

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

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Mexico

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More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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Mexico

Introduction

1. In the last decade, the Mexican competition legal framework has been modified on several occasions. Thus, Mexican policy towards gun jumping cases has changed over time.
2. The first Mexican Competition Law, enacted in 1992,¹ established that concentrations reaching the legal thresholds had to be notified before the former Federal Competition Commission (CFC). However, the legal provision did not oblige the notifying parties to wait for the CFC's authorization.²
3. The 2006 amendments to the law introduced the concept of “*non-execution order*”. This meant that within 10 days following the notification of a concentration, the CFC could issue a non-execution order to the parties involved in the transaction. If the authority did not issue the order, the merging parties, under their responsibility, could close the concentration. The amendments also strengthened the sanctioning scheme by increasing fines that could be imposed on undertakings (or economic agents) and any person who breached the law; and for the first time, criminal sanctions for cartel activities were introduced.
4. In 2013, the Mexican Constitution was again amended; two new competition authorities were created: i) the Federal Telecommunications Institute (IFT) for the telecommunications and broadcasting sectors and ii) the Federal Economic Competition Commission (COFECE) for all other sectors of the economy (here in after, “Competition Authority or Competition Authorities”).
5. As a result of the 2013 constitutional amendment, in 2014 a new Federal Economic Competition Law (LFCE or Law) was published.³ The Law provided for a suspensory procedure for merger control (see article 86 of LFCE).⁴ This means that the Competition Authority has to approve mergers prior its implementation – a standstill obligation is triggered, and also that merging parties are bound to act independently until the clearance of the transaction. The reform also introduced the concept of unlawful mergers and the exchange of sensitive information among the parties which may lead to anticompetitive conducts such as cartel violation, regarded as an absolute monopolistic practice.
6. In 2014, the Federal Telecommunications and Broadcasting Law (LFTR) was also published.⁵ The Law provided, additionally to the LFCE provisions, specific merger control in the telecommunications and broadcasting sectors, providing concessionaries

¹ The Federal Economic Competition Law published in the Federal Official Gazette on December 24, 1992.

² “*Concentration*” is a merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, and which is carried out among competitors, suppliers, customers or any other economic agent.

³ The new Federal Economic Competition Law was published in the Federal Official Gazette on May 23, 2014.

⁴ The Federal Economic Competition Law is available in English at the following website: https://www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf

⁵ The Federal Telecommunications and Broadcasting Law was published in the Federal Official Gazette on July 14, 2014.

must wait until the IFT approves the mergers prior its implementation, and therefore, merging parties are bound to act independently until the clearance of the transaction.

7. In the transfer of concession, the LFTR provides that even when the legal thresholds established in the LFCE are not met, the concentration must obtain authorization from the IFT, and the parties must wait until they get clearance, if the transfer of rights and obligations established in the concession is to another concessionaire that provides similar services in the same geographic area.

8. In addition, the LFTR provides that the IFT must analyse and authorize previously the concentration of the radio spectrum. To resolve the request for the authorization of frequency bands lease, the transaction must not generate a concentration, hoarding or cross ownership phenomenon, and the IFT must observe the principles of promotion of competition, elimination of barriers for the entry of new competitors, and the efficient use of spectrum.

9. In cases of subscription or transfer of shares that represents ten percent or more of its capital stock, that do not meet the legal thresholds established in the LFCE, the concessionaires must give prior notice to the IFT of their intention to subscribe or transfer shares and wait a period of fifty-five days in which the Institute may challenge the operation. Otherwise, it is deemed authorized.

1. Legal framework: unnotified concentration, gun jumping and unlawful concentrations

10. The LFCE establishes the mandatory notification of a concentration prior its implementation when legal thresholds are met, and the transaction has effects in Mexico.

11. The legal thresholds mostly refer to the price of the transaction and the merged entities' sales, income or equity. Thus, the Competition Authority has the power to analyse minority acquisitions although they do not lead to an acquisition or legal or de-facto control.

