¹¹² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 94, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹¹³ See Ginebra-Serrabou and Castrillon, *supra* note 11, at 116 – 118.

¹¹⁴ Constitución Política de los Estados Unidos Mexicanos [C.P.], Article 103 – 107, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

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- (c) Regarding essential inputs, the determination of essential input and the issuance of regulation on access mode, prices or rates, technical and quality conditions, and the implementation schedule; or
- (d) Divestiture of assets, rights, shares, or company parts in the necessary proportions to eliminate anticompetitive effects. This is done only when corrective measures are not sufficient to solve the competition concerns, and is not a sanction.¹¹⁵

Implied authorities and economic agents must be notified of the final decision.¹¹⁶ In this part, the FLEC alludes to the *affected* economic agents without making reference to the procedural standing, legal interest or legitimate interest, and it leads to reinforce the point made earlier about the need to notify economic agents participating in related markets and consumer associations that may be indirectly affected by the final decision.¹¹⁷ This is done *indirectly* because the remedies are not directly addressed to them, but they are related by circumstances of fact or law with those economic agents directly affected.

The FLEC provides that the economic agents might request the review of the final ruling through new investigation when they consider the conditions no longer exist for the setting of “barriers to competition” or an essential facility.¹¹⁸ We shall recall that in the case of an essential facility, whether it is determined through this regulatory proceeding or as a result of a RMP case, necessarily implies the *ex-ante* market power determination.

VI. Merger Review

Regarding mergers likely to reduce competition, called “unlawful mergers,” the FLEC provides that the competition authority “shall not authorize and, if the event, shall punish the mergers whose purpose or effect is lessen, harm or impair the competition and free concurrence regarding equal, similar or substantially related goods or services.”¹¹⁹

The former competition Law obliged economic agents to notify mergers to the *former Federal Competition Commission* who should “challenge and punish” or undue said mergers.¹²⁰ Under the new FLEC, the mergers should be “approved”¹²¹ by the competition authority, which is more precise wording.

¹¹⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 85, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹¹⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 79, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹¹⁷ *Id.*

¹¹⁸ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 96 - 97, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹¹⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 61 - 62, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹²⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 16 - 22, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹²¹ *Id.*

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According to the FLEC,¹²² when considering if the merger is unlawful, the FECC should note if the merger or intent of a merger:

- i. Confers or is likely to confer to the merging party, acquiring company or the resulting economic agent, market power in the terms of the Law, or increases or is likely to increase such market power, in order to obstruct, lessen, harm or impede competition;¹²³
- ii. Has or may have the purpose to establish barriers to entry, impede to others the access to the relevant market, related markets or essential inputs, or displace other economic agents;¹²⁴ or
- iii. Has or may have the effect to substantially facilitate to the merger participants the performing of monopolistic practices as defined in the Law.

With regard to the above, first, the increase of market power is a new element aimed to eradicate an old legal use. In the past, an argument of attorneys representing merging parties was that only the emergence of market power resulting from the merger was considered by the Law, and not the increase of an existing market power, as an inkling that the merger might reduce competition.¹²⁵

Second, it is a shame that the potential coordinated effects of the merger have not been included in the relevant provision. The rationale of coordinated effects argument in order to block or condition a merger is to prevent horizontal mergers reducing the quantity of firms in the market facilitating future cartels. Under this argument, commonly used in other jurisdictions, it would have prevented or conditioned mergers as *Cinemex/Cinemark—Exhibition of films* (CNT-010-2013, RA-029-2013), a FECC's decision that allowed the concentration of approximately 95% of exhibition market (nationally considered) Such a concentration substantially facilitates future coordinated conducts (implicit or explicit).

Third, on one hand, the reference to prevent access to related markets is very positive, as it was not mentioned under the former Law and it was source of discussion about legal certainty. On the other hand, the reference to “barriers to competition” will be cause of interpretation problems due to the dangerous broadness of the concept, as discussed above. The reference to essential inputs is a very positive inclusion inasmuch as it coincides with the essential facilities institutions: (i) the RMP and (ii) the regulatory proceeding to the determination of essential input.

Additionally, according to the FLEC, when the FECC considers there are potential risks to competition process, it must notify the merging parties at least 10

¹²² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 64, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹²³ The increase of market power is a new element with respect the former Competition Law.

¹²⁴ Related markets, barriers to entry and essential inputs are also new elements with respect the former Competition Law.

¹²⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 86 - 92, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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days before the case is brought into the consideration of the Plenum.¹²⁶ Thus the merging parties can propose remedies or conditions to correct the risks and competition concerns. The remedies or conditions¹²⁷ the FECC can impose or accept, might consist of:

1. Performing an action or refrain from doing so;
2. Divesting certain assets, rights, shares or company parts;
3. Modifying or eliminating certain terms and conditions from the projected operations;
4. Performing actions aimed to encourage the participation of competitors in the market, as well as give access or sell goods and services to them; or
5. Other remedies to prevent damages to competition as result of the merger.

