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Discussion topic.

On effective competition. Open questions.

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1. The Federal Law on Economic Competition (“FLEC”) as well as the Federal Telecommunications and Broadcasting Law (“TB”) makes reference to the concept of effective competition without further clarification as to its precise meaning. This lack of precision might as well lead to contentious situations.
2. For instance FLEC’s article 94 states the procedure to identify competition barriers or essential facilities in the following way:

*Article 94. The Commission shall commence either ex-officio or per request of the Federal Executive Branch, directly or through the Ministry, the investigation procedure when there are elements suggesting ***there are no effective competition conditions in a market*** and aiming to determine the existence of barriers to competition and free market access or of essential facilities that could generate anticompetitive effects, which shall be conducted pursuant to the following: ...*

3. FLEC’s article 96 procedure to issue resolution or opinion on matters related to effective competition, substantial market power or analogous concepts establishes:

*Article 96. When the legal or regulatory provisions expressly provide for a resolution or opinion ***on matters concerning effective competition, existence of substantial market power in the relevant market or other analogous terms***, or when so determined by the Federal Executive Branch by decrees or executive orders, the Commission shall issue ex-officio, upon request from the Federal Executive Branch, directly or through the Ministry, upon request from the corresponding sector’s coordinating entity, or upon request from the affected party, the corresponding resolution or opinion, for which the following procedure shall be conducted:*

*I. For cases in which the request is filed by an interested party or the corresponding sector’s coordinating entity, the petitioner shall submit the information needed to ***identify the relevant market and****

***the substantial market power pursuant to this Law**, as well as express the grounds giving rise to the need for issuing a resolution or opinion. ...*

4. One main objective of TB is to promote effective competition in comprised sectors. The concept is read all along the Law. Take for instance:

Article 264. The Institute is empowered to declare economic agents with substantial power in any of the relevant markets in these sectors, in accordance with this Law and the Federal Law of Economic Competition.

*When the Institute in the exercise of its antitrust powers, issues warnings of the existence of elements suggesting that **there are no conditions of effective competition in a market** or that free competition is compromised and that this behavior is carried out by or is involving the economic agents not subjected to the jurisdiction of the Institute in telecommunications and broadcasting, it shall inform the **Federal Competition Commission in order for it to proceed in accordance with the law in that matter.***

Article 276. If as a result of its preponderant economic agent position ...

*The preponderant economic agent may submit at any time to the institute a plan including as applicable, structural separation, divestiture of assets, rights, social parts or shares or any combination of the previous, in order to reduce its national participation below fifty percent in the sector where it has been declared preponderant, provided that the implementation of this plan **creates the conditions for effective competition in the telecommunications and broadcasting markets, in accordance with the Federal Economic Competition Law.** In this case the following shall apply: ...*

5. Questions to be answered:
 - i. Under what circumstances one should understand that there is effective competition in a relevant market?;
 - ii. Under what circumstances one should understand that there are conditions for effective competition in a relevant market?;

- iii. How the terms effective competition or conditions for effective competition relate to single substantial market power?;
- iv. How the terms effective competition or conditions for effective competition relate to joint substantial market power?;
- v. How FLEC's article 59 on substantial market power should be applied to determine effective competition or conditions for effective competition in a relevant market?
- vi. In order to determine the existence of effective competition or conditions for effective competition, is it a requisite to identify a relevant market pursuant to FLEC's article 58?;
- vii. Effective competition or conditions for effective competition can be identified in a "sector" regardless of FLEC's article 58 (relevant market) and/or regardless of FLEC's article 59 (substantial market power)? If that is the case, then what characteristics should fulfill those terms?

6. A preliminary proposal.

- i. Effective competition in a relevant market is absent whenever there exist a single economic agent with substantial market power;
- ii. Conditions for effective competition in a relevant market are absent whenever there exists a single economic agent with substantial market power;
- iii. Effective competition in a relevant market is absent whenever there exist two or more independent economic agents having joint substantial market power;¹
- iv. Conditions for effective competition in a relevant market are absent whenever there exist two or more independent economic agents having joint substantial market power;
- v. Effective competition in a sector (telecom or broadcast) is absent whenever there is a preponderant economic agent;

¹ A situation requiring further clarification is that of a market where collusion is actually detected (ie. an absolute monopolistic practice is taking place), in which case one could say that in such a market there is no effective competition. Yet if colluders do not have joint substantial market power, it is unclear whether the market as a whole could be regarded as a market without effective competition.

- vi. Conditions for effective competition in a sector (telecom or broadcast) are absent whenever there is a preponderant economic agent.

7. Contentious situations.

An example of likely contentious situations forthcoming could be expected given the way the Investigative Authority has applied FLEC's article 94 –above quoted- to identify slots as essential facilities and how its provision by the international airport of Mexico City might be causing **lack of conditions for effective competition** on air transportation services. (Cf. IEBC-001-2015).

8. Criteria.

Determination by competition authorities of relevant markets (or sectors) with or without effective competition or conditions for effective competition might lead to economic agents being subject to regulatory measures. Thus it is of the utmost importance competition authorities provide with criteria to determine as clearly as possible such terms.
