

March 2014

Discussion topic:

Concentrations:
Filing thresholds,
joint substantial power
and essential inputs.

Draft Federal Law of Economic Competition (DFLEC)

1. DFLEC, article 80, proposes an important change in filing thresholds. In particular:

Art. 80. The following concentrations should be authorized by the Commission before they are completed:

I. ...

II. ...

III. Whenever they are originated by an act or series of acts whereby assets or social capital accrued in national territory surpasses the equivalent to eight millions four hundred times the general minimum wage prevailing for the Federal District and in the concentration are involved two or more Economic Agents whose annual sales rooted in national territory or assets in the national territory jointly or individually amount to more than forty eight millions times the general minimum wage prevailing the Federal District.

It is observed that this is a two-tier threshold. The first one remains as formerly. The second tier has changed so than now figures for the economic groups to which the involved parties may belong to correspond only those located in Mexico whereas formerly such figures for such economic groups were considered at their international level.

2. DFLEC, article 57, referring to concentrations evaluation to study: the relevant market (sec. I); substantial market power –single or joint- (sec. II); effects on competitors, customers and related agents and markets (sec. III); relationships of involved agents with other agents in the same or related market (sec. IV); market efficiencies in support of competition (sec. V); others as established in Regulatory Provisions and technical criteria.
3. DFLEC, article 58, indicates how apply conclusions following the study mandated in article 57.

Article 58. The Commission will consider as indicia of an illicit concentration, if such concentration or a proposed concentration:

- I. **Grants or could grant to the merging party, the purchaser or Economic Agent resulting from the concentration, substantial power** pursuant to this law, or increases or could increase such substantial power, so free access and economic competition can be hindered, diminished, harmed or impeded;
- II. Has or can have as purpose or effect to establish entry barriers, impede third parties access to the relevant market, to related markets or to **essential inputs**, or to displace other Economic Agents, **OR**
- III. Has as purpose or effect to substantially facilitate the involved parties in such concentration the execution of conducts prohibited by this law, and particularly monopolistic practices.

Some points are worth observing:

Section I refers only to substantial power of a single economic agent, whereas article 53 provides for the existence of both single and joint substantial power. This lack of coherence could cause legal situations;

Section II is closely related to article 49 on relative monopolistic practices, whereby entry barriers could possibly be sanctioned only if imposed by an agent or group of agents holding substantial market power;

Section II refers to resulting analysis of effects on access to essential inputs. Yet the study mandated in article 57 makes no explicit reference to essential inputs -although reference is contained in article 50;

Section II includes at the end the word **OR**, so it is understood that a concentration could be regarded illicit based on any one of article's three sections;

Section III emphasizes the possibility to carry out monopolistic practices. With respect to relative monopolistic practices this section seems somehow a redundancy of Section II. With respect to absolute monopolistic practices the following aspects have to be responded: i. a single agent with substantial power, would he have reasons to collude and share his profits, risking to be sanctioned and penalized?; ii. a group of agents with joint substantial power -that is acting tacitly-, would the group have reasons to act explicitly to coordinate their actions?

arsg

