FIRM GROUNDS FOR A NEW ANTITRUST LEGAL FRAMEWORK

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On June 12, 2013 the amendments to article 28 of the Mexican Constitution entered into force. The new constitutional provision: (i) provides the Federal Competition Commission (FCC) with new, and more importantly, broader authority; (ii) provides that appeal for review will no longer be available, and (iii) that the only course of action available against the FCC's resolutions will be an indirect *amparo* action for constitutional relief without the right to petition for stay of execution of government action, exception made in this case of resolutions providing for the imposition of penalties or orders for divestiture by the economic agents involved.

Under transitional article third, section X, and transitional article seventh of the executive order providing for this amendment to the Constitution, the Mexican Congress had a term of 180 calendar days, counted as of June 12, 2013, that is to say, until December 12, 2013, to pass all legal amendments and additions required to implement the new content of constitutional article 28 at the regulatory level, it being understood nevertheless, that all provisions contravening the executive order were repealed as of June 12, 2013.

On September 11, 2013, the new FCC commissioners were sworn into office, and on September 19, the Organic Law of the FCC was published in the Official Gazette of the Federation and therefore entered into force on this same date[1].

The foregoing constitutional reform led us to give thought to the question on whether the FCC would be capable of exercising its new powers and authority solely on the basis of its Organic Law, without a legal framework and regulatory provisions drafted to take into account the present wording of article 28 of the Constitution.

[1] Mention should be made that on the date the Organic Law was published, one commissioner had not yet been appointed.

In this regard, we decided to give consideration to the following questions: (i) Is the plenum of the Commission authorized to apply article 28 of the Constitution directly, without the need of specific regulatory laws providing in detail for its new powers and authority? (ii) Will the commissioners have to apply the current Federal Law of Economic Competition (FLEC) and its Regulations (RFLEC) by interpreting them in the light of the present constitutional article as now worded, but under the restraints currently imposed on them by the FLEC?

On this issue, the last paragraph of transitional article seventh provides as follows:

> *"Should the relevant changes to the legal framework that are contemplated in transitional article Third not have taken place by the date the Federal Competition Commission* and of the Federal Telecommunications Commission *are set up ……, the [commissioners] shall exercise their powers and authority as provided in this Executive Order and, in all things that do not contravene this Executive Order, as provided in the laws on economic competition,* radio broadcasting and telecommunications *as currently in force."*

So in the light of the above, we must say that both our questions as stated before must be answered in the affirmative.

Indeed, since no amendments have been made to the FLEC up to the date this article is being published, and at present there is only a bill drafted for a new Law on Economic Competition and providing for amendments to be made to article 254 bis of the Federal Penal Code, sent by the Mexican President to the Mexican Chamber of Deputies on February 19, 2014 (hereinafter the New FLEC Bill) the plenum of commissioners has the authority to directly apply constitutional article 28 as currently worded to any cases brought to its consideration, this without prejudice to the application of the FLEC and the RFLEC provisions, if these do not contravene the constitutional text.

Nevertheless, direct application of constitutional article 28 must not be done arbitrarily. Proper construction of the transitional provisions imposes on the

plenum of commissioners the obligation of directly applying the constitutional article as now worded by adhering to the principles of consistency and coherence that allow for a comprehensive application of the legal framework.

Thus, the principle of consistency demands that the new authority vested in the commissioners as provided in new article 28 be exercised by the plenum without detriment to the remaining requirements provided in, and rights protected by, our Constitution such as: providing proper grounds in law and fact, the right to be heard and to due process of law, the right to legal security and certainty, among others.

On the other hand, coherence demands that the exercise of attributions conferred directly by our fundamental law be geared towards attainment of its stated purposes and the protection of constitutional rule.

Consequently, both of the above mentioned principles operate as limits to the exercise of the attributions vesting upon FCC and as safeguards to protect the human and fundamental rights of economic agents.

Hence, it is obvious that in order to uphold the above mentioned principles, the plenum of commissioners must exercise the new authority vesting in it directly under article 28 of the Constitution on the basis of the procedures contemplated in the FLEC and the RFLEC, in all things which do not contravene the new constitutional text.

In this regard it should be mentioned that the FCC has up to now been exercising the powers the constitution has vested in it over economic by adhering to the criteria, and giving thought to the considerations, we outline below.

These attributions had already been in fact contemplated in the FLEC. The amendments do not qualify these powers and attributions as new, and this leads us to ask ourselves: - What would be the purpose of specifying attributions in the constitutional text if these were not different from those bestowed by the laws in force prior to the reform?

The New FLEC Bill answers this question by stating that the attributions and powers therein contemplated are indeed new and as such required additional regulatory laws.

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This being so, we will first elaborate on our argument that the new powers and authority had already been contemplated by our legal system and were consequently applied. Afterwards we will analyze whether they can be applied with or without new developments in the regulatory framework on the matter; and finally we will address the issue regarding application of an economic competition legal framework in the light of the new FLEC bill.

At this moment we just want to say that we welcome the New FLEC bill. Its reasoned preamble states that the law is based on three supporting pillars: (i) the constitutional reform, (ii) the accumulated experience deriving from applying a policy of competition for the past twenty years; and (iii) best international practices.

I. Effective application of the three new powers and authority in the light of the laws in force which have not yet been amended

According to whereas clauses 4, 5 and 6 of the FCC charter, the FCC bases its direct application of the Mexican Constitution on transitional article seventh of the constitutional reform on economic competition, and it is on these grounds that it issues its own charter to provide in detail the basis for its operation. In other words, the FCC shall apply new article 28 of the Mexican Constitution and the FLEC on the basis of this charter as of September 19, 2013. The whereas clauses also contemplate the possibility of having the charter amended, taking into account any changes Congress may make to the regulatory laws on the matter.

We wish to point out that the role played by the FCC in drafting its own charter was not minor. It provides in detail for the processes contemplated in the laws and the powers and authority vested in the FCC by the Constitution, in order to solve any issues relating to the relevant attributions of the bodies and officers involved. Moreover, it specifically determined which officers have the authority to file action involving constitutional controversies, and made provision for the manner and terms under which economic agents will gain access to the Commissioners without infringing upon the rights of other economic agents involved in the proceedings. Thus, this charter will maintain the *status quo* and will allow economic agents to file the actions and proceedings currently contemplated in the laws in force on the matter, providing them with legal certainty.

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Notwithstanding the foregoing, the charter contains no specific provisions regarding the powers vested by article 28 of the Mexican Constitution in the FCC, to wit: a) to order that measures be taken to remove barriers to competition and free access to markets, b) to regulate access to essential inputs, and c) to order economic agents to undertake the divestiture of assets, rights, ownership interests or stock as required to eliminate effects that hinder competition, nor with respect to the instances, terms and conditions in and under which such powers will be exercised, containing a mere transcription of the wording of article 28 in this regard.

