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Prohibited Mergers and Market Power in Competition Law. An additional comment.

Discussion Topic
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This note is personal. It does not necessarily reflect VA&BA position

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0. Following VA&BA's discussion topic of February 2009, see http://www.vb.com.mx/index_english.html, it is important to observe the focus of FLEC on substantial market power to evaluate and challenge a merger and not on conditions that facilitate "collusive conducts" (pursuant to FLEC's article 17).

1. It is easy to observe that FLEC focus on the way substantial market has to be identified: (Translation into English by Ed. Themis 2009).

> **Article 13**. The following shall be considered to determine whether an economic agent possesses substantial power in the relevant market:
>
> I. The agent's share of said market and his capability unilaterally to establish prices or restrict supply therein without competitive agents being actually or potentially capable of counteracting said power;
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> II. The existence of barriers to entry, and those elements which might foreseeably alter both said barriers and supplies by other competitors;
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> III. The existence and power of competitors;
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> IV. The possibilities of access by the economic agent concerned, and by his competitors, to sources of input;
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> V. Said economic agent's recent performance, and
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> VI. Such other criteria as are established in the Regulations hereof.
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> **<u>FLEC's Regulations</u>**
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> **Article 11**. To determine the market share to which reference is made in section I of article 13 of the Law, the indicators as to sales, number of clients, production capacity or any other factor as determined by the Commission shall be taken into account.
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> **Article 12**. For the purposes of section II of article 13 of the Law, the following are, inter alia, elements that may be deemed to be barriers to entry:
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> I. Financial costs or costs of developing alternative channels, or limited access to financing, technology or efficient distribution channels;

II. The amount, indivisibility and term for recovery of the investment required, and also the inexistence or low profitability of alternative uses of infrastructure and equipment;

III. The need to hold title over concessions, licenses, permits or have any other governmental authorization, or to obtain rights of use or exploitation which are protected by the laws governing intellectual or industrial property;

IV. The advertising investment required for a trademark or trade name to acquire a market presence permitting it to compete with established trademarks or trade names;

V. The limitations on competition in international markets;

VI. The restrictions which are common practice by economic agents already established in the relevant market, and

VII. Acts of federal, state or municipal authorities that discriminate as to the granting of incentives, subsidies or support to certain suppliers, marketers, distributors or service providers.

Article 13. The following criteria must be taken into account in order to determine whether an economic agent has substantial power in the relevant market, in accordance with section VI of article 13 of the Law:

I. The degree to which the goods or services are positioned in the relevant market;

II. The lack of access for imports or the existence of high entry costs, and

III. That consumers resorting to other suppliers should have to face high differential costs.

Article 14. The Commission will publish in the Official Daily of the Federal Government the method used by it in the computation to determine the degree of concentration existing in the relevant market and the criteria for its application.

2. By contrast, there is no place in FLEC nor in its Regulations whereby one can find as clear indications as to how identify and evaluate elements conducive to facilitate collusive conducts so as to support a decision to block a proposed merger.