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Competition in the Food Supply Chain – Contribution from Paraguay

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More documentation related to this discussion can be found at: oe.cd/gfc24.

Please contact Mr Antonio Capobianco [Antonio.Capobianco@oecd.org] and Ms Carolina Abate [Carolina.Abate@oecd.org] if you have questions about this document.

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Competition in the Food Supply Chain

- Contribution from Paraguay -

1. Introduction¹

1. This paper aims to present cases in which the National Competition Commission of Paraguay studied issues related to the topic of the food supply chain.

2. Law and authority

2. Paraguay's 1992 Constitution sets out the guarantee for competition in the market².

3. Paraguay's competition law was enacted in 2013 under No. 4956 and the name of *Ley de Defensa de la Competencia* (LDC for its acronym in Spanish)³. In addition to setting the first legal framework in the country on matters of mergers and anticompetitive practices (abuse of dominance and anticompetitive agreements or cartels), it established a national competition authority for the first time: CONACOM. There was no prior institution or office that filled the role of a competition authority in the country.

4. CONACOM operates through two main bodies. The Board of Directors, comprised by three members, leads the institution on administrative matters, performs the role of competition advocacy and makes the decision on all enforcement cases⁴.

5. The enforcement cases, which could pertain to merger control, abuse of dominance or anticompetitive agreements, are all brought to the attention of the Board of Directors by the Directorate for Investigation, which has functional autonomy⁵.

6. On merger control, the Directorate for Investigation studies merger operations and issues technical opinions. Merger review is focused on whether the operation would significantly restrict competition due to the creation or reinforcement of dominance in the market.

7. When it comes to anticompetitive practices, the Directorate is in charge of investigating and filing charges against the alleged infringers of the LDC before the Board of Directors.

8. The Law also provides for advocacy mechanisms such as regulatory opinions and market studies which are, in both cases, entrusted to the Board.

¹ Document prepared by Guillermo Giménez, International Relations Staffer; Pablo Ramírez Ayala, Head of Advocacy and Jesús Silveira, Head of International Relations of CONACOM.

² Constitution of the Republic of Paraguay, article 107.

³ The LDC is available in Spanish at <https://www.bacn.gov.py/leyes-paraguayas/4775/ley-n-4956-defensa-de-la-competencia> (Accessed 25 Oct 2022).

⁴ LDC, art. 17.

⁵ LDC, art. 30.

3. Merger cases

3.1. Frigomerc/Frigorífico Norte Merger

9. The operation consisted of the signing of a contract by Frigorífico Norte S.A., whereby it was obliged to slaughter, process and package beef - twelve thousand (12,000) heads of cattle per month - in favor of Frigomerc S.A.

10. The cattle to be slaughtered would be provided by the contractor (Frigomerc S.A.), as well as the packaging materials for the manufactured products, which, ultimately, will be the sole and exclusive property of the latter.

11. CONACOM understood that this operation met the formal and substantial requirements to affirm that the contract would be an effective merger.

12. In said analysis, it concluded that the merger reinforced the dominance in the following relevant markets: (i) market for fresh beef at a national level; and (ii) market for the purchase of beef cattle for export slaughter in the entire national territory.

13. The authorization for the operation was rejected, as the Athena Foods Group (Frigomerc) would be reinforcing its dominant position in the market for the acquisition of cattle for slaughter, without having proven that the consequences directly derived from it are offset by the gains in economic efficiencies generated.

14. The Board of CONACOM considered⁶ the following:

- Among the export slaughterhouses, their market share is of 80% for ‘in natura’ meat at the national level.
- The Athena Foods Group is the leader in the ranking of ‘in natura’ meat exporters from Paraguay, a multinational company with a presence in several countries in the region.
- From the market share indicators for ‘in natura meat’ at the national level, it is clear that the Athena Foods Group is the leader, with shares that double its immediate follower.
- The Athena Foods Group was also, during 2019, the leader in the acquisition of cattle.
- In 2020, the Athena Foods Group kept its leadership in purchases.
- If the operation would have been approved, the Athena Foods Group would have reached purchasing levels of 46.30%.
- Athena Foods and Frigorífico Concepción S.A., ex post, would be purchasing close to 70% of all cattle for slaughter, which represents a high concentration.

3.2. Retail/Nuevo Super Merger

15. The merger involved a commitment agreement for the sale and partial transfer of a business asset between the firms Retail S.A. (Grupo Vierci), as buyer, and Kennedy & Compañía S.A. (Nuevo Super), as seller.

⁶ PARAGUAY. BOARD. Resolución D/AL N° 18/2020 dated 21 September 2020.

16. Through this, the business assets corresponding to the supermarket stores that currently operate under the name "Nuevo Super", "Nuevo Super 2" and "Nuevo Super 3", all located in the city of Caacupé, in the Department of Cordillera, were sold to Retail S.A.

