

Unclassified

DAF/COMP/WD(2014)99

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

04-Dec-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Note by Mexico --

**17-18 December 2014**

*This document reproduces a written contribution from Mexico submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm](http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm)*

**JT03367957**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*



DAF/COMP/WD(2014)99  
Unclassified

English - Or. English

## MEXICO

1. Any competition policy necessarily requires a good competition law as well as a robust, well designed and effectively run competition agency. Mexico started this process in the early 90's with the enactment of the first Federal Economic Competition Law (FECL) and the creation of the former Federal Competition Commission (CFC).

2. Since then, Mexico has strengthened the underlying legal and institutional frameworks. Two relevant reforms occurred in 2006 and 2011 and it was until 2011 when Mexican competition law was matched to best international practices.

3. 2013 marked an era of profound change, as the nation embarked upon a path of numerous structural reforms in key strategic sectors such as financial services, energy, broadcasting and telecommunications, being the element of competition one of the key drivers. A major constitutional reform set a new competition framework and gave way to the creation of the current Federal Economic Competition Commission (COFECE), a body with full constitutional autonomy and enhanced powers.

4. In this context, a new competition law was enacted and published in May 2014, strongly based on the previous law but also articulating the new constitutional setting. These two elements, a new competition authority and a new law, constitute the major pillars of the current Mexican competition system.

### **1. Background. Political and Economic Context**

#### ***1.1 The Pact for Mexico***<sup>1</sup>

5. During his first days in office, Mexican President Enrique Peña Nieto, along with the leaders of the main political parties, forged a new political, economic and social agreement with the goal of passing the reforms necessary to promote economic growth, as well as to reduce poverty and social inequality.

6. The Pact for Mexico outlined 95 individual political commitments organized into five broad agreements. The agreement on "Economic Growth, Employment and Competitiveness" sought to create the conditions for high-quality employment. To achieve this, it was deemed necessary to promote economic growth at a rate above 5%, increasing both public and private investment, as well as productivity.

7. As a result, the country's procompetitive efforts were deepened. The Pact for Mexico established a national commitment to intensify competition in all sectors of the economy, with special emphasis on strategic sectors such as telecommunications, transport, financial services and energy. One of the commitment's priorities was "Extending the benefits of competitive markets" which proposed the strengthening of the former Federal Competition Commission and the creation of specialized courts for economic competition and telecommunications.

---

<sup>1</sup> Available at: <http://pactopormexico.org/acuerdos/>

## 1.2 *National Development Plan 2013-2018*<sup>2</sup>

8. The National Development Plan (PND for its acronym in Spanish) is a planning document that governs the direction of the Federal Public Administration in Mexico. This document outlines the main public policy objectives, and sets out specific actions and relevant indicators to measure their progress.

9. The general assessment of the PND found that negative productivity growth has been one of the main constraints on national development. Productivity in Mexico has not had enough dynamism, which may be partly explained, on the one hand, by the crises that the country has gone through and, on the other hand, by the existing barriers that hinder productivity. The PND grouped these barriers into five major categories.

10. Consequently, one of the PND's national goals of is to accelerate economic growth, by promoting sustained productivity growth in a climate of economic stability through the creation of equal opportunities. This goal, named "México Prospero" (*Prosperous Mexico*), seeks to provide favorable conditions for economic development through regulation – allowing healthy competition between companies – and the design of modern economic development policies focused on generating innovation and growth in strategic sectors.

11. The "Mexico Prospero" objective, set out three lines of action to encourage the development of a more competitive domestic market: i) effectively enforce the competition law to prevent and eliminate monopolistic practices and unlawful mergers; ii) encourage regulatory frameworks that promote competition and efficient markets, and iii) develop standards to strengthen quality of domestic products and promote consumer confidence.

12. In 2013, within the framework of the Pact for Mexico and the National Development Plan, major constitutional amendments established a new institutional setting with respect to competition, broadcasting and telecommunications.

## 2. **A New Legal Framework for Economic Competition**

### 2.1 *2013 Constitutional Economic Competition Reforms*

13. In 2013, the Federal Congress as well as State Legislatures passed the most ambitious economic reforms in the country's recent history to address structural inefficiencies of the Mexican economy. On June 11, 2013, the Decree enacting the Constitutional Reform of broadcasting, Telecommunications and economic Competition was published in the Official Gazette of the Federation.<sup>3</sup> The most relevant the changes derived from the constitutional reform are the following:

- **Constitutional autonomy of competition authorities.** Two agencies – with full constitutional autonomy - responsible for competition matters were created: the Federal Telecommunications Institute (Instituto Federal de Telecomunicaciones – IFT), for broadcasting and telecommunications, and the Federal Economic Competition Commission (Comisión Federal de Competencia Económica – COFECE), for all other sectors.

