

# “Amendments to the Federal Economic Competition Law (FECL)”

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## Amendments to the *FECL*

- 1.- “Federal Competition Commission” powers
- 2.- Amendments to the *Federal Law of Economic Competition*
  - Deputies’ Bill
    - a) Strengthen of sanctions
    - b) Procedure innovations
    - c) Regulatory improvement
    - d) Institutional equilibriums
    - e) Joint dominance
  - “Partido Revolucionario Institucional” (PRI) Bill
  - “Partido de la Revolución Democrática” (PRD) Bill
  - “Partido Acción Nacional” (PAN) Bill

## 1.- “Federal Competition Commission”

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# 1. Prosecution and sanction of monopolistic practices

The FLEC defines collusive behavior as “Absolute Monopolistic Practices” including agreements between competitors with the aim or effect to :

- Fix prices
- Restraint supply
- Horizontally divide markets
- Bid rigging

These practices are considered illegal *per se* because their harmful effects on competition. There is no need to analyze them under the rule of reason.

They could be punished as a crime criminally according to the “Federal Criminal Code”; however, this has not happen.

## Leniency Program

This program allows the Commission to reduce fines for those firms that have participated or are participating in collusive agreements.

A candidate for leniency should:

- ❑ Have participated or be participating in an Absolute Monopolistic Practice.
- ❑ Provide enough evidence that makes possible to prove the collusive practice
- ❑ Provide full and continuous cooperation with the Commission.
- ❑ Must finish its participation in the practice.
- ❑ Provide information before the investigation period ends.

The “Relative Monopolistic Practices” (abuse of dominance and monopolization) are unilateral conducts carry out by dominant firms in a relevant market with the objective to displace rival firms, limit market access, or establish exclusive advantages. These conducts are only sanctioned if the efficiencies generated are not bigger than the harms to competition.

The forbidden conducts are:

- Vertical Market division by territory or clients
- Re-sale price fixing
- Exclusivities
- Tied sales
- Boycott
- Price predation
- Cross subsidies
- Price discrimination
- Refusing to deal
- Increasing rivals costs

## 2. Merger control



The FCC makes an ex ante analysis and can reject mergers that could impair, prevent or harm competition (Aeroméxico-Mexicana, Gigante-Soriana, etc.).

## 3. Measures regarding protection of competition



- Concessions (Radio electric spectrum and dark fiber)
- Bids (“Riviera Maya” Airport)

## 4. Opinions (Competition Policy)



- Adjustments to programs and policies, resolutions and consultations by firms (Foreign trade)
- Laws and regulations drafts (airports)

## 5. Regulatory Declarations



Issued to solve matters related to “effective competition” and existence of “substantial market power” (telecom and liquefied petroleum gas )

## Relevant decisions of the *Federal Competition Commission*

- In June 2010, the Commission imposed a fine to five land transportation firms and their directors due to a price fixing arrangement consistent on the agreement to impose a Diesel “Fuel Surcharge” rate. The enterprises were members of the biggest land transportation association in Mexico (CANACAR). The global fine imposed was around 2.4 million US dollars.
- In June 2010, the Commission confirmed fines imposed to several companies and individuals, all of them shareholders of PCTV Corporation (an association of cable TV companies that buys TV signals from companies like Disney, HBO, etc). The members of the association refused to re-sell the TV signals to competitors. The fine imposed was around 530,000 US dollars. Some issues related to the case were “Single entity” considerations to resolve the existence of a collusive agreement; and, cooperation between companies to change by-laws and adjust their conduct to the law.
- In June 2010, the Commission confirmed fines imposed to several pharmaceutical firms (all of them around 12.5 million US dollars) involved in bid rigging practices in the public health sector. They were conspiring not to compete in bids to buy insulin and other medical products. Issues analyzed included the use of economic evidence to probe an “agreement” between competitors, and the legality of circumstantial evidence.

## Relevant decisions of the *Federal Competition Commission*

- In 2009, the Commission confirmed fines imposed to real-state agencies and real-state agents (around 2 million US dollars) that agree to fix the price of commissions charged for the selling and buying of real state in the State of Jalisco (“Lago de Chapala”). Issues included the analysis of “Multiple Listing Services”.
- In 2010, the Commission confirmed the fine imposed to “Grupo Televisa” (around 1 million US dollars), for refusing to deal and provide its TV signals to a cable competitor of one of its subsidiaries. Issues include the analysis of possible conflicts between intellectual property rights and competition law.

## Amendments to the *FCL*

**3** Bill approved by Deputies

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In April 2010, revising a President Calderón's proposed bill, the Chamber of Deputies approved amendments to different Laws:

- Federal Economic Competition Law
- Federal Criminal Code
- Federal Tax Code
- Federal Contentious-Administrative Procedure Act
- Administrative and Tax Federal Tribunal Act

Basically, the amendments refer to:

## **a) STRENGTHENING THE SANCTIONS SCHEME**

### **Increase of economic sanctions**

- The calculation base changes from minimum wages to total annual income
- Fine up to 10% of annual income of the firm, for collusive practices
- Fine up to 8% of annual income of the firm, for abuse of dominance and monopolization Practices
- Income form outside Mexico would be excluded from calculation.

## **a) STRENGTHENING THE SANCTIONS SCHEME**

### **Criminal sanctions**

- A new description of “Hard core cartels” would be incorporated in the law and will be considered as crime punishable with imprisonment.
- Jail from 3 to 10 years.
- The crimes will be prosecuted provided there is a request of the Federal Competition Commission.
- Firms covered under the leniency program, would not be prosecuted.

