WHITE & CASE

Client**Alert**

Antitrust

March 2014

New Federal Antitrust Law Bill

On February 19, 2014, the Federal Executive Branch of Mexico submitted to the House of Representatives a bill to issue a new Federal Antitrust Law *(Ley Federal de Competencia Económica)* (the "Bill") which, if approved, will replace the existing antitrust law effective since 1993. The Bill was submitted as part of the goals under the National Development Plan 2013 – 2018 (Plan Nacional de Desarrollo 2013 – 2018) to guarantee clear rules to foster the development of the economy.

On the other hand, on February 25, 2014, the left-wing Democratic Revolution Party (Partido de la Revolución Democrática or "PRD") submitted its own bill to reform the current Federal Antitrust Law. That bill, as opposed to the one being analyzed herein, aims at amending the legal framework currently in effect. While we believe that a legislative debate will arise between both positions, we consider that the prevailing position will be the bill presented by the Federal Executive Branch, as it has happened with other recent reforms, including the so-called financial or tax reform. However, it is possible that the bill submitted by the PRD may influence the legislation that is finally approved.

It is worth noting that by virtue of the constitutional reform in telecommunications and antitrust matters published in the *Mexican Official Gazette* on June 11, 2013, the Bill develops an antitrust legal framework applicable to all sectors of the economic activity, except for the telecommunications and broadcasting industry, as the antitrust legal framework for such sectors will be developed by specific telecom secondary laws and will be enforced not by the Commission but by the Telecommunications Federal Institute (Instituto Federal de Telecomunicaciones).

This Client Alert comprises the following topics grouped into five chapters:

I. Merger control regime
II. Incremental authority
III. Monopolistic conduct
IV. Litigation proceedings and remedies
V. Internal provisions

White & Case will prepare a new Client Alert in connection with the Federal Antitrust Law that is ultimately approved by the Congress and enacted and published by the Federal Executive Branch.

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I. Merger Control Regime

A. General

The Bill preserves the merger control regime in substantially the same terms as the law currently in effect. That is, the concept of an "illegal merger" ("concentración ilícita") is preserved when its purpose or effect is to hinder, reduce, damage or prevent the free participation or competition process and the authority of the Federal Antitrust Commission (Comisión Federal de Competencia Económica) (the "Commission") in such regard is also maintained (Article 62).

The obligation to notify any merger that exceeds certain thresholds before closing is also preserved (the Bill does not modify the concepts or the amounts of the thresholds currently in effect). The Bill neither modifies the mergers' notification proceeding by the economic agents, nor the terms for the economic agents and the Commission to submit or request additional information or other terms of the proceeding in general (Articles 86 and 90).

For such purposes, many of the concepts included in the Regulations to the Federal Antitrust Law (Reglamento de la Ley Federal de Competencia Económica) (the "Regulations") currently in effect are incorporated in the body of the Bill (for example, the economic criteria to analyze the mergers, the content to be included in the notifications, etc.).

The regime regarding exceptions to file (which are preserved without material amendment with respect to the current framework) as well as the cases in which the economic agents may qualify for an abbreviated or short filing remains basically unchanged, so long as the economic agent's evidence shows that the proposed transaction will not have adverse effects on the competition process (Articles 92 and 93), although a more efficient authorization process is provided.

B. Standstill Order

The Bill eliminates the possibility for the Commission to issue a standstill order within the ten days that follow the submission of a merger's notification, as provided under the current law. This is somehow unexpected because the standstill order has proven to be an efficient tool to prevent transactions with potential adverse effects on competition to close before a final resolution is issued and a deeper analysis of the transaction is undertaken.

The elimination of the standstill order implies retrieving the Commission's ability to prevent potentially harmful transactions from closing. This may cause a large number of mergers to close if they are thereafter found to be illegal or harmful, with the subsequent problem of penalizing this conduct once they have closed.

C. Prohibition to Close

The Bill introduces a prohibition to register those actions related to a reportable transaction in the corporate ledgers or formalize them in public instruments and it preserves the already existing prohibition to register them with the Public Registry of Commerce until the Commission's approval is issued or otherwise until a period of 60 days following the formal admission of the filing has elapsed (Article 86).

D. Information Request to Other Economic Agents

The Bill introduces, in an innovative way, the Commission's ability to request additional information not only to economic agents related to the transaction, but to any other person, including public authorities, in order to analyze the transactions, but without giving such persons the status of parties in the proceeding. Although pursuant to the current proceeding the Commission may request or receive information from other economic agents, this is not carried out through requirements but through the voluntary decisions of such third parties and it is legally questionable whether such information may formally be integrated into the corresponding docket (Article 90).

E. New Mechanism to Propose Conditions

The Bill introduces a proceeding for the submission of a conditions mechanism to the Commission in order to avoid that, as a result of a notified transaction, the competition process and free participation proceeding may be damaged or hindered. Pursuant to the legal framework in effect, this proceeding used to occur both, before the matter was voted by the Plenary Session and—perhaps even more often—during the procedural stage of remedy provided thereunder. The Bill incudes the possibility to propose conditions since the submission of the filing and up to the day following the listing of the matter for its discussion in the Plenary Session.

What is really innovative with respect to this new proceeding is that the Commission shall publish the conditions proposed by the economic agents on its webpage so that any person may be entitled to comment in connection therewith but without granting them the "party" status. Once the conditions are submitted, the terms to resolve the transaction will be suspended until the corresponding resolution is issued.

Although it seems that the publication proceeding is intended to somehow resemble the proceedings that exist in other jurisdictions (for example, Australia), in such other jurisdictions, it is the competition authority that raises its preliminary concerns in connection with the transaction and proposes, or at least implies, the conditions that may be feasible to address them and, thus, the conditions are published for the opinion of the interested parties. Under the Bill, the conditions proposal is submitted by the

economic agents. The Bill does not contain a mechanism to preserve the confidentiality of the conditions, which may adversely affect the corresponding proceeding and the negotiation between the economic agents and the Commission (Article 90).