<sup>2</sup> Available at: [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5299465&fecha=20/05/2013](http://www.dof.gob.mx/nota_detalle.php?codigo=5299465&fecha=20/05/2013)

<sup>3</sup> Available at: [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5301941&fecha=11/06/2013](http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013)

- COFECE replaced former CFC, a body with technical autonomy which formed part of the Ministry of Economy and was given special institutional characteristics and new powers to effectively promote and protect the competition process. This autonomy includes features such as:
  - Distinct legal personality and self-patrimony,
  - Full independence in the decision-making process,
  - Budgetary autonomy,
  - The power to enact rules regarding administrative organization,
  - The power to enact implementing regulation,
  - The power to file a constitutional recourse before the Supreme Court of Justice in case the Federation violates or affects its authority.

COFECE is obliged to submit reports to the Executive and the Federal Congress, and is subject to various accountability and transparency mechanisms.

- **Separation of investigation and resolution functions.** In order to guarantee impartiality and objectivity, the reform provided for a separation between the authority in charge of the investigation and the authority in charge of the resolution (both within COFECE).
- **Incremental powers.** COFECE has an ample constitutional mandate to guarantee the competition process. For this effect, it has all the necessary powers, including the possibility to order measures to eliminate barriers to competition, regulate access to essential facilities and order structural separation or the divestiture of assets, rights, stock or shares of an economic agent in the proportion which is necessary to eliminate anticompetitive effects.

It is worth noting that, pursuant to the new competition law, these incremental powers may only be used by COFECE after a market investigation process and only with respect to markets with competition problems. Any possible affected party must be given due process of law. In all cases the COFECE must verify that the proposed remedial measures will lead to market efficiencies. In the case of a divestiture order, the measure may only be used when other corrective actions prove insufficient to solve the identified competition problem.

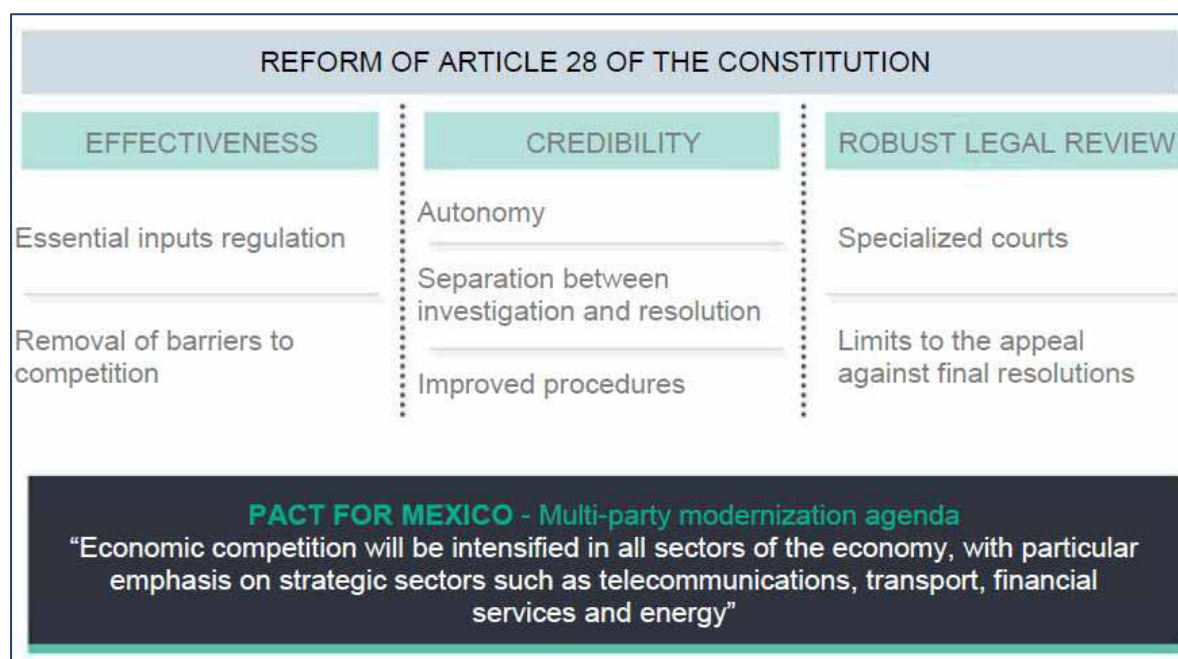
- **Criminal sanctions.** The constitutional reform mandated that criminal sanctions were to be reinforced.
- **New judicial framework.** Specialized courts for competition, broadcasting and telecommunications were established. Given that specialized courts are designed to handle cases more effectively and efficiently, it is expected that they will have a positive impact for competition policy.

