

Unclassified

DAF/COMP/LACF(2017)32

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

29-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

-- Contributions from Mexico --

4-5 April 2017, Managua, Nicaragua

The attached document from Mexico (COFECE) 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.

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

JT03411642

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)32
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

-- CONTRIBUTION FROM MEXICO (COFECE)* --

1. Recent years have seen the control of concentrations in Mexico evolve gradually to reach its current status. On one hand, competition legislation has been amended on several occasions with a view to giving the authority more and better tools; on the other hand, the analysis of concentrations has been improved, following international best practices. The objectives have been primarily: (i) to conduct merger investigations that are more efficient, consistent and transparent; (ii) to back its resolutions with technical arguments that are more solid and robust; and (iii) through the use of remedies, to prevent concentrations from having adverse effects on markets.

1. Trends: greater complexity

2. The complexity and the size of the concentrations¹ analysed by the Federal Economic Competition Commission (hereinafter COFECE or the Commission) has increased. In 2016, the value of such transactions amounted to 1.1 billion pesos; in 2015, they reached a record amount of 24.5 billion pesos, while in 2013 they totalled 474 million pesos.

3. This situation can be explained in part by the worldwide tendency of large multinational corporations to merge in search of greater profits, particularly in the pharmaceuticals, agrochemicals, consumer products and energy sectors, while at the same time, in light of their size, such mergers demand a more detailed analysis and more information on the part of COFECE.

* Contribution from the Federal Economic Competition Commission (COFECE).

¹ The Federal Economic Competition Law (LFCE) defines a concentration as a merger, acquisition of control, or any other arrangement between competitors, suppliers, customers or any other economic agents, by virtue of which companies, associations, shares, partnership holdings, trusts or assets in general are combined.

2. The new legal framework

4. The constitutional reform of 2013 established a new regulatory framework in the area of competition and telecommunications, and gave rise to COFECE as an autonomous institution of the Mexican State responsible for overseeing free and open competition in markets.²

5. The Federal Economic Competition Law (LFCE), published in 2014, established new elements for strengthening substantive procedures and adapting criteria to the highest international standards.

6. The most significant change implied by the new law in the analysis of concentrations is the requirement to have prior authorisation from COFECE to carry out transactions that would exceed the thresholds indicated in the law. Thus, firms will only be able to merge if they have the corresponding resolution of approval from the Commission. This procedure eliminates the "non-execution order", which COFECE could issue upon receipt of notification of a merger.

7. Moreover, when it comes to remedies, the new law defines the conditions that can be imposed on concentrations and establishes a procedure that allows companies to propose commitments that will prevent competition from being reduced, damaged or impeded as a result of the concentration. These commitments can be presented by the parties at the time formal written notification of the transaction is given, and up to one day after the matter is placed on the agenda of the COFECE Plenary. As well, the law provides that, in the case of concentrations that are deemed to pose a risk to the competition process, the Commission will ask the notifying parties to submit a proposal for commitments that will correct the risks.

3. Greater use of economic tools

8. Upon its creation, the COFECE assumed the responsibility of implementing competition legislation and the new provisions in an efficient manner in order to fulfil its constitutional mandate. In keeping with that commitment, the Commission designed a strategic plan for continuous improvement of its actions, designed to align its work with international best practices.

9. In its control over concentrations, the new Commission focused on adopting better and more sophisticated tools for economic analysis that would render its decisions and technical argumentation more solid and robust. Thus it extended the use of mathematical and statistical models, as well as auxiliary tools, for defining the relevant market and related markets – in the dimensions of product, geographic coverage and timing – and for determining the possible effects of the concentration on those markets.

10. A recent example of the use of these tools is the case of the concentration between Delta and Aeroméxico,³ an operation that was intended to forge an alliance between the parties for joint operation of their flights between the United States and Mexico. In this case, the Commission deemed it necessary to analyse the effects of the concentration on passenger service at the network level, i.e. over an entire system of routes, and not only with respect to particular routes.

² COFECE is the economic competition authority in Mexico for all sectors of the economy, except for radio broadcasting and telecommunications.

³ Aeroméxico is a subsidiary of Grupo Aeroméxico which is engaged primarily in the provision of air transport services for passengers and goods, such as scheduled transportation of passengers, freight and cargo, within and beyond Mexico, with a focus on high-density local routes and on international markets. For its part, Delta offers air transport services, primarily scheduled transportation of passengers, freight and cargo, both within the US domestic market and internationally.

11. In order to reinforce the network focus, COFECE conducted an econometric study that analysed the determinants of Aeroméxico's prices for cross-border flights, taking into account various indicators of competition such as the route distance between destination and origin, the number of competitors on the route, and the number of potential competitors..

12. The results indicated that the addition of a potential competitor would reduce Aeroméxico prices on average by approximately 1.3%. It also showed that, according to the model, Aeroméxico would cut its average prices by 4.9% when its flights originated in the hub of a US airline other than Delta. The former indicates a network effect. Moreover, it indicates the capacity for disciplining Aeroméxico prices that would be exerted, first, by the potential entry of competitors and, second, by the hubs of rival airlines (and hence their networks).

