

Unclassified

DAF/COMP/LACF(2017)14

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

31-Mar-2017

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contribution from Costa Rica --

4-5 April 2017, Managua, Nicaragua

The attached document from Costa Rica (COPROCOM) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

Ms. Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division [Tel: +33 1 45 24 18 77, Email: Lynn.ROBERTSON@oecd.org]

JT03411754

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/LACF(2017)14
Unclassified

English - Or. English

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



**15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua**

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

GENERAL NOTIONS ON THE MANDATORY CONTROL OF ECONOMIC MERGERS IN COSTA RICA

-- CONTRIBUTION FROM COSTA RICA (COPROCOM) --

1. The Mandatory Control of Economic Mergers began in Costa Rica since the year 2012, when the last partial reform to the Law Promotion of Competition and Effective Consumer Defense, Law No. 7472 was promoted. This is how all economic agents shall notify the Commission to Promote Competition (COPROM), of all transactions involving the participation of two companies that have operations in the national territory and, which also comply with the notification thresholds established in Article 16 (bis) depending on the value of the productive assets or the total income owned by the agents.

2. It is important to rescue that as result of the last partial reform to the Costa Rican Competition Law, some substantial changes were incorporated with respect to the protection provided by our legislation, since before 2012 when only preceded the voluntary and ex-post notification, which obviously complicated the function performed by the organ.

1. About the procedures and analysis of mergers

3. The merger control procedure begins with the notification of the transaction to COPROCOM, prior to the completion of the business or within five business days after the date of signing the agreement. Both the Commission and the Technical Support Unit may request information from the managing companies, whose knowledge is fundamental for the analysis of the operation, the market, the agents involved, competitors and any other information considered relevant according to the technical and legal foundations.

4. Once the notification has been received, there is a period of 10 calendar days as indicated in article 16 (ter), to request information from the agents involved in the business. This in those cases that the information provided is missing or incomplete.

5. In order to start the process of mergers, it is necessary to assess the definition of merger established in article 16 of Law No. 7472, and determine the type of business that could contemplate the process. This is seen as the plurality of legal figures that could be included in the concept of business and commercial activity developed by economic agents in the market. Therefore it must be determined whether it is a horizontal, vertical or conglomerate merger operation and separately assess the nature of the transaction if it involves more than one aspect.

6. However, there are two main concepts to determine if there is a merger in the terms of the standard, among them: 1) independence of the economic agents that are intended to merge and 2) the acquisition of economic control by one of them over the other or others, or on the formation of a new economic agent under the joint control of two or more competitors, which implies a stable change in the control structure of a company.

7. As part of the procedure, the requesting companies should publish a brief description of the merger under study in a national newspaper. The above is of great importance because with this communication could happen that those third parties who consider that the transaction is in some sense detrimental to the market could present their justifications to be valued during the processing.

8. Once all the information necessary to examine the merger is at hand, the Authority will have a deadline of 30 calendar days to resolve, however, in those cases whose nature is complex, it may be requested to extend the term up to 60 days, which will be granted only once and will be added to the initial 30 days term.

9. As indicated above, it is very important to have all the information necessary to carry out the merger review, in such a way that Article 16 (ter) establishes the information that an authorization request must contain, indicating: description of the transaction, identification of all the economic agents involved, audited financial statements for the last three periods, description of relevant affected markets and its competitors, market share, economic justification, entry barriers for distribution and marketing, among other data whose knowledge is fundamental to authorize or deny the merger.

10. In those cases where an economic agent omits the notification of a merger that should be known by COPROCOM, this Authority may investigate ex officio and apply the corresponding sanctions for failure to notify the merger and in case the operation has anticompetitive effects for the market will also apply the respective fine.

2. Aspects contemplated in the Analysis of Mergers, legal and economic instruments to measure the effects of the operation.

11. In order to start the valuation examination of a transaction, it has to be identified what type of transaction is involved, if it is due to a horizontal, vertical or conglomerate merger, and once this concept is clear, it is necessary to define and delimit the markets involved in the operation, identify the participants and establish market shares as well as designate the degree of merger of each of the identified markets. However, what is crucial is to determine what the effects might be in case a merger is authorized.

12. Thereafter the unilateral and coordinated practices that may arise from the merger are identified as well as those anticompetitive behaviors that could arise as a result of the transaction. In addition, it is necessary to recognize those restrictions that could discipline the exercise of unilateral and coordinated practices such as the existence of powerful buyers or the entry of potential competitors.