New rules were also established in order to avoid paralysis through the abuse of legal recourses. Only COFECE's final resolutions may be challenged by an "amparo" (a constitutional remedy) before specialized tribunals. COFECE's decisions may not be suspended while the "amparo" is resolved by the judiciary. Only in the case of sanctions or a divestiture order, decisions will be enforced until the "amparo" is finally resolved on the merits.

- **Transparency and Accountability.** New checks and balances were introduced such as:
  - COFECE must submit an annual work program;
  - COFECE's Commissioner-President must attend a hearing before the Senate each year;

- Resolutions must be made public;
- COFECE’s guidelines, technical criteria and other documents must be subject to public consultation; and,
- An Internal Comptroller, appointed by the Chamber of Deputies, has to oversee the application of the COFECE’s budget as well as the conduct of public officers regarding administrative responsibilities.

**Table 1. Constitutional reform of article 28 in competition matters at a glance**



Source: COFECE.

## 2.2 A New Federal Economic Competition Law (FECL)

14. On May 23 2014, a new Federal Economic Competition Law (FECL or Law) was published in the Federal Official Gazette to further implement the constitutional amendments.<sup>4,5,6</sup>

15. The Law, which entered into force on July 7<sup>th</sup> 2014, is the result of a Presidential Initiative sent to Congress in February 2014 and of all modifications approved by both the Senate and the Chamber of Deputies.

16. In the elaboration of this new law three key elements were considered:

- A recognition of more than 20 years of practice, including the basic features of the previous law and the judicial precedents (key concepts such as economic agent, relevant market, market power and monopolists practices were not modified);

<sup>4</sup> Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf>

<sup>5</sup> The new FECL came into force on July 7, 2014

<sup>6</sup> Both COFECE and IFT are responsible for enforcing the competition law.

- Best international practices; and
- The implementation of the new constitutional guidelines, including the incremental powers.

17. Overall, the new law will allow the COFECE to fulfill its mandate. Some of its key features (that differentiate it from the previous law) are explained below.

#### 2.2.1 *Checks and Balances*

18. The new FECL considers the following aspects to ensure that COFECE's work is governed by the principles of independence, impartiality and transparency:

- **Separation of functions.** The Law – as the Constitution provides - establishes a separation between the investigation authority from the authority which resolves (within COFECE itself). The law grants technical autonomy to the investigation authority so it can to perform its functions more effectively and without undue interference.
- **Adversarial procedures.** Before any resolution on illegal practices, the investigation authority and the economic agent against which an accusation is filed are parties in a process – administered by COFECE's Technical Secretariat COFECE – in which evidence is submitted and arguments are heard.
- **Decisions and sessions of the Board of Commissioners must be public.** As a general rule, COFECE must publish plenary sessions, agreements and resolutions, while making sure not to reveal any confidential information.
- **Contact rules with parties (hearings).** The law establishes rules for meetings/interviews between Commissioners and economic agents.
- **Publication of an Annual Work Program and Quarterly Activity Reports.** COFECE shall submit its annual work program as well as quarterly activity reports to the Executive and Legislative.
- **External evaluations.** The Commission has the power to request studies to evaluate the performance and impact of its decisions. These studies will be developed by experts in the field, independent from the Commission.

