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Prohibited Mergers and Market Power in Competition Law

Discussion Topic

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

1. In this Note it is argued that section I of article 17 of the Federal Law on Economic Competition (“FLEC”) is the **Core** one whilst its other two sections are only subsidiaries to decide whether a merger should be approved or prohibited.
2. It is worth mentioning that the FLEC defines what should be understood by a concentration in article 16. Therein it also establishes under what circumstances a concentration should be prohibited or sanctioned.
3. In article 17 the FLEC states the basic conclusions that should be derived pursuant to the delimitation of the relevant market (article 18 and article 12) and the assessment of market power (article 18 and article 13).
4. FLEC’s articles 16 and 17 read as follows:

*“Article 16. ... The Commission [Federal Competition Commission] will **challenge** and sanction those concentrations whose purpose or effect is to diminish, harm or thwart competition and free access to a market of goods or services deemed equal, similar or substantially related¹.*

“Article 17. To analyze concentrations the Commission will take into account as possible evidence of the circumstances referred to in the previous article, that the act or intended act:

- I. Confers or could confer to the merging party, the acquirer or merger’s resulting economic agent, the power to unilaterally determine prices or substantially limit the supply or provision in the relevant market without competing agents being able to, presently or potentially, offset such a power;*
- II. Has or could have as purpose to exclude improperly other economic agents or bar their access to the relevant market; **and***
- III. Has as its purpose or as its effect to substantially facilitate to the involved parties in such an act or intended act the execution of monopolistic practices as referred to in this Law’s second chapter.”*

5. The abovementioned section I clearly states the concept of substantial power in a relevant market. That is, the capability to decide independently of others what the price or the quantity should be in a defined market. Note that this provision

¹ In this Note “to challenge” is understood equivalent to “to prohibit”. This interpretation seems to be the one actually applied by the Commission, although it also gives place to discussions.

seems to make reference to the supply side of the market, whereas later on, in Article 18, section III, the demand side of the market is also taken into account.

6. In turn section II refers to relative monopolistic practices (e.gr. Vertical restraints) as contained in Article 10. Yet to sanction such practices it has to be credited that they are carried out by an economic agent with substantial power in the market wherein the practice takes place.
7. Section III refers to both relative and absolute monopolistic practices. The reference to monopolistic practices has practically been established in section II. Whereas for cartels or collusive practices, that is absolute monopolistic practices as contained in Article 9, they are prohibited and sanctioned without any need to take into account the market power of any one of the involved parties.
8. Finally notice that sections II and III are linked by the word “**and**”, thus it is reasonable to consider that the three sections are linked by the same word “and” even though the word does not appear between sections I and II. Given this structure of Article 17 then its three sections are not independent of each other.
9. Provided this reading is correct, then one can exemplify the following outcomes:
 - i. A proposed concentration will confer (or strengthen) a merging party with substantial power in the relevant market involved. **The Commission is empowered to prohibit such an act.**
 - ii. A proposed concentration will not confer a merging party with substantial power in the relevant market involved. Yet the market is highly concentrated and the merger will further reduce the number of competing agents, thus setting the ground for likely collusive acts among some or all of such competing agents. **The Commission has no legal grounds to prohibit such act since section I of Article 17 is not credited.**
 - iii. A proposed concentration will not confer a merging party with substantial power in the relevant market involved. Yet the market is highly concentrated and the merger will further reduce the number of competing agents, thus setting the ground for likely collusive acts among some or all of such competing agents which together have “collective or joint” substantial market power. **The Commission has no legal grounds to prohibit such an act because the concept of “collective or joint” substantial market power is not contained or allowed by the FLEC.**
10. An alternative reading of Article 17, section III, may be derived from the fact that collusive practices are prohibited and sanctioned even though none of the involved parties has substantial market power. Thus it can be argued that the corresponding segment of the provision can actually be taken independently of section I, situation equivalent to assess a merger without any regard to the creation or strengthening of market power.

11. The Commission then may prohibit a proposed concentration if it has reasonable supporting elements to presume forthcoming collusive conducts by the merging parties with other competing agents. Although in principle such type of situations may arise in some already highly concentrated markets (plus other contributing factors), there are no records as far as I know that an “independent” interpretation of section III has ever been applied by the Commission to prohibit a proposed merger.

12. In fact it is difficult to imagine the authority deciding to prohibit a concentration say, whenever the merging parties jointly are smaller or roughly equal in size to a third player, as that prohibition would most likely favor the competitive position of such third player. By contrast if the resulting merging party becomes much larger in size than a third competing agent, the presumption of the first one acquiring substantial market power may arise and give grounds to challenge the act based on section I of Article 17.