F. Consequences of Eliminating Remedies as Part of the Conditions Submission Proceeding

The current law includes the appeal for reconsideration as the means to revoke, modify or confirm a resolution issued by the Commission. Notwithstanding the foregoing, the constitutional reform published on June 11, 2013 sets forth that the only remedy available against the Commission's resolutions will be the constitutional proceeding (amparo indirecto). This includes the resolutions by the Commission with respect to merger control.

Accordingly, the Bill does not include the appeal for reconsideration as a defense mechanism available for the economic agents in case the Commission rejects (or conditions) a merger.

Until now, whenever the Commission has resolved that a merger may have an adverse effect on the competition or free participation process within a transaction notification process, in practice, the economic agents have used the appeal for reconsideration as the suitable procedural stage to submit conditions that mitigate the possible anticompetitive effects of the corresponding transaction, based on the concerns raised by the Commission in its resolution.

However, by eliminating this remedy, the only opportunity that the economic agents will have to propose their conditions to mitigate any negative effects of the transaction will be prior to being served with the Commission's resolution and, thus, before knowing what the Commission's concerns may be. Accordingly, in the case of receiving an unfavorable resolution, the agents will only be entitled to resort to the constitutional proceeding, without having the possibility of submitting conditions that could address the Commission's concerns. The only remedy available to the economic agents would be the constitutional proceeding, which is obviously not a suitable proceeding to negotiate or agree on the conditions that could satisfy the Commission's concerns. In practice, it is likely that the economic agents would have no other option than to submit the filing again. This may jeopardize the consummation of many transactions and, therefore, the economic dynamics in many sectors.

It is worth mentioning that some previous proposals to reform the current law existed, which were prepared by different actors that, taking into account this situation, stated that the Commission had to initially issue a "preliminary resolution" in connection with the merger, with the possibility for the economic agents to submit their conditions proposals until the issuance of the Commission's "final resolution". Although this solution presented several questions in connection with its implementation, at least it maintained the possibility for the economic agents to submit conditions proposals based on the specific concerns raised by the Commission in the "preliminary resolution". The Bill submitted to the House of Representatives did not include this system.

II. Incremental Authority

A. New Constitutional Concepts

The constitutional reform in telecommunications and antitrust matters published in the *Mexican Official Gazette* on June 11, 2013 expressly introduces three original concepts and vests the Commission with powers and authority in such regard so that the Commission may efficiently comply with its purpose of promoting, protecting and guaranteeing free market participation and competition process of the Bill, namely: (i) the power to order measures to eliminate barriers to competition and free participation process; (ii) the power to determine the existence of, and to regulate the access to, essential supplies (insumos esenciales); and (iii) the power to order the divestitures (Article 12). These powers are to be determined pursuant to a special investigation proceeding introduced by the Bill, which is briefly explained in Section B of this chapter.

(i) To order measures to eliminate barriers to competition and free participation

The Bill sets forth that the Commission is entitled to establish measures to eliminate competition barriers by means of ex ante review mechanisms but also through ex post detection mechanisms, and to impose sanctions due to absolute (horizontal) or relative (vertical) monopolistic conducts and/or illegal mergers (Article 57).

The Bill introduces criteria to determine: (i) if one or several economic agents have substantial power in the relevant market; (ii) the existence of entry barriers; and (iii) the elements expected to alter such barriers as well as the offer of other competitors (Article 59).

Furthermore, and similar to the legal framework in effect, the fact that a merger has or may have as its purpose or effect to establish entry barriers, prevent third parties from entering the relevant market, related markets or essential supplies, or to displace other economic agents is considered a presumption of an illegal merger.

(ii) To determine the existence of, and to regulate the access to, essential supplies (insumos esenciales)

The Bill introduces, for the first time at a legal level, criteria that could make it easier for the antitrust authorities to determine the existence of essential supplies.

The Bill does not include a clear definition for essential supply (for example, if the concept "supply" shall be understood in its strict form or in a broader form, which would include infrastructure [i.e. "essential facilities"] and services). Nonetheless, the Bill does include criteria that the Commission shall consider to determine the existence of an essential supply, specifically (Article 58):

a. If the supply is held or rendered only by one economic agent or by a reduced number of economic agents

b. If the reproduction of the supply by another economic agent is not feasible from a technical, legal and economic standpoint

c. If the supply is essential for the provision of goods or for the rendering of services in one or more markets, and there are no accessible substitutes and

d. Other elements that, in its case, could be established in regulatory provisions

Consistent with the constitutional text, it is stated that the Commission shall only determine the existence of essential supplies whenever they have to be regulated in order to eliminate anticompetitive effects. Hence, the Commission is granted the express power to regulate the access to essential supplies. Additionally, the Commission will be entitled to impose a fine of up to 10 percent of the revenue of the economic agent controlling an essential supply (Article 120).

(iii) Authority to order divestiture of assets, elimination of entry barriers and regulation of essential supplies

The Bill grants the Commission the power to order the corresponding measures, including the elimination of the barrier, the regulation of essential supplies and/or the divestiture of assets, rights or partnership interests in the proportions necessary to eliminate anticompetitive effects.

The order of divestiture of assets, rights, partnership interests or shares in the proportions necessary to eliminate anticompetitive effects is considered the maximum sanction. This measure may be imposed whenever an offense is committed by someone previously sanctioned due to monopolistic practices or illegal mergers. For such purposes, it is worth mentioning that the economic agents will be entitled to submit alternative programs of divestiture before the Commission issues the corresponding resolution.

The following section describes how the authority for the three previously mentioned concepts would be exercised.

B. Special Investigation Proceeding

For the Commission to exercise the abovementioned powers and to order the corresponding measures, including the elimination of the entry barriers, the regulation of essential supplies and/or the divestiture of assets, rights or partnership interests in the proportions necessary to eliminate anticompetitive effects, the Bill establishes a special investigation proceeding. This proceeding also entitles the Commission to request a non-binding technical opinion of the governmental entity that coordinates the sector with respect to the measures that, in its case, it may take (Article 94).

