

## LEGAL NOTE

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May, 2014

**To:** Clients and Friends  
**Re:** New Mexican Competition Law

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On May 23, 2014, the Official Gazette of the Federation published a Decree enacting (i) a new Federal Economic Competition Law (the "New Law"); and (ii) amendments to the Federal Criminal Code. The New Law is the result of the recent amendment to Article 28 of the Mexican Constitution which substantially changed the competition legal framework. The New Law will enter into force 45 calendar days following its publication (*i.e.*, July 7, 2014) while the 1992 Competition Law (the "Old Law") currently in force will be repealed<sup>1</sup>.

Although the New Law contains provisions and procedures covered in the Old Law, it incorporates new topics which are novelty in the Mexican competition regime; including new procedures and formalities.

The purpose of this Note is to generally discuss the relevant changes contained in the New Law.

### I. In general

The New Law provides for a more severe scrutiny on topics covered by the Old Law (*e.g.*, monopolistic practices and illegal concentrations). The Investigation Authority is a new division created within the Federal Economic Competition Commission (the "FECC"), which will operate independently with broad authority and power and will be in charge of the investigations conducted by the FECC. This is an important improvement, as it provides for the separation of duties between the investigation and enforcement divisions of the FECC.

Consistent with the amendment to Article 28 of the Constitution, the New Law applies to all economic activities, except for those relating to telecommunications and broadcasting, which will be handled by the Federal Telecommunications Institute, an independent governmental agency with the same authority and power than the FECC in such affairs.

The protection granted to strategic economic areas controlled by the government, patent and copyrights and the so called export cartels continue to be in force; those activities will remain exempted from the applicability of the New Law.

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<sup>1</sup> Procedures currently handled by the FECC will continue to be handled and resolved based on the Old Law

The FECC is now an autonomous body, as it formerly was a non-concentrated administrative entity of the federal government, as a result of which other governmental agencies cannot influence its activities.

The New Law now contains the concept of “*essential input*” along with a procedure for its determination. The application of this new concept will be used mostly in connection with the analysis of abuse of dominance activities. Likewise, it now has a detailed mechanism for the appointment/removal of the commissioners to the FECC, which is currently composed by 7 members.

New provisions on transparency of procedures and decisions adopted by the FECC are contained in the New Law (e.g., publications of the Plenum’s meetings and resolutions adopted), including an obligation to publish guidelines and technical criteria to provide more certainty on its activities, as well as to issue formal and binding opinions on consultations made by any economic agent.

The FECC is now empowered to order (in the case of repeated offenses) the divestiture on assets or shares to those economic agents involved in relative monopolistic practices or illegal concentrations.

Unlike the Old Law where only an affected party was entitled to file a complaint, the New Law now allows any party to file a complaint against relative monopolistic practices and illegal concentrations and not only with respect to cartels.

## II. Absolute monopolistic practices / cartels

Consistent with the provisions of the Old Law, the New Law provides a list of conducts considered as absolute monopolistic practices; provided, however, that now the exchange of certain information among competitors is also considered a cartel. These practices are illegal, null and void.

## III. Relative monopolistic practices / abuse of dominance

The New Law is also consistent with the treatment of the so-called relative monopolistic practices; however it incorporates a new concept of “*joint substantial power*”, which consists in the evaluation by the FECC (for purposes of determining the existence of a relative monopolistic practice) of the conducts carried out by a group of agents acting together (and not only by a single agent) and if such group of companies together have market power.

Two additional relative monopolistic practices are introduced (i) denial, which refers to restricted access or access granted in discriminatory terms to an essential input, and (ii) margin squeeze, which consists in reducing the margin between the price of access to an essential input provided by one or more operators and the price of the good or service to the final consumer by those operators, using the same input.

#### IV. Concentrations

The New Law now provides a more restrictive approach when dealing with concentrations. While the analysis to determine if a transaction should be challenged is substantially the same, there are certain changes that extend the FECC's powers and also affect the mechanics that had been followed in Mexico when closing a transaction.

Under the Old law, the FECC had 10 business days to issue a stop order preventing the parties to a transaction from closing it; if no order was issued the transaction could be closed with the parties bearing the risk of the FECC imposing conditions or prohibiting the transaction when issuing its resolution. The New Law eliminates the stop order mechanism and now parties to a transaction can only close it once clearance is issued by the FECC. In addition, the term for the FECC to conclude its analysis is extended from 35 to 60 business days from the date it has a complete file on the transaction. This period may be further extended in complex cases.

Other comments relating to concentrations are the following:

The statute of limitations for the FECC to investigate a transaction subject to a pre-merger filing is extended from 5 to 10 years.

The three monetary thresholds to determine if a transaction is subject to a pre-merger filing remain the same.

The parties in a pre-merger filing are required to refrain from exchanging sensitive information, while the transaction is under review.

The period for the FECC to request basic information on a concentration (*i.e.*, information that should be contained in the initial filing); as well as the period to satisfy such request, is extended from 5 to 10 business days.

If the FECC has a concern on the effects of a transaction in the market it must so notify the parties at least 10 business days in advance to the date when the discussion of such transaction is to be included in the agenda of the FECC's plenum, in order to agree on possible conditions to address such concern.

The clearance issued by the FECC will be in force for a term of 6 months, which term may only be extended once for the same period of time.

The fast-track (simplified filing) procedure is maintained. Thus, parties to a transaction that will have no adverse effect in the market and falls under certain hypothesis may request it.

The New Law provides for certain exemptions on transactions that will not be subject to a pre-merger filing (*e.g.*, corporate reorganizations, increase in the participation of an agent already having control over a company).

Any document submitted in a language other than Spanish, must be accompanied by a Spanish language translation of its main provisions prepared by an authorized official translator, provided that the FECC may request the translation of other provisions or the whole document.

If you have any questions or need additional information regarding this Memorandum, please feel free to contact José Ruiz López – Partner ([jose.ruiz@creelabogados.com](mailto:jose.ruiz@creelabogados.com)) and Patricio Martínez O. – Partner ([patricio.martinez@creelabogados.com](mailto:patricio.martinez@creelabogados.com)).

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