12. The LFCE also establishes illicit behaviours considered as absolute monopolistic practices. These practices carried out between competitors shall be null and void, and consequently will not produce any legal effects. The economic agents that engage in such practices shall be subject to the sanctions provided in the LFCE, regardless of any criminal or civil liability that may arise.

13. When two or more economic agents notify a concentration to the Competition Authority, they remain subject to compliance with the provisions established by the LFCE to prevent and sanction anti-competitive behaviours that could damage the competition process and free market access. It is important to identify whether the economic agents who notified a concentration, are competing among themselves, because if they are -under the obligation to wait for the authorization of the Competition Authority before executing the concentration- they should continue behaving as such, de facto and de jure.

14. In accordance with the foregoing, competing economic agents that notify a concentration cannot celebrate contracts, agreements or arrangements that have as their object or effect any of those foreseen in the LFCE as absolute monopolistic practices, or exchange information with those objects or effects. Failure to comply with the above would set up an absolute monopolistic practice.

15. When issuing the resolution on the procedure of concentrations, the Competition Authority may authorize, object or subject the authorization of a concentration to the fulfilment of conditions. The LFCE provides legal certainty to economic agents who notified a concentration and obtained favourable resolution. These concentrations cannot be investigated since its potential impact on the markets were analysed.

16. As an exception, the Law foresees non-reportable concentrations, which are those that do not exceed the thresholds established in the LFCE, so economic agents intending to concentrate are not required to notify it before the execution, and consequently, not expect the authorization by the Competition Authority. (Article 93 of the LFCE establishes this exception).

17. Without limiting the foregoing, the LFCE empowers the Competition Authority to investigate *ex post* these non-reportable concentrations in order to analyse the effects generated in the market.

18. To start the investigation of a non-notifiable concentration, the Investigative Authority requires an objective cause that is any indication of its illegality. In other words, that the concentration had as the object or effect to obstruct, diminish, harm or impede free market access or economic competition. In this case, the LFCE sets a time limit on the exercise of the powers of the Investigative Authority, thus non-reportable concentration may only be investigated within a year following its implementation.

19. Three types of violations regarding concentrations are defined by the LFCE: I) unnotified concentration, II) gun jumping and III) unlawful concentration. In addition, as mentioned above, the exchange of information during a merger negotiation could constitute an anticompetitive conduct, sanctioned in terms of article 53 of the LFCE.

1.1. Unnotified concentration

20. The first type of violation consists in undertakings implementing and formalizing a reportable concentration without prior notification to the Competition Authority.

21. Reportable concentrations are those that exceed the thresholds established in the LFCE, so economic agents intending to concentrate are obliged to notify them and wait for Competition Authority authorization before the execution.

22. Economic agents who consume a concentration exceeding the thresholds established in the LFCE without previously notifying the Competition Authority, incur in an infringement of the LFCE.

23. In this case, the time limit of the Investigative Authority to initiate investigations which may result in liability and imposition of sanctions expire within a ten-year period, from the date on which the unnotified concentration is executed.

1.2. Gun jumping

24. The second type of violation consists in undertakings consummating the reported transaction before the approval of the Competition Authority.

25. Economic agents who consume a notified concentration exceeding the thresholds established in the LFCE without clearance of the Competition Authority, incur in an infringement of the LFCE.

1.3. Unlawful concentration

26. The third type of violation refers to unlawful mergers, which according to article 62 of the LFCE, are those that have the object or effect to diminish, damage or prevent free market access and competition.

27. The LFCE establishes an exception to the general rule of not investigating the concentrations that have obtained clearance, when said clearance was issued on false information rendered by notifying parties. The LFCE empowers the Investigative Authority to investigate said concentrations.

2. Investigation of gun jumping and unlawful concentrations

28. The Regulatory Provisions of the LFCE for COFECE and the IFT determine the procedure to be followed to verify compliance with the obligation to notify a merger. These establish the steps deemed necessary to gather information and documents that are relevant to the investigation.

