

Unclassified

DAF/COMP/WP3/WD(2016)86

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

24-Nov-2016

English - Or. English

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

Working Party No. 3 on Co-operation and Enforcement

AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Mexico --

28-29 November 2016

This document reproduces a written contribution from Mexico (COFECE) submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03406110

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/WP3/WD(2016)86
Unclassified

English - Or. English

-- MEXICO* --

1. Introduction

1. In the last years, merger activity in Mexico has reached historic levels in terms of number, size, and complexity. Only in 2015, the Mexican Federal Economic Competition Commission (COFECE) analyzed 149 mergers valued MXN 24.4 billion (Mexican pesos), 33% more than those analyzed in 2014.¹

2. This contribution is intended to articulate the principles and practices employed by the Mexican Federal Economic Competition Commission (COFECE) when deciding whether to prohibit a merger or accept the remedies proposed by the merging parties.

2. Merger control in Mexico.

3. Designing and implementing remedies has not been a static practice for the Mexican competition authority, it has evolved in the last years in hand with the legislative framework in which the agency operates.

4. According to the Federal Economic Competition Law (FECL) which regulates article 28 of the Mexican Constitution, the COFECE is the authority responsible for analyzing merger cases in Mexico – except for those concerning telecommunications and radiobroadcasting markets²— and determining whether they should be approved, conditioned or prohibited.

5. As for the specific definition of a merger, the regime in Mexico is outlined in article 61 of the FECL which establishes that a concentration shall be understood as 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.

6. Likewise many other features of the FECL, while maintaining several provisions, the 2013 competition overhaul also established relevant changes on mergers' legal framework. The new FECL maintained the former law's provisions for topics such as the exceptions and procedure for those mergers not raising competition concerns, as well as notification thresholds.

* Contribution by the Federal Economic Competition Commission (COFECE), Mexico.

¹ https://www.cofece.mx/cofece/images/Documentos_Micrositios/Doc-Los15del15-Final-3_200116.pdf

² The Federal Institute of Telecommunications (IFT by its Spanish acronym) was created in 2013 by the constitutional reform of article 28. Accordingly, the IFT is the competent authority for economic competition matters in the radiobroadcasting and telecommunications sectors.

7. Nonetheless, the new FECL provides some novel traits in order to enhance the effectiveness of merger control in Mexico. Notably, merger parties are no longer allowed to consummate the merger before the COFECE has reached a favorable decision to do so. In this sense, the 2014 FECL establishes fines for those notaries public or attesting officials who participate in the acts concerning a merger without prior authorization by the Commission.³ Several other aspects about merger control resulted as a consequence of the 2013 Constitutional reform, including: i) the extension of the period to require and submit information; ii) the extension of the timeframe to resolve on merger cases (60 days); iii) the notification of competition concerns at least 10 days before its listing for the Plenum’s session, for the presentation of conditions; and iv) the ability to request information from any public authority.

1.2 Merger notification

8. COFECE has powers to examine any merger between economic agents. Nevertheless, the FECL only requires the notification of mergers that have more relevance due to its economic value. Article 86 of the FECL establishes thresholds for merger notifications, as showed below:

A merger shall be notified when:		
The transaction’s amount exceeds the equivalent of eighteen million times the current daily general minimum wage in Mexico City.	The transaction implies the accumulation of thirty-five percent or more of the assets of an economic agent and its annual sales in Mexico are worth an amount in excess to the equivalent of eighteen million times the current daily general minimum wage in Mexico City.	The transaction implies an accumulation -within national territory- of assets in excess to the equivalent to eight million four hundred thousand times the current daily general minimum wage in Mexico City, and two or more of the economic agents participating in the merger have annual sales originating in Mexican territory or assets which are worth, jointly or separately, an amount in excess of forty-eight million times the current daily general minimum wage in Mexico City.

9. Mergers outside these thresholds can be voluntarily notified to the COFECE. In the same sense, the COFECE can investigate mergers that do not meet the thresholds but may generate contrary effects to competition.