## **b) PROCEDURAL INNOVATIONS**

### Preliminary injunctions (precautary measures)

- They are not provided by the law today
- Only to be used in cases where there could be extreme harm to competition
- The CFC's Plenum would decide the request of the Executive Secretary (in charge of investigation)
- In force for a maximum of 4 months, extendable
- Order would not be granted if they limit the production capacity

## **b) PROCEDURAL INNOVATIONS**

### **Improving on-site visits procedure**

- Elimination of the obligation to obtain a court order
- Elimination of the need of prior notification before the visit takes place
- If opposition, pressure measures and criminal sanctions could be applied
- The Executive Secretary shall be allowed by the Plenum in order to perform a visit
- The visits cannot exceed 2 months period, extendable for an equal term

## **b) PROCEDURAL INNOVATIONS**

### More powers for Information request

- The Commission will have more clearance to require information and documentation
- Evidence could be required and obtained from any person or State Agency
- Requirements: the information required is relevant and pertinent for the investigations and must comply legal grounds.

## b) PROCEDURAL INNOVATIONS

### Leniency Program

- ❑ There would be a clarification in the statute to confirm that individuals that are or were participating in a collusive practice can request the benefit
- ❑ Against CFC's resolution, judicial or administrative review would be available.
- ❑ Identity of individuals would remain confidential.

### Early termination of procedures (related to abuse of dominance practices or forbidden mergers)

- ❑ Commitments could be presented in any stage of the procedure (before the definite resolution)
- ❑ The resolution can:
  - ❖ Close the procedure without responsibility for the firm
  - ❖ Find responsibility and impose a fine

## c) Regulatory Improvement

### Elimination of regulatory burdens associated with merger notifications

- Simplified the mechanisms of mergers regulation
- Include in the statute criteria for mergers that won't have the object or effect of impair or harm the competition
- Exempt certain type of mergers that pose no risk to competition from the obligation to notify to the Commission.

## c) Regulatory Improvement

### Coordination between Federal Competition Commission and regulatory agencies

- The Federal Competition Commission's President and the regulated sectors agencies will meet at least once a year
- Objective: Definition of criteria for definitions and guidelines in competition matters.

## d) Commission balance of powers

### Commission's impartial activity

- ❑ In the current statute, the Executive Secretary is appointed by the President; now he or she would be appointed by the Plenum
- ❑ The Executive Secretary would appoint and remove personnel from the administrative units under its charge (without intervention of the President of the Commission).
- ❑ Each Commissioner will have the obligation of presenting a resolution draft to the Plenum for discussion and final resolution.
- ❑ Oral Hearings: The party under investigation will have the possibility of offering oral arguments to the Plenum.

## d) Commission balance of powers

### Transparency and accountability

- The deliberation process of the Plenum must include a written vote of all the Commissioners
- The Plenum must publish every five years a report regarding contributions to consumer's welfare derived from the work done by the Commission.
- The President of the CFC should present an annual report related to the work done by the Commission by march 31<sup>st</sup>.

## d) Commission balance of powers

### Transparency and Legal Certainty

Technical criteria would need to be developed and published on:

- merger analysis
- calculation of administrative fines
- definition of relevant market and substantial market power
- preventive injunction procedures (precautary measures)
- initiation of criminal procedures
- among other issues

## Review of Commissions' resolutions

❑ There would be two different options:

- A challenge could be submitted before the Commission itself,  
or
- An appeal could be submitted before a specialized court room that would be created in the existent Administrative and Tax Federal Tribunal.

# Reforms to the FLEC

□ PRI's bill

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## Similarities with Chambers of Deputies Bill

- Transparency and Legal Certainty
- Early conclusion of proceedings
- Criminal sanctions for cartel abuses

## Similarities with Chambers of Deputies Bill

- Increase of fines, however the annual income that would serve as base for a fine would exclude foreign profits, thus calculation of income would be cumbersome
- No inclusion of precautionary measures, which prevent the avoidance of irreversible damages in the markets
- Eliminates the surprise factor in on-site visits, so the main purpose of obtaining better information is lost (no dawn raids)
- Specialized tribunals (besides Competition Commission and specialized court room in the Administrative and Tax Tribunal), which generates multiple instances and confusing

## Similarities with Chambers of Deputies Bill

- Includes a definition of relevant market, that only takes into consideration substitution in demand, but not in supply side
- The Commission would be transformed into an agency independent from the Executive Power
- Commissioners would be appointed by the President of Mexico, but ratify by the Senate House.
- The bill does not include a definition of a new “joint dominance” or “joint substantial market power” concept

# Reforms to the FLEC

□ PAN's bill

(submitted to Senate before President's Calderon proposal)

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## Coincidences

- Increase of economic sanctions
- Surprise on-site visits
- Information and documentation requests
- Early conclusion of procedures
- Reduction of regulatory burdens associated with merger notifications
- Publishing of criteria
- Cooperation agreements with academic and consulting firms
- Precautary measures

## Differences

- No criminal sanctions, but a reference is made to other bill which reforms criminal sanctions, in a similar way than President Calderon's proposal
- The Leniency program would not include individuals
- No specialized judges and tribunals in competition matters.
- No joint dominance

# Reforms to the FLEC

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## Deputies coincidences

- Joint dominance
- Cautionary measures

## Deputies not coincidences

- Benefits for workers associations and cooperatives
- Price fixing of certain goods by Consumers Authority
- Increasing of fines
- Commissioners confirmed by Senate

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