Consequently, and given that the instances, terms, conditions and the criteria for the interpretation and application of the FCC's three new attributions have not yet been determined, we will proceed to show how the exercise of modalities of such attributions had already been contemplated in the current regulatory laws.

I.1 To order that measures be taken to remove barriers to competition and free access to markets

We are of the opinion that the FCC has exercised this power before the entry into force of the amendments to article 28 in various ways and we expect it will continue to do so, since they are contemplated in its charter, these being: binding and non-binding opinions, as well as proposals for regulatory liberalization, deregulation and reform aimed at the federal public administration, that were and are meant to eliminate or foster the elimination of barriers to free trade of a programmatic or regulatory nature[2].

The FCC also exercised this power before the entry into force of new article 28 by issuing non-binding opinions as regards regulatory provisions or acts contrary to constitutional principles regarding interstate trade issued by state or municipal authorities, with the intent of acting as assistant to the Federal Executive or of the

[2] Article 11, section I of the FCC charter, and Article 24, sections VI and VIII of the FLEC are examples of provisions contemplating binding opinions on this matter.
Article 11, section I of the FCC charter and Article 24, sections VII, X, and XI address the matter of non-binding opinions.
Proposals for regulatory liberalization, deregulation and amendment are governed by Article 11, section I of the FCC charter and Article 24, section XVIII bis 2 of the FLEC.

Attorney General's Office, to enable them to bring constitutional controversy jurisdictional actions, if deemed by them to be warranted[3].

I.2 To regulate access to essential inputs

Regulatory provisions on this matter seemed to be restricted in the past to the establishment of measures of protection and promotion, and the issuance of binding guidelines to be followed by the federal public administration, that were meant to regulate access of private entities to concessions and permits granted by the Federal Government, and regulate also the various aspects of government procurement procedures carried out by the different governmental entities[4], insofar as the titles to concessions, permits and the relevant public assets could have been deemed as essential components to allow access to markets of public goods and services and could also constitute regulatory barriers hampering access to markets of this type. The charter contemplates this power, and we believe it will continue to be exercised in this manner.

I.3 To order economic agents to undertake the divestiture of assets, rights, ownership interests or stock as required, to eliminate effects that hinder competition

The charter contains no provision by which the regulatory laws that govern this power were amended, so in our opinion it will be exercised by the Plenum of the Commission as the most serious sanction that can be imposed on an economic agent engaging in recidivism, with the characteristics contemplated in article 37 of the FLEC, under which divesture must take place "…..of that portion that may be required for the economic agent to cease to have substantial power in the relevant market".

Emphasis should be made on the fact that in the light of transitional article seventh of the constitutional reform, with respect to paragraph nineteen of constitutional article 28, this new power must be used with greater moderation, since the

[3] Article 19, section XXVII of the FCC charter and Article 14 of the FLEC are examples of provisions contemplating non-binding opinions on matters of legal norms or actions that contravene constitutional principles in regard to interstate trade issued by state or municipal authorities.

[4] Article 11, section I of the charter and Article 24, section XIII bis of the FLEC are examples of provisions regarding binding guidelines.
Measures for promotion and protection are regulated by Article 11, section I of the charter and Article 24, section XVI of the FLEC.

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ultimate purpose of this measure is to remove any specific effects that prevent or hamper competition, and therefore a case-by-case consideration is required because such action will not in fact always entail the divestiture or sale of assets that will result in the elimination of the infringing party's substantial power in the market. This conclusion can be drawn without a doubt from the wording of the provisions of the constitutional reform.

As regards telecommunications, sections III and IV of transitional article eighth provide for ordering disaggregation and access to services that will probably not have the effect of making predominant economic agents lose their market shares once such measures are implemented.

II. Application of the three new powers in the light of the sanctions to be applied

According to paragraph thirteen of new constitutional article 28, the **purpose** of the FCC is that of: **ensuring free competition and access to markets, as well as to prevent, investigate and combat monopolies, monopolistic practices, concentrations and other barriers to the efficient operation of markets,** ***as provided in the Constitution and the laws,*** **having the** ***necessary powers to attain this purpose efficiently, inter alia the following: (i) to order the measures required to eliminate barriers to competition and free access to markets; (ii) regulate access to essential goods and services, and (iii) order the divestiture of*** assets, rights, ownership interests, or stock of economic agents, ***in the proportions required to eliminate anticompetitive effects.***

We believe, in the light of the principles of consistency and coherence mentioned above, that the FCC may exercise the three powers discussed before ***in the form of sanctions to be imposed directly on private persons as a result of a legal action*** filed on the grounds that they have engaged in absolute or relative monopolistic practices that warrant such sanction, or else, **imposed as** ***conditions to be implemented by economic agents that are part of a concentration*** upon whom notice to do so has been served. This course of action may be followed until reforms are made to the FLEC and the RFLEC, since acting otherwise would entail violations to the principles of legality of the acts of authority, the formal authority of the law, scope of jurisdiction and purviews as constitutionally determined, the

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fundamental rights to have free access to markets and to compete, to be heard in court, to legal certainty[5] and due process of law, among others.

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[5] See the binding precedent to be found under the data provided below, from which we include here a free translation:

Época: Novena Época
Registro: 169143
Instancia: SÉPTIMO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO
Tipo Tesis: Jurisprudencia
Fuente: Semanario Judicial de la Federación y su Gaceta
Localización: Tomo XXVIII, Agosto de 2008
Materia(s): Común
Tesis: I.7o.A. J/41
Pag. 799

[J]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXVIII, Agosto de 2008; Pág. 799

RIGHT TO A LEGAL HEARING, WHAT CONSTITUTES THIS RIGHT

Among the various fundamental rights affording legal certainty as contained in the second paragraph of article 14 of the Political Constitution of the United Mexican States, that of prior legal hearing stands out for its primordial importance. This higher imperative, the essence of which affords those who are governed the fundamental right of legal certainty, imposes the unavoidable obligation on the authorities of having to comply with a series of essential formalities prior to issuing an order to deprive an individual of his/her liberty, requiring them to hear what the parties involved have to argue in their defense. These formalities and their proper compliance, together with those relating to the fundamental right of legality contemplated in the text of the first paragraph of article 16 of the Constitution, are essential elements that serve to show those who are affected by the act of an authority that the resolution that is inflicted on them is not issued arbitrarily and anarchically, but on the contrary, it is so in strict compliance with the applicable legal system. Thus, by observing these imperatives, all trials and proceedings must be carried out by unavoidably meeting all stages that together ensure the formal right to be heard in court for those who are governed, that is that the party affected be cognizant that a proceeding has been filed, of the matter at issue and of its consequences, that the party be allowed to make his/her/its defense by an evidentiary system by which the party making and argument be allowed to prove it, while allowing the opposing party to introduce evidence on which his/her/its own defense pleadings are grounded, and after the evidentiary stage is concluded to finally make their closing arguments, for the trial to come to an end with a resolution deciding on the matters at issue that must be clearly stated and include the time frame and manner in which it must be complied with.