2.2 Mergers clearance

10. Generally, firms merge aiming to expand its markets and increase their efficiency, which bring benefits to consumers.

11. COFECE analyses and solves mergers notified by economic agents, avoiding the generation of market structures which could give a company substantial power, so they can limit the supply, rise prices or promote behaviors considered as monopolistic practices.

12. Article 61 of the FECL establishes that the Commission shall not authorize or, if it is the case, shall investigate and sanction those mergers whose purpose or effect is to hinder, harm or impede competition and free market access regarding equal, similar or substantially related goods or services.

13. Articles 61 to 65, and 86 to 93 of the FECL explain the type of analysis that the COFECE performs regarding mergers.

³ Article 127, subsection XIII of the FECL.

14. Accordingly, the Mexican merger regime provides that in order to determine whether an operation should be authorized, the COFECE should take into account: i) the relevant market; ii) the main economic agents that supply the market in question, their power and the degree of concentration of the said market; iii) the effects of the merger in the relevant market or related markets concerning other competitors or consumers of the good or service in question; iv) market shares of the involved parties and its effect on other economic agents, and vice versa; v) the elements provided by economic agents in order to credit efficiencies arising from the transaction; and vi) other criteria established in the Regulatory Provisions.⁴

3. Prohibited and conditioned mergers

15. The aforementioned analysis may deliver the Commission’s authorization, prohibition, conditioning or sanctioning of a merger.

16. The authorization of a merger refers to a situation in which the Commission reached the conclusion that the transaction would not raise competition concerns. In these cases, the authorization is issued without conditions.

17. Additionally, the Law foresees that in order to object a deal, the Commission shall identify either that the transaction will facilitate anticompetitive practices on behalf of the merging parties; that the transaction will pose barriers to competition which will impede the access or will unduly displace other players; or that it may confer market power to the acquirer to fix prices or restrict the supply in the relevant market, without competitors being able to counter such power.

Article 64 of the FECL establishes that a merger can pose a risk to competition when:

It confers or may confer the merging entity, the acquirer or the economic agent resulting from the merger, market dominance in terms of this Law, or if it increases or could increase said market dominance, by which free market access and economic competition may be hindered, diminished, harmed or impeded.	It has or may have the purpose or effect of imposing barriers to entry, impeding third parties access to the relevant market, to related markets or to essential facilities or displaces other economic agents.	Its purpose or effect is to substantially facilitate the merging parties to incur in conduct proscribed under this Law, and particularly, in monopolistic practices.
--	---	--

3.1 Prohibited mergers

18. Whenever the Commission fails to identify suitable remedies so as to address competition concerns raised by the proposed merger, it would ban the transaction.

19. In cases in which neither structural nor behavioral relief, nor a combination of the two, would effectively preserve competition in the market, COFECE will seek to block the merger (or unwind a consummated merger). This occurred in the proposed mergers between the main airlines in the country, Mexicana-Aeroméxico during 2000 and 2007 (Files: CNT-25-95 and CNT-095-2012).

20. In both occasions, the Commission denied the merger of the two companies as it would affect competition, noticing that the take-off and landing slots allocation regime was a significant barrier to entry for new competitors. In 2007, the Commission considered that the remedies proposed by Mexicana did not compensated the possible harm to competition that could result from the transaction, and consequently, the merger was not authorized.

⁴ Article 63 of the FECL.

21. Likewise, the Commission recently denied the Sherwin Williams Company-Comex merger (File CNT-095-2012) arguing that the deal would strengthen their market power considering that the proposed remedies would not eliminate competition concerns. Relevant cases will be specifically addressed later on.

3.2 *Conditioned mergers*

22. In spite of the aforementioned, merger prohibitions are normally the last resorts measure for the COFECE. Before baring a transaction, the Commission would seek to find appropriate remedies that offset the competition issues found in order to serve the double purpose of protecting competition in the market and not hindering economic agents' harmless business plans.

23. Notwithstanding the fact that when conducting merger analysis, whenever possible, the COFECE would privilege the clearance option, the major trade-off between a conditional approval and a prohibition decision is the design and implementation of remedies because of the gigantic task that it entails.

