

April 2010

Collective dominance in the Mexican Federal Law of Economic Competition (FLEC)

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Discussion topic

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

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0. These days Congress is discussing amendments to FLEC proposed by the Executive Branch. The only economic concept to be amended concerns the definition of substantial power (SP) in a relevant market. Its inclusion poses risks which could be avoided with further amendments.
1. The statute as it stands today refers to SP as held by only one economic agent (FLEC's article 13).

**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;*
  - II. The existence of barriers to entry, and those elements which might foreseeably alter both said barriers and supplies by other competitors;*
  - III. The existence and power of competitors;*
  - IV. The possibilities of access by the economic agent concerned, and by his competitors, to sources of input;*
  - V. Said economic agent's recent performance, and*
  - VI. Such other criteria as are established in the Regulations hereof. [Themis Ed., 2009]*
2. The proposed amendment will include the possibility that SP might be identified for more than one economic agent, thus giving rise to “collective dominance” or “joint SP” (may I employ both concepts as being equivalent):

**Article 13.** *The following shall be considered to determine whether an economic agent or several economic agents possesses substantial power in the relevant market, or to determine effective competition situations, or existence of substantial power in a relevant market, or other situations related to competition process or free access to markets, as referred to by this or other laws, rulings or administrative regulations:*

- I. *The agents' share of said market and their capability to establish prices or restrict supply by themselves therein without competitive agents being actually or potentially capable of counteracting said power;*

(...)

- IV. *The possibilities of access by the economic agent or agents concerned, and by his or their competitors, to sources of input;*

- V. *Said economic agent or agents recent conducts as she or they act in the relevant market,*

(...)

*Existence of substantial power in the relevant market shall be credited whether one or several economic agents fit into the sections considered in this article.*

*To determine substantial power account will be taken of this law's regulations, as well as technical criteria as issued by the Commission.*

3. The risk posed by the proposed amendment will be reflected in the assessment of concentration analysis (FLEC's articles 17 and 18), in relative monopolistic practices (FLEC's articles 10 and 11), and competition conditions in a given market (FLEC's article 33 bis).
4. For instance:
  - a concentration between two minor suppliers may be blocked if it is going to take place in a market with a small number of suppliers, even though a much larger supplier may be present;

- an anticompetitive vertical restraint could be identified if a small number of suppliers adopt similar competitive commercial practices, even though taken individually none of them holds SP;
- lacking conditions for effective competition in a relevant market could be determined if a small number of economic agents supply that market –even if involved in head-to-head competition, thus providing basis for some sort of regulation by the corresponding regulatory body.

#### 5. Recommendation.

To avoid uncertain application of the concept, if approved, could require further amendments to FLEC or to its regulations, detailing how such joint SP is going to be measured and under what circumstances its use is appropriate.

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