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**LATIN AMERICAN COMPETITION FORUM**

**Session I: Competition Issues in Trade Associations**

**Contribution from Mexico**

**13-14 Septembre 2011, Bogotá (Colombia)**

*The attached document from Mexico is circulated FOR DISCUSSION under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).*

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## LATIN AMERICAN COMPETITION FORUM

13-14 September 2011, Bogota (Colombia)

### Session I: Competition Issues in Trade Associations

#### -- CONTRIBUTION FROM MEXICO\* --

#### 1. Application of competition law to trade associations

##### 1.1 *What is the definition of a trade association for antitrust purposes?*

1. Pursuant to current legislation in Mexico, business and other private sector associations and their confederations (hereinafter referred to as trade associations) are public interest institutions, which are autonomous, have a legal personality, have their own assets, and they consist of traders and industry.

2. These types of organisation exist to represent, promote and advocate the activities of industry, trade, services and tourism at the national and international level. As advisory and collaborative bodies of the Mexican State, they are to act in compliance with their mission and be of a non-profit making nature. They must also refrain from religious and party-political activities.<sup>1</sup>

##### 1.2 *Are the activities of trade associations specifically covered by the competition laws in your jurisdiction?*

3. Trade activities by these associations are regulated by the Federal Economic Competition Law (*Ley Federal de Competencia Económica*, LFCE, or Law), on the grounds that this law is generally applicable in the entire Republic of Mexico to all economic activities and to all economic agents (enterprises, natural persons, etc.). Trade and professional associations are explicitly subject to the Law, in the same way as are their members. Any organisation of this nature that becomes involved in a monopolistic practice, either as a party or intervener, can therefore be sanctioned, irrespective of its size or field of activity.

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\* This document is submitted by the *Comisión Federal de Competencia*.

<sup>1</sup> See the Law of Trade Associations and their Confederations.

4. In order to prevent anti-competitive practices, the *Comisión Federal de Competencia* (CFC, Federal Competition Commission or Commission) has made substantial efforts in terms of competition advocacy, with particular emphasis on promoting this culture among trade associations. As part of these activities, a “Guide to the enforcement of competition law for trade and professional associations”<sup>2</sup> (Guide) was published in 2010. The purpose of the Guide is to assist business and professional associations in their responsibility to comply with the Law, by illustrating the types of conduct to be avoided in order to prevent infringement of the LFCE, together with the steps to be followed to remedy any unlawful practice.

5. Anti-competitive practices which are unlawful under the LFCE, and in which associations may become involved, are:

- Absolute monopolistic practices: agreements between competitors that have the object or effect of the following:
  - To fix, agree or manipulate prices, or to exchange information with the same object or effect.
  - To restrict the supply or demand of goods and/or services.
  - To distribute or allocate markets for customers, periods of time or geographical areas.
  - To coordinate bidding (bid-rigging) in public procurement.
- Relative monopolistic practices: The abuse of a dominant position in order to unreasonably displace other economic agents from the market, for example, through refusal to deal, discrimination between competitors, tying (tied products) and boycotts.

1.3 *Are the activities, and if so which ones, exempted from the application of competition law (e.g. lobbying activities)?*

6. Please refer to the answer given in paragraph 8.

1.4 *Do trade associations have a separate antitrust liability from their individual members?*

7. No. Please see the answer given in paragraph 3.

## **2. Pro-competitive role of trade associations**

2.1 *How are the lobbying activities of trade associations assessed for their pro or anti-competitive effects (e.g. does an agreement between members seeking to secure government imposed restraints on competition breach antitrust rules)?*

8. Trade associations have a fundamental role in representing the interests of their members. This role is of particular importance when they lobby for the amendment or abolition of regulations that impose barriers or restrictions on the markets for goods and services that they operate in. Although lobbying implies an agreement between their members, under the LFCE the practice is not liable to sanction. Nevertheless, when associations engage in lobbying to promote regulations that seek to impose restrictions on competition, the CFC is authorised to analyse the draft regulations and to issue its opinion regarding the potential anti-competitive and competitive effects they may have.

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<sup>2</sup> Available from: [http://www.oecd.org/pages/0,3417,en\\_40382599\\_40393122\\_1\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_40382599_40393122_1_1_1_1_1_1,00.html).

2.2 *Are trade associations a vehicle for the competition authority to disseminate sound competition principles in a specific industry sector? Do trade associations foster compliance with competition rules through measures/programmes for their members?*

9. In addition to their activities specific to representing their members, trade associations are also a channel through which the importance of the culture of competition can be disseminated to its members. The CFC has been active in promoting compliance with the Law through dissemination of the Guide, and also its Leniency Programme.

10. The CFC has also sought to develop other types of mechanisms to ensure compliance by trade associations and their members with the Law. These mechanisms include the signing of cooperation agreements with trade associations, the purposes of which are:

- Dissemination among their members of the principles of competition to avoid the risk of legal proceedings for antitrust practices. Strategies envisaged in the agreements for publicising this information include publications on matters concerning competition, information and awareness-raising events, the CFC's participation in trade association activities and the setting up of direct channels of communication between the competition authority and the association;
- Training and assistance from CFC on matters dealing with competition for associations and their members, in particular on recommendations for association to bring their policies in line with the Law;
- Commitments by the association and its members:
  - To not issue recommendations on prices or sales forecasting;
  - To not agree or discuss prices, price increases, mark-ups, bid positioning or any other related issue;
  - To not apply discriminatory or exclusionary membership policies, or to limit markets to those where members have access;
  - To inform the CFC of any possible unlawful practice committed by any association or its members so that the CFC can start an investigation and sanction any possible violation of the Law.