For transparency purposes, the Bill sets forth that the resolution issued in connection with the imposition of any of the above-mentioned measures shall be published in its entirety on the Commission's webpage and the relevant information in the *Federal Official Gazette*.

The investigation proceeding will have a term of 30 to 120 business days and may be commenced ex officio or upon the request of the Federal Executive Branch. The commencement of this proceeding ex parte is not included.

As described below in Chapter V.I, as part of the Commission's new internal structure, a new entity is created, an investigating authority as an entity (órgano desconcentrado) of the Commission that, pursuant to applicable law, has technical and management autonomy (the "Investigating Authority"). The special investigation proceeding will commence with the initial communication issued by the Investigating Authority, which will have investigation powers, including the authority to request the necessary reports and documents, summon persons related to the case, carry out dawn raids and conduct any diligence deemed appropriate.

Upon conclusion of the investigation, the Commission will be entitled to close the docket if no elements to be sanctioned or regulated are identified. But if such elements are identified, the resolution to be issued by the Commission may include the order to eliminate barriers to competition and free participation process or to issue special regulation for essential supplies or the divestiture of assets, rights, partnership interests or shares of the economic agents in the proportions necessary to eliminate the anticompetitive effects identified by the Commission.

When, in the opinion of the owner of the essential supply, the requirements to be considered as such no longer exist, it will be entitled to request the Commission to commence the investigation in order for the Commission to determine if such requirements exist or not. If the Commission determines that the good or service is no longer considered an essential supply, from that moment, the resolution issued by the Commission regulating the access thereto will have no effect.

While these new powers and authority are not a surprise considering that they were already foreseen in the Constitutional reform of 2013 (and, therefore, it would seem impossible that this Bill or any other would not elaborate on such constitutional mandate) they are indeed original and extreme. It may be said that they reach dimensions akin to a state-conducted economy and, therefore, they should be exercised by the Commission with extreme care and technical rigor. Should these powers and authority be exercised without proper controls, the risk of the economic agents to exercise free-riding could be high.

It may also be said that, within the investigation and resolution proceeding, the rights of due process and defense of the involved economic agents are damaged. For such purposes, several litigation and disputes in connection with the potential exercise of such extreme powers by the Commission are anticipated, both due to the economic justification to exercise such powers and due to its proceeding.

III. Monopolistic Conduct

The Bill maintains the classification of the current law that classifies the illegal anticompetitive conducts into: (i) absolute monopolistic practices (horizontal conducts); and (ii) relative monopolistic practices (vertical conducts, abuses of dominant position).

A. Absolute Monopolistic Practices

The Bill (Article 53) defines the absolute monopolistic practices in the same terms as the current law (Article 9) as it considers them as contracts, agreements, arrangements or their combinations among competing economic agents, which purpose or effect is, generally: (i) to fix prices of goods or services offered in the markets; (ii) to restrict supply (obligation to produce, process, distribute, sell or render only a limited or restricted amount of goods or services); (iii) market segmentation (division, distribution, allocation or imposition of portions or segments of a current or potential market of goods and services, whether by clients, suppliers, seasons or spaces); and (iv) to make private agreements during public bids, biddings, auctions or public auctions.

The main difference in the Bill is that the information exchange with any of the purposes or consequences listed above is not only considered an absolute monopolistic practice (Article 9, Item I of the current law), but it is now punishable if its purpose or consequence is the supply restriction, market segmentation or private agreements in public bid proposals. Such modification would entitle the Commission to, for example, investigate and sanction cases in which, even without direct evidence of horizontal agreements, there is direct evidence indicating that an exchange of information was done with anticompetitive purposes or effects.

(i) Criminal penalties

The Bill intends to increase the criminal penalties derived from executing absolute monopolistic practices, from the current range of 3 to 10 years in prison and a fine equivalent to 1,000 to 3,000 days of minimum wage salary to a range of 5 to 10 years in prison and a fine equivalent to 1,000 and 10,000 minimum wage salary days.

It is important to mention that, through the Bill, the exchange of information is now within the crimes (that correspond to possible absolute monopolistic practices) established in the Federal Criminal Code (Article 254 bis), which is not included nor regulated in the Federal Criminal Code effective as of today in either form. The description of the other crimes included in the Federal Criminal Code is not modified as a consequence of the Bill.

Under the Bill, the Federal Criminal Code sets forth that the crimes derived from absolute monopolistic practices are to be prosecuted upon the complaint of the Commission or the Communications Federal Institute, as applicable. Unlike the current Federal Criminal Code, the requirements for a criminal complaint to be admitted is modified as it is now established that a criminal complaint may only be filed after the competent authority has determined that an economic agent was responsible for absolute monopolistic practices pursuant to the terms contained in the Bill (apparently, upon conclusion of the administrative proceeding in the form of trial), in contrast to the current provisions where the requirement is that a resolution by means of which the responsibility was finally and conclusively determined (after all the corresponding constitutional proceedings have been exhausted).

It seems that there is an inconsistency between the procedural requirement described in the previous paragraph and the power of the Investigating Authority (for more details on the powers of this new entity, see Chapter V Section I) to submit complaints "at any moment" pursuant to Article 77 of the Bill.

Finally, it is important to mention that due to the increase in the sanctions, the statute of limitations of the criminal action increases from six and a half years to seven and a half years (the moment in which the statute of limitations initiates depends on whether the offense is of an instantaneous, attempted, continuous or permanent nature).

The proposed amendments to the Federal Criminal Code under the Bill deserve a special remark to the extent that they clarify something that is currently not defined under the current framework by setting forth that no criminal responsibility will arise for the economic agents that resort

to the waiver and sanctions reduction program under the Federal Antitrust Law (i.e., leniency program).

B. Relative Monopolistic Practices

Except for the introduction of "narrowing of margins" and "access denial to an essential supply", and the changes to the definition of "predatory pricing", which are described below, the Bill does not modify in substance the list of the conduct considered to be relative monopolistic practices (Articles 54 to 56) vis a vis the legal framework currently in effect (Articles 10 to 13).