3.2.1 *Remedies design*

24. In Mexico, merger conditions (remedies) are established in article 90, subsection V and 91 of the FECL, as well as in article 21 of the Regulatory Provisions.

25. According to article 91 of the FECL, these are the remedial options that COFECE may accept during its merger analysis:

1. Carrying out or abstaining from a specific action;
2. Divesting specific assets, rights, partnership interest or stock in favor of third parties;
3. Modifying or eliminating terms or conditions from the acts intended to be executed;
4. Committing to implement actions that are intended to encourage the participation of competitors in the market, as well as providing access or selling them goods or services, or
5. Other measures aimed at preventing that the merger may hinder, damage or impede competition or free market access.

26. As may be noted, the FECL provides for two types of remedies: structural and behavioral (also known as conduct remedies).

27. To select or accept the appropriate remedy, the COFECE takes into account the interaction of a range of legal, factual and economic considerations. Even though the operations and transactions may look alike in some cases, their effects on competition vary depending on numerous factors, thus, this choice will most likely depend on a case-by-case analysis.

28. Also, worth mentioning, the design of remedies is done taking into consideration the COFECE's own experience in merger cases resolutions and international best practices guidelines. The International Competition Network's (ICN) recommendations are strongly taken into account, as they reflect the exchange of experiences between competition authorities from around the globe.

29. At this point, it is worth to mention that our young agency still lacks an institutional white paper or guidance document that sheds light on the remedies selection.

3.2.2 *Structural or behavioral remedies*

30. In the COFECE's experience, structural remedies are frequently used when dealing with horizontal merger cases, as they have proved to be efficient where there is high market concentration and there will raise more likely coordinated and non-coordinated effects. When this latent risk is added to the existence of barriers to entry and the absence of market efficiencies that compensate the possible competitive costs, the Commission has decided for structural remedies.

31. Particularly, the partial divestiture of assets is a condition that has been useful in relevant cases, seeking to affect only those segments of the market where anticompetitive conducts may emerge such as the Nestle-Pfizer case, the Continental-Veyance case, the Delta-Aeroméxico case, and recently the Soriana-Comercial Mexicana case. We will get into more detail of these cases in the following lines.

32. On the other hand, behavioral remedies have usually been applied to vertical merger cases. Common behavioral remedies accepted by the COFECE include elimination of exclusivity clauses, dissemination of advertisements and publication of annual reports.

33. In some cases, the best solution might be a combination of both behavioral and structural remedies. For instance, in the Mexichem-CYDSA merger (File CNT-088-2009), the Commission found that operation between competitors in the market for PVC pipes represented risks to competition, as it would lead to the integration of the only two domestic producers of the main raw material PVC in the industry. In addition to the divestiture of assets, the Commission requested the merged company, to refrain from claiming unfair trade practices not to affect the supply of inputs to competitors. Additionally, it should not acquire PVC pipe factories, and to do not condition in any way the sales of PVC resins, deny their supply or discriminate those clients that would acquire imports.

34. In the design of remedies it is also important the nature of the would-be divested assets. For instance, if we are facing an airline merger, the competition authority would most likely meet obstacles to define the legal property of slots if it were willing to divest them. In the Soriana – Comercial Mexicana merger that was recently analyzed, the Commission had to deal with the fact that some of the Soriana stores were not actually owned by the company but they were leased properties.

3.2.3 *Remedies negotiation*

35. Within the merger control regime in Mexico, economic agents are allowed to propose remedies since their notification and until one day passed the listing of the topic for the Plenum's discussion.

36. Expertise has shown that better results are obtained when remedies are tailored by the joint work of economic agents and authorities. In general, discussing remedies helps to avoid unnecessary burdens for the authorities and the economic agents. This is particularly true taking into account that the specialization of the agencies' staff is nearly impossible, thus the negotiation process allows authorities to have a better understanding of the market in question, allowing a better allocation of resources.

