

Federal Law on Economic Competition (“LFCE”)

Should a concentration be challenged due to its effects on a Related Market?

By: Alvaro R. Sánchez-González

The opinions in this note are author’s responsibility

1.- Article 16 of the LFCE states:

“Article 16.- ... The Commission [Federal Competition Commission] will challenge and penalize those concentrations whose object or effect is to decrease, jeopardize or inhibit competition as well as free concurrence regarding equal, similar or **substantially related** goods and services.” (emphasis added)

2. Neither the LFCE nor its Code of Regulations indicates what should be understood as “...substantially related”

3. In this Note it is suggested to consider related markets those which can be identified- pursuant to article 12 of LFCE- as belonging to a productive chain: production + distribution (i.e. wholesale) + merchandising (i.e. retailing).

4. Article 17 of LFCE focuses on the importance of a relevant market in two of its three sections:

“Article 17. To evaluate concentrations, the Commission must considerer as indicia of the assumptions referred to in the preceding article, that an act or intended act:

I. Confers or can confer the merging party, the acquiring party or the concentration’s resultant economic agent, the power to determine prices in a unilateral way or to restrict supply **in the relevant market**, whereas competitors can not actually or potentially offset such a power.

II. Has or can have as an object an undue displacement of other economic agents or inhibit their access to the **relevant market**; and

III. Has as purpose or effect a substantial support for the execution of monopolistic practices by merging parties; these latter are referred to in this Law second chapter.” (emphasis added)

5. The abovementioned sections I and II pinpoint the importance of the “relevant market” without mentioning “related markets”.

Concerning the third section, in this Note it is argued that its application should focus on relative monopolistic practices (article 10 of LFCE). These practices known as vertical restrictions could be sanctioned as long as they are executed by an economic agent with **substantial power in the relevant market**.

6. LFCE's article 18 indicates the elements to take into account "... To determine if the concentration should be challenged or penalized..." Among the elements therein, it is worth noting that sections III and IV remark the analysis of **concentrations effects in relevant and related markets**.

7. Based on the foregoing, the following applications are proposed:

i) A concentration that derives in an agents acquiring "psmr" (substantial power in the relevant market) or strenghtening its already acquired "psmr" should not be authorized or should be sanctioned without any need to evaluate effects on related markets;

ii) A concentration which does not produce an agent with "psmr" should not be challenged nor sanctioned due to its effects on related markets.

iii) A proposed or executed concentration involving an agent with "psmr" could be challenged and penalized if it there are reasons to conclude that the merging parties will incur in relative monopolistic practices.

8. The Commission issued a "Resolution to make public the method applied to estimate indexes for the concentration's degree in a relevant market and criteria for its application." (Official Federation's Gazette, 27.07.98).

Its fifth section indicates that even though the said indexes do not point to a "risky" concentration level, it can be considered that a concentration may have adverse effects on competition when the involved economic agents: "...5.3. Have or may get substantial power in related relevant markets."

9. The proposal in this Note (cf. 7, ii), contrary to FCC's position, is:

Conclusions arrived to when studying a relevant market should prevail over conclusions on effects on relevant markets. Thus, a concentration wherein involved parties do not have and will not acquire "psmr" should not be challenged nor sanctioned due to its likely effects, whatever they are, on "related markets."

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