SEVENTH COLLEGIATE TRIBUNAL IN ADMINISTRATIVE MATTERS OF THE FIRST CIRCUIT.

The foregoing binding precedent was issued on the basis of the court precedents cited below:

Amparo Directo 3077/2001

We wish to point out that should these powers be exercised directly on economic agents, such action would entail three new sanctions, because these measures tend to inhibit and prohibit private entities from engaging in certain activities that are fostered and protected as rights under the guiding principles of the laws on economic competition, because they curtail the freedom of action of economic agents, an act of deprivation allowed by our legal system only if the fundamental right to be heard in court is upheld and its intent is that of eliminating anticompetitive effects that are caused by the relevant practices.

Nevertheless, and adhering to the principles of tipicity, reservation of congressional powers (*reserva de ley*), legality, legal certainty and access to effective justice, we believe **that it is necessary for the FLEC and the RFLEC to contain clear and specific provisions typifying the illegal conduct, the respective sanctions and the rights to due process which the FCC must uphold when issuing its resolutions and imposing sanctions,** in order to clearly specify the kind of sanctions, how, when, where, upon whom, why and as a result of what, will sanctions be applied upon private entities when: (i) ordering that measures be taken to eliminate artificial barriers to competition and free access to markets; (ii) regulating access to essential inputs, and (iii) ordering the divestiture of assets, rights, ownership interests or stock of economic agents in the proportion necessary to eliminate anticompetitive effects.

Furthermore, we wish to comment that our Supreme Court has established the need for a clear predetermination of the infraction and the corresponding sanction under *lex certa* requirements, so as to enable private persons to predict with sufficient certainty when a conduct is infringing[6].

We are of the opinion that legislative inaction in this regard could lead to innumerable conflicts of interpretation and result in multiple *amparo* actions for constitutional relief that will meet with a high degree of success. Especially if one

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Amparo Directo 131/2005
Amparo en Revisión 47/2005
Amparo Directo 107/2006
Amparo Directo 160/2008

[6] See following court records: Registro No. 170 961 [J]; 9ª. Época; 2ª. Sala; S.J.F. y su Gaceta; Tomo XXXVI, Diciembre de 2007; Pág. 207. Registro No. 100/2006 [J]; 9ª. Época; Pleno; S.J.F. y su Gaceta; Tomo XXIV, Agosto de 2006; Pág. 1667.

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takes into consideration the various interpretations, range of applicability and content that the legislative power itself and other authorities in matters of competition have given to such powers in other areas, as has been the case for telecommunications, which are discussed below.

II.1 Order measures to be taken for the elimination of barriers to competition and free access to markets

No clear definition of this power is given in the charter or in the statement of purpose of the constitutional reform bill. The latter just mentions it as a means to foster market efficiency and benefit consumers by lowering prices of goods and services, improving productivity and driving economic growth, all of which will contribute to overcome market failures, in particular by **economic regulation that will lead to the elimination of artificial barriers that restrict free access to markets and will inhibit or eliminate anticompetitive practices.**

One of the interpretations of the foregoing text is that the FCC will try to eliminate such barriers by issuing orders to cease and desist or imposing conditions on a case by case basis, should it find or detect that they exist when reviewing or conducting inquiries into absolute or relative monopolistic practices or into concentrations which are brought to its attention. To exemplify, should it detect that an exclusive dealing agreement between a supplier and a distributor works in fact to prevent market access to such distributor's competitors in the relevant market, it may sanction this conduct as a form of a relative monopolistic practice and order that such agreement be peremptorily rendered void and without effect, given that it constitutes an artificial barrier to trade in the relevant market.

Consequently, it is essential that express regulations be issued that will clearly define the instances in which such measure is to be taken, **and for the law to provide general guidelines for its interpretation and scope, rather than wait for this to be defined on a case by case basis until binding precedents are set by the process of reiteration.**

II.2 **Order the divestiture of** assets, rights, ownership interests, or stock of economic agents, **in the proportion required to eliminate anticompetitive effects**

The term "divestiture" has not yet been clearly defined. Article 37 of the FLEC provides only that divestiture may be ordered, and as mentioned before this

measure is contemplated as the most serious sanction that the FCC may impose on a recidivist economic agent that meets the characteristics described in the above mentioned article.

Formerly, the FLEC allowed sanctioned economic agents to present alternative divestiture plans when filing for reconsideration, but since this remedy was eliminated by the constitutional reform, the question has been raised on whether such plans may be submitted for consideration by the CFF plenum through the interaction meetings regulated by the charter or were eliminated entirely.

Notwithstanding the foregoing, we would like to point out that the new FLEC bill clarified this issue in the last paragraph of article 123, since it expressly states that "…Economic Agents shall be entitled to submit alternative divestiture plans before the Commission issues the relevant resolution".

At the international level orders of divestiture have not been implemented in all countries and apparently in the countries where it has been regulated, it has been used only in extreme cases. The European Union is still debating on their pertinence, and this discussion just started halfway through the past decade. The measure has been in use in the US since the middle 80's. The measure is not called divestiture elsewhere. In economics, and in particular in the telecommunications area, it has been called functional and/or structural separation.

We therefore would like to suggest that secondary legislation should clearly establish the cases in which divestiture would be warranted or else, clarify whether it is to be maintained solely for cases of recidivism, as an extreme or ultimate measure, in particular when the economic agent(s) subject to review hold title to essential inputs in the markets involved.

II.3 Regulating access to essential inputs

The charter does not address this power in detail either, and neither does the statement of purpose of the reform bill with respect to the FCC. However, a harmonious interpretation of article 28 leads to the conclusion that the FCC may only regulate access to essential inputs in private hands by prohibitions or the imposition of conditions applied when imposing sanctions for engaging in relative monopolistic practices that have previously been found to be detrimental to free access in the relevant and/or related market.

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It follows from the above that access to the essential input is deemed to be an apparently effective measure for disaggregation and/or divestiture. Therefore, it would be prudent for the regulatory provisions to clarify whether this power is or not related to disaggregation.