37. Furthermore, settlements are supposed to reduce the uncertainty of the judicial review outcomes for the agencies. However, it does not always turns out to be this way as will be shown in the description of the Scribe-Bio Pappel merger.

38. In addition, for economic agents, specifically in the case of mergers, conditions allow the transactions to be approved, and in doing so, the merger-specific efficiencies can take place in the market.

39. All that notwithstanding, tailoring remedies becomes a complicated task since there are some presumptions that structural remedies can be intrusive and behavioral remedies are somehow unassertive and costly.

3.2.4 Remedies implementation

40. The COFECE's practice has shown that we have preferred structural remedies before behavioral remedies overtime. In general terms, in horizontal mergers, structural remedies are considered more appropriate to solve competition concerns. Even so, some difficulties have aroused during their implementation of structural remedies, especially when the remedy chosen implies the divestiture of assets.

41. This, because: a) divested assets may not be attractive to third parties (possible buyers); b) buyers may not be reliable; c) divested assets may be degraded beforehand to stop the buyer from becoming a possible competitor; d) buyers may not be totally informed about the nature of the assets being purchased; e) partial divestitures might not be as effective as the divestiture of stand-alone business and f) there may be collusion between the independent auditor appointed to monitor the fulfillment of conditions and the economic agents involved.

42. Nevertheless, during the COFECE's young history, some measures have been effective to ensure implementation of remedies.

43. To begin with, the conditions should include a clear chronogram regarding the timeframes for execution. The divestiture process is divided into three phases: i) divestiture in behalf of the parties, ii) divestiture on behalf of a divestiture agent, iii) the auction of the assets. Normally, the term for the divestiture on behalf of the parties has been set to 90 natural days with option to extension. It must be said that the COFECE has no experience concerning the subsequent stages.

44. The timing of the divestiture is critical. The COFECE has allowed that the execution of the conditions is carried out after the completion of the deal. In complex cases (that are generally those conditioned), the procedure tends to be relatively long. Hence, a request that the conditions are implemented before the merger is closed may unnecessarily extend the closure of the deal generating uncertainty and risking the operation.

45. According to COFECE's experience, when implementing the remedies after the closure of the operation, the parties acquire even those assets that they are required to divest. This situation poses several challenges. On one hand, the authority would expect that the administration of those assets would be as independent as possible taking into account that they will soon belong to a competitor in the market. However, at the same time, there is a need for the assets to remain competitive and it is somehow difficult when trying to separate them from the rest of the business.

46. In this sense, in order to favor the independence of the would-be divested assets, the COFECE has put in place two measures once the deal is closed: i) the appointment of a supervisor for the would-be divested assets that will be independent from the parties, and ii) the appointment of an independent auditor that will monitor the remedies. For both of them to be efficient mechanisms, the appointments may be challenged by the COFECE.

47. The compliance with remedies should be continuously monitored through the independent auditor. In practice, the auditor would normally elaborate monthly reports before the divestiture is closed and quarterly reports once it was accomplished. Also, parties are requested to report on a monthly basis their efforts and contacts with parties interested in acquiring the divested assets.

48. For the COFECE, it is preferable a scenario where all the assets to divest are sold to a single buyer. However, sometimes this may get troublesome, for instance, when facing regional markets.

49. Once there is a buyer, COFECE must grant its approval. Especially, if the procedure will have later stages, it is important that when it is notified of the existence of a buyer, this one is formally involved in the procedure.

50. Once executed the divestiture, conditions that allow an orderly transition of the assets to be divested should remain (contracts for the supply or distribution, licensing, leasing of premises, access to infrastructure or equipment, consultancies, etc.). These remedies should also be monitored by the independent auditor.

51. Another type of remedies imposed by COFECE have included: i) modification of certain clauses in a contract, (ii) unilateral termination of a contract or unilateral waiver to an exclusivity clause, and (iii) monitoring of the members of the Board to avoid directories cross directories.

52. As we have stressed before, for each case notified, the COFECE will always seek to find ways to authorize it while preserving competition in the markets. Even when the merger may imply risks and harms, solutions are given in order to foster economic development. However, there have been a few cases in which no structural or behavioral remedies were found.

