

SOME CONSIDERATIONS AS TO THE RECENT MODIFICATIONS AND REFORMS MADE TO THE MEXICAN FEDERAL COMPETITION LAW

Interstate Market

Pursuant to the regulation applicable to state and municipality authorities in connection with the prohibition of entry or exit of goods or services from state territories, Article 14 was modified and Article 15 was abrogated in order to establish that the Antitrust Commission might issue a resolution when it considers that state or municipal authorities have issued legal ordinances or executed acts with the purpose or effect of impeding the entry or exit of goods or services by establishing tariff, taxes or any other kind of payment as established in Article 117 of the Mexican Constitution.¹

Concentrations

The Antitrust Law regulates mergers and acquisitions under the term "concentrations." According to the Antitrust Law, a concentration includes "*any merger, consolidation, acquisition, or any act that combines corporations, associations, shares, assets or trusts, between competitors, customers, suppliers or business entities.*"

As part of a policy toward more transparency certainty and expedited notification proceedings of concentrations, Articles 18, 21, and 22 were modified and Articles 21 bis was added. These provisions dictate as follows:

Related Markets and Efficiency Gains

The Antitrust Law considers a concentration to be illegal if the purpose or effect thereof is to diminish, impair or hamper competition or free market participation. Before a concentration is considered to be anticompetitive, the Antitrust Commission must now consider two new elements: (i) the effects of the concentration on the relevant market in connection with competitors and end users of the goods or services as well as other markets and related economic agents; and (ii) gains of efficiency that are to be accredited by the involved concentrated economic agents and that might be generated by the concentration, not only in favor of such involved economic agents but also to the end consumers.²

Monetary Thresholds

In order to review only the concentrations that might have an impact in the Mexican market, the monetary thresholds for required review, as established in Article 20 of the Law, were increased as follows:³

Art.	Before	After
20	I. If the value of a single transaction or series of	I. When an act or succession of acts give origin

¹ See Antitrust Law, Arts. 14-15.

² Id. Art. 18.

³ Article 19 of the Regulations dictates that for the purposes of Article 20 of the Antitrust Law, the Minimum General Wage ("MGW") in force in the Federal District on the day previous to that on which the notification takes place will be taken into account and, in case the parties have agreed that operations are to be in foreign money, the rate of exchange to be applied will be that established by the Bank of Mexico for paying debts denominated in foreign currency and payable in Mexico and published in the Official Gazette of the Federation the day previous to such notification.

<p>transactions amounts to over <u>12 million</u> times the Minimum General Wage (“MGW”) prevailing in the Federal District.</p> <p>II.- If a single transaction or series of transactions implies accumulation of <u>35 percent</u> or more of the assets or shares of an economic agent, whose assets or sales amount to more than <u>12 million</u> times the MGW prevailing in the Federal District; or</p> <p>III.- If two or more economic agents take part in a transaction, and their assets or annual volume of sales, jointly or separately, total more than <u>48 million</u> times the MGW prevailing in the Federal District, and such transaction implies an additional accumulation of assets or capital stock in excess of <u>four million eight hundred thousand times</u> the MGW prevailing in the Federal District.</p>	<p>in the <u>Republic</u>, directly or indirectly, an amount over the equivalent of <u>18 million</u> times the MGW prevailing in the Federal District.</p> <p>II. When an act or succession of acts directly related with the transaction, the accumulation of <u>35 percent</u> or more of the assets or shares of an economic agent, whose annual assets in the <u>Republic</u> or annual sales originated in the <u>Republic</u> reach an amount more than the equivalent to <u>18 million</u> times the MGW prevailing in the Federal District; or</p> <p>III. When an act or succession of acts directly related with the transaction the accumulation in the <u>Republic</u> of assets or capital stock in excess of <u>8.4 million times</u> the GMW prevailing in the Federal District; and the concentration involves the participation of two or more economic agents whose assets or annual volume of sales, joint or separately, total more than <u>48 million</u> times the MGW prevailing in the Federal District.</p>
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Timeframe

With the purpose of avoiding the legal counting of official holidays applicable to the Antitrust Commission for delivering its concentration resolutions, Article 21 of the Antitrust Law changed the time frame requirements from calendar days to working days as follows:

Art.	Before the amendments	After the amendments
21	<p>I.- Additional information or document requests made by the Commission within <u>20 calendar days</u> after receiving the corresponding notification.</p> <p>II.- Submittal of the additional information or documents requested by the Commission by the interested parties within <u>15 calendar days</u>.</p> <p>III- Final resolution by the Commission within <u>45 calendar days</u> after having received the notification, or the additional information or documentation requested by the Commission.</p> <p>IV.- In exceptionally complex cases, the Chairman of the Commission may, under his</p>	<p>I.- Additional information or document requests made by the Commission within <u>15 working days</u> after receiving the corresponding notification.</p> <p>II.- Submittal of the additional information or documents requested by the Commission by the interested parties within <u>15 working days</u>.</p> <p>III- Final resolution by the Commission within <u>35 working days</u> after having received the notification, or the additional information or documentation requested by the Commission.</p> <p>IV.- In exceptionally complex cases, the Chairman of the Commission may, under his</p>

responsibility, extend the time limit referred to in Sections II and III for up to <u>60 more calendar days</u> .	responsibility, extend the time limit referred to in Sections I and III for up to <u>40 working days</u> .
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Voluntary Notification