17. Retail, in its policy of growth and expansion, sought to have a presence in the city of Caacupé; taking into account that it did not have any retail stores or supermarkets in the city nor in neighboring or nearby cities, and that the only store they owned in the entire Department of Cordillera is located in the city of San Bernardino, more than thirty (30) kilometers from Caacupé. CONACOM determined that this was a merger since a legal entity took control of part of the goodwill or assets of another legal entity, through the transfer contract between both parties.

18. The relevant markets included in the operation are (i) the retail market for food and non-food products for current consumption in the home, that is, the retail market for current consumption products in Caacupé; and (ii) the market for the purchase or supply of food and non-food products for current consumption in the home, that is, the market for the purchase of current consumption products at a national level.

19. CONACOM authorized the merger with conditions⁷ aimed at offsetting the effects of the dominance that Grupo Vieri would acquire as a result of the operation in both relevant markets affected. As for the conditions imposed; these are structural and behavioral. The conditions were imposed based on the following points:

- As for the market for the sale of current consumer products in Caacupé, where the notifier acquires dominance with this operation, there are economic and strategic barriers to entry, highlighting the lack of incentives for new entrants to land and compete with the Vieri Group.
- Another commercial condition related to dealing with other suppliers and which could constitute anti-competitive behavior, under certain circumstances, is the requirement of exclusivity. Although Retail would not be including said condition in its agreements in accordance with a review of those that the Board had on file, it was not out of place to establish as a commitment for Retail to refrain from establishing said condition in the future, considering the dominant position that it enjoys in the national market for the purchase of current consumer products.
- Exclusivity agreements restrict competition, especially in highly concentrated markets where there are few retail outlets, such as Caacupé, by preventing market access to suppliers disadvantaged by such exclusivity, and by reducing the alternative products for sales channels that cannot access the products that the dominant company owns exclusively for sale to the public.
- The non-competition clause included in the transfer contract, although minimally, reduced the competitive pressure to which Grupo Vieri would be exposed from the sellers and their shareholders, regarding whom the Board did not know their intention to return to operate in the current consumer retail market in the modern channel.

3.3. Grupo Azeta/Biggie Merger

20. This transaction involved the acquisition by Grupo Azeta of 50% of the shares of the companies Biggie S.A. and Foodie S.A.

⁷ PARAGUAY. BOARD. Resolución D/AL N° 75/2022 dated 21 September 2024.

21. This acquisition was carried out through the share purchase agreement signed on January 5, 2024, between the company Azeta Mandatos y Servicios S.A., Biggie and Foodie.

22. This association entails the entry of Grupo Azeta into the retail sector, therefore, it is expected that, with this transaction, important synergies will be generated for the expansion of the network of stores throughout the country and to optimize Biggie's operations. The parties will maintain joint control of Biggie and Foodie.

23. The relevant markets that are included in the operation are (i) retail sale of mass consumption products; (ii) online sale of products via the web; and (iii) import, fractioning and distribution services of food products.

24. After analyzing the documentation presented, the Directorate for Investigation concluded that this merger would not represent a significant obstacle to effective competition in the markets by not creating or reinforcing any dominant position, so it recommended the authorization of the operation⁸.

25. The Board agreed that the operation is compatible with the provisions contained in the LDC and, therefore, will not represent a significant obstacle to effective competition in the same, by not creating or reinforcing dominance, so it authorized it without conditions as there was no alteration in the structure of the markets in which the acquired companies participate, but rather said alteration only occurs in the shareholding composition of these companies⁹.

3.4. Final considerations

26. Mergers can affect competition in the food supply chain. Cases analyzed by the national competition authority of Paraguay showcase that operations can result in dominance being acquired by market participants.

27. In addition to the possibility of dominance in the retail part of the chain, attention must be placed to the possibility of monopsonistic purchasing power acquired through mergers, such as in the cases of Frigomerc and Retail.

28. Mergers in this sector often include clauses that may restrict future competition by the sellers and conditions may be imposed to remedy the effects.

29. Attention must be placed on the possibility of the acquisition of dominance in national or localized markets.

4. Advocacy case

4.1. Yerba mate case¹⁰

30. One of the methods of intervention of CONACOM is the issue of non-binding opinions on regulation. Opinions can be issued on drafts or existing regulation of any level, with a view to promoting competitive measures.

⁸ PARAGUAY. DIRECTORATE FOR INVESTIGATION. Parecer/DI N° 8/2024 dated 30 April 2024.

⁹ PARAGUAY. BOARD. Resolución D/AL N° 44/2024 dated 2 May 2024.