#### 2.2.2 *Substantive and procedural issues.*

- **Monopolistic practices.** Two new relative monopolistic practices were added: “margin squeeze” and refusal to provide access to essential facilities.
- **Barriers to competition and essential inputs/facilities.** Criteria were introduced in the law in order to further develop the meaning of these two elements.
- **Strengthening of the investigation authority.** The law strengthens the powers of the Investigation Authority to perform its functions, for instance regarding the conduct of dawn raids, the imposition of coercive measures and the collection of information. It may also file complaints before the Office of the General Attorney (*Procuraduría General de la República*, PGR) in cases of possible criminal conduct.
- **Guidelines and technical criteria.** The COFECE shall issue directives, guides, guidelines and technical criteria previous public consultation. These will be reviewed at least every five years.
- **Merger authorization.** The economic agents require prior approval from the Commission to carry out transactions that exceed the thresholds or meet the criteria specified in the FECL. This

scheme prevents economic agents from carrying out mergers without the Commission's previous authorization. The process also facilitates the submission of measures by the applicants that may mitigate competition concerns.

- **Benefit from leniency and reduction of fines.** Economic agents who engage in anticompetitive practices may inform the Commission of their behavior voluntarily, in exchange for immunity or reduction of fines.
- **New sanctions and offenses.** Previous administrative sanctions for cartels and abuses of dominance remain the same (10% and 8% of national turnover, respectively) and new sanctions were set. These include:
  - Up to 10% of turnover in case of refusal to comply with an order regarding the elimination of a barrier to competition, structural separation or divestiture of assets, or access to an essential input/facility.
  - In case an economic agent breaches the Law twice, as an alternative structural separation may be ordered.
  - The Federal Criminal Code was amended, heightening criminal sanctions for cartels and introducing a new criminal sanction to those that alter or destroy documents with the purpose of interfering with an investigation.<sup>7</sup> Cartels are now subject to criminal sanctions of 5 to 10 years of prison (previously 3 to 10 years) plus 1,000 to 10,000 of salary days of monetary sanction (previously 1,000 to 3,000 days).
  - Company executives and directors who participate in cartels may be banned from performing such positions for up to 5 years.

### 3. New institutional design

19. The COFECE was legally established on September 10, 2013, when the Senate ratified six of the seven commissioners conforming COFECE's Board of Commissioners. Commissioners are appointed by a fair and transparent mechanism conducted by an autonomous Evaluation Committee through an impartial examination process which generates a list of the most qualified candidates, from which the President selects nominees that the Senate must consider for ratification.

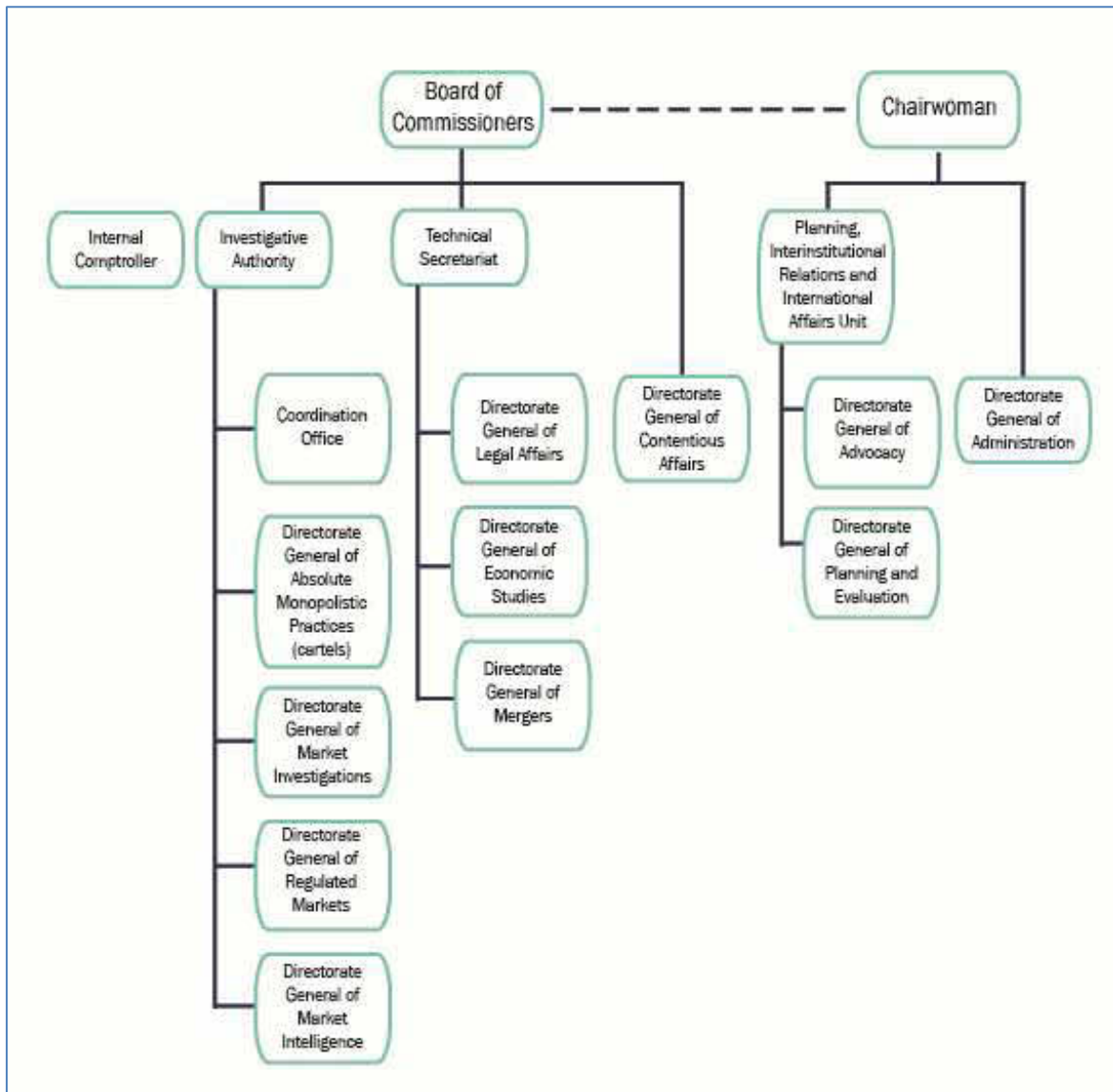
20. Pursuant to one of its new powers, COFECE's Board of Commissioners issued the Organic Statute on July 8<sup>th</sup> 2014. This document sets the administrative structure and defines each unit's responsibilities within the institution, with a view to improve the overall performance.