Notwithstanding the foregoing, the Bill specifies that the relative monopolistic practices (listed in Article 56) are to be considered illegal and punishable whenever they are performed by economic agents with substantial market (Article 54, Item II) and when they have or may have as purpose or effect in the "relevant market" or in any "related market", to unduly displace other economic agents, to materially hinder their access or to establish exclusive advantages in favor of one or several economic agents (Article 54, Item III).

The concept of "joint market power" is preserved (Article 54, Item II), which has not been used since its introduction in 2011 and which has internationally become irrelevant given its confusing nature.

(i) Narrowing of margins

The Bill introduces this new type of relative monopolistic practice (Article 56, Item XIII) which consists of the reduction of the existing margin between (i) the price to access an essential supply provided by one or several economic agents; and (ii) the price of the good or service offered to the final consumer by those same economic agents, using the same raw material (supply) to produce it.

This type of dominant abuse conduct presumes the vertical integration of the economic agent that undertakes it, which has to participate in two different layers of the production-distribution-sale chain (that in which provides a raw material and that in which the raw material was used) in order to take advantage of its dominant position in connection with such raw material, affecting the price at which it is acquired by the economic agents that compete with such agent in a subsequent layer of the production chain. Although the concepts of dominance and vertical integration are essential to explain the conduct of narrowing of margins, the Bill does not include them in the definition of the conduct.

When determining the existence of this practice, the concept "essential supply" is also important, which, as described in Chapter II Section A (ii) above, does not have a clear definition.

(ii) Access denial to an essential supply

Item XII of Article 56 of the Bill includes a new type of absolute monopolistic practice which consists of the denial, access restriction or discriminatory access to an essential supply (raw material) by one or several economic agents.

(iii) Predatory pricing

Unlike the provisions law currently in effect (Article 10, Item VII), the Bill (Article 56, Item VII) eliminates the requirement that the sale of goods or services below their total average cost shall be "systematic" and the sale of goods and services below the variable average cost shall be "occasional" for them to be considered relative monopolistic practices, as long as there are elements to presume that such sales are made to cover the losses with future increases.

C. Commencement of the Investigation

(i) Commencement upon request of other authorities

Similar to the current law (Article 30), the Bill provides that the investigations related to monopolistic practices and illegal concentrations may be initiated ex officio or ex parte. However, the Bill (Article 66) additionally sets forth that the Ministry of Economy, the Federal Attorney's Office of Consumer (Procuraduría Federal del Consumidor) or the Executive Branch by itself may request the commencement of an investigation.

(ii) Objective cause and publication of the commencement communication

The Bill (Article 71, first paragraph) introduces the requirement that the investigation is to be initiated due to "any sign of the existence of monopolistic practices or illegal mergers" (objective cause). Article 71 of the Bill also includes that the investigation will initiate upon the issuance of the commencement communication, but does not provide that it shall be published in the *Federal Official Gazette*, as included in the current law (second paragraph of Article 30).

(iii) Capacity as defendant or third party in interest in the Investigation

Unlike the provisions of the current law, the Bill provides that when the Commission requests information or documents for its investigations, it shall indicate the capacity in which the corresponding party is being required/served, which may be (i) defendant; or (ii) third party in interest (co-adjunct) (Article 73). The Bill does not foresee the case in which the required party is a person

investigated by the Commission due to an investigation initiated ex officio and not due to a complaint or request.

This inclusion seems to clearly arise from the judicial proceedings faced by the extinguished Federal Antitrust Commission when it requested information during the investigation, which was subsequently used to charge the requested parties, in which violation to due process is evident.

D. Sanction Reduction Proceeding (leniency)

In general terms, the sanction reduction proceeding is preserved without changes with respect to the legal framework in effect.

(i) Relative monopolistic practices and illegal mergers

With respect to the proceedings carried out before the Commission related to relative monopolistic practices or illegal mergers, at any moment before the corresponding resolution of potential responsibility is issued, the investigated economic agent may, only once, state in writing its decision to resort to the benefit of the sanction reduction program established in this law, provided that the following is proved to the Commission:

a. Its commitment to suspend, eliminate or rectify the corresponding practice or merger in order to reinstate free trade and antitrust and

b. The proposed mechanisms are legally and economically feasible and suitable to avoid or, if applicable, to extinguish the relative monopolistic practice or illegal merger subject to the investigation, establishing the timing and terms for its verification (Article 100)

The Commission's resolution may either grant the benefit of the exemption or reduction of fines and/or order the mechanisms to reinstate free trade and antitrust.

(ii) Absolute monopolistic practices

Any economic agent that has engaged in or is engaging in an absolute monopolistic practice or that has directly participated in absolute monopolistic practices on behalf of legal entities, and the economic agent or individual that has assisted, promoted, encouraged or participated in absolute monopolistic practices may admit such fact before the Commission and resort to the sanctions reduction program, provided that:

a. It is the first among the economic agents or individuals involved in the conduct to present sufficient means of evidence that, at the Commission's discretion, are sufficient to prove the existence of the corresponding conduct

b. It fully and continuously cooperates in the investigation and, in its case, in the proceeding followed in the form of trial and

c. It takes the necessary actions to terminate its participation in the illegal practice

After completion of the abovementioned requirements, the Commission will issue the corresponding resolution and will impose a minimum fine.

The economic agent or individual that is not the first one to present sufficient elements may be entitled to obtain a reduction of the fine of up to 50, 30 or 20 percent of the maximum permitted amount if they present elements within the investigation in addition to those already in possession of the Investigating Authority and if they comply with the rest of the abovementioned requirements.

IV. Litigation Proceedings and Remedies

A. The Investigation and the Hearing and Sanction Proceedings Related to Conduct in Violation of the Federal Antitrust Law

The Bill highlights the creation of the Investigating Authority which has the following authorities (Article 28): (i) to initiate complaints proceeding from conducts contrary to the Bill; (ii) to conduct investigations to sanction violations of the law; and (iii) to issue the opinion of probable liability resulting from the investigation stage.

