COMMENTS OF THE ABA SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW IN RESPONSE TO THE MEXICAN COMPETITION COMMISSION’S REQUEST FOR COMMENTS ON THE PROPOSED REGULATORY PROVISIONS IMPLEMENTING THE MEXICAN FEDERAL COMPETITION LAW

August 19, 2014

The American Bar Association Sections of Antitrust Law and of International Law (together the “Sections”) appreciate the opportunity to submit these Comments on the Mexican Competition Commission’s (the “Commission”) proposed Regulatory Provisions of the Mexican Federal Competition Law (the “Regulation”). These comments have been approved by the governing Councils of each Section. The views expressed herein are being presented on behalf of the Sections of Antitrust and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. INTRODUCTION

As we stated in our April 2013 Comments on the Regulation (“2013 Comments”), 1 we support the Commission’s promulgation of the Regulation as a means of increasing efficiency, consistency, and transparency in the Commission’s administration of the Federal Competition Law. Consistent with our 2013 Comments, we believe that the latest version of the Regulation does an excellent job in elaborating a state-of-the-art approach to the implementation of competition law, and in providing detailed procedural guidance that should prove quite helpful to entities covered by the Regulation. We believe, nevertheless, that a few specific changes to Articles 3, 5, and 8 of the Regulation, which we discuss below, could improve the excellent draft.

II. DISCUSSION

A. Invitations to Engage in Per Se Illegal Behavior

Article 3(1) treats as an indication of absolute monopolistic practices (“per se” illegal practices that will be struck down automatically without an evaluation of their purpose, rationale, or effects) an invitation to engage in per se unlawful behavior. As we explained more fully in our 2013 Comments, we believe, given potential ambiguities in communication, per se condemnation of such invitations may inadvertently chill efficient communications (a point

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1 ABA Sections of Antitrust Law and International Law, “Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the Mexican Competition Commission’s Request for Comments on the Proposed Regulation Implementing the Mexican Federal Competition Law” (April 2013). In these comments, we refer to suggestions we made in the 2013 Comments, which we append to this submission.
recognized by the OECD\(^2\)). Accordingly, we reiterate our recommendation that the Commission not treat such invitations as absolute monopolistic practices, but instead consider characterizing them as “relative” anticompetitive practices subject that will be assessed on a case-by-case basis, and hold only the offering party potentially liable.\(^3\)

**B. International Price Differences**

Article 3(2) treats as an indication of absolute monopolistic practices domestic offer prices that are noticeably higher or lower than their international reference price, except when the difference derives from tax rules, transportation, or distribution costs. As we explained in our 2013 Comments, intrinsic differences among jurisdictions in a variety of market conditions may explain such price differentials, and firms that are prohibited from taking them into account may be deterred from doing business in or investing in Mexico. In addition, price discrimination in competitive markets is not uncommon,\(^4\) and therefore treating international price differences as an absolute monopolistic practice would threaten wrongly to condemn (and thus deter) a substantial amount of procompetitive business behavior. Therefore, the Sections reiterate our recommendation that international price differences not be condemned as absolute monopolistic practices.

**C. Financing Costs as a Barrier to Entry**

Article 5(1) lists financing costs as a barrier to entry. As we stated in our 2013 Comments, we believe that treating financing costs in and of themselves as an entry barrier is inappropriate,\(^5\) and that if the Commission is concerned about particular circumstances that cause financing costs to functions as an entry barrier, it should so specify (for example,  

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\(^3\) Holding the offeree potentially liable would not make sense and would be inherently unfair, as the party that receives an invitation to collude engages in no anticompetitive behavior if it ignores the offer. On the other hand, if the offeree accepted the offer and colluded with the offeror, both parties would be engaging in per se illegal conduct, which would constitute an absolute monopolistic practice under Mexican law.


