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**Mexico**

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## Overview

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The Federal Law on Economic Competition (FLEC) considers the concept of effective competition (EC) being ‘analogous’ to the concept of substantial power in a relevant market. Whereas substantial power is a well-developed concept within the FLEC’s body, the rules to establish an analogy with effective competition are missing.

It is worth mentioning that substantial power is applied to evaluate concentrations and relative monopolistic practices (ie, vertical restraints), whereas effective competition is addressed to identify situations in markets which may need price regulation.

A concentration may not be authorised by the Federal Competition Commission if as a result an economic agent may get or strengthen substantial power in a relevant market (compare FLEC’s articles 16, 17 and 18). A vertical restraint conducted by an economic agent may be sanctioned by the Competition Commission, but only if it is proven that such an agent, individually, has already substantial power (compare FLEC’s articles 10, 11, 12 and 13). FLEC is available at <http://www.cfc.gob.mx>.

On another vein, competition law is linked to what might be a decision by the Federal government to impose checks on prices for goods deemed ‘necessary for the national economy or popular consumption’ as long as ‘there are no conditions for effective competition’ (cf FLEC’s article 7). Likewise ‘whenever other rulings call for resolutions on effective competition issues, existence of substantial power in a relevant market or other analogous terms, the Commission will... resolve accordingly...’ (compare FLEC’s article 33 bis).

Specifically FLEC establishes substantial power of an economic agent whenever it has the power to unilaterally set prices or quantities (cf. FLEC’s articles 13 and 17).

Competition law does not allow for nor provides guidelines to evaluate a relevant market for the presence of ‘collective dominance’ or ‘joint substantial power’.

There are some rulings in Mexican legislation that call for a Competition Commission resolution

over the absence of effective competition or conditions for effective competition to develop in a relevant market. If this resolution confirms such circumstances, the corresponding regulatory authority may proceed to impose price regulation.

An example of the above is the code of regulations on liquefied petroleum gas, whose article 7 reads: ‘It corresponds to the Ministry, within the scope of its attributions to establish through Guidelines price and tariff regulations applicable to Transportation, Storage and Distribution activities, in the relevant markets where the Federal Competition Commission determines the absence of conditions of effective competition...’

Recently the Competition Commission in a preliminary decision related to liquefied petroleum gas markets considered that: ‘Absence of conditions for competition equates situations wherein there is an economic agent with substantial power over the relevant market and/or where prices and quantities offered by suppliers in a relevant market, with high concentration levels and entry barriers, are or can be determined based on decisions over prices and/or quantities supplied by the other economic agents. In this way the Commission Plenum has concluded that to determine the possible existence of substantial power or the lack of conditions for competition in a relevant market, account must be taken of articles 12 and 13 of the FLEC, as well as 9, 10, 11 and 13 of its Code of regulations.’ (FCC, 23 August 2007. file number DC-01-2007, at [http://www.cfc.gob.mx/images/stories/actividades\\_de\\_CFC/Declaratorias/DC-01-2007DictamenPreliminar.pdf](http://www.cfc.gob.mx/images/stories/actividades_de_CFC/Declaratorias/DC-01-2007DictamenPreliminar.pdf).)

To assert that the presence of an economic agent with substantial power over a relevant market precludes conditions for effective competition, seems an acceptable argument as long as the stated definition of substantial power means the capability of acting unilaterally, that is irrespective of competitors, as regards to prevailing price or supply in a relevant market (cf FLEC’s article 13, I).

Nevertheless, the Federal Competition Commission’s analysis is also developed such

that in a relevant market with few competitors, a homogeneous product and entry barriers, there may not be conditions for effective competition, as competitors act tacitly in a coordinated way or by some conscious parallelism. What might be missing in the economic analysis, apart from a discussion of other elements that condition market results, are similar environments where the price or quantity outcome reflects head-to-head competition rather than collusive conducts aimed at obtaining collective supra-normal rents.

It is expected that a final resolution will be handed down to the Ministry of Energy so that this latter may determine rules on prices regarding liquefied petroleum gas distribution in a subset out of 145 relevant markets.

The core question for this note concerns the fact that the Competition Commission's evaluation conveys the idea, although it is never explicitly mentioned, that absence of effective competition or lack of conditions for effective competition reflect 'collective dominance' or 'joint substantial power' exerted by a group of competitors in a relevant market. The competition authority makes a risky use of a concept hardly sustained by FLEC's actual articles. In any case, its application deserves a more comprehensive economic analysis.

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Valdés Abascal y Brito Anderson SC is a Mexican law firm founded in 1996 focused on litigation and administrative, corporate and tax law, with vast expertise in amparo; administrative, civil, commercial and tax litigation; antitrust, regulatory affairs and fiscal consulting.

We counsel and represent domestic and foreign companies acting in terrestrial and satellite telecoms, radio, television, seaports, airports, railroads, energy, finance, real estate and consumer goods, among others. Most of our clients are ranked among the top three companies in Mexico in their respective fields.

Valdés Abascal y Brito Anderson SC is a leading law firm on competition counselling and litigation in Mexico. Three of its members have served as high-level officials at the Federal Competition Commission (CFC) and we have had an intensive practice in this area since the firm's foundation. Our practice is as old as the enforcement of Mexican competition law.

We have been involved in several of the most relevant competition cases that have taken place in Mexico and we have participated in the design and drafting of an important number of norms and regulations set forth in the current competition legal framework.

The firm has its own economic area led by the former head of CFC's concentrations and investigations directorates, who is recognised as one of the most prestigious competition economists in Mexico.



### **Alvaro R Sánchez-González**

Valdes Abascal & Brito Anderson Attorneys at Law

Alvaro R Sánchez-González studied Economics at the Instituto Politécnico Nacional in Mexico. He obtained his MA and PhD in Economics from the University of California at Berkeley. His doctoral thesis dealt with an econometric model of the Mexican financial sector, being advised by Professors Steve Kohlhagen, James L Pierce and Laura Tyson.

After graduation, he worked for the Office of the Republic's Presidency, the Ministry of Finance, as a financial consultant at Siclos, a private consultancy firm, the National Commission on Welfare and the Ministry of Economy.

In June 1995 he arrived at Mexico's Federal Competition Commission, where he held the positions of head of the general directorate for mergers (for 10 years) and head of the general directorate for investigations (for one year). At the FCC he was in charge of reviewing and preparing for the FCC's plenum market analysis of proposed merger transactions and evaluations of anti-competitive conducts. During his appointment he was responsible for more than 2,000 such reports. His area, together with a commissioner, developed the current FCC's merger guidelines. He was also involved in the merger working group endeavours at the International Competition Network.

In September 2006, Mr Sánchez-González joined Valdes Abascal & Brito Anderson, where he is in charge of all supporting economic analysis concerning mergers and trade practices related to the Federal Law on Economic Competition as well as to regulatory issues in areas undergoing dynamic changes, such as natural gas and telecoms. ■