We believe that the concept of 'regulating access to essential inputs' encompasses two aspects: the first one relating to the regulation of monopolistic practices whereby access is contractually restricted, resulting in the creation of a non-tariff barrier, and the second entailing a kind of divestiture/disaggregation.

Therefore, in the event the FCC decides to interpret the three new constitutional powers as sanctions that can be applied directly to private persons, it must wait until the FLEC is amended to clearly specify which of, how, when, where, upon whom, why and wherefore will these sanctions be applied.

We are of the opinion that if a conservative criterion is applied under which the law must address all issues contemplated in the regulatory assumptions and their consequences, the bill lacks the required precision, and therefore the FCC would be forced to issue administrative provisions of general applicability (Regulatory Provisions, as contemplated in the bill) that will round off the legal regime governing application of its new powers and authority.

III. Application of the 3 new powers on the basis of declarations

Some of the experts in the field are of the opinion that these new attributions allow the FCC the opportunity of using them for corrective purposes or to bring about order in markets, under special justified proceedings so as to remove barriers that hamper the efficient functioning of the markets under investigation; that is, not necessarily as a result of the illegal activity of economic agents.

This aspect is more evident as regards the faculty to eliminate barriers in regulated sectors, particularly the financial and energy sectors, where market studies conducted by the FCC, any declarations of dominance and other corrective measures issued or ordered by it could work favorably to implement a more competitive framework, such regulations and orders not necessarily implying a violation of the rights of economic agents to enter freely and compete in markets and to legal certainty nor of their right to be heard in court, since both the Constitution and secondary laws on the matter provide for the possibility of

subjecting these activities to such state controls as are deemed necessary for the smooth operation of payment systems, the stability in the purchasing power of the national currency and energy security of the country.

Notwithstanding the foregoing, we believe that for non-regulated sectors, the FCC would have to uphold the above mentioned rights before imposing on them special regulatory laws meant to: (i) eliminate barriers to competition both regulatory and non-regulatory; (ii) regulate access to essential resources over which they hold title, or else (iii) to divest themselves of any of their assets, since measures such as these would imply a restriction of their legal rights, in particular their rights of ownership, which might constitute an act of deprivation should their rights to due process under Mexican law not be properly upheld.

One must keep in mind that the ultimate purpose of the legal framework governing economic competition is precisely that of ensuring competition in, free access to and the efficient operation of markets so as to benefit consumers. Hence, if consumers are not affected by the dominance of an economic agent, and if the elements available do not suffice to determine that such dominance may be used to the detriment of the rights and interests of the other economic agents in the respective markets or to the detriment of consumers' rights and interests, for example by over-pricing, shortages and other abuses brought about by dominance, the FCC's intervention to prevent dominance *per se* would not be justified.

With respect to the faculty of regulating access to an essential input over which a private person or group of private persons holds title in order to allow competitor economic agents to make use of it under competitive conditions, it is believed that the new FLEC will have to contain provisions contemplating that the regulatory authority will have to analyze whether a series of elements are met such as: a refusal to supply, the impossibility of finding a different source, the indispensable nature of the input in order to be able to compete thus resulting in effective elimination of competition, actual or potential detrimental effects for efficient market operation, and other elements that evidence clear anticompetitive auctioning in regard to exclusive or restricted access to the essential input, as well as the modes of access to such essential input, the compensation to be paid to have access to such input, as well as technical and quality aspects and, if applicable, the timeframe for application, since otherwise the FCC's action would be disproportionate and confiscatory.

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Furthermore, we are of the opinion that the provisions of a procedural nature of the new FLEC must ensure that when this faculty of regulating access to essential inputs is exercised, the right to legal certainty of the economic agents having exclusive access to the essential input be protected, not only to uphold the right to due process of the economic agent that might be affected, but also for this autonomous body to obtain sufficient elements to establish regulations as are strictly necessary to eliminate the anticompetitive effects detected in the course of the special inquiry conducted for such purpose.

Indeed, article 28 of the Constitution includes a criterion of proportionality to b e followed in exercising the faculty to order divestiture of assets, ownership interests or stock of economic agents, by providing that this measure is to be applied "**only in the proportion necessary to eliminate anticompetitive effects"** and this criterion must be kept in mind in regulating access to essential inputs. In other words, regulations on this matter must be geared solely to the elimination of the anticompetitive effects brought about by exclusive access to an essential input in the market in question.

The constitutional reform includes this mechanism in the area of telecommunications, where upon a determination of a "predominant economic agent", regulatory provisions contemplate corrective measures that shall last only as long as is necessary to mitigate current anticompetitive effects.

We believe that the bill for a new FLEC provides sufficient regulation on manner in which these three new FCC powers are to be exercised for corrective purposes and to ensure orderly functioning of markets by contemplating a special procedure in articles 94 and 95 of said bill. This will undoubtedly allow the FRCC to comply with constitutional article 28 and to uphold the rights provided for in articles 14, 16 and 17 of the Mexican constitution by adhering at all times to the criteria regarding reasonableness, suitability, proportionality and need.

IV. Regulatory attributions and constitutional controversies

We cannot fail to discuss the fourth power of the FCC that is new that derives from section IV of the present nineteenth paragraph of constitutional article 28, relating to the issuance of administrative provisions of general applicability issued

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exclusively to comply with its regulatory function within the scope of its jurisdiction. In our opinion, this attribution may convert this autonomous body into **an efficient prudential market regulator**.

In fact, on November 12, 2013 the FCC published in the Official Gazette of the Federation the **first administrative regulatory provisions of general applicability of the Federal Economic Competition Law**, governing ancillary proceedings brought before this entity. As regards this matter, the Commission mentioned that the issuance of these regulations was indispensable for it to efficiently carry out its purposes, ensure competition in and free market access, and also to prevent, inquire into and combat monopolies, monopolistic practices, concentrations and other restrictions on efficient operation of markets,[7] perhaps because among such ancillary proceedings regulated by these provisions are those regarding: (a) **verification of actual compliance with or performance under the resolutions issued by the FCC,** and (ii) **declaring falsely before, or proving false information to the FCC.**

Moreover, on February 11, 2014 additional administrative provisions of general applicability regulating the oral hearings contemplated in article 33, section VI of the Federal Law on Economic Competition were published in the Official Gazette of the Federation. These regulations entered into force the day following publication.

Nevertheless, observation shows that up to the present the FCC has also exercised this power as a body having constitutional autonomy to regulate merely organizational and procedural aspects. Examples can be found in article 18, section V of the charter and the administrative provisions of general applicability published by the FCC in the Official Gazette of the Federation on September 19, 2013 and onwards, which deal with organizational, budgetary and government procurement aspects.

