

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

Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN CROSS-BORDER MERGER CASES

-- Mexico --

29 October 2013

This note is submitted by Mexico to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 29 October 2013.

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CROSS-BORDER MERGER REMEDIES

– Mexico –

1. **Please provide a short description of a few important mergers your agency has reviewed in the last 5 years that involved cross-border remedies (e.g., remedies that include asset divestitures or conduct outside your jurisdiction, or involve a matter investigated by another competition authority).**

1. Please see answer below.

2. **Please share your agency's experiences coordinating or cooperating with any other agencies in connection with these remedies, particularly with respect to:**

- whether waivers were obtained from parties, and if not, why not;
- coordination / cooperation mechanisms used if waivers were not available, and how well those mechanisms worked;
- identifying or evaluating assets to be divested;
- evaluating potential acquirers and market testing the proposed remedy;
- designing behavioral (conduct) remedies, if any; and
- using or selecting divestiture/hold separate/monitoring trustees, including utilizing a common trustee reporting to both agencies.

2. The Mexican Federal Economic Competition Commission (Commission or CFCE for its acronym in Spanish) cooperates internationally in enforcement matters to increase the effectiveness of its actions and with the aim of reaching consistent decisions with other jurisdictions. The latter is particularly relevant in merger review where the Commission's cooperation focuses on reaching better decisions and preventing consumers' harm.

3. The Federal Law of Economic Competition (FLEC) does not allow coordination of cross-border remedies between the CFCE's Directorate-General for Mergers and other authorities' technical areas due to the fact that remedies are decided by the CFCE's Plenum. This approach makes the analysis and decision process in complex cases less flexible because even though the Commission's technical area could discuss common remedies with other agencies, it is not their role to make the final decision.

4. The following two cases are mergers that were notified in different jurisdictions and where the Commission cooperated with other agencies through informal channels and through formal mechanisms.

2.1 *Nestlé / Pfizer Inc global infant formula nutrition business*¹

5. In June 6, 2012, Nestlé notified to the Commission its intention to acquire Pfizer Nutrition, a global infant nutrition business. The transaction consisted in the acquisition of Pfizer's Mexico infant formulas division, including shares, assets and trademarks. The merger was part of a global deal where Nestlé acquired the worldwide infant nutrition business of Pfizer Inc.

6. In Mexico, in November 2012 the Commission challenged the merger on the basis that the transaction would substantially lessen competition in the Mexican market of infant milk formulas. In particular, the entity merged would hold a market share of approximately 71% to 88% of the volume sold in the infant formula markets for babies aged zero to 36 months, in a market with high barriers to entry. The transaction would likely result in higher prices on this type of formulas.

7. Given the Mexican market structure, it was necessary for Nestlé to design a remedy to avoid anticompetitive effects. The Commission's Plenum reached a settlement that required the divestment to a third party (without any relation with the parties) of all assets necessary to maintain Pfizer infant formulas division presence in the Mexican market as a viable and independent competitor. That is, Nestlé was required to divest Pfizer's manufacturing plant of infant formulas and the sales force and operational staff. Similarly, this company was required to grant exclusive licenses in Mexico over Pfizer's brands related with infant formulas during a 10 years period and allow a black out period for other 10 years. The Commission considered that this settlement, which prevented the merger of Nestlé and Pfizer infant formulas businesses in Mexico, ensures competition in this market, to the benefit of consumers.

8. The transaction was notified in different jurisdictions, including Chile and Colombia. To facilitate the Commission's cooperation particularly with the latter two Latin American countries, both merging parties, Nestlé and Pfizer, granted confidentiality waivers.

9. With respect to confidential information obtained from the firms², this can be exchanged with other jurisdictions when the firm has granted a waiver for such purpose. The agencies that receive the information granted by the waiver shall keep the confidentiality nature of the information.

10. In this regard, given the existence of the confidentiality waivers, when different information requests were made by the Superintendencia de Industria y Comercio (SIC) from Colombia and by the Fiscalía Nacional Económica (FNE) from Chile, the Commission was able to exchange via conference calls information related to the transaction under analysis and to share the merger's resolution with the SIC and the FNE.

11. The Commission also exchanged non-confidential information and officers' experience with these jurisdictions, which contributed to better understand the case and to take better strategic decisions, complementing formal procedures.

