

March 2014.

Discussion topic:

On Essential Inputs

Draft Federal Law of Economic Competition (DFLEC)

1. Article 28 (DOF, June 11, 2013) establishes the Federal Commission on Economic Competition has powers to: **“regulate access to essential inputs”** for all economic sectors exception made of “radiodifusión y telecomunicaciones”.
2. The published DFLEC establishes the Commission has powers not only to regulate but also **to determine the existence of an essential input** (DFLEC, Art. 12, Art. 54).
3. Commission’s regulatory powers regarding essential inputs:¹

The issued resolution concerning the existence of an essential input will contain, if that is the case, way of access to the essential input, prices or tariffs regulation, technical and quality conditions, and implementation calendar. (DFLEC, Art. 88).

4. Questions:
 - i. DFLEC grants the Commission power to determine the existence of an essential input, yet **that power is not considered** in the amendments of June 2013. Even though determination is needed for regulation, each aspect corresponds to a different link of an analytical chain.

What legal implication may accrue from such situation?

- ii. The determination of an essential input and regulation of access to it seems much more appropriate endeavor for a specialized body.

Has or will have the Commission enough resources to efficiently carry out said regulation, is the institutional design up to it?²

5. Additional comment:

¹ Also sanctions relative monopolistic practices involving essential inputs (DFLEC, Art. 50, Art. 111).

² Even if the Commission may ask for technical, non-binding-, advice from a sectorial coordinator office (DFLEC, Art. 88).

Art. 54 sets-up some guidelines to determine the existence on an essential input. Nevertheless the need to carry out such study under the frame of a relevant market, whereby supply and demand are evaluated, seems to be lacking. Even though Art. 88 establishes the Commission should carry out **a market investigation** for such determination, therein there is no explicit referral to Art. 52 which contains elements to delimit a **relevant market**.

Furthermore an essential input is closely linked to the concept of substantial market power, so that a single economic agent or a group of economic agents who control an essential input could also be identified as having substantial power over the relevant market where such an input is traded.

Thus it would be advisable to amend the current proposal and keep coherence with the analysis of illicit concentrations and relative monopolistic practices as both types of procedures are carried out within the frame of a relevant market (Arts. 50 and 58).

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