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## ***E. Competition Law***

The Federal Economic Competition Law (the "Law"), effective as of June, 1993 and its amendments published on June, 2006, as well as its implementing regulations issued on March, 1998, comprise the antitrust act to promote economic efficiency and protect the process of free competition and market participation. The Law also created a Competition Commission as an autonomous agency separate from the Ministry of Economy. The Commission, although not a judicial entity, is responsible for enforcing the Law, conducting investigations, issuing administrative rulings and fighting monopolies, monopolistic practices and concentrations in accordance with the Law.

The Competition Law is divided into two principal areas: monopolistic market practices and concentrations, and applies to all individuals and companies, Mexican or foreign, regardless of the economic activities carried out by the companies in Mexico. Federal, state and municipal agencies, professional associations, and other economic groups are also included. Nonetheless, there are some exceptions, such as owners of patents and trademarks, which are enumerated in article 28 of the Mexican Constitution.

### **1. Monopolistic practices**

The Law distinguishes between absolute and relative monopolistic practices. Absolute monopolistic practices are considered anticompetitive *per se* (meaning that they are always unlawful), while the legality of relative monopolistic practices depends if the economic agent involved in such practice enjoys or not substantial market power in the relevant market. However, the "rule of reason" evaluation, is applied to the net impact on competition, and the competitive process is taken into consideration, so a relative practice can be considered illegal.

"Absolute" monopolistic practices are commonly referred to as horizontal practices that take place among competitors. Absolute monopolistic agreements are illegal *per se* and therefore, are not enforceable. The Law establishes several presumptions regarding absolute monopolistic agreements between or among competitors, including, (i) price fixing or manipulation; (ii) placing restrictions or limitations on production, processing, distribution or commercialization; (iii) dividing or segmenting the market; and (iv) coordinating bids or abstaining from bidding in calls for bids, auctions or public sales.

The Law also sanctions "relative" monopolistic practices, which consist of vertical agreements among non-competing businesses with substantial market power for the purpose of unfairly driving competitors out of the market. Presumptions of relative monopolistic practices include: (i) the fixing, imposition or establishment of exclusive distribution and commercialization of goods or services, or the division or allocation of customers or supplies; (ii) limitations imposed upon the manufacture or distribution of goods; (iii) the imposition of obligatory prices or other conditions on distributors or suppliers; (iv) linkage of the transaction to the sale or distribution of an additional good or service usually distinct from the transaction product or service; (v) sale or transaction subject to obligation not to use, acquire, sell, commercialize or provide goods or services of a third party; (vi) unilateral refusal to sell or supply to certain agents goods that are normally offered to third parties; (vii) agreements to exert pressure on certain customers or suppliers as retaliation to dissuade them from certain conduct, or to force them to act in a certain manner; (viii) the sale of a product or services below cost and the losses to be recovered by means of future price increases; (ix) Utilization of profits of one product or service in order to finance losses regarding the sale or marketing of another product or service or any act, such as predatory pricing, giving of discounts in return for exclusivity, causing increases in costs, inhibiting production or reducing demand, that might impair free competition.

A "relative monopolistic practice" will be sanctioned if it is proven that the responsible party has substantial power in the relevant market and the practice relates to goods or services corresponding to such relevant market.

The "relevant market" will be determined by grouping goods or services that can be substitutes for each other in terms of use and price. For this purpose, the Commission takes into consideration products characteristics, acquisition costs, opening of the economy to foreign markets, restrictions of access to alternate suppliers thereto or to other markets, their geographic location, and the ease of access to the product and its substitutes.

In determining "substantial power," additional criteria is used. Such criteria includes: the assessment of whether there is the capacity to fix prices unilaterally, or to produce or considerably restrict the supply of goods or services in question, without competitors being able to fairly oppose the actions; the existence of natural or artificial entry barriers for the products, the possibility that competitors may access other sources; and the recent behavior of the accused, as this might indicate his capacity to act unilaterally.

## **2. Mergers and acquisitions (concentrations)**

The Law governs all acts that have effects in Mexico. The analysis of mergers assesses an intended transaction's impact in Mexico. In some cases, however, the determination of the relevant market may include elements of overseas territories. The Law applies to all economic entities whose actions have a bearing on markets in Mexico.