4. Relevant recent cases and lessons learnt

4.1 Prohibited mergers

4.1.1 Comex - Sherwin Williams case

53. The most relevant case of prohibited mergers attended by the COFECE in the last years is the Comex – Sherwin Williams case.

54. Comex is a company specialized in the production, distribution and sales of paints and coating. In December, 2012, the American company of general building materials industry, Sherwin Williams, announced its intention to acquire Comex under a merging operation. By the time the case was opened, Comex owned 52% of the national market of decorative coating, with 6 production plants, 6 distribution centers, and more than 300 stores, 700 franchises and 1,600 self-service centers. Meanwhile, Sherwin Williams was the number 4th company in its industry, according to the Coatings World Ranking 2013.

55. The Commission determined that the transaction involved numerous risks to competition in the relevant market of decorative coating at the national level. If the merger was cleared, both companies would have acquired a market participation between 48% and 58%, as it would also have risen barriers to free market access. One of the main barriers was revealed by the fact that Comex controlled the biggest distribution network of the coating market in the country and owned the largest portfolio of brands in its industry⁵.

56. If the merged companies had been approved by CFC, consumers of the paint and coating market would have lost a supply option and would have been exposed to possible price increases and reductions in service quality in the relevant market.

⁵ Federal Economic Competition Commission. Case Assessment: Analysis of mergers Comex - Sherwin Williams and Comex - PPG Industries. Mexico: COFECE, January, 2015. Available at: https://www.cofece.mx/cofece/images/Analisis/Analisis_Casos1_Comex-Sherwin.pdf

57. At the time, it was considered that a possible remedy to this case could have consisted in transferring to a third party (another paints and coatings firm participating in the national market) a portion of the decorative coatings segment. Nevertheless, this solution may not had been attractive to Sherwin Williams.⁶

58. As for Comex, it later fulfilled a better transaction with another company, PPG Industries, without harming competition.

4.1.2 *Cinemark – Cinemex case*

59. In early 2013, the former Commission's (the CFC) Plenum denied the cinema chain, Cinemex, the acquisition of the total operations of Cinemark, arguing that this operation would have left only two competitors in the relevant market⁷, generating a duopoly. Nevertheless, after the CFC's transition to the COFECE, the Plenum of the new competition agency analyzed the case again and stated that there were no elements to conclude substantial risks to competition in the market of exhibition of films in cinemas, arising from a possible merger of Cinemark and Cinemex.

60. The revised analysis indicated that Cinemark, compared with its main competitors, maintained low participation in the market and its presence was limited; therefore, it was an economic agent that did not help to increase competition in the sector. Consequently, in November, 2013, the COFECE authorized the merger operation, which later intensified competition between Cinemex and its counterpart, Cinepolis.

4.2 *Conditioned mergers*

4.2.1 *Nestlé - Pfizer case.*

61. In 2012, Nestlé notified the COFECE its intention to buy Pfizer Nutrition Mexico, as part of an international business strategy. Nestle aimed to acquire Pfizer's products on prenatal vitamins, milk formulas for children.

62. After a rigorous analysis, the Commission decided not to clear the operation as proposed since it would give Nestlé the power to unilaterally set prices or substantially restrict supplies in the relevant market. Nestlé could have increased its participation in the relevant market to more than 70%. And prices could have increased between 2.8% to 11.5%.⁸

63. The Nestlé-Pfizer merger is another good example of COFECE's efforts to avoid the risks of a structural remedy. In this case, the Commission only admitted the divestiture of milk-based infant formulas if it included the manufacturing facilities, an exclusive license over IP rights, sales forces and personnel in order to guarantee the viability of the business on a stand-alone basis.

64. The remedies allowed this transaction to avoid numerous adverse effects in Mexico. By imposing remedies, COFECE generated an estimated profit of 457 million Mexican pesos for consumers of milk formulas in the country.

⁶ Ibid.