VII. Proceedings

Although there are several changes dealing with proceedings in comparison to the former Law, we will only stress out the most important parts.

A. Investigation Proceeding¹²⁸

Any person can file a complaint or report an AMP, a RMP, or an unlawful merger to the IA.¹²⁹ The complaints filed by the President of the Republic and by the *Federal Consumer Attorney* shall receive preferential treatment.¹³⁰

Unlike the former Law, the FLEC eliminates the FECC's duty of publishing the beginning of investigation notice in the OGF.¹³¹ During the investigation, the FECC has the power to request information to any person including authorities.¹³² In doing so, the FECC should explicitly specify if the required person is the complained party or only an assistant/informant of the IA.¹³³

¹²⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 86 - 92, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹²⁷ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 91, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹²⁸ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 66 - 79, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹²⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 66 - 70, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹³⁰ *Id.*

¹³¹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 30 - 31, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹³² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 119, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹³³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 66 - 82, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

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B. Adversarial Proceeding¹³⁴

As noted above, the redesign of the proceeding turns it into an adversarial proceeding. It implies that the parties to the proceeding are: the IA as complainant on one side, and the respondent on the other. The respondent can be one or several economic agents. Both parties litigate the case before the Plenum.

The petitioners, firms or persons reporting the monopolistic practices or unlawful mergers, have only the character of assistant/informants of the AI.¹³⁵ They are not parties to the proceeding.

C. Proceedings to Challenge the FECC's Decisions

According to the constitutional amendment, the FECC's decisions might only be challenged through the *writ of amparo* before the Federal Courts specializing in Competition and Telecommunications.¹³⁶ In compliance with that provision, the FLEC eliminated the former proceeding of appeal existing under the force of the former Law.

D. Proceeding to Enforce the FECC's Decisions¹³⁷

Under the former Law, in the matter of monopolistic practices and unlawful mergers, the verification of the authority decisions was not adequately regulated since the authority had to resort to the *Federal Civil Procedures Code* in order to implement the verification of its decisions. Thus, this new proceeding provided by the FLEC is very positive.¹³⁸

The proceeding can be initiated *ex officio* or by the request of any person having legal interest, a very restricted procedural standing.¹³⁹ The Plenum shall decide in a term up to 20 days once the case file has been integrated.¹⁴⁰

It is important to highlight once more that it is a shame that only persons having legal interest can request the initiation of this proceeding. This is due to the same reasoning made above about the legitimate interest as a less restricted legal standing for consumers and economic agents participating in related markets inasmuch as they might also be affected by the decision.¹⁴¹

¹³⁴ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 81 - 85, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹³⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 80 - 82, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹³⁶ Constitución Política de los Estados Unidos Mexicanos [C.P.], Article 28, 103, and 107, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

¹³⁷ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 132 - 133, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 78 -82, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁴¹ Constitución Política de los Estados Unidos Mexicanos [C.P.], Article 103 and 107, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); Ley Federal de Competencia

VIII. Commitment Decisions, Leniency and Reduction of Fines

On the matter of RMPs and unlawful mergers¹⁴², the respondent can present its proposed commitments only up to the time that the IA issues the OPR. The respondent must accept in writing the benefit of reduction of fines by proving: (i) its commitment to suspend, finish or correct the practice or merger in order to restore the competition process and (ii) the proposed measures are legally and economically viable and suitable in order to stop the effects of the RMP or merger under investigation, noting the terms to its compliance.¹⁴³

Despite seeming that the respondents must accept the administrative liability as established by the FECC's decision, such an issue is not clear at all. The FLEC does not clearly provide that the decision emitted by the FECC should contain the declaration on the respondents' liability.

This was very clear in *Telcel* (referred to above). In that case, the former *Federal Competition Commission* accepted the commitments proposed by *Telcel* during the appeal,¹⁴⁴ and such authority did not require the acceptance of liability inasmuch as the commitments were supposedly beneficial for competition and consumers.

The ideal design would have been that the proposal of commitments by the respondents might be examined and possibly accepted by the FECC, even during the adversarial stage, meaning up to the time the case was listed for the Plenum's decision.

On the other hand, the cases ending without liability declaration over the respondent would impair people willing to claim antitrust damages before the civil Courts inasmuch as the *Federal Civil Procedures Code* (for class actions) and the article 134 of the FLEC (for individual claims) requires a previous FECC's decision on the respondent's antitrust liability.