One of the new provisions established by the Antitrust Law is the possibility to notify a concentration even though it is not within the monetary threshold established in Article 20 of the Antitrust Law. In other words, if the economic agents involved in a concentration are unsure if they should submit notification or if they would like to obtain the blessing of the Antitrust Commission regardless of the monetary thresholds established in Article 20 of the Antitrust Law, they will be able to do so.⁴

Prohibition of Concentrations

The Antitrust Law mandates that when a concentration exceeds the aforementioned monetary thresholds, a previous mandatory notification needs to be submitted. Accordingly, the Antitrust Commission, within a period of 10 working days as of the day on which notification is submitted, can prevent the economic agents involved in a concentration from executing or closing such concentration until the Antitrust Commission renders a favorable resolution. In the event that the Antitrust Commission does not issue its authorization, the economic agents are entitled to close the concentration deal under their own responsibility.⁵

Notorious Concentration

With regard to a newly introduced concept -“notorious” concentrations, the Antitrust Law furnishes that the Antitrust Commission should resolve notorious concentrations within 15 working days as of the notification submission rather than within the 35 working day period it had to resolve these kind of concentrations and still does for all other sorts. For this purpose, the economic agents involved in the concentration shall file an analysis providing the relevant information in connection with the relevant market and market share. In the event that the Antitrust Commission does not consider that the concentration is notorious, it is understood that it will resolve the clearance of that concentration in 35 working days.⁶

In order to avoid misunderstandings and discretionary considerations by the Antitrust Commission, **it is necessary that the Executive Branch, in the Antitrust Law Regulations, carefully explain the meaning and scope of the word notorious.**

Powers of the Antitrust Commission

Some of the most important modifications made to the Antitrust Law are the new powers and authorities that have been granted to the Antitrust Commission, the most important of which include the following:

- (i) The power to request from economic agents all information or documents that the Commission considers to be relevant to an investigation proceeding of monopolies, monopolistic practices and concentrations.

⁴ See Antitrust Law, Art. 20.

⁵ *Id.* Art. 20.

⁶ *Id.* Art. 21 bis.

- (ii) The power to request authorization from the judicial authorities in order to conduct inspection visits and to request papers, books, documents, files and further information that could prove compliance with the Antitrust Law and other further applicable legal ordinances.
- (iii) The power to establish mechanisms to coordinate with federal, state and municipal authorities to contest and prevent monopolies, concentrations and any other unfair trade or monopolistic practices.
- (iv) The power to declare the existence of effective competition, the existence of substantial power in the relevant market and further issues related with the competition process and free market.
- (v) The power to issue binding opinions when necessary or when it is so requested by an interested party concerning adjustments in programs and policies of the federal public administration, the effects of which may damage competition and free market participation. This faculty will be also applicable to rulings and further administrative acts such as license, permits, authorizations, and registrations issued by the above-mentioned authorities.
- (vi) The power to provide opinions when it is considered necessary or when it is so requested by an interested party regarding proposed bills, regulations and decrees regarding free market and competition aspects.
- (vii) The power to execute inter-governmental institutional agreements.

One of the most important above-mentioned new faculties (in addition to the possibility of visiting the domicile of the economic agents) is without question the binding opinions that the Antitrust Commission shall provide to interested parties, the significance of which is that actions taken by the federal government (such as Pemex and the Federal Electricity Commission, Ministry of Health, among others) in granting their authorizations, permits, administrative contracts, and registrations will be subject to the binding opinion published by the Antitrust Commission.

Requirements for Disclosure of Information

Some of the most common appeal processes filed against the Antitrust Commission are those that are related to the kind of information requested by such Commission.⁷ Therefore, the modifications to the Antitrust Law try to make clear the handling of information by defining which information will be considered public, reserved, or confidential. In this way (i) reserved information will refer to information that may only be accessed by the economic agents with legal interest in the proceeding; (ii) confidential information will refer to information that cannot be revealed without the consent of the economic agent that provided such information; and (iii) public information will refer to information that is available to the general public. Public servants shall be held responsible

⁷ When exercising its powers, the Commission may request the necessary information or documents in order to carry out investigations, as well as to summon those involved in the corresponding cases. *Id.* Art. 31.

in the case of disclosure of information, except when disclosure is mandatory by order of a competent authority.⁸

Witness Protection Program

For the first time ever in the Mexican legal system, a witness protection program has been established for economic agents that have participated or are currently participating in an absolute monopolistic practice. The program will benefit the whistleblower by reducing the amount of sanctions established in the Antitrust Law.⁹ The Antitrust Law prohibits so-called "absolute monopolistic practices" that involve agreements among competitors to join forces to (i) fix prices; (ii) restrict production and distribution of goods and services; (iii) divide markets; or (iv) rig bids on contracts.¹⁰ Consequently, the purpose of the witness protection program is to obtain relevant information from the cartels' insiders that are trying to protect the efficient operation of the market for goods and services.