29. Accordingly, the procedure could be initiated based on the objective knowledge of a probable omission to comply with the obligation to notify a merger or on any indication of non-compliance with this obligation. Information that may be considered includes that disclosed by any public media, including journalistic notes, statements, bulletins in the stock market, among others; or information in the Commission's records, as would be the case of the sanction COFECE imposed on *Mexico Multifamily Fund VIII, Invex, Cibanco, HSBC and Monex*. Likewise, the parties involved may offer the evidence deemed appropriate, which, in their case, may be submitted later.

30. The LFCE also establishes three mechanisms to open an investigation for unlawful concentrations or absolute monopolistic practices (cartel activities):

- Ex officio;
- At the request of a party, that is, through a complaint; or
- At the request of the Federal Executive branch.

31. These mechanisms aim to ensure that any person has the opportunity to let the authority know about the possible existence of an anticompetitive practice or unlawful concentration.

32. Additionally, COFECE and the IFT, within the scope of its powers, are continuously monitoring the functioning of the markets to detect possible indications of unnotified or unlawful concentrations, as well as anticompetitive conducts.

33. For example, COFECE has its own Department of Market Intelligence – within the Investigative Authority – to continuously monitor markets. There is also the option for any person – even anonymously – to report anticompetitive practices or unlawful mergers through the Commission's website.

34. The Investigative Authority, as the Technical Secretariat, may take into consideration information disclosed by public media or found in the Commission's records, or it may use the information provided by the Technical Secretariat in accordance with article 133 of COFECE's Regulatory Provisions of the LFCE.

35. The IFT has information of the economic agents' that participate in the telecommunication and broadcasting sectors. This information could give an indication of a probable unnotified or unlawful concentration. The LFTR establishes the obligation to the concessionary, if they are a legal entity, to present their shareholding structure to the IFT every year, as well as notifying any subscription or disposal of the shares that represents ten percent or more from the total amount of their capital stock.

36. The Investigative Authority's tools to gather information when investigating include: i) information and documents requests to individuals and authorities; ii) subpoenas or interviews; iii) integrate information on public records to Competition Authority's files; iv) the use of market intelligence tools; v) order verification visits to the undertakings' facilities (dawn raids); and vi) the leniency program.

3. Legal consequences and fining of gun jumping

37. The current Law provides the following sanctions and fines. If the parties proceed to the implementation of the merger before its clearance – gun jumping violation – they may be subject to penalties of up to 5% of the parties' annual turnover, but if it is determined that the transaction is anticompetitive, fines would raise to 8% of each parties' annual turnover. Also, Competition Authorities may order to divest the assets from the corresponding anticompetitive transaction as a sanction. Penalties may be imposed to companies as well to the individuals who intervened in the execution of the transaction.

38. COFECE and IFT have imposed several fines for unnotified concentration violations on undertakings and individuals involved in the transactions, as described below.

COFECE:

- In 2015, a MXN 25.7 million fine (approx. USD 1.4 million) on *Alsea*, the largest restaurant operator in Latin America and a MXN 2.9 million fine (approx. USD 157.9 thousand) on *Grupo Axo*, a clothing labels operator in Mexico, for failing to notify a concentration.
- In 2017, a MXN 365 thousand fine (approx. USD 19.3 thousand)⁶ on each of the following financial institutions, *Mexico Multifamily Fund VIII*, *Invex*, *CIBanco*, *HSBC* and *Monex* and for the first time ever a MXN 8.5 million fine (approx. USD 450 thousand) on a public notary for closing and formalizing, respectively, a merger that did not have the approval of the COFECE.
- In 2017, a MXN 56.2 million total fine (approx. USD 2.97 million) on *Panasonic Corporation*, *Panasonic Europe*, *Ficosa Inversión* and *Pindro Holding* for failing to notify a concentration when they were legally obligated to do so.
- In 2017, MXN 754.9 thousand fine (approx. USD 39.9 thousand) on *Santander* and *Banco Popular Español* (investor of *Ve por Más Financiamiento*) for having consummated the transaction before its approval.

