



# Mexico's New Competition Law:

Attempt to Level the Playing Field  
Generates Uncertainty

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On April 29 the Mexican Congress passed secondary legislation to implement last year's constitutional competition policy reform. The legislation was the same as that proposed by President Enrique Peña Nieto, with some modifications.

The purpose of the legislation is to finally limit the monopolistic practices that have plagued the Mexican economy for generations. To that end, the reform gives teeth to Mexico's antitrust agency, the Federal Competition Commission (COFEC), an institution that has long lacked meaningful authority and sanctioning power.

COFEC's mandate continues to be promoting, protecting, and guaranteeing a competitive free market in Mexico, but its capacity to do so has been greatly expanded. The law authorizes the Commission to eliminate barriers to competition and free market entry anywhere in the economy (except in the telecom sector, which is governed by its own competition authority established by last year's telecom reform) and to identify and regulate access to essential production inputs (*insumos esenciales*). And the law finally gives the Commission real sanctioning powers that should allow it to force dominant actors to comply with Commission rulings.

The Peña Nieto Administration hopes that this reform will increase productivity by reducing production costs in the Mexican economy and encourage new market entrants and foreign

capital by leveling the proverbial playing field. Despite these laudable aims, and despite congressional amendments adopted in response to private-sector complaints to more clearly define the process through which the Commission can sanction firms, the law still has some questionable elements. These are apt to increase uncertainty for many firms and economic groups operating in Mexico and encourage legal challenges to the new rules, delaying full implementation and prolonging the legal uncertainty.

## New Enforcement Tools

The new law gives the Commission several new enforcement tools. First, it increases the fines the Commission can levy for anticompetitive behavior (up to 10 percent of the previous year's net income) and authorizes a series of new sanctions, including criminal penalties, banning specified individuals from holding positions in a sanctioned company for up to five years, and the divestiture of assets, the maximum sanction reserved for previously sanctioned firms and permitted only following a formal, public investigation.

The Commission can also block any merger or acquisition that is likely to have significant anticompetitive consequences. And with the sole exception of divestiture, Commission-imposed sanctions can no longer be suspended during the appeals process through the use of the judicial *amparo* – one of the most common legal tools previously employed by firms to block the implementation of Commission rulings and thereby render them inert. Moreover, in response to private-sector concerns expressed during the legislative process, the conditions under which asset seizure can take place are clearly delineated in the law.

The Commission can also now regulate the supply of essential goods whose production is highly concentrated. It can also take other measures designed to eliminate monopoly practices, such as requiring firms whose market power can create barriers to entry to implement measures that compensate for this competitive advantage. (Note: The law does not require firms to have exercised this power before being subjected to this sort of regulation.)

### **The Controversy Around “Essential Production Inputs”**

One of the most controversial elements of the reform is the authority it grants the Commission to identify and regulate *insumos esenciales*. The law does not clearly define what constitutes an “essential production input” or the process by which the Commission will determine which goods are to be deemed essential. As a result, there are concerns that this provision will open the door to discretionary application of the law, producing a great deal of uncertainty in segments of the private sector.

This raises the important question of how the Commission’s anticompetitive powers will be exercised – broadly and discretionally or narrowly and consistently? The law does limit the Commission’s authority to declare something an essential production input to situations where this is necessary for eliminating anticompetitive pressures in the economy. However, in a country such as Mexico, with a long history of discretionary application of the law and significant state intervention in the economy, the answer to this question is not immediately obvious.

We will have to wait for the Commission’s formulation of the regulatory law (*ley*

*reglamentaria*) that will guide their implementation efforts in this area to see whether a clearer definition of “essential production inputs” emerges. This process will be completely public and the proposed regulatory law will be opened to public comment before it is finalized. And while the Commission is not required to respond to concerns expressed during the public comment period, it is hoped that it will follow in the footsteps of the Congress and respond positively to reservations expressed by the private sector, especially with regard to the definition of *insumos esenciales*.

