

LATINLAWYER

LATINLAWYER Reference – TRADE AND ANTITRUST 2009

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MEXICO

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1) What is the relevant antitrust legislation?

The constitutional basis for antitrust legislation is established in article 28 of the Mexican Constitution, which prohibits monopolies and monopolistic practices. A monopoly is the dominant (although not exclusive) exercise of an economic activity. Monopolistic practices make reference to different kinds of agreements between competitors aimed at avoiding competition between them (absolute monopolistic practices or horizontal restraints); or actions performed by economic agents with substantial market power to unduly displace other agents from the market (relative monopolistic practices).

The regulatory law of the above-mentioned constitutional article was published in the Federation's Official Gazette on 24 December 1992, under the Federal Law of Economic Competition. This Law has been in force since 22 June 1993 and was last amended on 28 June 2006.

Besides the Federal Law of Economic Competition, a Code of Regulations was published on 12 October 2007, replacing the original Regulations, which were published on 4 March 1998.

2) Which authorities enforce antitrust legislation?

The authority that enforces antitrust legislation is the Federal Competition Commission, which is a public non-concentrated federal organism with technical self-governance. The Federal Competition Commission takes its decisions through a collegiate body comprising five commissioners, one of them being the president of the Commission who has the decisive vote when issuing any Commission's resolutions.

3) Are decisions of the antitrust authorities subject to administrative or judicial review?

Federal Competition Commission decisions can be revised by the Commission itself through an administrative appeal and subsequently challenged or revised through a constitutional trial before the federal courts.

4) What practices can be deemed as anti-competitive under the legislation?

Under the Federal Law of Economic Competition there are two kinds of practices that can be deemed as anti-competitive: absolute monopolistic practices and relative monopolistic practices.

The first kind of the above-mentioned practices can also be referred to as horizontal restraints or collusive agreements. Article 9 of the Federal Law of Economic Competition typifies those agreements as any contract, agreement, arrangement or combination between economic agents that compete with each other when its purpose or effect is any of the following:

- price fixing;
- restriction of output;
- market segmentation; or
- bid rigging.

Absolute monopolistic practices shall be null, always void (per se) and have no legal effect.

The second kind of practices that can be deemed as anti-competitive are established in article 10 of the Federal Law

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of Economic Competition, where acts, contracts, agreements, procedures or combinations with the purpose or effect is, or might be, to unduly displace other agents from, or substantially preclude their access to, the market, or to create exclusive advantages in favour of one or several persons are considered to be relative monopolistic practices. These practices are explicitly defined in the Law and, in general terms, they correspond to the following practices that prevail in other jurisdictions:

- vertical price fixing;
- resale price maintenance;
- tied sales;
- exclusive dealing;
- refusal to deal;
- boycott;
- predatory pricing;
- loyalty rebates;
- cross subsidies;
- price discrimination; and
- rising rival's costs (price squeeze).

These kind of practices are not illegal per se as absolute monopolistic practices are. However, they are illegal when they are performed by an economic agent with substantial market power; said power is the capacity to unilaterally fix prices or substantially restrict the supply or provision to the relevant market without competing agents being actually or potentially capable of counteracting such capacity.

Additionally, in order for these practices to be illegal they shall have as a purpose or effect to unduly displace other agents from, or substantially preclude their access to, the market, or to create exclusive advantages in favour of one or several persons.

Finally, even if the assumptions referred to above actually took place, a relative monopolistic practice can be permitted if efficiency gains are generated so that net contribution to consumers' welfare is considered to be greater than the anti-competitive effects.

5) Do antitrust violations incur administrative, civil or criminal liability?

Antitrust violations always incur administrative liability. Civil liability may also result from an antitrust violation by means of an ordinary trial for damages and losses, filed by any economic agent affected by such violation once the Federal Competition Commission has completed the administrative procedure and said resolution is not appealed.

Regarding criminal liability, it may only be applicable when an absolute monopolistic practice takes place, and according to article 253 of the Federal Criminal Code, legal precept which typify the felonies against the public economy, such a violation must threaten national wealth or national consumption and cause an unjustified rise of necessary consumer goods prices. It is important to note that the Federal Competition Commission is not empowered to resolve the violation if a felony has been committed; in this case a criminal trial shall be initiated.

6) What are the penalties for antitrust violations?