Regarding the leniency mechanism for reduction of fines,¹⁴⁵ there are not substantial changes in respect to the former competition Law. This mechanism is devoted to deactivate cartels or AMPs. And, the earlier the cartel reveals to the FECC the existence of the cartel, the greater the fine reduction.¹⁴⁶

It is important to stress that in the cases of the revealed cartels to the FECC, this procedure is clear that the respondent's administrative liability will always

Económica [LFCE] [Federal Antitrust Law], Article 66 – 70, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁴² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁴³ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100 - 103, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁴⁴ The original decision ruled an administrative liability of Telcel and a fine USD 1,000 million.

¹⁴⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 102, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁴⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

be established by the Plenum's decision, so the procedure on civil liability before civil Courts is more likely to be initiated by the affected people.¹⁴⁷

IX. Sanctions¹⁴⁸

It is worthy to note the new sanctions provided by the FLEC¹⁴⁹:

- Measures aimed to regulate the access to essential inputs controlled by one or more economic agents, in the case of a RMP related to an essential facility);
- Fines up to 5% of the economic agent's income for not reporting a merger;
- Fines up to 10% of the economic agent's income for non-compliance of the conditions imposed to the merger, without prejudice the divestiture;
- Ineligibility to act as board member, manager, officer, director or representative of a legal entity up to a period of 5 years and a fine up to 200,000 times the minimum daily wage in Mexico City (approximately 1 million dollar) to whomever participates directly or indirectly in the performance of monopolistic practices or unlawful mergers as representatives or on behalf of legal entities;
- Fines up to 8% of the economic agent's income for non-compliance of: (i) the commitment decisions, (ii) the order of stop the practice or unlawful merger or (iii) the order of divestiture;
- Fines up to 18,000 times the minimum daily wage in Mexico City (approximately 90,000 dollars) to public notaries intervening in not authorized mergers by the FECC;
- Fines up to 10% of the economic agent's income to the firm controlling an essential input for non-compliance of the regulation regarding the input or non-compliance of the order to eliminate a barrier to competition; and
- Fines up to 10% of the economic agent's income for non-compliance of an interim measure.

X. Legal Term to Initiate Investigations

Unlike under the former Law, the FECC can now initiate investigations even after 10 years the anticompetitive practices or unlawful mergers had being performed.¹⁵⁰ Under the force of the former Law, the period was 5 years.¹⁵¹

¹⁴⁷ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100-103, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁴⁸ The fines for monopolistic practices remain the same: 10% of the economic agents' income in the case of AMPs (cartels), and 8% in the case of RMPs (vertical restraints) and unlawful mergers.

¹⁴⁹ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 127, Fractions VI – XV, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁵⁰ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 137, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁵¹ *Id.*

XI. Civil Liability for Antitrust Damages

As provided before, the claim for antitrust damages is a matter that comes under the jurisdiction of Civil Courts. However, both the *Federal Civil Procedures Code* and the FLEC¹⁵² provides that in order to file a formal complaint for damages it is essential that a FECC decision previously declares the existence of a monopolistic practice or an unlawful merger (*in res judicata*).¹⁵³

The FECC's decision shall prove the unlawful conduct as required by Civil Law in order to claim damages.¹⁵⁴ The complainant in the civil procedure must prove before the Court the existence of a cause-effect link between the unlawful conduct and the harm.¹⁵⁵

Article 134 of the FLEC also provides that the antitrust damages shall be litigated before the Federal Courts specializing in Antitrust and Telecommunications.¹⁵⁶ There is a problem with that provision because the Constitution clearly provides for jurisdiction by the Federal Courts only in the case of class actions.¹⁵⁷ Thus, as long as the Constitution does not provide the civil liability as a matter under the jurisdiction of the Federal Courts but a matter under the jurisdiction of the State Courts, the individual claims for antitrust damages must be litigated before the State Courts at least until the *Supreme Court of Justice* or the Federal Collegiate Circuit Courts provides otherwise.

XII. Criminal Liability

According to the articles 254 and 254 bis 1 of the *Federal Criminal Code*, there is criminal liability for those who: (i) participate in an AMP (cartel) and (ii) obstruct the investigation procedure of the FECC or alter or destroy information.

XIII. Final Comments

The FLEC introduces to Mexican Law several new antitrust institutions on which both the authority and practitioners have little experience. The work of the specialized courts and the experience of national and foreign scholars and practitioners will be essential to the process of enriching the scope of such concepts and its application.

There is also a very important pending task. Mexico must develop an adequate system to claim antitrust damages, an essential part of the antitrust enforcement that has proven to be very effective in many jurisdictions.

¹⁵² Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 134, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 134, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁵⁶ Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 134, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

¹⁵⁷ Constitución Política de los Estados Unidos Mexicanos [C.P.], Article 16, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).