IFT:

- In 2015, a MXN 10.5 million fine (approx. USD 556.2 thousand) on each of the following economic agents, *Teléfonos de México*, *Dish México Holdings*, *Dish*

⁶ The exchange rate used is MXN 18.91 = USD 1

México and *Grupo Frecuencia Modulada Televisión*; a MXN 3.8 million fine (approx. USD 206.0 thousand) on *Teninver*; a MXN 3.0 million fine (approx. USD 163.8 thousand) on *Comercializadora de Frecuencias Satelitales*, and MXN 8.5 million fine (approx. USD 452.4) on *Corporativo Mexicano de Frecuencias Dish*, for failing to notify a concentration when they were legally obligated to do so.

4. Practical guidance

39. To avoid sanctions or fines, undertakings may request a meeting to have pre-merger talks, particularly where the proposed transaction meets the legal thresholds, with the Competition Authorities according to the corresponding jurisdiction. Pre-merger talks may include the topic of information exchange between the parties.

40. Competition Authorities recognize that exchange of certain information is needed to carry out a merger. For example, when exploring, planning, assessing and notifying a merger. In these cases, exchanging information is fundamental for the development of due diligence and it is usual that parties are in constant communication to properly evaluate the transaction.⁷

41. It is important that the undertakings involved in the merger understand that information exchange is subject to restrictions under the LFCE, particularly in mergers between competitors, known as horizontal mergers.

42. According to the LFCE, prior to the merger process and during the merger notification process, undertakings are obliged to maintain their independence and to conduct themselves in a competitive manner until the operation is cleared by the Competition Authorities and they are authorized to close the transaction.

43. Exchange of the minimum necessary, public and non-strategic information for the planning process and for the materialization of the merger, is generally consistent with the Law. In general, non-strategic information refers to information that it is not related to commercial strategies of the parties but allows to calculate the value of the acquired business and to plan the transaction.

44. For example, non-strategic information includes: the location and value of assets and offices, operating and computing systems, concessions, licenses, permits and patents, accounting methods, general financial information, general information on current products and product lines, general corporate costs, general information on joint initiatives or similar relationships with other economic agents, as well as any other information of a regulatory and legal nature.

45. The exchange of strategic information will be of particular concern to the Competition Authorities. This kind of information includes: prospective information or on prices and offers, profit margins in specific products, costs or prices of individualized products or offered to specific customers, strategic business plans such as marketing, research and development, capital expenditures, audits and integration of the undertakings⁷

⁷ Regarding possible gun jumping as a result of information exchange before authorization is granted, in the sectors not involving telecommunications and broadcasting sectors, parties are encouraged to review COFECE's Guidelines on information exchange between economic agents. The guidelines provide the elements that the Commission will consider when evaluating the exchange of information among parties. Available in Spanish at COFECE's website: <https://www.cofece.mx/wp-content/uploads/2018/01/guia-0072015-intercambioinf.pdf#pdf>.

planning, that are exchanged without measures to prevent commercial use of the information or to conduct anticompetitive practices (cartel conducts).

46. The risk of information exchange is evaluated on a case-by-case basis, taking into account the purpose of the exchange, the nature and characteristics of the information, the mechanisms to exchange the information and the conditions of the affected market.

47. For the Competition Authorities, exploiting the information shared during the pre-merger processes, prior to the Authorities clearance could be anticompetitive and reduce competition between undertakings, through:

- Price-fixing mechanisms;
- Market segmentation;
- Restriction of supply; and
- Bid rigging.

48. Therefore, information exchange during the preparatory stage of a merger could lead to an absolute monopolistic practice (cartel activity) when: i) one of the parties is able to predict future prices of the counterparty, supply or innovation strategies, with a certain degree of specificity or certainty resulting from the access to its competitor's information; ii) competition between the competitors is reduced if the transaction is not closed; iii) information exchange is not related with the effective development of due diligence or planning integration of the parties; or iv) it is followed by a change in the business strategy, prior to the formalization of the transaction.