The following penalties or sanctions may be imposed by the Federal Competition Commission when antitrust violations are performed:

- The correction or cessation of the monopolistic practice or concentration involved.
- Partial or full de-concentration of that which has been unduly concentrated, without prejudice to the monetary sanction that might be warranted.
- A monetary sanction up to the equivalent of 35,500 times the general minimum wage in force in the Federal District for having made false statements or having provided false information to the Commission.
- A monetary sanction up to the equivalent of 1.5 million times the general minimum wage in force in the Federal District for having engaged in an absolute monopolistic practice.
- A monetary sanction up to the equivalent of 900,000 times the general minimum wage in force in the Federal District for having engaged in a relative monopolistic practice.

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- A monetary sanction up to the equivalent of 900,000 times the general minimum wage in force in the Federal District for having engaged in a concentration prohibited by the Federal Law of Economic Competition.
- A monetary sanction up to the equivalent of 400,000 times the general minimum wage in force in the Federal District for not giving notice of a concentration when the legal obligation of giving such notice exists.
- A monetary sanction up to the equivalent of 900,000 times the general minimum wage in force in the Federal District for failure to fulfil the conditions established by the Commission when a concentration is authorised under certain terms, without precluding an order to de-concentrate.
- A monetary sanction up to the equivalent of 30,000 times the general minimum wage in force in the Federal District is imposed on individuals engaging directly in monopolistic practices or prohibited concentrations, or acting in the name or on behalf and under the instructions of legal entities.
- A monetary sanction up to the equivalent of 28,000 times the general minimum wage in force in the Federal District upon the economic agents or individuals who have assisted in, furthered, induced or engaged in monopolistic practices, prohibited concentrations or other actions constituting a restriction upon the efficient functioning of markets as provided on the Federal Law of Economic Competition.
- A monetary sanction up to the equivalent of 1.5 million times the general minimum wage in force in the Federal District, for failure to fulfil a resolution issued in a leniency programme.

It should be noted that in cases of recidivism, a monetary sanction of up to twice the applicable one may be imposed, or up to 10 per cent of the annual sales obtained by the infringing party in the immediate preceding fiscal year, or up to 10 per cent of the value of the infringing party's assets, whichever is the highest. A recidivist is a party, who having engaged in an infringement that was sanctioned, engages in another infringement of the same type or nature.

In the imposition of fines, the Commission shall take due consideration of the seriousness of the infraction, the damage caused, the intention indications, the violator's share of market, the affected market size, the practice or concentration duration, the re-occurrence, background and financial capacity of the violator.

When a party has been sanctioned for infringing practices two or more times, the Federal Competition Commission instead of applying the pertinent sanction, may order the divestiture or sale of assets, rights, ownership interests or stock, in a portion as may be required for the economic agent to cease to have substantial power in the relevant market. For this purpose, it shall be understood that the infringing party has been sanctioned twice:

- when the resolutions by which the sanctions have been imposed have become final and conclusive;
- when at the beginning of the second or ulterior proceeding there is a prior resolution that has become final and conclusive, and that no more than 10 years shall have elapsed between the commencement of the proceeding and the resolution that became final and conclusive; and
- when the sanctions are imposed for engaging in monopolistic practices or prohibited concentrations with respect to the same relevant market. Sanctions imposed for a multiplicity of monopolistic practices or for concentrations prohibited hereunder in one and the same proceeding shall be considered to be one single sanction.

7) How are investigations initiated and what are the procedural steps?

An investigation shall commence upon the Federal Competition Commission's own initiative or upon request of a party by filing a complaint.

When a complaint is filed, the Federal Competition Commission shall issue a resolution either to admit the complaint or to dismiss the complainant in order to complete or clarify its petition.

Once the complaint is admitted, or when the proceedings are initiated upon the Federal Competition Commission's own initiative, the executive secretary shall issue a commencement resolution and must publish, in the Federation's Official Gazette, an abstract of said resolution containing the probable violation into which the inquiry is being made and the market where it takes place.

The term of the investigation shall start as of the date of the abstract publication and shall not take less than 30 days and not more than 120 days. However, this term may be extended up to four times, for periods of up to 120 business days when there are duly justified reasons to do so. During the investigation, the Federal Competition Commission is empowered to ask any person for information and documents which are relevant to the investigation and also to perform verification visits to obtain additional conviction elements.

