

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

**Working Party No. 3 on Co-operation and Enforcement**

**INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS**

-- Mexico --

25 February 2014

*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 25 February 2014.*

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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– Mexico –

1. Pre-merger notification regime

***Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction?***

1. In accordance with article 20 of the Federal Law on Economic Competition (hereinafter FLEC or competition law), a merger is subject to mandatory notification when it exceeds certain monetary thresholds and must obtain approval prior to its realization. The purpose of the review is to identify those mergers that potentially prevent or lessen competition.

2. Article 20, sections I to III, of the FLEC establishes that mergers must be notified when one of the following conditions is met:

- I. The transaction exceeds the equivalent amount of 18 million times the current general minimum wage<sup>1</sup> in the Federal District.<sup>2</sup>
- II. Accumulation of 35% or more of the assets or shares of a firm, whose annual assets in Mexico or annual sales originating in Mexico, exceed the equivalent of 18 million times the current general minimum wage in the Federal District.
- III. Accumulation in Mexico of assets or social capital exceeds 8.4 million times the current general minimum wage in the Federal District<sup>3</sup>, and in the merger there are 2 or more firms involved whose assets or annual turnover, together or separately, exceed 48 million times the current general minimum wage in the Federal District.<sup>4</sup>

***If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below).***

3. Mexico's Federal Economic Competition Commission (hereinafter COFECE or Commission) may issue a "non-execution order" within ten days of the merger notification. In such cases the merger has to be on hold until COFECE issues its resolution, according to what is stated in the antepenultimate paragraph of article 20<sup>5</sup> of the FLEC.

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<sup>1</sup> The FLEC considers minimum wage multiples (economic measure adjusted on an annual basis) because it is clearly defined, transparent and it is easy to obtain by the parties involved).

<sup>2</sup> Approximately 1,211.21 million Mexican pesos or 93.25 million US dollars (official exchange rate at 14/01/2014; 12.9889 Mexican pesos per US dollar).

<sup>3</sup> Approximately 565.31 Mexican million pesos or 43.52 million US dollars.

<sup>4</sup> Approximately 3,229.94 million Mexican pesos or 248.67 million US dollars.

<sup>5</sup> Article 20.

(...)

Within ten days of the filing of a merger notice, the Commission may order the firms involved in the transaction not to execute the merger until the Commission issues a favorable resolution. If the Commission does not issue the

## 2. Review of mergers falling below notification thresholds

***For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger?***

4. For those mergers that do not meet the notification thresholds, there is a provision under the last paragraph of article 20<sup>6</sup> of the FLEC where the parties can voluntarily notify to the COFECE the transaction. For mergers that do not meet the notification thresholds and are not notified, COFECE has the power to review the merger only up to one year after the merger has been executed (article 22<sup>7</sup> of the FLEC).

5. As regards as mergers exempted from notification requirement, the fourth and seventh paragraphs of Article 28 of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*) provide for exclusions and exceptions to economic competition regulation for strategic areas<sup>8</sup> exclusively reserved to the Mexican State.<sup>9</sup>

6. Additionally, it is worth highlighting that since June 11, 2013 a Constitutional Reform granted economic competition regulation and merger review provisions of the telecommunications and broadcasting sectors to another specialized agency (*Instituto Federal de Telecomunicaciones*).

***If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?***

7. COFECE may challenge a merger, or approve it imposing behavioral or structural remedies. According to article 19<sup>10</sup> of the FLEC, after its investigations, in addition to implementing the corresponding fines, the Commission could impose the fulfillment of conditions, as well as partial or total

corresponding order, the firms, under its responsibility, may execute the transaction. The order or the lack of it does not prejudice the substance of the matter.

<sup>6</sup> Article 20.

(...)

The firms involved in a merger that does not meet the assumptions provided in this Article, may voluntarily notify the Commission on the transaction.

<sup>7</sup> Article 22. Under this Law, mergers that have received clearance cannot be investigated, except when such clearance was granted on the basis of false or misleading information, or when the favorable resolution was subject to subsequent conditions and these were not fulfilled within the period stipulated. Mergers not subject to mandatory notification also cannot be investigated after a year has elapsed since its execution.