13. The econometric study, then, showed that the analysis of the relevant market, from a network perspective, was appropriate.

14. Another relevant example is the transaction that involved the acquisition⁴ by Alsea of the Mexican restaurant chain belonging to Wal-Mart Mexico.⁵ COFECE employed a number of statistical tests to determine the relevant market. In this case, it sought to show whether independent restaurants, regardless of their size, represented a significant competitive counterweight to the restaurants covered by the transaction, i.e. chain restaurants.

15. In conducting this analysis, a number of statistical tests were applied. The results showed that the Herfindahl index for chain restaurants has a negative effect on the number of independent competitors in each locality, i.e. the more concentrated the chain restaurant market in a given area, the fewer independent competitors there will be. On this basis, the COFECE concluded that in the markets where there is a high concentration of chain restaurants, the independent restaurants would not exert sufficient competitive pressure, and this would be reflected in a lower number of restaurants of this type.

16. To make these results more robust, further tests were conducted to compare the number of independent restaurants in areas with high and low Herfindahl indices. This exercise included controls for population size, comparing localities with similar populations. Various regressions were performed, using as the dependent variable the number of independent restaurant competitors and taking as independent variables the Herfindahl indices for chain restaurants and the population in each of the overlap areas, under three possible scenarios: (i) totality of independent competitors; (ii) independent competitors with 30 employees or more; and (iii) independent competitors with 50 employees or more. Mean difference tests were also performed, comparing the number of independent restaurants in areas where the Herfindahl indices of chain restaurants were either high or low. This exercise controlled for population size, comparing localities with similar populations, and it considered the three scenarios mentioned above.

⁴ Case CNT-095-2013, available at: <http://www.cofece.mx:8080/cfcresoluciones/docs/Concentraciones/V539/55/1797956.pdf>.

⁵ Alsea is a Mexican corporation that operates global-brand restaurants in Mexico and Latin America, including Domino's Pizza, Starbucks Coffee, Burger King, Chili's, California Pizza Kitchen, Italianni's, P.F. Chang's China Bistro, Pei Wei Asian Diner and The Cheesecake Factory. For its part, Wal-Mart Mexico is the biggest retail firm in Mexico.

4. Remedies

17. COFECE imposes remedies or conditions to prevent concentrations from having an adverse impact on markets. In the case of more complex transactions COFECE, like other authorities around the world and in line with international best practices, designs packaged or "hybrid" remedies, a less traditional approach that combines structural and behavioural conditions and that uses tools such as "up-front buyer"⁶ provisions and "fix-it-first"⁷ remedies.

18. In the transaction⁸ involving Continental's acquisition of Veyance,⁹ indirectly owned by Carlyle, the COFECE imposed conditions of two kinds: (i) behavioural: Continental was to renounce unilaterally the exclusivity clause in the contract it had with its supplier of simple hosepipes, before the transaction was closed, and it was not permitted to renew that clause for a period of one year after closure; and (ii) structural: it was to divest itself of Veyance's plants in Mexico as well as the technical centre it rented in Fairland, Ohio.

19. Of notable interest among the concentrations authorised with conditions is the acquisition by Sanofi of the worldwide human health business of the Boehringer group.¹⁰ The approval of this acquisition was conditioned upon the obligation not to buy a portion of the business. In this case, the Commission found that, in the domestic over-the-counter market for productive cough medications, as a result of the concentration: (i) Sanofi would no longer face pressure from its closest competitor, Boehringer, and (ii) Sanofi would widen its lead over its competitors in terms of market share. For this reason, it imposed on Sanofi the condition that it should not acquire the medications marketed by Boehringer under the trademarks Bisolvon, Mucosolvan, Bisolsek and Sekretovit.

⁶ *Comprador inicial.*

⁷ *De arreglo previo.*

⁸ Case CNT-084-2014, available at:
<http://www.cofece.mx:8080/cfresoluciones/docs/Concentraciones/V591/88/1883446.pdf>.

⁹ Continental is a German company engaged in the development, production and sale of components for the manufacture of automobiles, trucks and industrial parts. In Mexico, Continental has 18 subsidiaries but only two of these are engaged in activities relating to the transaction notified. Veyance is a US company producing rubber products, conveyor belts, air springs, hosepipes, power transmission belts, rubber tracks and moulded products.

¹⁰ Sanofi is a publicly held French corporation engaged in the research, development, manufacture and sale of health products. This company groups its activities into three categories: pharmaceuticals, human vaccines, and animal health. Among its subsidiaries is the Mexican firm Sanofi Aventis. Boehringer is a German firm engaged in the development, manufacture, distribution and marketing of pharmaceutical products, in particular those available by medical prescription or over-the-counter, and those for animal health.