In accordance with the better antitrust practices of other countries, where the prosecutor body (órgano acusador) is functionally separate from the sanctioning body (órgano sancionador), the Bill proposes to grant technical and management autonomy to the Investigating Authority to initiate, file, investigate and raise an accusation for conduct presumably in violation of the Bill before the Plenary of the Commission. In other words, it assumes responsibilities that are similar to those of the Public Prosecutor.

In order to formalize the above, the Bill regulates two proceedings: (i) investigation proceeding; and (ii) hearing proceeding to the economic agent, followed in the form of a trial. As opposed to the provisions of the legal framework currently in effect, where the procedural rules of the corresponding proceedings are established in the Regulations, the Bill proposes these proceedings to be governed at a legal level.

(i) Investigation proceeding

The investigation stage is governed under Articles 68 to 78 of the Bill, which highlights the following:

a. As described in Chapter III, Section C (i) above, the investigation shall be initiated by the authority, as per request of the Executive Branch, through the Ministry of Economy (Secretaría de Economía) or through the Federal Attorney's Office of Consumer (Procuraduría Federal del Consumidor), or as per request of any individual

b. When the investigation is requested by a public entity, no formalities shall be required and shall be conducted under a preferential nature; however, when requested by an individual, the Bill provides some formal requirements that the complaint should comply with. In our opinion, there is no basis for this distinction

c. As described in Chapter III, Section C (ii) above, the Bill requires an "objective cause" (causa objetiva) to initiate the investigation (Article 71)

d. As provided by the current law, the investigation shall last no fewer than 30 business days and no more than 120 business days, such period may be extended in 4 occasions (Article 71)

e. Any person related to or with knowledge of the subject matter of the investigation, shall appear and/or provide any documents to the Commission, likewise, it is also provided that any authority shall cooperate with the investigation within its scope of competence (Article 73)

f. In the event that a potential liability resolution is issued, it shall contain at least: (i) identification of the alleged offender; (ii) the facts and subject matter of the monopolistic practice or prohibited merger; (iii) the legal provisions that were violated; and (iv) the evidence and elements of conviction proving the existence of liability (Article 80)

(ii) Dawn raids

a. Within the authority granted to the Investigating Authority, the one regarding dawn raids (visitas domiciliarias) has not been amended by the Bill vis a vis the law currently in effect and it shall be subject to specific rules which include, inter alia: (i) the issuance and service of a visit order that must contain the name of the visited person, the purpose and scope of the visit, the address or addresses to be visited and the names of the Commission's personnel authorized to intervene in the visit; (ii) visits must be carried out on business days and, exceptionally, on non-business days; (iii) under no circumstance the assets and/or documents of the visited person may be seized or sequestered; (iv) the authority shall execute a minutes *(acta circunstanciada)* of the visit; and (v) the visited person, at any time, shall have the right to raise comments of the visit (Articles 75).

   Similar to the provisions of the current antitrust law, dawn raids (visitas de verificación) do not require prior judicial order.

b. Once the visit is completed because its duration or purpose has been exhausted, it may: (i) issue the start of the proceeding followed in the form of trial (preliminary hearing) by the delivery of the opinion of probable liability to the alleged offender(s); or (ii) issue the closing of investigation without liability for lack of evidence (Article 78).

(iii) Hearing proceeding followed in the form of trial

In the event that the investigation phase is concluded, the potentially liable party(ies) would be served to appear in or shall be notified of a proceeding to be conducted in the form of a trial, in which the Investigating Authority will act as the prosecutor and the Plenary of the Commission will act as a resolution body (Articles 80 to 85). In general, such proceeding shall be conducted under the following premises (Article 83):

a. Upon service, the alleged offender shall have 30 business days to respond and to provide the evidence it deems appropriate

b. In case the alleged offender fails to make reference to the facts contained in the potential liability resolution, it will be deemed to have tacitly accepted all the allegations made thereunder

c. With the responsive pleading, the Investigating Authority shall be required to provide its opinion within 15 business days following the corresponding service

d. Once the term of the Investigating Authority to provide its opinion regarding the defendant's responsive pleading has elapsed, a resolution admitting or dismissing the evidence submitted shall be issued. Any means of evidence regarding the subject matter of the investigation is admissible, except the cross-examination of the authorities

e. Once the term to provide evidence is concluded, the Commission may obtain additional evidence

f. Once the term of instruction is concluded, the Commission shall provide a 10 business days' term to provide conclusions, after which, it shall

issue a resolution within a term not exceeding 40 business days

g. The assessment of evidence in the proceeding is regulated by the principle of free assessment, where the Commission shall have broad authority to analyze the evidence contained in the file

h. The final resolution of the Commission may: (i) determine if there is no violation to be sanctioned; or (ii) determine the liability of the investigated economic agent

i. The final and conclusive resolution of the Commission shall contain at least: (i) the analysis of the evidence, legal grounds and merits to impose a fine or sanctions or the reasons justifying that there was no evidence of conduct in violation of the applicable law; (ii) in the case of relative monopolistic practices, whether the economic agents have substantial power in the market; (iii) the order to refrain from undertaking the relevant monopolistic conduct or prohibited merger or their effects, or the order to carry out actions to correct such monopolistic activity or prohibited conduct; and/or (iv) the determination to impose the fines.

B. General Implementing Provisions Applicable to All Proceedings

The Bill includes a chapter of general rules applicable to all proceedings, which was previously governed by the Regulations. Such chapter provides mainly the following:

a. The representation and authorization of lawyers and authorized persons to hear and receive notices (Article 104)

b. Proceedings in Spanish are mandatory (Articles 105 and 106)

c. Calculation of terms, although there is no specific term governing when service of process should be effective (Articles 107 to 110)

d. The supplementary application of the Federal Civil Procedures Code (Código Federal de Procedimientos Civiles) is provided (Article 114)

e. Classification of information within the proceedings (Articles 117 and 118)

f. Enforcement measures (Article 119)

g. Fines and sanctions

C. Fines and Sanctions

One of the main changes in the new legislation is the increase of sanctions. The sanctions provided by the Bill may be classified into: (i) banning of individuals; (ii) economic fines; (iii) criminal sanctions; (iv) divestiture of assets; (v) issuance of measures to regulate the essential supplies (raw materials) controlled by one or more economic agents; and (vi) any measure aimed at eliminating the monopolistic practice or illegal merger.