<sup>8</sup> These strategic areas, reserved for the State include mail and telegraph services; radioactive minerals and nuclear power generation; planning and control of the national electricity system, as well as public transmission and distribution of electricity services; and, exploration and extraction of oil and other hydrocarbons. Activities carried out by the central bank are not considered as monopolies.

<sup>9</sup> The FLEC establishes that activities in strategic areas exclusively reserved to the Mexican State (article 4); as well as unions; privileges granted to authors and artists and inventors; and export associations (articles 5 and 6 of the FLEC) do not constitute monopolies.

<sup>10</sup> Article 19. If as a result from an investigation or an administrative procedure In addition to enforcing the corresponding sanctions, the Commission could:

I. Subject the transaction to the fulfillment of the conditions set by the Commission.

II. Order the partial or total divestiture of what was unduly merged, ending of company's control, or suspend the transaction, as appropriate.

divestiture of assets of what was unduly concentrated, termination of control or suppression of acts, as appropriate. Similarly, sections I and II of article 35<sup>11</sup> of the FLEC set forth that the Commission may challenge the merger, order the rectification or suppression of the anti-competitive conduct or of the merger, as well as the divestiture of assets.

8. In the case of violations of the FLEC, COFECE has the authority, for up to five years, to investigate prohibited conducts (article 34 bis 3<sup>12</sup> of the FLEC).

***If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek?***

9. Merger remedies are the same for both cases: COFECE may challenge the merger, order the rectification or suppression of the merger or of the anti-competitive conduct, as well as the divestiture of assets. It is important emphasizing that according to the article 22 of the FLEC, the Commission can review a consummated merger that was not subject to mandatory notification provisions, only up to one year after the merger was executed. Otherwise, the Commission can only challenge non-notifiable mergers as it is set forth in article 35, sections VII or VIII of the FLEC.

**3. Have you had success with remedies in these situations? Please provide examples.**

10. Although it is established under section I of article 35 of the FLEC, this provision has not been used in recent years.

***Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?***

11. If the case is a notifiable merger that was consummated without being filed to COFECE, the procedure follows and an investigation is open to verify for anti-competitive effects. Similarly, if the transaction was non-notifiable but it is suspected to have anti-competitive effects, the Commission may initiate an investigation.

12. This, despite of the corresponding fine that the Commission may impose, as explained further below.

**4. Review of mergers that should have been notified but were not**

***If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties?***

13. In accordance to section VII of article 35<sup>13</sup> of the FLEC, there is a fine of up to 5% of the revenues of the firm.

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<sup>11</sup> Article 35. The Commission may apply the following sanctions:

I. Order the rectification or suppression of the anticompetitive conduct or merger in question.

II. Order the partial or total divestiture of a merger prohibited by this Law (FLEC), subject to the fine, as the case may be.

<sup>12</sup> Article 34 bis 3. The powers of the Commission to initiate investigations that could lead to liability and sanctions, in accordance with this Law (FLEC), are extinguished within five years from the unlawful conduct.

<sup>13</sup> (...)

14. However, in accordance to article 36<sup>14</sup> of the FLEC, when imposing a fine, the Commission shall consider the seriousness of the infringement, damage caused, intentionality, infringer's market share, size of the market, duration of the unlawful conduct or concentration and recidivism, as well as infringer's ability to pay.

***In such a case, does your agency retain full power to review the merger under merger review or other competition law provisions?***

15. The investigative procedure for verifying for anti-competitive effects applies if there are concerns.

***Is there a time limit on when the agency can bring an enforcement action?***

16. Up to one year to challenge the merger, order the rectification or suppression of the merger, or of the anti-competitive practice, or the divestiture of assets. (Sections I and II of article 35 of the FLEC).

17. Up to five years in the case of mergers that do not meet the thresholds but have anti-competitive effects. (Article 34 bis 3 of the FLEC).

***If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek?***

18. According to sections I and II of article 35 of the FLEC, COFECE may order the rectification or suppression of the merger or of the anti-competitive practice, or the divestiture of assets, in addition to enforcing the corresponding fines.