The Law defines a concentration as the merger, acquisition of control, or other act whereby corporations, associations, stocks, corporate shares, trusts, or other assets merge, and such merger is realized between competitors, suppliers, clients, or other economic agents. The Commission will challenge and sanction any concentrations whose object or effect is to decrease, damage, or impede free competition with respect to equal, similar, or substantially related goods or services.

If the Commission determines that a proposed merger lessens, impairs or hampers competition in a relevant product area or geographic market, the Commission has broad authority to order divestiture, suspension, modification or annulment of the transaction. In making such a determination, the Commission considers a number of factors, including the degree of concentration in the market, barriers to entry of competing firms, the availability of substitute products, whether the transaction would give the resulting entity the power to set prices or restrict output unilaterally, and any other factor relevant to competition. The Law also contains a pre-merger notification requirement, which is triggered if one of three thresholds is met:

a) If the value of a single transaction or a series of transactions amounts to over 18 million times the minimum general daily wage prevailing in the Federal District, which on August, 2006, was approximately US\$ 80 million; or

b) If a single transaction or a series of transactions create an accumulation of 35 percent or more of the assets or shares of an economic agent, whose assets or sales amount more than 18 million times the minimum general daily wage prevailing in the Federal District; which on August, 2006, was approximately US 80 million; or

c) If two or more economic agents participate in the transaction, and their assets or annual volume of sales, jointly or separately, total more than 48 million times the minimum general daily wage prevailing in the Federal District, which on August 2006 was approximately US\$ 212 million; and such transaction creates an additional accumulation of assets or capital stock in excess of 8.4 million times the minimum general daily wage in the Federal District, which on August 2006, was approximately US\$ 37.6 million.

Prior to closing, mergers exceeding the established thresholds must file a notification to the Commission. The Commission has ruled that the buyer is primarily required to file this notification, although the seller or transferor may comply with this obligation. In the case of mergers for consolidation purposes, all parties are obliged to notify the Commission. The initial notification must include, among other things, the corporate name, the corporations' legal representatives, the by-laws and articles of incorporation, financial statements,

the shareholding structure, a description of the transaction, a description of the principal goods or services produced or provided, data related to the market share, and addresses of the plants or facilities involved.

Commission may request additional information within 15 days after receipt of the initial notification, to which the interested parties must respond within 15 days. The Commission has 35 calendar days to respond from the date of notification or from the date of receipt of the additional information. In exceptionally complex cases, the Commission may extend the period for the Commission's response up to an additional 40 days. If it fails to render a decision within the statutory time period, it is deemed to have consented to the transaction.

Furthermore, economic agents may present to the Commission an analysis and other pertinent information demonstrating that the merger will not have the objective or effect of decreasing, harming, or impeding free competition. The Commission has a period of 15 days to analyze the economic agent's analysis describing how the concentration does not affect free trade. If the time lapses without response from the Commission, it will be assumed that there is no objection to the realization of the transaction.

Under the new rules, within 10 days computed from the date of notification, the Commission may order the economic agents not to close the transaction until a favorable resolution is issued. If the time lapses without the Commission issuing resolution, the parties are able to close the transaction but assuming the risk the merger is determined to be anticompetitive and therefore, the Commission ordering divestiture or modification.

If the concentration is significant, the Commission studies whether the party or parties, by virtue of the proposed transaction, acquire "substantial power" in their relevant market, or whether the parties already have "substantial power." The Commission takes into consideration the existence and power of present and potential competitors, and the recent conduct of the parties participating in the merger, among other elements legally required.

Concentrations may not be challenged once a transaction has been approved, except where the parties provided false information to the Commission, or after one year in cases of concentrations that did not require notifications.

No other agency from the Executive Branch of the government participates in the Commission's decision-making process. Parties may appeal to the Commission for reversal of rulings unfavorable to them. If the appeal is rejected and the decision involves fines, the parties may later file an administrative adversary proceeding in Federal Tax Court. If the decision affects their constitutional rights, they may file suit in a District Court.