(i) Fines and administrative sanctions provided by the Bill

The Bill includes the following fines and monetary penalties (Articles 120 and 121):

a. A fine of up to the equivalent to 10 percent of the economic agent's income during the last fiscal year (i) for participating in an absolute monopolistic practice; (ii) when the economic agent fails to comply with the conditions of a resolution conditioning a merger; (iii) for breaching the terms of the resolution resolving an enforcement measure requested by the Investigating Authority; and (iv) for breaching the terms of the resolution regulating essential supplies.

b. A fine of up to the equivalent to 8 percent of the economic agent's income during the last fiscal year (i) for participating in a relative monopolistic practice; (ii) for participating in an illegal merger; and (iii) for breaching the terms of the resolution under a leniency proceeding.

c. A fine of five thousand days of minimum wage and up to 5 percent of the economic agent's income during the last fiscal year for failing to notify a reportable transaction to the Commission.

The Bill also provides innovative non-monetary sanctions:

a. Banning of individuals from holding positions within a commercial company for a period up to five years.

b. Issue regulation for essential supplies, by imposing intervention measures to the transactions with these goods, although such measures are not clearly defined. Under the current wording, it could be questionable as it includes a wide range of events subject to be sanctioned at the discretion of the Commission.

c. In the event that the sanctioned economic agents have not filed their tax returns and a fine of a percentage equivalent to their annual incomes is imposed, substitute sanctions based on minimum wages will be imposed (Article 121).

d. As explained in Chapter II, Section A (iii), in the event of repeated monopolistic practices or prohibited mergers,

the divestiture of assets may be ordered. For purposes of considering second-time offenders, the resolution determining the first offense should be final and not subject to any additional remedy.

The administrative penalties shall be applied, notwithstanding the criminal sanctions and the obligation to repair the corresponding damages by specific compensatory action.

It is strange that not in all cases where the Commission imposes a fine based on a percentage of the economic agent's annual incomes, the foreign sources of economic wealth are excluded, which de facto classifies the offenders in unjustified assumptions. Additionally, for second-time offenders the fine would double the original sanction.

In all cases where the Commission imposes a sanction, it shall consider the intentionality, the damage, recurrence, market share, the offender's tax capacity, the duration of the sanctioned activity and the size of the affected market (Article 122).

As set forth in Chapter III, Section A (i) above, the amendment to article 254 Bis to the Federal Criminal Code (Código Penal Federal) sets forth criminal sanctions.

D. Action to repair damages and losses (daños y perjuicios).

The Bill provides a repairing action (acción resarcitoria) to those who suffered damages and losses by a monopolistic practice or an illegal merger, who may initiate a special trial before the specialized antitrust courts, broadcasting and telecommunications matters ("los tribunales especializados en materia de competencia económica, radiodifusión y telecomunicaciones"), once the resolution issued by the Commission becomes effective (which shall be evidence of the unlawful conduct of the economic agent causing the damages and/or losses). The content of Article 126 of the Law is one of the most questionable provisions of the Bill, since it is unclear and ambiguous when governing the events that could trigger the repairing action; therefore it presents multiple practical defects, among others:

(i) It does not distinguish between whether the action is brought before a District Court (juzgado de distrito) or Circuit Courts (Tribunal Colegiado de Circuito).

(ii) By providing the option to initiate a judicial procedure before specialized antitrust courts,[1] which creates legal uncertainty as to what would happen with the amparo trial filed against resolutions issued within the proceeding or against final resolutions, as the current structure of the specialized courts (basically the number and absence of Unitary Courts (Tribunales Unitarios)) does not allow Appeal Courts that review the constitutionality of the direct and indirect amparo resolutions.

(iii) It creates uncertainty as to the concrete judicial procedures that shall be initiated, because it is not clear whether the current civil action for loses and damages is excluded.

(iv) The statute of limitations regarding a claim is uncertain, since at the time the damage occurs, an investigation may not be under way and therefore the triggering event to file such an action may have never occurred.

(v) There are no provisions governing collective interests for these types of actions.

(vi) While the hypothesis of this Article provides that the repairing action would be admitted when the resolution determining the prohibited conduct is final (i.e., it has not been challenged or, if challenged, the courts have confirmed the challenged resolution), the final part of such Article inconsistently provides that "the final resolution issued within the proceeding followed in the form of trial shall evidence the illegality of the corresponding economic agents' conduct for compensatory action purposes." How would this be possible if such resolution of the Commission is still under judgment?

In our opinion, given its many inconsistencies, Article 126 of the Bill should be substantially modified in the legislative process.

V. Internal Provisions

The Bill reflects what is already provided by the newly amended Article 28 of the Mexican Constitution, regarding the nature of the Commission, as it defines it as an independent constitutional body, with legal capacity and patrimony, in which its purpose is: (i) to ensure free participation and competition process; and (ii) to prevent, investigate, combat, challenge and eliminate monopolies, monopolistic practices, illegal mergers and other restrictions to the efficient operation of the markets. The Bill provides that the Commission may establish additional delegations to their offices in Mexico City.

A. Authority of the Commission

The purpose of the Commission is broadened by providing that, as part of the reform, such Commission shall ensure the competition process and free participation thereat, and to prevent, investigate and combat monopolies, as opposed to the current law which only

1 It is important to note that the Bill does not provide any mandatory deadline for the Commission to issue and publish those measures.

provides the obligation to investigate the existence of monopolies, monopolistic practices and illegal mergers.