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Once the investigation ends, the Federal Competition Commission must issue a decree evidencing said ending, and within 60 business days after said issuance, must issue an official communication of probable liability but only if there are enough elements to support the existence of possible violations of the Federal Law of Economic Competition; otherwise a resolution closing the procedure must be issued. The Federal Competition Commission shall then serve notice with the above-mentioned official communication to the alleged responsible party, who shall respond within 30 business days asserting any arguments, including any documentary proof in its possession and introducing any evidence warranting submission.

Once the referred term expires, a resolution on the admission or dismissal of evidence, as the case may be, shall be issued and the place, date and time for its introduction shall be set. The introduction of evidence shall take place within a term that shall not exceed 20 days, counted from time of its admission. Once the evidence has been introduced and within the following 10 business days, the Federal Competition Commission may order the introduction of evidence for the better understanding of the case. Once all the evidence has been introduced, the Federal Competition Commission shall set a term that shall not exceed 10 business days for the parties to submit their arguments in writing. The case file shall be deemed to be completed on the date the arguments are filed or at the time such term expires. Once the case file is completed, the Federal Competition Commission shall issue a resolution within a term that shall not exceed 40 business days.

8) What are the possible mitigating factors of anti-competitive practices?

Possible mitigating factors are analysed by the Federal Competition Commission but only when resolving relative monopolistic practices or concentrations. These factors are known as efficiency gains to the market and must show that the net contribution to consumers' welfare outweighs their anti-competitive effects.

9) Is there a leniency programme?

The Federal Law of Economic Competition establishes a leniency programme when absolute monopolistic practices are being performed. Also, a reduction of penalties may apply by means of a procedure when a relative monopolistic practice or illegal concentration is being analysed under an investigation procedure. The leniency programme may be initiated at any time during the investigation period, but always before the issuance of the decree evidencing the ending of said period. Regarding the procedure to request penalty reduction, it can be initiated at any time before the Federal Competition Commission issues a final resolution.

10) Is there a provision for merger control in the antitrust legislation? What kinds of transactions are caught?

Merger control under the Federal Law of Economic Competition takes care of those transactions that are relevant in monetary terms.

11) What are the thresholds (turnover, etc) for filing and is it voluntary or mandatory?

The Federal Law of Economic Competition establishes the following thresholds that provide the cases when a transaction giving rise to a concentration must be notified before the antitrust authority:

- When the amount of the transaction directly or indirectly, whether in a single act or a series of acts, and independently of their place of execution, in Mexico, exceeds the equivalent of 18 million times the general minimum wage in force in the Federal District.
- When the transaction implies, whether in a single act or in a series of acts, accumulation of 35 per cent or more of the assets or shares of an economic agent, whose assets in Mexico or annual sales originating in Mexico amount to more than the equivalent of 18 million times the general minimum wage in force in the Federal District.
- Transactions, whether in a single act or in a series of acts, in which two or more economic agents participate and whose assets or annual volume of sales, individually or in the aggregate, amount to more than 48 million times the general minimum daily wage in force in the Federal District, and which implies an accumulation in the Republic of assets or capital stock exceeding the equivalent of 8.4 million times the general minimum wage in force in the Federal District.

If a transaction does not fit with any of the above-mentioned criteria, the filing is permitted but it would be a voluntary notification.

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12) What are the deadlines for filing and is there any mandatory waiting period?

A transaction must be notified before the Federal Competition Commission prior to its closing and there is a 10-day waiting period for all transactions. During this waiting period, the Federal Competition Commission is empowered to issue a decree to order the parties not to close the transaction until clearance is granted.

13) What is the substantive test for clearance and overall timetable for the analysis?

When analysing a notified transaction, the Federal Competition Commission shall conclude that it would not confer or may not confer to the merging or acquiring party or to the economic agent resulting from such concentration, the power to unilaterally fix prices or substantially restrict supply or provision to the relevant market, without competing agents being actually or potentially capable of counteracting such power. This analysis usually takes between one to four months depending on the transaction. However, the official deadline for the Federal Competition Commission to issue a resolution in a notifying procedure is 35 business days (extendable by 40 business days in justified cases), from the filing. If said period lapses without such issuance, it shall be deemed that the authority has no objection whatsoever.

14) To what extent do merger control rules apply to regulated sectors?