\(^5\) As the leading United States antitrust treatise writer, Professor Hovenkamp, explains, “there is little reason for thinking that high investment, standing alone, deters entry. American and world capital markets are very efficient. . . . Indeed, there may be some relevant scale economies in the raising of capital that make it relatively easier to raise the higher amount. High initial investment, standing alone, should not generally be treated as a qualifying entry barrier.” Herbert Hovenkamp, Federal Antitrust Policy 584 (4th ed. 2011).
irreversible or “sunk” costs may constitute an entry barrier in industries in which there is little or no market for costly specialized assets if entry fails.\textsuperscript{6)}

**D. Essential Inputs**

Article 8 states that for purposes of Article 60(V) of the Federal Competition Law,\textsuperscript{7} the Commission shall consider whether allowing the use of an “essential input” by a third party will generate efficiency in the market. In implementing this criterion of the “essential input” doctrine, the Sections recommend that the Commission keep in mind that requiring broad access to inputs deemed “essential” may create long-term disincentives to efficiency-enhancing investments in the production of such inputs and dampen dynamic competition. In particular, the following information on the United States and European experiences with the analogous “essential facilities” doctrine may prove useful.

The essential facilities doctrine has been used rarely in the very few jurisdictions where it exists (and has never been used in the patent context anywhere in the world). The U.S. Supreme Court treats essential facilities claims (equivalent to essential input claims) with great skepticism, has never accepted the doctrine, and has said that enforced sharing of assets is in “some tension with the underlying purpose of the antitrust laws.”\textsuperscript{8} In large part, this tension exists because the doctrine supplants market economics and “requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited.”\textsuperscript{9} Relatedly, enforced sharing lowers the value of the shared asset and can undermine the incentives for the asset owner to create the next “essential facility” or for its rivals to develop a substitute to an existing essential facility.\textsuperscript{10}

European Union jurisprudence offers a sense of the maximum extent of the use of the essential facilities (or essential input) doctrine. In the intellectual property context, the European Court of Justice in *IMS Health* (2004) limited the doctrine to situations in which access is essential to create a new product or service and where alternatives are not feasible.\textsuperscript{11} More recently, the European Commission’s Guidance in Its Enforcement Priorities in applying Article

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\textsuperscript{6} See Hovenkamp, *id.*, at 584 (“entry is much less likely to occur” in markets where specialized assets required for entry have a low salvage value, as compared to markets where assets required for entry can readily be redeployed to other markets in the event the entrant’s new business fails). See also Robert S. Pindyck, “Sunk Costs and Risk-Based Barriers to Entry,” MIT Sloan School Working Paper 4723-09 (Feb. 13, 2009), available at http://web.mit.edu/rpindyck/www/Papers/RiskEntryBarriersWP0209.pdf.

\textsuperscript{7} Article 60 elaborates an “essential input” doctrine (a version of the “essential facilities” doctrine), that applies when (1) a party is dominant or possesses substantial market power, (2) the reproduction of the input is not legally, technically, or economically viable by another economic agent, (3) the input lacks close substitutes and is indispensable for the provision of goods or services to one or more markets, (4) based on the (unspecified) circumstances under which the holder came to control the essential input, and (5) additional criteria established in the Regulation implementing the Federal Competition Law.


\textsuperscript{9} Id.

\textsuperscript{10} Id.

Article 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings states that an input is essential in a refusal to deal context when “there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long-term – the negative consequences of the refusal.” This Article 102 Guidance is consistent with the IMS decision.

Finally, and very importantly, we note that Article 8 does not clarify whether the application of the doctrine requires that the producer of the input should have market power with respect to the input. It would be inconsistent with sound economics to require access to an input where the holder of the input lacks market power. Accordingly, we respectfully recommend that the Commission clarify the language of Article 8 to provide that the “essential input” doctrine only applies to entities possessing market power with respect to the input.

In sum, we respectfully recommend that the Commission take into account economic learning, which strongly suggests that mandating access to an “essential input” very seldom if ever would generate efficiency. To the contrary, overreliance on the essential facilities doctrine would tend to undermine, rather than to promote, competition. We also recommend that the Commission clarify that an entity only is potentially subject to the “essential input” doctrine if it possesses market power in the market to which the input pertains.

III. CONCLUSION

The Sections appreciate the opportunity to provide comments on the proposed Regulation and hope that the Commission finds them useful.

Respectfully submitted,

Section of Antitrust Law
Section of International Law
American Bar Association

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