With respect to this matter, it would be advisable to reflect on the matters that the published charter contemplates. According to articles 11, section I of the charter and 24, section XVIII bis of the FLEC, these provisions continue governing the issuance of technical criteria, and the question that arises is whether the

[7] See whereas clause 5 of the *ACUERDO mediante el cual el Pleno de la Comisión Federal de Competencia Económica emite disposiciones administrativas de carácter general reglamentarias de la Ley Federal de Competencia Económica*, published inthe Official Gazette of the Federation on November 12, 2013.

administrative provisions of general applicability may refer to the matters addressed by such criteria or else, whether we have in fact two different types of regulatory mechanisms that will be available for the FCC to be used prudentially to ensure efficient market operation without the need of intervention by the federal executive.

Another concern that might arise among economic agents affected by the administrative provisions of general applicability issued by the FCC is their scope and how would these provisions rank hierarchically with respect to the FLEC Regulations.

We are therefore of the opinion that the new FLEC will have to provide for the limits on the scope of the provisions of general applicability, designated as "Regulatory Provisions" in the bill and address multiple issues, such as assessment criteria to determine the existence of an essential input and access to it in a certain market, procedures for public consultation for the review from time to time of guidelines and technical criteria, among others.

Discussing further the FCC's regulatory power, it should be noted that according to articles 105, section I, clause l) of the Constitution, and 11, section XIII of the charter, the FCC plenum may file constitutional controversy actions against bodies vested with constitutional autonomy, the executive branch or against Congress regarding the constitutionality of their acts or general provisions, although in this event the decisions of the Supreme Court of Justice would produce effect solely as regards the parties in the controversy, thus preventing: (i) the general declaration of immediate voiding of a precept containing a federal regulatory barrier, as well as (ii) the elimination of regulatory barriers that may be established by state or municipal authorities. Consequently, the broad general power of the FCC as the supreme body in competition matters that is meant to eliminate precisely this type of barriers would again be subject to inter-institutional collaboration arrangements, and thus could prove to be less efficient.

Given the scope of this subject, and in the light of various binding precedents[8], it follows that t is advisable to give *erga omnes* effect to the decisions of the

[8] See:
Época: Novena Época
Registro: 193257
Instancia: PLENO

Supreme Court of Justice to be made by majority vote in regard to the

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Tipo Tesis: Jurisprudencia
Fuente: Semanario Judicial de la Federación y su Gaceta
Localización: Tomo X, Septiembre de 1999
Materia(s): Constitucional
Tesis: P./J. 101/99
Pag. 708

[J]; 9a. Época; Pleno; S.J.F. y su Gaceta; Tomo X, Septiembre de 1999; Pág. 708

CONSTITUTIONAL CONTROVERSY. THE POWER OF THE SUPREME COURT OF JUSTICE OF GUARANTEEING PROPER CONSTITUTIONAL COMPLIANCE EXTENDS ALSO TO THE PROTECTION OF THE WELFARE OF HUMAN BEINGS THAT ARE SUBJECT TO THE RULE OF GOVERNMENTAL ENTITIES AND BODIES.

A systematic analysis of the provisions of the Political Constitution of the United Mexican States reveals that even though constitutional controversies were created to function as a means of defense between the branches of government and governmental bodies, they also have as another relevant purpose that of protecting the welfare of the individuals that are subject to their rule. Indeed, title first establishes the fundamental rights that are meant to protect citizens against the arbitrary acts of the authorities, especially those provided for in articles 14 and 16 that guarantee due process and restrict the exercise of state action to proper jurisdiction as provided in the law. Moreover, articles 39, 40, 41 and 49 acknowledge the principles of the sovereignty of the people, the adoption of a democratic, representative federal state, as well as the separation of the branches of government, all of these formulas that seek to prevent the concentration of power in entities that do not serve, and do not spring directly from the people, since they are created precisely for the people's welfare. Furthermore, articles 115 and 116 provide for the operation and prerogatives of free municipalities as the basis of the territorial division, and political and administrative organization of the federated states, regulating the framework of their legal and political relationships. This basic scheme, which must be protected by the Supreme Court of Justice, comprises in a latent and implicit manner the people, since the people constitute the reason for the existence of the organic and dogmatic component parts of the Constitution, thus providing ample grounds for stating that the constitutional control mechanisms that it includes, constitutional controversies among them, should serve to guarantee fundamental rights in full, without admitting any limitation that could give rise to arbitrary action that would essentially work against the sovereignty of the people.

THE COURT *EN BANC*
CONSTITUTIONAL CONTROVERSY 31/97.

The Court *en banc,* at a private session held on September 7 of the year running, approved the preceding binding precedent. Mexico, Federal District, on September 7, nineteen hundred and ninety nine.

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constitutional controversies filed by the FCC when involving provisions of general applicability. This aspect would, however, require a new amendment to article 105 of the Constitution.

V. Other limits on the FCC powers

On this issue it is convenient to keep in mind the weighing, reasonableness and proportionality criteria established by the Supreme Court to be applied in matters involving restrictions on human rights, which we believe should be used as guiding criteria in the amendments that are to be made to FLEC, and also when giving consideration to the regulatory, corrective and sanctioning powers of the FCC,so as to ensure that the reform and the acts of the Commission adhere to the Constitution and to the principles of consistency and coherence that rule our legal system. As to this matter, we provide herein below a translation of the binding precedent set by the Supreme Court, to be found under the data herein provided.

"Época: Décima Época
Registro: 160267
Instancia: PRIMERA SALA
Tipo Tesis: Jurisprudencia
Fuente: Semanario Judicial de la Federación y su Gaceta
Localización: Libro V, Febrero de 2012, Tomo 1
Materia(s): Constitucional
Tesis: 1a./J. 2/2012 (9a.)
Pag. 533

[J]; 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro V, Febrero de 2012, Tomo 1; Pág. 533

RESTRICTIONS ON FUNDAMENTAL RIGHTS. ELEMENTS TO BE TAKEN INTO ACCOUNT BY THE JUDGE HEARING A CONSTITUTIONAL CASE FOR SUCH RESTRICTIONS TO BE CONSIDERED VALID

No fundamental right is absolute, and therefore all may be subject to restrictions. Nevertheless, regulation of such restrictions cannot be done arbitrarily. In order for measures issued by the legislature to restrict fundamental rights to be valid, they must at the minimum meet the following requirements: a) be admissible under the

Constitution, that is to say, the legislature may only restrict or suspend the exercise of fundamental rights for purposes that fall within the provisions of the Constitution; b) be essential to achieve the purposes for which the restriction on constitutional rights is to be enacted, in other words, it does not suffice for the restriction to be in broad terms useful to achieve the stated purpose, but must be the one that is adequate to achieve such purpose, meaning by this that the end sought by the legislature cannot be reasonably attained by means less restrictive of fundamental rights; and c) be proportional, that is, the legislative measure must seek to balance between the end sought by legislation and the detrimental effects on other constitutional rights and interests, it being understood that pursuing constitutionally protected objectives should not be attained to the detriment of, and unnecessarily and disproportionally affecting other constitutionally protected rights and privileges. *Thus, the court must determine in each case if the legislative restriction of a fundamental right is*, first, *admissible under constitutional provisions,* second, *if it is the necessary means to protect the constitutionally protected ends or interests in the absence of less restrictive options to achieve such purposes;* and thirdly, *if the legislative measure falls within the treatment options that can be considered proportional.* Likewise, the restrictions must adhere to the law, including international human rights standards, and be compatible with the nature of the rights protected by Constitution, in order to attain the legitimate ends sought, and *be strictly necessary to foster the general welfare* in a democratic society.