⁷ Forbes. CFC denies Cinemex - Cinemax merger. Mexico: Forbes, 2013. Available at: <http://www.forbes.com.mx/confirmacion-cfc-negativa-a-fusion-cinemex-cinemark/#gs.qbsH8zU>

⁸ Federal Economic Competition Commission. Case Assessment: Analysis of conditioned merger Nestlé-Pfizer, milk formulas. Mexico: COFECE, June, 2015. Available at: https://www.cofece.mx/cofece/images/Promocion/Historias/AnalisisFormulasLacteas_vf_170615.pdf

4.2.2 *Continental – Veyance case.*

65. On September 18, 2014, the firms Continental and Carlyle notified to COFECE its merging intention. By this operation, Continental sought to acquire Veyance (an indirect property of Carlyle) and gain control over three Veyance subsidiaries in Mexico.

66. After a previous analysis of the merger and its possible results, the COFECE identified risks to competition in two markets: hoses and air springs. Continental maintained exclusive contracts in the hoses' market, which gave it advantage over its competitors. Regarding risks in the air springs for commercial vehicles' market, if the merger between Continental and Veyance was carried out, the number of competitors in the market would have been reduced from three to two.

67. In this sense, the COFECE determined that the authorization of the transaction could only be issued if the merger was subject to conditions. For this case, the COFECE imposed a combination of both structural and behavioral remedies. The Commission pointed out that the authorization was conditioned to the divestiture of the plants owned by Veyance in San Luis Potosí (Mexico) and Fairland, Ohio (United States of America). Likewise, Continental would be conditioned to put an end to its exclusive contracts in the hoses' market for one year.

68. To address some of the aforementioned risks, the Commission has required some specific measures for their implementation. The establishment of limited periods, as well as conditions and selling to the highest bidder after a limited period helps to diminish the risk of asset's degradation. For instance, in the Continental-Veyance merger, COFECE established a 30 day period for divesting the assets of Continental AG and Cartye CIM Agent. It was also required that if they failed to complete the sale within this timeframe, the business would be sold to the highest bidder during the following 30 days.

69. The merger operation between Continental and Veyance ended successfully thanks to the timely fulfillment of the parties involved. So far in COFECE'S young history, this case is worthy of being highlighted since its economic agents proved to be cooperative and responsible in the application and observance of the remedies imposed. This case also stresses that the will of the parties is essential to ensure the achievement of a merger albeit subject to conditions.

4.2.3 *Soriana - Comercial Mexicana case.*

70. In February, 2015, the department store retail chain, Soriana, announced to COFECE its intention to acquire 159 supermarket stores owned by Comercial Mexicana. At that moment, Soriana and Comercial Mexicana were two of the only four national coverage chains of supermarkets in Mexico. If the operation was approved, Soriana would have accumulated a large number of stores around the national territory and could displace competitors in local markets, since they would not be able to counterbalance Soriana's presence due to a lack of sufficient distribution networks.⁹ And therefore, Soriana could acquire enough economic power to increase prices and affect consumers.

71. Based on its analysis, COFECE determined the merger was subject to the following structural conditions: i) Soriana should not acquire any of the stores located in the 27 markets subject to competition risks, and ii) if so, Soriana should divest them and sell them to a third party through a divestiture program rigorously monitored by the Commission.

⁹ Federal Economic Competition Commission. Case Assessment: Analysis of conditioned merger Soriana – Comercial Mexicana (updated). Mexico: COFECE, August, 2015. Available at: https://www.cofece.mx/cofece/images/Promocion/Historias/Soriana-Comer-v6_270416.pdf

72. On October, 2015, Soriana and Comercial Mexicana accepted the remedies pronounced by the competition authority and committed to fulfill them in due time. They informed that Comercial Mexicana would maintain its possession over 14 stores and the rest would be firstly acquired by Soriana and then offered to third parties following the proposed divestiture program. This operation started on January 27, 2016, and its status remains in process.

73. If the transaction had been approved in its original terms, Soriana could have increased its prices by 5.26% in the 27 affected markets. Thanks to the intervention of COFECE, consumers saved 343 million 863 thousand Mexican pesos annually¹⁰.