Merger control rules apply to all sectors of the economy; notwithstanding the aforementioned, there are regulated sectors where the procedure to obtain Federal Competition Commission clearance is not conducted through the notifying process, but through diverse so-called favourable opinion procedure (ie, in some public biddings).

Trade remedies

15) What are the main laws and regulations related to trade remedies?

The main laws and regulations related to trade remedies are the:

- Foreign Trade Law;
- Foreign Trade Law Regulations;
- World Trade Organization Agreements:
 - General Agreement on Tariffs and Trade 1994 (GATT);
 - Agreement on the Implementation of Article VI of the GATT (Anti-Dumping Agreement);
 - Agreement on Subsidies and Countervailing Measures;
 - Agreement on Safeguards;
 - Agriculture Agreement; and
 - Understanding on Rules and Procedures Governing the Settlement of Disputes; and
- international trade treaties and agreements.

16) Which are the investigating authorities? Who takes the final decision on the application of trade remedies?

The investigating authority is the Unit of International Trade Practices of the Ministry of Economy. According to article 5(VII) of the Foreign Trade Law, the Ministry of Economy is the empowered authority to investigate anything related to trade remedies. However said authority, through its Internal Regulations, created an organ, the Unit on International Trade Practices, which is responsible for carrying out the investigation procedure against international unfair trade practices.

The final decision on the application of trade remedies is taken by the Ministry of Economy, which according to article 59 of the Foreign Trade Law shall publish its final decision in the Federation's Official Gazette. Notwithstanding the aforesaid, as stated on article 58 of the Foreign Trade Law, when the Ministry finishes an investigation on international unfair trade practices it must submit to the Foreign Trade Commission (a government organ presided over by the Ministry of Economy, and implemented by undersecretaries and general directors of different ministries, such as those of International Affairs, Agriculture, Health, and the Federal Competition Commission, among others; whose mission is to review all the issues regarding foreign trade) a draft of the final decision for its opinion before publishing it in the Federation's Official Gazette.

17) How long does a trade investigation last?

As stated on article 59 of the Foreign Trade Law, the maximum amount of time that a trade investigation can last is 210 working days, counting from the day after the start of the investigation was published in the Federation's Official Gazette.

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However, if a denouncement is submitted, the authority has up to 62 working days to publish the beginning of the investigation in the Federation's Official Gazette. Therefore from the time someone submits a denouncement until it is resolved can be a period of 273 working days.

18) What is the recent record of the authorities regarding the imposition trade remedies?

The recent record of the authorities on the imposition of trade remedies is a 350 per cent ad valorem remedy on pencils from China. However, said remedy is the product of an agreement between Mexico and China and it must be progressively eliminated. There are 47 compensatory duties currently in force. Of said duties, the record is 88 per cent on some Russian cold rolled sheets.

19) Are information and documents provided during a trade remedies investigation treated confidentially?

During a trade remedies investigation, information and documents may be provided and said information and documents are treated confidentially. During an investigation, only the interested parties have access to the file containing such confidential information as stated in the Foreign Trade Law Regulations. According to the Foreign Trade Law and its Regulations, subject to accomplishing some requirements, a party may ask that the information provided be classified in three different categories:

- Confidential: available only to the accredited legal representatives of the interested parties, as well as to those persons who are entitled to have access, according to the treaties to which Mexico is part.
- Trade secrets: No one has access to it.
- State secrets: No one has access to it.

20) Are verification visits permitted and are they carried out in practice?

Verification visits are permitted if the parties to whom the verification visit is going to be performed approves of it. However, the Ministry of Economy shall carry out the proceedings that it considers appropriate in order to ascertain that the information and proof that were provided are accurate and complete. In practice verification visits are carried out, although not all the times.

21) Are provisional measures permitted under the anti-dumping laws and regulations?

Provisional measures are permitted under the Foreign Trade Law. In a preliminary resolution that the Ministry of Economy must publish in the Federation's Official Gazette within 90 working days from the publication of the beginning of the investigation, said authority may impose a provisional countervailing or anti-dumping duty. The provisional duty may be revoked or modified at the final resolution.

22) Is China considered a market economy for the purposes of anti-dumping investigations? If so, is it possible to argue otherwise?

Even though there is no official declaration, for purposes of anti-dumping investigations China is not considered a market economy, although it has been argued otherwise by parties involved in an investigation.

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