FIRST CHAMBER

The foregoing binding precedent was issued on the basis of the five court precedents listed below:

Amparo en revisión 173/2008, April 30, 2008.
Amparo en revisión 1215/2008, January 28, 2009.
Amparo en revisión 75/2009, March 18, 2009.
Amparo directo en revisión 1675/2009, November 18, 2009.
Amparo Directo en revisión 1584/2009, October 26, 2011
Binding precedent 2/2012 (9a.) Approved by the First Chamber of this High Court at a prívate session on February eight, two thousand and twelve."

It can be inferred from the criteria established as set forth above by the Mexican Supreme Court of Justice, that in order to comply with the principles of reasonableness and proportionality, the legislative body must, in defining the scope of a fundamental right: a) seek a constitutionally legitimate end, b) be the appropriate, fit, suitable means to attain the end that is being sought; c) be necessary, that is, that it suffice to achieve the stated purpose without imposing an undue, excessive or unreasonable burden on the governed, and d) be grounded in constitutional reasons. **That is, it must be reasonable in a manner such that the greater the extent of the restriction on the fundamental right, the greater the weight of the constitutional reasons to justify such restriction**. This is also consistent with the principle of legality according to which the legislature cannot exceed its powers nor can it act arbitrarily to the detriment of the governed.

Although the binding precedent cited above was addressed to the legislature as the branch of government that customarily enacts general rules which provide in detail or restrict the exercise of fundamental rights, we believe that the FCC would be under the obligation of adhering precisely and diligently to the reasonableness and proportionality criteria contained in binding precedents, in the event this autonomous body decides to regulate or apply its new powers.

In any event such reform should be geared towards determining precisely the scope of any restriction on the fundamental and human rights of the economic agents that would result from regulating access to inputs, eliminating barriers to trade or ordering divestiture of any assets. This being so, because binding precedents rule on the essential elements that a judge taking cognizance of an action for constitutional relief must analyze to consider that a given restriction on fundamental rights is valid, and must do so in close detail and transparently, regardless of the authority issuing the restrictive measure in question.

Moreover, an authority whose main duties are predominantly of an administrative nature complies with the fundamental right of legality by grounding its resolutions in law and fact. However, when specific legislation is not available to regulate its specific action, and it has to ground such action directly on a constitutional provision that enables it to act, the reasons it took into consideration to issue the particular measure that restricts fundamental rights become part of the grounds for its resolution. In the particular case of the application by the FCC of its new

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powers without the support of specific legislation, it would have to justify its action on the reasonable and proportional application of the measures involved in the specific case.

That is, direct application by the FCC of the Constitution will require that this entity undertake, should it need to act to restrict any fundamental rights, the pondering action that is usually the job of the legislature, while ensuring that the rights to legal certainty of economic agents be upheld, among these that of legality. It is for this reason that it will have the primordial obligation of giving due regard to the decisional criteria of reasonableness and proportionality set by binding precedents, both in issuing its resolutions and, such being the case, the administrative regulatory provisions that will govern in general the assumptions, terms, duration, scope and other conditions under which the Commission will apply its powers to regulate access to inputs, the elimination of barriers and divestiture.

Keeping the foregoing considerations in mind, we are of the opinion that the measures to be applied by the FCC to economic agents in exercising its three new powers would be constitutional and not excessive only in the event they are: adequate, necessary and proportional. These assumptions would only be met when the Commission's resolutions restrict the sphere of action of economic agents under the most favorable conditions for the right affected, having to select the best option from among all those that may be adequate to attain the purpose sought by the relevant resolution, this under the assumption that the advantages to be obtained from such course of action should outweigh the negative effect on the entity affected by such measure.

Another restraint that the FCC must impose upon itself in exercising these powers either for corrective or sanctioning purposes is that of weighing the actual and potential anticompetitive effects of market practices, barriers and conditions, and also the structure, operation, assets and exclusive access to inputs of the economic agents subject to its resolutions, declarations o regulations, since they would be excessive if it is not reasonably to be expected that they will have anticompetitive effects.

This will be even more difficult for the FCC when trying to order efficient operation of the market. Finally the courts hearing *amparo* cases for constitutional relief will have to give consideration and weigh the imperious need of "preventing" a

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secondary or indirect effect that has not yet occurred, and the actual restriction of human and fundamental rights that will be imposed on economic agents in order to regulate future conducts.

In this respect, it is worth mentioning that the primordial reason that justifies the FCC's measures in restricting private parties' scope of action is precisely that which is set forth in its constitutional purpose, that is, to ensure competition and free access to markets, and to prevent, inquire into, and combat monopolies, monopolistic practices, concentrations and other barriers to efficient market operation. Therefore, should the FCC's acts deviate from these stated purposes, such action would become excessive and violate the human and fundamental rights of economic agents[9].

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[9] See the following binding precedent:
Época: Novena Época
Registro: 175082
Instancia: CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO
Tipo Tesis: Jurisprudencia
Fuente: Semanario Judicial de la Federación y su Gaceta
Localización: Tomo XXIII, Mayo de 2006
Materia(s): Común
Tesis: I.4o.A. J/43
Pag. 1531

[J]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXIII, Mayo de 2006; Pág. 1531

GROUNDING IN FACT AND LAW. THE FORMAL ASPECT OF THIS RIGHT AND ITS PURPOSE IS THAT OF EXPLAINING, JUSTIFYING, ALLOWING FOR DEFENSE AND COMMUNICATING THE DECISION.