Additionally, the Bill provides additional powers and authority to the Commission, some of which is described in Chapter II hereof, which will be exercised through its different bodies according to their nature, such as: (i) to order measures to remove barriers to competition process and free participation thereat; (ii) to determine the existence and regulate access to essential supplies; (iii) to order the divestiture of assets (which includes goods, rights, equity interests or shares of the economic agents), as required to eliminate anti-competitive effects; (iv) to file accusations and complaints before the Attorney General's office regarding conducts affecting the competition process and free participation thereat; (v) to file requests for dismissal with respect to potentially liable criminal conduct against consumption and national wealth; (vi) to order the suspension of acts or facts comprising potentially liable conduct; (vii) to issue non-binding opinions regarding (a) the adjustments to programs and policies carried out by the Public Authority when they can have adverse effects on the competition process and free participation thereat; and (b) the proposed draft of international treaties, laws, regulations, decrees and general administrative provisions to the extent that they have adverse effects on the competition process and free participation thereat; (ix) to issue opinions regarding the incorporation of protective and promoting measures within the process of divestiture of public entities and assets, in public bids, assignments, concessions, permits, licenses or the like carried out by public entities; (x) to issue Regulatory Provisions and the internal regulations of the Commission; (xi) to publish and review at least every 5 (five) years, the guidelines and technical criteria provided for in the Regulatory Provisions[2]; and (xii) to exercise collective actions, among others.

B. Members and Powers of the Plenary of the Commission.

The Bill provides that the Plenary is the governing body of the Commission and it follows the rule set forth in Article 28 of the Mexican Constitution providing that the Plenary shall comprise seven Commissioners, as opposed to the current five members.

The Bill provides for the creation of a committee to evaluate applicants to be appointed as Commissioners (the "Evaluation Committee") referred to in Article 28 of the Mexican Constitution.

The Evaluation Committee will not have a structure or budget of its own, but it will be composed by the staff of the institutions to which they belong, and they will use the material and financial resources of such institutions to perform the work of such committee.

The Evaluation Committee shall have the broadest powers to analyze and decide on the selection of candidates for Commissioners. It is important to note that decisions of the Evaluation Committee shall not be subject to any remedy and may, therefore, not be challenged, including amparo trial and, thus, they may not be modified or revoked by any authority.

C. Powers of the Plenary

The Plenary shall be vested with most of the Commission's aforementioned powers and authority; those that are not within its scope of competence shall be exercised by other internal bodies of the Commission. However, and this is new, there are certain powers that require the vote of a qualified majority (not fewer than five Commissioners) to be exercised.

Resolutions shall have 100 percent votes of the Commissioners, i.e., the Commissioners may not refrain from casting their vote, except for justified reasons. In case of absence of a plenary session, the Commissioner shall cast its vote in writing before the meeting or within five days following thereof.

The Plenary sessions and resolutions shall be public, where the Plenary states what is confidential or proprietary information in accordance with applicable law. It seems difficult to determine which sessions shall be public or private considering that, while issues themselves are public, their discussion may involve confidential or proprietary information. It appears that the issues addressed by the Commission are public (mergers, investigations for monopolistic practices or analysis of market conditions, etc.) since its existence will eventually be revealed in terms of law; confidential or privileged information will be only part of the information or data discussed therein. This poses a complex challenge for the Commission as to how to comply with the transparency obligation to hold public discussions while simultaneously protecting confidential or private data.

D. Chairman

The President shall chair the Plenary and the Commission. In case any Commissioner is unable to exercise its vote in a meeting for justified reasons, and there is a tie, the President shall have the casting vote (voto de calidad).

2 Such provisions will be guidelines and criteria which shall refer to: (i) the imposition of sanctions; (ii) monopolistic practices; (iii) mergers; (iv) investigations; (v) determination of substantial market power of one or more economic agents; (vi) determination of relevant markets; (vii) sanctions reduction program (leniency); (viii) suspension of prohibited conducts (monopolistic practices or potentially illegal mergers); (ix) determination and granting of guarantees to suspend the application of enforcement measures; (x) request to dismiss criminal proceedings under the Federal Criminal Code; and (xi) any other measures necessary to enforce the law. Prior to its publication, the guidelines and criteria shall be subject to public scrutiny, provided that the result of such consultation is not binding for the Commission.

E. Powers of the Chairman

The Bill provides innovative powers to the Chairman which includes, inter alia: (i) standing to file constitutional controversies, with prior approval of the Plenary; (ii) reporting to the House of Representatives and the Evaluation Committee any vacancies in the Plenary or Internal Comptrollership; and (iii) receiving reports from the Internal Comptroller regarding reviews and audits conducted, in order to verify the proper and legal application of resources and assets of the Commission.

F. Grounds for Removal of Commissioners

In the preamble of the Bill, the Executive Branch explains that the new proposed Antitrust Law includes mechanisms to avoid the "capture of the regulator".

In such regard, the Bill provides, in addition to the provisions under paragraphs G, H, K and L below, that the Internal Comptroller has the authority to notify the Mexican Senate when it considers that there is sufficient evidence to prove a possible ground for removal of Commissioners. The removal shall be carried out through a procedure conducted by a special commission, mainly for reasons that: (i) affect confidential or proprietary information to which they have access by virtue of their position; (ii) compromise the legality of its resolutions by not excusing any issues with conflict of interest; or (iii) subject to consideration of the Plenary, false or altered information in order to influence their decision.

Additionally, it provides that the Commissioners may be subject to impeachment (juicio politico).

G. Prohibitions to the Commissioners

Within the Bill, the Commissioners are prevented from knowing any matter, in which they have direct or indirect interest, preventing them from acting in full independence, professionalism and impartiality, as a result of: (i) a straight-line relationship without limitation, collateral relationship by blood up to the fourth relationship and collateral affinity up to the second degree; (ii) a personal, familiar or commercial interest; (iii) having been expert, witness or counsel in the matter in question, or to have previously managed the case for or against any of the interested parties; or (iv) having publicly and unequivocally set the direction of his/her vote before the Plenary resolves that case.

H. Contact With the Commissioners

The Bill provides that the hearing will be the only contact between Commissioners and people representing interests of the economic agents. Accordingly, a call mechanism to the Plenary is provided, regardless of whether or not, once called, the hearing is held in the presence of only one of them.