13. As part of the study, it is necessary to consider the efficiencies of the operation and whether the assets acquired could be withdrawn from the market if the merger is not authorized. In the case of those economic mergers with the possibility of creating, enhancing or consolidating market power from the demand side, the methodology is applied by analogy¹

14. According to what is indicated in the regulations to proceed with the procedure of notification of an operation this should contain the following elements:

- It is necessary that it happens between two or more independent economic agents, whether or not they are competitors.
- That at least two of the participating economic agents have operations with incidence in Costa Rica
- That it implies the transfer in control of one or more of them, either by acquiring control of one over the others or in the formation of a new economic agent.
- That the operation is carried out with a permanent character or with an intention of permanence.
- That the sum of all assets of the economic agents complies with the reporting thresholds indicated in 16 (bis) and 39 of regulation number 37899-MEIC.

15. Likewise, it is fundamental to evaluate the relevant market that involves the operation through a deep assessment of the competitors of the companies that are merged and to highlight the possible adverse effects that could lead to the merger of the competition. With the study of the relevant market, it is possible to determine if the merger could affect the possibilities of supplying or consuming certain goods for customers and consumers and at the same time identifying what could be current or potential bidders by analyzing their shares in the market and what could be the degree of merger.

16. The practical application of the definition of the relevant market contemplates the criteria of substitutability from the point of view of demand and supply. The above reflected by the possibility that a customer or consumer replaces the product by another in the event of an increase in price or any other deterioration around the available supply. Likewise, the reactions that companies could have that do not offer products of those included in the relevant market facing a price increase or in the case of a significant change in the supply conditions. Potential competition is also analyzed.

17. However, in the study of the merger, an approach is incorporated that corresponds to the relevant product market, which implies the determination of the group of all products that could be seen as substitutes by the consumer. The above applies to the middle of the "hypothetical monopolist test" known as the "SSNIP test"²

18. In general for this test, what is considered whether a small but significant and non-transitory increase in prices between 5% and 10% for a period of one year could affect or redirect demand with respect to certain products of the companies to be merged. Such redirection of the sale of certain products should be included in the relevant market definition and could be considered as "close substitutes".

¹ See guide for the analysis of merges of the Commission to Promote Competition.

² Small but significant non-transitory increase in Price test(SSNIP test).

19. This exercise begins with the portfolio of products of the companies that merge and continue with the exercise, including and taking out products, in order to check the extent to which the pricing policies can be influenced by companies being merged. This tool is used as an orientation of possible substitutes and nearby products for the purpose of identifying the relevant geographic market whether this one is local, regional or international.

20. In the analysis of economic mergers other aspects and dimensions are involved to consider the conceptualization of the relevant market, determining which are the market participants seen as the companies that earn income in the country, expanding the valuation to the "fast entrants", then market shares and the degree of merger, for the latter the Herfindahl and Hirschman Index (HHI) is used to determine the level and variation of the merger of the product supply of the operation according to the reference values issued by the United States guidelines of the United States Federal Trade Commission and the United States Department of Justice.

21. In summary, during the analysis of the operation, the body will take into consideration all the indicated indicators and other associated with the anticompetitive effects as in the case of vertical mergers (exclusion of access to inputs, customers, coordinated effects, diagonal mergers) and in the case of conglomerate mergers, the valuation of which is aimed at determining whether the negotiation is to exclude competitors by means of tied sales or package sales or through portfolio effects along with other aspects (barriers to entry, Compensatory capacity of vigorous buyers, cost reductions, efficiency gains, firms in crisis, and thus other aspects linked to the criteria of judgment that must have the Authority adjusted to the reasonableness and efficiency to make the final decision without affecting the market.

3. About the imposition of structural or behavior remedies and the challenges for their application.

22. During the process of analysis of the effects of mergers, the Authority has the power to condition the operation and restrict its authorization to comply with any remedies that may be imposed on these structures or behavior, with the aim of reducing or counteracting the effects Anticompetitive effects caused by the operation.

23. In accordance with what is stated in article 16 point 1) of the Law on Promotion of Competition and Effective Consumer Defense, shall be approved by the Competition Authority the mergers that do not have as their object or effect: a) to acquire or increase power b) facilitate express or tacit coordination between competitors or produce adverse results for consumers; c) diminish, damage or impede the competition or free competition in respect to similar or substantially related goods or services.