4.2.4 *Delta – Aeroméxico case.*

74. In March, 2015, the American firm Delta Air Lines (Delta) and the Mexican firm Aerovías de México (Aeroméxico), both providers of air transport services, announced COFECE their intention to operate together its flights between Mexico and the U.S.A. through a Joint Cooperation Agreement (JCA).

75. The Commission analyzed the case and determined that the JCA, under the conditions proposed by the airlines, constituted a barrier because it would limit the number of companies in each country that could offer routes between Mexico and the U.S.A. In addition, it would impede other airlines from those routes. Moreover, the COFECE pointed out that saturation at the Mexico City's International Airport would limit other competitors from offering routes to/from the city. Finally, it concluded that the JCA would increase the joint market power of Delta and Aeroméxico, which could cause a unilateral price rise¹¹.

76. The COFECE imposed the following remedies: i) Aeroméxico and Delta should give up 8 pairs of slots in Mexico City's International Airport, as well as some slots along their U.S.A. - Mexico routes where both companies' operations overlapped, and ii) one of the airlines should give up its appointments on the routes covered by the agreement. The COFECE would keep open the alternative to cancel routes that coincided.

4.2.5 *Scribber - Bio Pappel case*

77. Bio Pappel is a Mexican company that manufactures and commercializes paper products for printing, writing and packaging. Scribe, also Mexican, is a firm that produces raw materials, manufactures and sells printing paper, toilet paper and facial tissues. On early 2016, these companies notified to the COFECE their merger intentions.

78. The COFECE determined that both companies coincided on the markets of fabrication of: 1) roll and cut bond paper, and 2) paper raw materials. The evaluation showed that the operation could affect free competition in the cut bond paper market, since the economic agents involved may be able to promote anti-dumping investigations on imports of the main countries where this product came from: U.S., Finland, Indonesia and Portugal.

79. Under these considerations, there was a risk that imports would decrease and, in the end, they would be eliminated completely, which would result in a market structure with characteristics of duopoly. Consequently, in a context of high barriers to entry, the two domestic producers, Bio Pappel and Scribe, would be able to increase prices to customers.

¹⁰ Ibid.

¹¹ Federal Economic Competition Commission. Case Assessment: Joint Cooperation Agreement between Delta and Aeroméxico. Mexico: COFECE, September, 2016. Available at: <https://www.cofece.mx/cofece/images/Promocion/Historias/AMX-DELTA-v2.pdf>

80. Economic agents offered not to request to the Ministry of Economy or other competent authority, any investigation of unfair international trade practices relating to the import of cut bond paper from countries with which Mexico has signed free trade agreements. In addition, they offered not to promote, support, participate or provide information for studies or investigations undertaken by other operators whose purpose could request any investigation of unfair international trade practices regarding the importation of cut bond paper produced in countries with which Mexico has signed a trade agreement

81. These behavioral remedies were initially accepted by both Scribe and Bio Pappel. Nevertheless, days later they filed a legal resource to the specialized courts in economic competition, arguing that some of their rights were violated by the conditions imposed by the COFECE.

82. Since the Political Reforms of 2013 that created the COFECE and developed specialized courts in economic competition, this is the first time that an economic agent presents a legal resource to the courts. In this sense, for the first time in the COFECE's young background, a conditioned merger case will be tested in the courts. Undoubtedly, this will be one of the biggest tests that the agency will face in order to prove the congruence and efficiency of its remedies.

83. This case also highlights the trade-off between prohibiting and conditioning mergers because even when the Commission will always seek to find a suitable remedy and would offer the engagement of economic agents in their design, this does not guarantee that the competition authority decisions will not be challenged before courts.

5. Conclusion

84. In trying to decide on whether it is best to block or condition a merger, competition authorities should be mindful at all times of the costs that the remedies selection comprises.

85. Designing and choosing remedies poses great challenges for competition agencies, as we must engage into a prospective analysis in order to predict the possible consequences arising from the adoption of either resolution. Sometimes, this can be extremely difficult.