***Have you had success with remedies in these situations? Please provide examples.***

19. A case of section I of article 35 of the FLEC: A precedent for using this remedy is the resolution of the CNT-085-99 file, in which the Commission challenged a merger. In this case, the Commission analyzed the market of production and selling of tequila, and ordered the parties involved in the transaction to return to original state prior to the execution of the merger. The firms were fined for failing to notify the merger within the legal timeframe.<sup>15</sup>

VII. Fine up to the equivalent of five percent of the revenue of the firm, for failing to notify the merger within the legal timeframe.

<sup>14</sup> Article 36. The Commission takes into consideration the following elements when calculating the amount of a fine: seriousness of the infringement, damage caused, intentionality, infringer's market share, recidivism and infringer's ability to pay.

<sup>15</sup> Merger: ROMO HERMANAS, S.A. DE C.V. ("RH"), TEQUILA HERRADURA, S.A. DE C.V. ("TH"), COMERCIALIZADORA HERRADURA, S.A. DE C.V. ("CH"), DESTILADOS DE AGAVE, S.A. DE C.V. ("DA") Y CORPORACIÓN DE SERVICIOS HERRADURA, S.A. DE C.V. ("CSH").

The transaction involved the acquisition by RH of 49.98% stake in TH and 50% in CH, DA and CSH, where the company Super Club de Vinos y Licores S.A. de C.V. ("SCVL") was the majority shareholder. Juan Domingo Beckmann Legorreta was the majority partner of the company and son of Juan Francisco Beckmann Vidal, who had control of JB y Cia. JB y Cia. was the majority owner of Jose Cuervo SA de C.V.

In this case, the market of production and selling of tequila in Mexico was analyzed. From its investigation, the Commission concluded from the filial relationship between the stakeholders of the firms, that the companies were part of the same economic group and that this corporate group already had a big share of the market analyzed.

It is worth highlighting that the merger was notified to the Commission months after it had been consummated. The Commission decided to challenge the merger: the firms were ordered to return to the original state prior to the

20. A case of section II of article 35 of the FLEC: A precedent for using this remedy is the resolution of the CNT-028-94 file, where the Commission sanctioned the merging parties for providing false information. In this case, the Commission analyzed the market for recorded music sales to the final consumer (cassettes, vinyl records and compact discs).<sup>16</sup>

21. Both provisions have not been used in recent years.

##### **5. Subsequent review of previously cleared and consummated mergers**

*If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then?*

22. According to article 22 of the FLEC, the Commission could only challenge a merger in the case where the parties provided false information. For an approved merger with remedies, the Commission could only challenge a merger if the remedies were not honored.

23. In both cases, the aforementioned remedies apply.

*Is there a time limit on when such a post-merger review can take place?*

24. Up to one year to order the rectification or suppression of the merger, or of the anti-competitive practice, or the divestiture of assets. (Sections I and II of article 35 of the FLEC).

25. Up to five years in the case of mergers that do not meet the thresholds but have anti-competitive effects. (Article 34 bis 3 of the FLEC).

*Please provide examples.*

26. Please refer to paragraphs 19 and 20.

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transaction (16/11/1998): divest all the assets, shares and stocks related with the merger. The Commission also imposed a fine for failing to notify the concentration on time.

<sup>16</sup>

Merger: Sanborns Hermanos SA ("SH") and C. Emma Dana Halabe Massry, in its capacity as majority shareholders of Promotora Musical, SA de C.V. ("PM") reported a merger. The operation forced SH to acquire one representative share of the capital stock of PM, subsequently SH would subscribe a capital increase of the company in the amount of 50 thousand pesos, paying a premium equivalent to 101.16 million pesos due to the subscription of the corresponding shares.

The market analyzed was "services of recorded music sales to the final consumer (cassettes, vinyl records and compact discs)". The market analysis showed no anti-competitive problems, however, the Commission found that it had received false information by the parties. The Commission concluded that SH was responsible for giving false information, and fined the company fine of seven thousand five hundred times the daily minimum wage in Mexico City ("DSMMVDF"). Also Emma Dana Halabe Massry was responsible for submitting false information. The Commission fined her three thousand seven hundred and fifty DSMMVDF. Finally the Commission ordered to raise a complaint to the Federal Public Prosecutor (Ministerio Público Federal) if the acts merit federal sanction. (On the basis of Article 28, section V of the Rules of Procedure of the Commission at that time, 1994).