Regarding such hearings, they shall be recorded in minutes (acta circunstanciada), which will contain the names of those present and topics covered. Such records shall be published on the Internet website of the Commission. Likewise, the Bill introduces a new registration hearing system by electronic and optical means, in a manner that the development of the hearings is recorded and the Commissioners may consult them at any moment.

The public officials of the Commission and its bodies are subject to the contact rules determined by the Commission in its internal rules.

I. Investigating Authority

As mentioned, the Bill introduces a new body of the Commission called the Investigating Authority, which shall be the body of the Commission with technical and management autonomy, in charge of (i) carrying out the investigation phase; and (ii) becoming a party to the proceeding followed in the form of trial. Such body will be led by one person.

The main powers and authority granted to the Investigating Authority include, among others, the following: (i) to receive and, where appropriate, accept or reject as notoriously inadmissible the complaints filed before the Commission for potential violations of the law, for which it may require reports and necessary documents, summon as witnesses to those who have relation with the issues and, where appropriate, to carry out dawn raids; (ii) to issue the potential liability resolution and to exercise actions to carry out all corresponding requirements at each stage of such procedure; (iii) to file accusations and complaints before the Attorney General's Office regarding potentially criminal conduct regarding the competition process and free participation thereat and, where appropriate, to contribute to the investigations arising from these accusations or complaints; (iv) contributing with the Plenary in the preparation of the Regulatory Provisions; and (v) to apply corrective measures established by law.

J. The Executive Secretary Disappears

The figure of the Executive Secretary disappears under the Bill; however, in accordance with the powers granted to the Investigating Authority, the latter shall have the same powers as the Executive Secretary and many others.

For purposes of its appointment, the head of such body will require a qualified majority of the Plenary to be appointed and the election requirements shall be set forth in the internal regulations of the Commission.

Regarding the responsibility of the Investigating Authority, the Bill proposes that the Internal Comptroller is the entity in charge of issuing any resolutions thereof, provided that the filing of the accusations and complaints has been concluded.

K. Internal Comptrollership of the Commission

The Internal Comptrollership is the body with technical and management autonomy, in charge of: (i) the control of revenues and expenses of the Commission; and (ii) the liability regime for public servants. Such body will be led by one person who will be in charge for four years and may be reelected only once, and who shall be appointed by the House of Representatives by a vote of two-thirds of the present members, and who shall comply with certain common requirements for public officials set forth in the Bill.

The main powers that the Bill proposes to grant to the Internal Comptrollership are: (i) to carry out all necessary procedures for the review and control of resources by areas of the Commission; (ii) to instruct, carry out and resolve all administrative procedures regarding complaints against public officials of the Commission under Federal Law of Administrative Responsibilities for Public Officials (Ley Federal de Responsabilidades Administrativas de los Servidores Públicos); and (iii) to file before the Plenary of the Commission previous annual reports of management results.

Additionally, as discussed in the preceding paragraph F, there are some cases in which the Internal Comptrollership has the authority to notify the Mexican Senate regarding the removal of the Commissioners.

It is important to note that such body will be prevented from intervening in the exercise of the powers and authority on the competition process and free participation thereat vested to other bodies and public officials of the Commission.

L. Responsibility of the Internal Comptroller

The Bill provides an innovative procedure of administrative responsibility, applicable to the head of the Internal Comptrollership, when there are complaints or accusations against it. Such procedure shall be carried out before the House of Representatives, which will resolve the application of the corresponding sanctions, including dismissal, in accordance with the Law on the Administrative Responsibilities of Civil Officials (Ley Federal de Responsabilidades Administrativas para Servidores Públicos). In the event of the two-thirds vote of the members present at the meeting of the House of Representatives, removal of the Internal Comptroller will proceed.

Notwithstanding the foregoing, the head of the Internal Comptroller may be dismissed for serious reasons of administrative responsibility, such as: (i) use of documents and confidential information for his/her benefit or a third party's; (ii) refraining from imposing liability or sanctions when such liability is duly evidenced and the liable party is identified; (iii) improper use of the documentation and information under his/her care or custody or existing in the Comptrollership; (iv) not behaving impartially in monitoring procedures and sanctions; and (v) providing the Mexican Senate with false or altered information during a process for removal of Commissioners.

M. General Prohibition for Directors, Investigating Authority and Internal Comptroller

Upon conclusion of office, and throughout a period of time equivalent to one-third of the time in office, any of such officers must refrain from holding any positions or commissions linked to the economic agents for which a procedure has been followed during their position.

N. Administration of the Commission

The Bill includes a special procedure for the budgetary management of the Commission, by means of which the Commission will approve its budget proposal and it shall be sent to the Ministry of Finance (Secretaría de Hacienda y Crédito Público) to be incorporated into the proposal of the Federal Expenditure Budget (Presupuesto de Egresos de la Federación); and it may be exercised without being subject to the evaluation and control of the appropriate bodies. In the event of requiring an adjustment to its budget, it will not require any authorization provided they do not exceed the overall ceiling of its approved budget.

Furthermore, the Bill includes the obligation of the House of Representatives to ensure the adequate budget of the Commission, in order to enable the effective and timely exercise of its powers.

O. Property of the Commission

In accordance with the Bill, the patrimony of the Commission comprises: (i) movable assets and real estate acquired for the fulfillment of its purpose, in the understanding that the Commission may not have more real estate than that strictly necessary to comply with its purpose; (ii) the resources provided to the Commission in accordance with the Federal Expenditure Budget; (iii) donations in its favor; and (iv) income received by any other sources.

P. Accountability Commission

The Chairman shall annually appear before the Senate and it also shall submit before the Executive and Legislative Branches the annual work program, which will be delivered no later than January 31 of each year. Such program should refer to: (i) the analysis of the Commission's administration; (ii) performance in connection with its objectives and strategic goals; (iii) a summary of the opinions issued by the Commission and; (iv) an expense report of the immediately preceding year.

Likewise, the Bill provides that the report the Commission should submit to the Executive annually under the law currently in effect shall also be submitted to the Legislative Branch, but now on a quarterly basis, aimed at fostering transparency and accountability matters.

The Commission's annual work program and quarterly report shall be of public knowledge.