The primordial purpose and reason of the formal embodiment of the right to legality established in constitutional article 16 that is expressed in the need for grounding in fact and law, is that the parties who are subject to the law be cognizant of the "why" that serves as grounds for the actions of the authority. This translates into allowing them to know fully and in detail the essentials of all the circumstances and conditions that served as a basis for such action, so that it is clearly evident to the affected party, in order to enable such party to question and challenge the merits of the decision, and thus to exercise a real and authentic defense. Consequently, it is not sufficient for the act of an authority to formally meet the requirements of proper grounding, if in so doing it is inconsistent, insufficient or inexact, thus preventing the reasons for it from being known and verified, and preventing also a proper defense. It is not valid either for it to be exceedingly lengthy and superfluous, since to consider that the action has been properly grounded in law and fact, [proper grounding] should express what is strictly necessary to explain, justify, and allow for a defense, as well as to notify the decision. Grounding in law and fact should contain the relevant facts that served as a basis for the decision, the provisions of law and a minimum but sufficient

Likewise, the FCC shall also have to uphold the constitutional right of economic agents to legal hearing when they are affected by its resolutions or regulations and will have to thoroughly ground in law and fact the subject matter, purposes, manners, scope and duration of the conditions, restrictions, prohibitions, rules and other restrictive measures that it will impose on economic agents[10], and in addition

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argument to provide a rationale from which the logic connection, which is that of subsumption, between the facts and laws invoked can be inferred.

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO

The foregoing binding precedent was issued on the basis of the five court precedents listed below:

Amparo directo 447/2005.
Amparo en revisión 631/2005.
Amparo directo 400/2005.
Amparo directo 27/2006.
AMPARO EN REVISIÓN 78/2006.

[10] See the following binding precedent:

Época: Octava Época
Registro: 216534
Instancia: SEGUNDO TRIBUNAL COLEGIADO DEL SEXTO CIRCUITO
Tipo Tesis: Jurisprudencia
Fuente: Gaceta del Semanario Judicial de la Federación
Localización: Núm. 64, Abril de 1993
Materia(s): Administrativa
Tesis: VI. 2o. J/248
Pag. 43

[J]; 8a. Época; T.C.C.; Gaceta S.J.F.; Núm. 64, Abril de 1993; Pág. 43

GROUNDING IN LAW AND FACT OF ADMINISTRATIVE ACTS

According to constitutional article 16, all acts of authority must be sufficiently grounded in law and fact, the former meaning that the legal provision applicable to the case must be expressed with precision, and the latter that the special circumstances, particular reasons or immediate causes taken into consideration for the act must also be expressed with precision. It is also a requirement that there be an adequate connection between the facts cited and the applicable legal provisions, that is, that in the specific case the legal hypothesis be met. In other words, when said constitutional article provides that no one may be disturbed in his/her person, property or rights except by written order issued by a competent authority who must ground in law and fact the legal cause of the

express the reasons that serve as grounds for the application of such measures because they have been found to be necessary, adequate and proportional after having been assessed applying the criteria established by the Supreme Court. These will be the essential elements to be pondered when restricting human rights contemplated by our legal system that are contained in binding precedents[11]

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proceeding, it is mandating that all authorities act within the law and that they specify the applicable law and the particular provisions that support the relevant order. In administrative matters, specifically, to consider that an act of authority is properly grounded, it is necessary for it to cite: a) the bodies of law and provisions that are being applied to the specific case, that is, the legal hypothesis into which the conduct of the party concerned falls, which obligates him to pay, and these must be cited with due accuracy, mentioning the applicable clauses, subclauses, sections and precepts, and b) the bodies of law and precepts which are grounds for the jurisdiction or attributions of the authority to act to the detriment of the governed.

SEGUNDO TRIBUNAL COLEGIADO DEL SEXTO CIRCUITO

The foregoing binding precedent was issued on the basis of the five court precedents listed below:

Amparo directo 194/88.
Amparo directo 367/90.
Revisión fiscal 20/91.
Amparo en revisión 67/92.
Amparo en revisión 3/93.
See: Apéndice al Semanario Judicial de la Federación, 1917-1995, Tomo III, Primera Parte, tesis 73, página 52.

See: Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XIV, noviembre de 2001, páginas 35 y 31, tesis por contradicción 2a./J. 58/2001 y 2a./J. 57/2001, de rubros: "JUICIO DE NULIDAD. AL DICTAR LA SENTENCIA RESPECTIVA LA SALA FISCAL NO PUEDE CITAR O MEJORAR LA FUNDAMENTACION DE LA COMPETENCIA DE LA AUTORIDAD ADMINISTRATIVA QUE DICTO LA RESOLUCION IMPUGNADA." and "COMPETENCIA DE LAS AUTORIDADES ADMINISTRATIVAS. EN EL MANDAMIENTO ESCRITO QUE CONTIENE EL ACTO DE MOLESTIA, DEBE SEÑALARSE CON PRECISION EL PRECEPTO LEGAL QUE LES OTORGUE LA ATRIBUCION EJERCIDA Y, EN SU CASO, LA RESPECTIVA FRACCION, INCISO Y SUBINCISO.", respectively.

[11] See:
Época: Décima Época
Registro: 160267
Instancia: PRIMERA SALA
Tipo Tesis: Jurisprudencia
Fuente: Semanario Judicial de la Federación y su Gaceta
Localización: Libro V, Febrero de 2012, Tomo 1
Materia(s): Constitucional

On the basis of all that has been discussed above we arrive at the conclusion that the reform to constitutional article 28 made the FCC not only a corrective agent, but a preventive regulator to ensure efficient market operation, and it will therefore have to exercise its new powers with prudence on a case by case basis. Moreover, it will have to do so within the legal framework in force at the time, but also in the light of its constitutional purpose, while adhering at all times to the principles of consistency, coherence, reservation of congressional powers, legal certainty, proportionality and reasonableness that govern our legal system and afford proper protection of the public interest and allow the exercise of human and fundamental rights by the governed.

For those who hold the opposing viewpoint that the new FCC powers need not be mandatorily applied in sanctioning proceedings, but also as part of special proceedings involving both a properly conducted market investigation and a properly conducted administrative proceeding in trial form that ensures that the human and fundamental rights of economic agents and, such being the case, public entities are upheld, or for those who hold the contrary perspective, the truth of the matter is that regulation is nowadays a necessity. We believe that such regulation must stem from Congress, as provided in section X of transitional article third of the constitutional reform.