24. In view of the study of a merger with anticompetitive effects, economic agents related to the transaction may submit a proposal for conditions from the moment they notify the transaction and if not, they will be granted a deadline to offer the commitments. The imposition of the remedies may correspond to one or more temporary conditions, among which are: a) The assignment, transfer, license or sale of one or more of the assets, rights, shares, distribution systems or service to a third party authorized by the Commission; b) the limitation or restriction on the provision of certain services or on the sale of certain goods, or the definition of the geographical scope in which they may be supplied or the type of customers to which they may be offered; c) The obligation to supply certain products or provide certain services, on non-discriminatory terms and conditions, to specific customers or to other competitors; d) The introduction, elimination or modification of clauses contained in written or verbal contracts with their clients or suppliers.

25. Likewise, the Commission may establish any other structural or behavioral conditions that it considers necessary to prevent, reduce or counteract the anticompetitive effects of the operation. These conditions must respond to the proportionality and reasonableness of the anticompetitive effects that it is intended to correct, since it is a question of counteracting those effects that could damage the market. It is important to be clear that it is not a question of establishing regulatory measures, in order to force companies to improve conditions of competition.

26. The measures to be taken must comply with the criteria of proportionality, effectiveness, efficiency, opportunity because the agents will assume the obligation to fulfill the commitments assumed.

27. It is important to remember that in the application of a structural measure, the commitment goes from selling the entire business to the divestment of assets and other activities in favor of third parties or new agents participating in the market, hence its application is considered high risk, in the sense that the Authority must safeguard through a scheme or special systems a plan or control that ensures us to fully comply with the measures imposed, through the real and effective verification that the company has tried to do its best effort or everything possible to fulfill the obligation.

28. At present, having a system that controls and ensures that the commitments to sell a business or the assignment of a license of rights among other commitments, in order for them to effectively comply, and that there is no other position than the one imposed by the Commission, form part of the priority challenge of this body, because it is necessary to ensure the review of mergers and in particular to effectively comply with the merger control regime as a whole, ensuring the efficient implementation of the remedies imposed. The corresponding example to force a company to sell a particular asset and that can be demonstrated through a review plan with established deadlines, that the companies made their greatest efforts to execute the sale but in case this would fail the causes respond to external factors beyond its control, for which the Authority can verify that the agent made the necessary efforts to comply with the condition.

4. The co-ordination with other Competence Authorities with respect to mergers reviewed outside the national territory and the influence of decisions taken by other Authorities outside of Costa Rica.

29. The Costa Rican Competition Authority believes that it is essential to maintain a channel of communication with the various competition agencies in the world regarding the possibility of knowing about those mergers that could cause certain effects or affect in some way the Costa Rican market. It is important to achieve the best results of this coordination to be clear that Costa Rica is a small country with an open economy, which means that there is a high probability that a large group of transactions will have repercussions internally.

30. In order to achieve effective enforcement of competition laws in cases where a transaction is authorized at an international level and the Costa Rican agency can exercise its protection in some way to mitigate some restrictive and even harmful effects on the market, it is necessary that at least one of the agents related to the business has some formal representation in the country. This is because Costa Rican legislation could not be applied beyond national borders and, on the other hand, it requires a legally constituted figure to proceed with the opening of an investigation and to apply the respective sanctions if necessary.

31. Currently this agency has not had to evaluate any operation whose effects are associated with the results of a transaction approved in another law and with anticompetitive effects for the country, however, indeed we have studied some cases involving international operations whose knowledge is disclosed through public media specifically news of important operations that somehow has any representation in Costa Rica. For this reason, it is investigated and sometimes officials in charge of other competition

agencies are contacted to provide us with data and information whose disclosure is not restrictive, mostly informal conversations are held to know the generalities of the operation and if these could affect us.

32. In addition, it is fundamental for the law to take advantage of the exchange of information with other competition agencies for valuation of operations; however, the exercise of this power must ensure the rules established in the order as to the origin of the information and the possibility of exchange with other Authorities.

33. Given the analysis of operations in other legislations, what is of utmost importance is to be clear if the effects will be reflected in the Costa Rican market and how these effects could be counteracted and in case of structural and behavior, it is essential to be clear about the scenario and what the normative scope is for effective control of the operation. Another fundamental aspect refers to the representation that must have any of the parties involved in the business in our law, because if there is no representation it is not feasible to interpose any formal management to counteract the merger.

34. To conclude, among other possibilities to mitigate the effects facing the lack of representation of the companies, it could happen that through a public policy measure or national strategy, sensible improvements of competitiveness are established in order that the national companies can compete achieving in this way to mitigate the detrimental effects of an operation and in some way, possible distortions in the market could be avoided.

35. However, if the options mentioned above do not solve the problem and rather could resort to an exceptional mechanism such as is the price regulation, but as a last alternative.