---

<sup>7</sup>

Available at: [http://www.diputados.gob.mx/LeyesBiblio/pdf/9\\_140714.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/9_140714.pdf)

**Federal Economic Competition Commission: Organization chart**



#### 4. Regulatory provisions

21. On November 2014, COFECE also published implementing regulations pursuant to one of its new constitutional powers. These regulations complement, detail, and provide more substantive and procedural content with the aim of facilitating the implementation of the Law. Relevant provisions include:

##### 4.1 Investigations

- **Leniency Program.** Under certain circumstances, sanction reductions may be awarded to those who fully collaborate with COFECE providing the information regarding cartels. Further details are provided for in the regulations.
- **Essential facilities.** COFECE has to demonstrate efficiency gains when ordering access to an essential facility of a third party.



- **Corrective measures.** A reasonableness standard, based on best international and judicial practices, is established.
- **Public initiation of investigations:** The initiation of an investigation may be published on COFECE's website.
- **Closing of investigation.** The closing of an investigation – whether by lack of elements or by determining a possible illegal conduct – are regulated.

#### 4.2 *Administrative proceedings*

- **Role of the Investigation Authority:** The Investigation Authority's intervention during the administrative trial proceedings is regulated.
- **Role of the complainant:** The complainant's role during the investigation period is defined.
- **Submission of evidence.** Procedural rights of both the complainant and the Investigation Authority are specified. Rules are established for the objection and evaluation of documents.
- **Hearings.** Oral hearings are regulated.

#### 4.3 *Mergers*

- **Translations.** In order to ease procedures for economic agents, whoever proves having technical knowledge of a language may be considered a translation expert.
- **Notifications.** Rules are included regarding notifications of operations involving several buyers or sellers from the same economic group, allowing the controlling entity to notify.
- **Thresholds.** Threshold calculation methods are detailed.
- **Withdrawal.** Both the withdrawal of the request and the waiver of rights are regulated.
- **Contact with the notifying parties.** A procedure is set out for informing economic agents that their transaction may pose risks to competition in order for them to submit conditions or efficiency claims.

#### 4.4 *Sanctions and remedies:*

- **Criteria.** Parameters are established for the calculation of sanctions.
- **Banning of directors.** Directors involved in cartels may only be punished when acting with malice and the COFECE must prove it.
- **Economic capacity.** COFECE may presume economic capacity when an economic agent does not submit requested information. Assets may be considered when there is not income.
- **Structural separation.** Economic agents can propose divestiture alternatives according to specific rules.