### **How the Commission Will Operate**

The law delineates a clear process through which any sort of anticompetitive behavior will be identified and sanctioned. At the core of this process is an independent (*organo desconcentrado*) Investigating Authority that replaces the Commission’s preexisting Executive Secretary. The Investigating Authority is responsible for investigating potential violations of the law to determine whether there is anticompetitive behavior and indicate corrective measures or sanctions. Investigations can be initiated by the Economy Ministry, the Consumer Regulatory Commission, the Federal Executive, COFECE itself or a sanctioned firm attempting to demonstrate that the conditions causing the sanctions no longer exist. The law also increases the number of commissioners from five to seven but leaves the selection process unchanged (the President nominates commissioners and the Senate confirms them).

### **Will COFECE Be Fully Independent?**

To protect the Commission from potential political pressures and prevent regulatory capture – two historic problems afflicting the

regulatory sphere in Mexico – the law establishes that commissioners can be removed for violating confidentiality rules or a series of limitations on their interaction with the firms they regulate. The Commission’s Internal Comptroller has the authority to notify the Mexican Senate when it concludes there is sufficient evidence that such a breach of the rules has taken place, and a special commission will investigate the matter and determine whether removal is warranted. Commissioners can also be impeached by the Senate. And to protect the Commission from political pressure emanating from the Federal Executive, a historic limitation to regulatory autonomy in Mexico, its budget will now be submitted directly to the Congress rather than through the Economy Ministry.

The law markedly increases the transparency of Commission deliberations. In the past, neither Commission votes nor their deliberations were made public (sometimes even the Commission staff was kept in the dark) and commissioners were free to meet privately with parties to an investigation. This often created unpleasant surprises for the private sector as well as suspicions of regulatory capture among politicians and the public.

Now every investigation must be made public, beginning with the initial investigation. Transcripts of all deliberations must be posted on the Commission’s website, and each commissioner’s vote must be made public. Meetings between any commissioner and parties subject to investigation must be reported publicly (place, date, start and end times, names of participants, and topics covered), and all commissioners must be invited to attend (but the meeting can go forward with any number of commissioners, including just one).

As a final note, the business community’s concerns that the Commission will become an all-powerful behemoth seem overwrought. The transparency provisions of the law, and in particular the requirement that the regulatory law must be publicly available, will sharply constrain the capacity of the Commission to exceed its legal authority. In addition, the new Competition Law does nothing to increase the limited budgetary resources that have restricted the Commission’s activities for years.

### What to Watch for in the Implementation Process

As implementation of the new Competition Law progresses in the months ahead, several developments will determine how it ultimately will affect the interests of large private-sector actors, as well as overall competition, investment, and growth in the Mexican economy.

At ManattJones we are keeping a close watch on the following:

- When will the Competition Law (the *Ley Federal de Competencia Económica*) be published in the *Diario Oficial de la Federación*? The law goes into effect 45 days after this happens. Once the law takes effect, the Commission has six months to establish its *ley reglamentaria*, the specific rules that will govern its implementation of the secondary legislation.
- What will be the content of the Commission’s proposed regulatory law? Most particularly, how and how clearly will it define “essential production inputs” and the process by which goods are deemed essential? How will the public comment period proceed? Will firms have sufficient

opportunity to express their concerns, and how will the Commission respond to them? In other words, will the result be a regulatory law that sustains or reduces uncertainty for producers?

- Will the Commission adhere strictly to the transparency requirements in the law? Given the historic tendency in Mexican government entities to honor transparency requirements in the breach, this is far from an irrelevant concern.
- How aggressively will the Commission employ its new sanctioning authority? Will it be employed mostly to punish firms for anticompetitive behavior or as a warning shot to encourage large firms to change their behavior? And will the Commission target specific sectors or take a more global approach?
- What will be the makeup of the new specialized competition court responsible for hearing appeals of the Commission's findings and sanctions? Will the judges named to this court be competent and well-trained, or will they reflect political agreements among Mexico's political parties, as has happened previously?
- How will the Senate use its authority to remove or impeach commissioners? Will this be limited to efforts to maintain the integrity and professionalism of the Commission, or will it be used to advance political or industry concerns?

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