12. In both countries, Colombia and Chile, the competition authorities imposed remedies to lessen the negative impact of the transaction on competition. As noted above, these remedies were not coordinated with the Mexican authority.

¹ File CNT-035-2012

² Article 31 bis of the Federal Law of Economic Competition (FLEC)
http://www.cfc.gob.mx/images/stories/Leyes/compencionormativo/2013/Compendio_CFC_mayo_2013.pdf

2.2 *Anheuser-Busch /Grupo Modelo*³

13. In August 7, 2012, Anheuser-Busch Inbev (ABI) notified to the Commission its intention to acquire all of the shares of Grupo Modelo that it did not already own, through a public tender.

14. The Commission cleared the proposed acquisition of Grupo Modelo by ABI, as the transaction was a consolidation of shares by ABI in Grupo Modelo, in which ABI already was a shareholder.

15. The Commission considered that ABI did not produce or distribute its products in Mexico due to the fact that Grupo Modelo distributed ABI products in the country. Additionally, ABI's products had a marginal presence in the beer Mexican market.

16. As regards as the effects of the transaction on other related markets such as operation of convenience stores; production and distribution of bottled water and manufacturing of glass containers, the Commission did not identify any adverse effects on competition.

17. The Commission therefore concluded that the proposed transaction did not raise competition concerns.

18. In the United States, Anheuser-Busch Inbev proposed the acquisition of total ownership and control of Grupo Modelo. In January 31, 2013, the Department of Justice (DOJ) filed a civil antitrust lawsuit challenging the transaction. According to the DOJ, "the \$20.1 billion transaction would substantially lessen competition in the market for beer in the United States as whole and in 26 metropolitan areas across the United States, resulting in consumers paying more for beer and having fewer new products from which choose"⁴.

19. In April 19, 2013, the DOJ reached a settlement with both parties that required the divestiture of "Modelo's entire U.S. business – including licenses of Modelo brand beers, its most advanced brewery in Mexico: Piedras Negras, its interest in Crown Imports LLC and other assets – to Constellation Brands Inc., in order to go forward with their merger"⁵. According to the DOJ the settlement would maintain competition in the beer industry in the U.S., benefitting consumers.

20. In this case, the authorities of both countries, U.S. and Mexico, had conference calls to discuss the case in general terms and also to explain notification procedures, and deadlines. Due to the flexibility of the U.S. procedure's timetable to review the transaction, the U.S. authority challenged the merger after the Mexican authority's decision was released.

21. Cooperation among agencies was useful to understand the procedural phases of the jurisdictions. Cooperation was also important to gauge possible effects of an authorities' decision in other jurisdictions.

22. As mentioned before, cooperation and information exchanges in both transactions, Nestlé/Pfizer and ABI/Grupo Modelo were subject to national provisions on confidentiality of information and public records produced by courts in formal proceedings.

³ File CNT-052-2012

⁴ DOJ Press Release: Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev's Proposed Acquisition of Grupo Modelo, January 31, 2013.

⁵ DOJ Press Release: Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case: April 19, 2013.

3. To the extent not already described, please tell us what challenges have arisen in the design or implementation of cross-border remedies, and how your agency, on its own or through cooperation or coordination with one or more agencies, has overcome those issues.

23. A system of mutual recognition of decisions of other antitrust enforcers would make cross-border enforcement more efficient and less burdensome. However, under the current Mexican legal framework, any attempt to enforce decisions locally based on a resolution by a foreign authority would be contested in the judiciary by the parties involved. Without a doubt, the courts would grant the parties involved the right to contest a decision of such nature, complicating the Commission's work.

24. In addition, the Commission faces legal constraints for formal international cooperation in merger review because of the stringency of the procedure outlined by the Federal Law of Economic Competition (FLEC). For example, the law does not allow for, among other things, synchronizing the timing of the merger review process, which could help to issue concurrent resolutions. Furthermore, the procedures outlined in the FLEC do not contemplate the possibility of "stopping the clock" once a review has started.

4. Have you encountered situations where cross-border remedies had to be revised because of unforeseen circumstances or subsequent developments? How did you handle cooperation and coordination in these cases?

25. N/A.