

Competition - Mexico

Congress enacts constitutional amendments affecting competition

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Introduction

In March 2013 President Enrique Peña Nieto and the coordinating deputies of several parliamentary groups⁽¹⁾ submitted to Congress an initiative to amend the telecommunications and competition regulatory framework in Mexico. The proposal introduces substantial changes to the institutional structure of the Federal Competition Commission, among other regulatory changes (for further details please see "[Proposed constitutional amendments overhaul Federal Competition Commission](#)").

The amendments provide as follows:

- The Federal Economic Competition Commission (FECC) will be created as a constitutional and autonomous entity (eg, as is the Bank of Mexico).
- The current Federal Competition Commission commissioners will be replaced.
- The FECC will have the necessary powers to fulfil its duties – in particular, to:
 - remove barriers to entry (which has important implications for regulated sectors);
 - regulate access to essential inputs; and
 - order the divestiture of assets (the Federal Competition Commission has this power at present, but it is limited and has never been used).
- The new commission will no longer be responsible for competition matters with respect to the telecommunications sector, which will become the responsibility of the Federal Institute of Telecommunications (also to be created by the amendments).
- The FECC will issue its own organisational statute by majority vote. This may involve changes to its structure and operation methods (but will follow the principles of the constitutional reform).
- The following principles will apply to the operation of the FECC:
 - full constitutional independence (ie, it will be an autonomous entity);
 - a guarantee of budgetary efficiency;
 - guaranteed separation of investigatory and decision-making areas;
 - the possibility to challenge resolutions only through an indirect *amparo* trial before specialised courts without suspensive effect;
 - transparency through public plenary meetings and resolutions, with a prohibition on *ex parte* communication with commissioners;
 - the requirement to submit annual activity reports to the executive and legislative branches; and
 - the staggered appointment (according to a specific evaluation method) of seven commissioners for nine-year terms.
- Congress will establish criminal offences to punish monopolistic practices and unlawful concentration severely.

Legislative changes

During the legislative process, the Chamber of Deputies made the following modifications to the amendments:

- It was specified that the Chamber of Deputies will guarantee the FECC's budgetary

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efficiency.

- The salary of FECC commissioners will be subject to Article 127 of the Constitution.

Moreover, the Senate made the following modifications to the amendments:

- FECC resolutions imposing fines or divestiture orders will be executed after the resolution of any *amparo* trial challenges.
- The heads of the new entities should submit quarterly activity reports to the executive and legislative branches.
- FECC commissioners can be removed from office by two-thirds vote of the Senate where there has been a serious fault in the exercise of their duties.
- The FECC will have an internal management structure whose head will be appointed by the Chamber of Deputies.
- The FECC president will be appointed from among the commissioners by two-thirds vote of the Senate and will serve a four-year term, renewable only once.
- FECC commissioners need not have a degree in a subject related to economic competition. However, commissioners must have at least three years of experience in professional activities related to economic competition.
- FECC commissioners must not have served as secretary of state, attorney general, senator, local or federal deputy, state governor or head of government of the Federal District in the year preceding their appointment.
- FECC commissioners must not have been employees of a company that has been subject to an FECC punishment procedure in the three years preceding their appointment.
- The labour rights of Federal Competition Commission employees will be respected at all times.
- Communications between commissioners and representatives of economic agents involved in FECC procedures will be regulated by the applicable law.
- The FECC's plenary meetings and resolutions will be published according to the applicable law.

Enactment

The amendments as modified by the Senate were approved by the Chamber of Deputies on April 25 2013 and by the Senate on April 30 2013. The amendments were published in the *Federal Official Gazette* on June 11 2013 and entered into force on June 12 2013. In terms of the fifth transitional article of the amendments, the provisions that require no specific implementation measures also entered into force on June 12 (eg, the provisions modifying foreign investment limits in telecommunications, satellite communications and broadcasting). The other provisions will enter into force subject to:

- implementation measures that must be executed by the president and Congress within 180 days of publication in the *Federal Official Gazette* (eg, amendments to the Federal Telecommunications Act and the appointment of the commissioners of the new entities); and
- the creation of the FECC and the Federal Institute of Telecommunications (eg, 'must carry' and 'must offer' provisions will come into effect after the institute has been created).(2)

Regarding the creation of the FECC, the evaluation committee – which will nominate candidates for FECC commissioner positions – will send an initial list of nominees to the president (with three to five candidates for each position) by August 10 2013.(3) From this list, the president will select candidates for each position by August 20 2013; following this, the Senate will ratify the appointment of the new commissioners by August 30 2013.(4)

If the Senate does not ratify a particular appointment, it will return the nominee list to the president so that he can select another candidate for the Senate to consider. The process will be repeated as necessary until only one candidate from the list remains; otherwise, the federal executive may appoint the commissioner directly.

Moreover, the seventh transitional article of the amendments states that as long as the new legislation has not been fully enacted, the existing telecommunications and competition legislation will remain in force, to the extent that it does not contravene the Constitution as amended. In this respect, it is likely that Congress will analyse the new legislation in an *ad hoc* session scheduled for mid-August 2013.

Comment

The future of proceedings pending before the Federal Competition Commission and the Federal Communications Commission is uncertain, since the seventh transitional article of the amendments(5) is unclear. Two possible interpretations can be drawn:

- The FECC and the Federal Institute of Telecommunications will conduct ongoing proceedings that were initiated before their creation, exercising the functions and powers established by the former regulatory framework; or
- The FECC and the institute will conduct such proceedings according to their new capacities and functions under the amendments.⁽⁶⁾

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Endnotes

(1) *Partido Revolucionario Institucional, Partido Acción Nacional, Partido de la Revolución Democrática and Partido Verde Ecologista.*

(2) The amendments gave these regulatory bodies the status of constitutional autonomous agencies.

(3) The selection process for FECC commissioner candidates began on June 18 2013 with the publication of the committee's invitation to participate in the process. According to a press release, the committee registered 324 candidates, who had to submit the required documentation by July 5 2013.

(4) Assuming that the Senate will hold an *ad hoc* session to ratify selection of the commissioners. According to reports, the Senate will hold such an *ad hoc* session in mid-August 2013.

(5) This article reads: "The procedures that initiated before the creation of the Federal Economic Competition Commission and the Federal Telecommunications Institute will continue in terms of the legislation in force at the moment when they were initiated."

(6) The amendments state that all competition issues concerning telecommunications matters will be under the exclusive authority of the Federal Institute of Telecommunications.

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