The manner in which the scheduled reforms to the FLEC are adopted, among them the debate on and eventually the approval of the bill for a new Federal law of Economic Competition that was signed by the Mexican President on February 18, 2014 that was sent to the Chamber of Deputies, will provide us with guidelines to further express more specific opinions on the regulation of the new FCC powers. It is unquestionable that those who draft the secondary laws have an important task in precisely determining the manner in which such powers will be applied, aspects which were specified with middling clarity by Congress for the Federal Telecommunications Institute, as provided in the transitional articles of the

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Tesis: 1a./J. 2/2012 (9a.)
Pag. 533

[J]; 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro V, Febrero de 2012, Tomo 1; Pág. 533

RESTRICTIONS ON FUNDAMENTAL RIGHTS. ELEMENTS THAT A CONSTITUTIONAL JUDGE MUST TAKE INTO ACCOUNT FOR THESE TO BE CONSIDERED VALID.

constitutional reform. We believe these aspects are, in general terms, fully addressed in the mentioned bill.

We consider that the FCC's action will gain strength with each step forward, to the extent that legal hypotheses are clear and properly disseminated among the economic agents in the different markets, thus allowing the latter to exercise and enforce their human and fundamental rights under the Constitution, and will allow the FCC to exercise its powers to regulate orderly markets and provide the legal protection of the public interest entrusted to it. Furthermore, the FCC will be able to issue robust resolutions, independently from the laws in force at any given time, if it upholds the principles of consistency, coherence and legal certainty which we have discussed throughout this paper. We believe these will work as a guiding compass that will direct the steps the FCC will have to take to face the new and changing challenges that are posed by markets on a daily basis.

Finally, we would like to review the most important aspects regarding the regulation of the three new FCC powers contemplated in the bill for the New Law of Economic Competition sent to the Chamber of Deputies on February 19, 2014, this in order to contribute to the analysis and debate that will ensue and take place in Congress on this matter.

VI. Regulatory function of the three new FCC powers contained in the New FLEC Bill

In general terms we are of the opinion that the New FLEC Bill adheres to the provisions of article 28 of the Mexican constitution by including primary regulation of the three new FCC powers.

Both the statement of purpose of the bill and the constitutional reforms in telecommunications and economic competition are consistent with the guiding principles set on these matters under the *Pacto por México* (an agreement among the three major political parties in Mexico to implement required reforms) and provide a significant interpretative source that clearly reveals the purpose of each of the regulatory precepts to be contained in the New FLEC, should the bill pass in Congress as presently drafted.

With respect to the constraints on the exercise of the three new powers, we find that the bill provides that each one of these may be exercised to impose sanctions, to bring order to markets and for corrective purposes, provided they are exercised following special inquiry procedures to conduct market studies intended to

determine: (1) the existence of essential inputs and the specific regulatory action required to ensure fair access to them; (ii) the existence of regulatory and non-regulatory barriers, as well as the corrective measures that need to be taken in order to eliminate them; and (iii) the terms and conditions under which divestiture may be ordered, which must be properly grounded in law and fact, proportional and not be part of a sanctioning procedure; it must also adhere to the procedural requirements contemplated in articles 14 and 17 of the Mexican constitution and uphold the fundamental right of legality and due process as mandated by constitutional article 16. Thus, the FCC's guiding principle and ultimate purpose is that of ensuring: (i) competition and free access to, and efficient operation of, markets, and (ii) protecting the fundamental rights of economic agents without encroaching on the scope of authority of other public entities.

In the bill, divestiture continues to be the most severe sanction to be applied as regards monopolistic practices and only in cases of recidivism, to be applied solely to a degree such as is necessary to eliminate the anticompetitive effects such practice has had in the relevant and related markets.

The same can be said for the provisions in the bill that deal with the FCC's corrective and sanctioning powers meant to promote fair access to essential inputs controlled by one or more economic agents that make abusive use of their exclusive rights over the same (either by reducing production, sale and distribution margins, or else by manipulating prices to the detriment of consumers), since any regulatory action regarding access to such essential input that may be taken by the FCC is part of both the sanction that has been provided in the bill for the newly contemplated relative monopolistic practices, and of the special procedure included to order that measures be taken for orderly operation of markets that are intended to foster competitive use of the essential input involved.

Any corrective action taken by the FCC with respect to access to essential inputs may give rise to conditions of effective competition in certain markets and may result in attracting more investment for the sectors involved, but may in other instances discourage investors should they feel that regulation is excessive. For instance, let us imagine that a price as determined by the FCC for an essential input is adequate but nevertheless the economic agents that theoretically could benefit from such price decide to pay this price but abstain from making new productive investment or innovations.

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In other words we believe that the FCC shall have to give consideration on the case by case basis if regulation of access to an essential input constitutes a scheme that will foster additional productive investment in Mexico, or else if the corrective action to be undertaken will need to be adjusted with time or eliminated to achieve this purpose.

With respect to the elimination of regulatory barriers, we believe that even though the special procedure as contemplated in the bill provides sufficient insight into the manner in which such barriers might be detected, and into the manner and specific conditions under which corrective measures for their elimination are to be ordered, the bill still maintains the traditional arrangement of inter-institutional collaboration as regards inter-state governmental barriers, and this may delay and even prevent effective barrier elimination.

We welcome the fact that detailed provisions were included on the weighing criteria that must be followed by both the authority in charge of the inquiry and the plenum of the Commission in the proceeding to be conducted in trial form to initiate and conduct the inquiry, and followed as well when imposing sanctions that must be proportional as a result of any of the prohibited practices. We celebrate in particular that the bill provides for the need to detect first whether there is an actual or threatened anticompetitive effect that serves as grounds to initiate an inquiry into the actions of an economic agent, and that sanctions are to be applied only when predominance is used in an abusive manner, since this lessens the risk of excessive state intervention. Such excessive state intervention in the past had serious distorting effects on the efficient operations of markets that resulted in inflation and economic recession and were detrimental to consumers.

We believe that the provisions governing contact between commissioners and economic agents shall contribute to mitigate improper contact with the regulatory authority and will provide better feedback for all those involved in the proceedings brought to the attention of the new autonomous body that is now the FCC.

Therefore we are able to conclude that as regards the new powers, the new FLEC bill contains provisions and provides for proceedings that are robust enough to ensure that the fundamental rights of economic agents are upheld and to concurrently guarantee that the ultimate purposes of the Mexican legal framework on matters regarding economic competition are attained. Moreover, the bill allows the FCC sufficient flexibility to exercise its new powers in a prudent, timely, balanced, proportional, reasonable and evolving manner that will contribute to the

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efficient operation of markets and foster economic growth, while affording legal certainty to all actors and entities that concur in Mexican markets.

The FCC shall further contribute to the efficient operation of markets and to economic growth if it decides to adhere on a daily basis to both the principles of consistency and coherence and to the criteria of reasonableness, proportionality, suitability and need established by the Mexican Supreme Court, thus allowing it to apply the law with legal certainty so as to achieve the ends contemplated by the new article 28 of the Mexican Constitution.

Translated by: Victoria Cisneros Stoianowski

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