11. One such example is the agreement signed in November 2010 between the CFC and the *Asociación Mexicana de Profesionales Inmobiliarios* (AMPI). This agreement was concluded following the concern of AMPI and its members regarding the fines given in 2009 to 41 real estate brokers and the local AMPI in Mazatlán, and 32 real estate brokers and the local AMPI in Chapala.

2.3 *Briefly describe the industry promotion activities undertaken by trade associations considered to have legitimate purposes e.g. product standardisation, industry reports, best practices.*

12. Industry promotion activities by associations that are lawful under the Mexican legal system include the following: representation of their members; the provision of services to modernise the structure of production; the representation, promotion and advocacy of the general interests of commerce, services, tourism and industry, as the case may be, as general activities of the national economy and on the basis of the precept that the public interest must prevail over private interests.

13. Furthermore, trade associations in Mexico act as advisory and collaborative bodies on each level of government for the design, dissemination and implementation of policies, programmes and instruments

for promoting national economic activity; they promote the participation through trade associations of traders and industrialists; they act as mediators, arbitrators and experts, both nationally and internationally, with regard to events linked to activities in commerce, services, tourism and industry in terms of relevant prevailing legislation and regulations that derive from the *Ley de Cámaras Empresariales y sus Confederaciones* (LCEC, Law of Trade Associations and Confederations), and they also give impetus to socially responsible behaviour.

### **3. Anti-competitive role of trade associations**

*3.1 Please provide examples of trade associations being used as a mechanism to organise naked restrictions on competition, e.g. price fixing, customer/market allocation, collusive tendering.*

14. In 2007, customs brokers and their association refused non-member brokers access to prevalidation services for customs clearance declarations. For this conduct, the association and the customs brokers received a fine of 5.7 million pesos.<sup>3</sup>

15. As mentioned in paragraph 11, the CFC sanctioned real estate brokers and their associations following their agreement to charge uniform and artificially high commissions for their services, which constituted a violation of article 9 of the LFCE. In the case of Mazatlán, the fine came to \$295,596 pesos and in the case of Chapala, \$24,373,975 pesos.<sup>4</sup>

16. In addition, investigations are currently under way into antitrust practices involving trade and professional associations.

17. Recent investigations have covered amongst others the markets of haulage contractors, anaesthesiology and the pharmaceutical industry.

*3.2 Please provide examples of members using legitimate trade association activities to conceal anti-competitive practices, without the knowledge of the trade association?*

18. Aside from the positive and lawful aspects mentioned above, the existence of trade associations "potentially" represents a forum for anti-competitive conspiracies. Nevertheless, in the majority of the cases investigated by the CFC, the evidence has suggested active participation by the corresponding trade association when illegal practices have been detected.

### **4. Information exchange between competitors via trade associations**

*4.1 What factors do you consider in assessing the lawfulness of information sharing programmes of trade associations? Are these practices different to the direct exchange of information between competitors?*

19. The exchange of information needs to be carefully analysed as it may involve sensitive information being used by the members of associations as the basis for cartel-type conspiracies. Nevertheless, certain mitigating criteria exist in relation to the type of information exchange, such as information associated with:

- the improvement of supplies and raw materials;

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<sup>3</sup> Guide to competition law compliance for trade and professional associations. CFC, 2010.

<sup>4</sup> IO-001-2008 and IO-019-2007.

- resources for the efficiency and improvement of production processes;
- where the object is to generate joint efforts to publicise the industry,
- technological development and innovation in the industry,
- the comparison of more highly efficient structures for production and best practices in the industry.

4.2 *Do you distinguish between different types of information exchange and, if so, how?*

20. Information exchange, and any other form of communication between competitors, establishes closer links and a circumstantial context that – given certain incentives – give rise to conditions that are conducive to collusion.

21. Conduct to be avoided (as absolute monopolistic practices) includes advising, suggesting, orchestrating, concealing or carrying out any unlawful conduct based on available information.

22. In relative monopolistic practices (or of a dominant position), it may be the case that the abuse of a dominant position has the aim or effect of forcing non-members of an association out of a market, thereby constituting a boycott, which can take diverse forms.

23. The abovementioned factors are essential when considering the legality of information exchange programmes used by trade associations.

24. The LFCE considers information exchange to be an absolute monopolistic practice when it has the object or effect of influencing and/or manipulating the purchase and/or selling price in the market supply and demand of goods and services.<sup>5</sup>

4.3 *Does your agency have guidelines or best practices for information exchange in the context of trade associations?*

25. Yes, as mentioned in paragraph 4, there is the CFC Guide (published in 2010), which includes comments on the importance of not exchanging price lists or information on members' transactions or on quantities produced or placed on the market unless this is in aggregate terms; and of not discussing nor encouraging the exchange of information on public procurement in which an association's members may participate.

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<sup>5</sup> Article 9 (I), LFCE.