Supplementary Law

For matters not covered by the Antitrust Law or its Regulations, the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*) shall also apply.¹¹

Use of Electronic Media

The modifications aim to encourage the use of electronic media for all of the proceedings established by the Antitrust Law, including any request made to the Antitrust Commission.¹²

Monetary and Administrative Sanctions

In order to discourage participation in anticompetitive acts, the Mexican Congress decided to increase the monetary sanctions as follows:

Art.	Before the amendments	After the amendments
35	<p>I.- Fine of up to <u>7,500 times</u> the MGW prevailing in the Federal District for having made false statements or for having submitted false information to the Commission.</p> <p>II.- Fine of up to <u>375 thousand times</u> the MGW prevailing in the Federal District for having engaged in an absolute monopolistic practice.</p> <p>III.- Fine of up to <u>225 thousand times</u> the MGW prevailing in the Federal District for having engaged in any relative monopolistic practice, and up to <u>100 thousand times</u> regarding the relative monopolistic practices contained in section VII of Article 10 of the Law such as</p>	<p>I.- Fine of up to <u>30,500 times</u> the MGW prevailing in the Federal District for having made false statements or for having submitted false information to the Commission.</p> <p>II.- Fine of up to <u>1,500,000 times</u> the MGW prevailing in the Federal District for having engaged in an absolute monopolistic practice.</p> <p>III.- Fine of up to <u>900,000 times</u> the MGW for having engaged in any relative monopolistic practice.</p>

⁸ Id. Art. 31 bis.

⁹ Id. Art. 33 bis 3.

¹⁰ Id. Art. 9.

¹¹ Id. Art. 34 bis.

¹² Id. Art. 34 bis 1.

<p>predatory pricing; exclusive discounts; cross subsidies; and discrimination on price and sale conditions.</p> <p>IV.- Fine of up to <u>225 thousand times</u> the MGW for participating in a concentration prohibited by the Law; and a fine of up to <u>100 thousand times</u> the MGW for failing to notify a concentration to the Commission, when obligated by the Law.</p> <p>V.- Fine of up to <u>7,500 times</u> the MGW to individuals who engage directly in monopolistic practices or prohibited concentrations, on behalf or through representation and mandate of corporations.</p>	<p>IV.- Fine of up to <u>900,000 times</u> the MGW for participating in a concentration prohibited by the Law; and a fine of up to <u>400 thousand times</u> the MGW for failing to notify a concentration to the Commission, when obligated by the Law.</p> <p>V.- Fine of up to <u>30,000 times</u> the MGW to individuals who engage directly in monopolistic practices or prohibited concentrations, on behalf or through representation and mandate of corporations.</p>
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In addition to the above-mentioned sanctions, the following events will be also sanctioned monetarily:

(i) Fine of up to 900,000 times the MGW for not having observed the conditions established by the Commission in a concentration previously reviewed by the Commission and subject to certain conditions regardless of the possibility of requesting the divestiture of the concentration by the Commission.¹³

(ii) Fine of up to 28,000 times the MGW to the economic agents or individuals that have contributed, participated, induced or participated in the execution of monopolistic practices, prohibited concentrations or other acts against the efficient participation of the economic agents in the markets in terms of this Law.¹⁴

(iii) Fine of up to 1,500,000 times the MGW, to any economic agent that breaches its own agreement reached with the Antitrust Commission regarding the suspension, correction or elimination of the relative monopolistic practice or prohibited concentration.¹⁵

In case of repeated offenses, the Antitrust Commission will be able to impose a fine of up to the greater amount of (i) double the original fine, (ii) 10 percent of the annual sales obtained by the offender during the previous fiscal year, or (iii) 10 percent of the value of the assets of the offender.

Further, in the case that an anticompetitive practice has been carried out by an economic agent that has been sanctioned two times or more under the terms of Article 35 of the Antitrust Law, the Commission, instead of applying the corresponding sanction, may order the divestiture or sale of assets, rights, capital stock or shares for the amount needed so that the involved economic agent cannot have substantial power in the relevant market. This sanction can only be enforced by the competent judicial authority.¹⁶

Conclusion

¹³ Id. Arts. 22, 35 (VIII).

¹⁴ Id. Art. 35 (X).

¹⁵ Id. Arts. 33 bis 2, 35 (XI).

¹⁶ Id. Art. 37.

The Mexican government has made a significant and important effort to provide more transparency in the application of the Antitrust Law, and to have its statutory provisions brought up to date to make them more comparable to other antitrust legal frameworks that govern free access to markets in a changing economic and globalization environment. The new Antitrust Law has been updated to overcome any administrative, regulatory or legislative barriers that were restraining free access to markets and efficient competition in Mexico. The Antitrust Law represents one of the most important legal ordinances in the Mexican legal system in evaluating the international economic policy of the Mexican government.