¹⁰ This section of the contribution is a partial own translation of a fragment of the article titled, in Spanish, as El análisis regulatorio como estrategia de promoción de la cultura de la competencia *en*

31. Opinions can be issued upon request of a party or *ex officio*, by the Board of the institution. The Board has an Advocacy Unit that advises on these topics.
32. Paraguayans consume *yerba mate* as an integral part of tereré, a traditional drink that mixes the yerba mate with cold water and, occasionally, other herbs.
33. In 2023, a draft law was studied in Congress. If approved, it would have provided a legal mechanism to set the minimum price of the raw *yerba mate*, through a calculation of the production cost base that would be carried out by a commission or other updated technical reports.
34. Any sale with a price lower than the one established by the commission would be liable to penalties.
35. Setting prices is a barrier to competition, affecting the ability to seize advantages producers may have in the economic structures to set a competitive price.
36. The Board took the case and issued two opinions on the draft law. The first one was issued upon the request of the Commission on Industry, Trade and Tourism of the Senate, which was considering its own opinion on the draft to present it to the chamber.
37. The Board studied the reasoning for the bill that talked about the alleged existence of very low prices of sale, high costs of supplies and other problems affecting producers. However, no complaints have been filed to CONACOM on this topic that would warrant an investigation.
38. In its Opinion D/01/2023¹¹, the Board acknowledged that, in accordance with guidelines from the Organization for Economic Cooperation and Development (OECD), setting minimum prices can be used as a response to a very vigorous competition and as means to protect small suppliers from unfair competition although, as expressed by CONACOM in its own *Guide for competitive regulation* (2022), this involves the expectation that suppliers cannot gain on the market share by offering better prices than those set out in the regulation.
39. It was also stated that setting prices may limit innovation, as agents could have the incentive to maintain structures that allow them to benefit from the margin of profit offered by the regulation, or to seek innovation only to the degree in which they can maximize their own benefits.
40. A notorious subject is that the opinion was based on the experience of the National Commission for the Defense of Competition of Argentina (CNDC) which, in an analysis of the conditions of competition of the *yerba mate* sector in said country, observed that, due to the informality of the sector, there were cases in which producers were paid *under the table* with a lower price than the official one. There may also be an excess of supply due to the signals that the regulation gave to producers due to high prices¹².

la CONACOM en el 2023 by Pablo Ramírez Ayala, published in the 2024 edition of Anuario de la Competencia del MERCOSUR, the annual review published by the competition authorities of Argentina, Brazil, Paraguay and Uruguay. Available at: <https://conacom.gov.py/anuario-mercosur>

¹¹ PARAGUAY. CONACOM. Opinión del Directorio D/01/2023, Proyecto de ley “De fomento y protección a los pequeños y medianos productores de yerba mate - Ilex Paraguariensis”, dated 5 June 2023.

¹² ARGENTINA. CNDC. Análisis de las condiciones de competencia en el sector yerbatero argentino de la Comisión Nacional de Defensa de la Competencia. Available at: https://www.argentina.gob.ar/sites/default/files/sector_yerbatero_argentino_1.pdf

41. Upon considering these circumstances, the Board reminded Congress that competition problems can be solved through the investigation and sanction of anticompetitive practices as stated by Law No. 4956/2013, which forbids the abuse of dominance and cartels.

42. Seeing the lack of technical reports and data that would prove the necessity and proportionality of the measure and, considering the impossibility of a modification of the draft law in the stage it was analyzed, the Board recommended that bill should not be passed, reaffirming that price intervention by way of regulation should only be implemented under exceptional circumstances.

43. Despite the objections raised by CONACOM, Congress approved the draft law, and it was submitted to the Presidency of the Republic for its enactment or veto.

44. A new enquiry was made to CONACOM by the Presidency of the Republic, which was answered with a ratification of the objections expressed in Opinion D/01/2023 and a recommendation to veto the draft.

45. The Presidency of the Republic, largely citing CONACOM's new Opinion D/07/2023¹³, finally decided to veto the draft law¹⁴.

46. Although Congress could override the veto, it did not¹⁵.

4.2. Final considerations

47. CONACOM has reaffirmed, through a regulatory opinion in the food supply chain sector, that setting prices by regulation can restrict competition, so it should only be considered in exceptional circumstances.

48. There were no data or technical studies that would justify the regulation, and there were no complaints of anticompetitive practices in the market.

49. The advocacy work of CONACOM in this case prevented a regulation that would have distorted the market without proper necessity or due consideration of the proportionality of the measures.

50. By vetoing the draft law, the Paraguayan Government supported CONACOM's argument and decided against the implementation of the restrictive regulation.

¹³ PARAGUAY. CONACOM. Opinión del Directorio D/07/2023, Proyecto de ley “De fomento y protección a los pequeños y medianos productores de yerba mate - Ilex Paraguariensis”, dated 16 October 2023.

¹⁴ PARAGUAY. Decreto N° 575/2023 “Por el cual se objeta parcialmente el proyecto de ley N° 7170/2023 ‘De fomento y protección a los pequeños y medianos productores de yerba mate – Ilex Paraguariensis’”. Gaceta Oficial, 25 October 2023, no. 208, p. 45-52.

¹⁵ PARAGUAY. CONGRESO NACIONAL. Proyecto de ley “De fomento y protección a los pequeños y medianos productores de yerba mate – Ilex Paraguariensis”, presentado por los senadores José Gregorio Ledesma Narváez y Juan Eudes Afara Maciel, de fecha 21 de setiembre de 2022. Available at: <https://silpy.congreso.gov.py/web/expediente/126687>