Organisation for Economic Co-operation and Development

DAF/COMP/WD(2023)95

Unclassified

English - Or. English

17 November 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Serial Acquisitions and Industry Roll-ups – Note by Mexico

6 December 2023

This document reproduces a written contribution from Mexico submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03531963

Mexico

1. Introduction

1. The Federal Economic Competition Law (LFCE) provides the necessary legal framework for the Federal Economic Competition Commission (Cofece or Commission) to review mergers[1] involving a succession of acts, a figure similar to a serial acquisition.

2. The following contribution presents an overview of the Mexican experience regarding this type of operations. The first section explains the legal framework applicable to them and afterwards a recent case analysed by Cofece is presented.

2. Mexican legal framework for merger review

3. Cofece analyses the effects of mergers before these take place to address in advance either the creation of an economic agent with a dominant position or market structures that could facilitate carrying out monopolistic practices.

4. The LFCE provides that any acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts, or assets are consolidated and that it is carried out among competitors, suppliers, customers, or any other economic agent that exceeds certain quantitative thresholds, must be notified and authorized before it is executed.[2]

5. As stated in Article 61 of the LFCE, several types of transactions fall into the concept of merger and are therefore subject to Cofece's authorization. Serial acquisition and roll-ups are part of these types of transactions.

6. Additionally, Article 86 of the LFCE establishes the monetary thresholds that economic agents must consider when assessing whether they must notify their transaction for merger control or not. These monetary thresholds can be triggered either by a single transaction or by considering the aggregate amount of a series of acquisitions that are part of the same transaction, as it will be further explained.

3. Succession of acts

7. A succession of acts can be defined as "the sequence or series of legal acts or operations which allow an Economic Agent to combine companies, shares, social shares or assets of the same agent or economic interest group".[3] A succession of acts takes place when the same economic agents are involved in different transactions (i.e. same sellers –

[1] In this contribution, the term "merger" will be used to refer to a concentration as it is defined under Article 61 of the LFCE. This article provides that a concentration is a merger, acquisition of control or any act by which companies, associations, shares, social shares, trusts, or assets in general are united; that is carried out between competitors, suppliers, clients, or any other economic agents.

[2] Articles 61 and 86 of the LFCE.

[3] According to "The Guide for the Notification of Concentrations" issued by Cofece, which is available at https://www.cofece.mx/wp-content/uploads/2023/08/GUIACON_ingles.pdf

same buyers), and in which the buyer has an overall strategy or purpose, even though the assets of each transaction are different. In other words, for a series of transactions to be considered as a "succession of acts", the same buying economic group can acquire different objects, but these must belong to the same selling economic group, and there must be an overall strategy or intention from the buyer to acquire these objects together. The period during which the purchases are made is also considered when determining the existence of an overall strategy, however there is no specific time frame to consider whether a series of transactions is considered as a succession of acts or not.

8. Article 87 of the LFCE establishes that transactions consisting of a succession of acts must be notified to the Commission before the act by virtue of which the notification thresholds established in Article 86 of the LFCE are met. For example, it is possible that an Economic Agent makes partial acquisitions for amounts that, individually or combined, are below the monetary thresholds without any obligation to notify. Said obligation arises when, due a new act which is part of the overall transaction meets the monetary thresholds. This prevents an Economic Agent from gradually acquiring participation in the share capital of another one, through acts that do not require individual notification, until obtaining *de jure* or *de facto* control.

9. Economic Agents involved may express their intention to engage in successive acts, for example, when the transactions include options for the future acquisition of equity. To determine whether there is a succession of acts subject to be notified in terms of Article 86 of the LFCE, the Commission evaluates the context of each merger, particularly when the assumptions of Article 87 of the LFCE are met.

4. Theories of harm involving succession of acts

10. Mergers executed through a succession of acts may hinder the process of competition and free market access in the same way that a "traditional" merger would do since it could imply an increase in the number of market shares in such a way that either an economic agent with substantial market power is created, the substantial market power of the agent conducting the operation is increased or non-competitive market structures are created. In this sense, the effects on the market of a merger involving a succession of acts are analysed by Cofece in the same way of a "traditional" merger.

11. It should be noted that, even if this type of mergers is only subject to notification when they exceed any of the thresholds established in Article 86 of the Law, when analysing a succession of acts, the Commission reviews all the related transactions and their effects in the market prior to the notification. In this scenario, Cofece could block the operation as a "whole" and, in that regard, order to reverse the acts that were consummated before the notification.

12. Finally, it is important to consider that there are cases where economic agents could make certain purchases over time either of several assets in a same relevant market or of shares of a competitor without triggering the notification thresholds. As this type of acquisition strategy could create a market structure that hinders competition or the creation of an economic agent with substantial power, they can be investigated by the Investigative Authority to review whether these series of transactions constitute an unlawful merger. The statute of limitations for the Investigative Authority to start these investigations is of one year after the closing of the merger and, if Cofece determines that the transaction effectively constitutes an unlawful merger, it can order to reverse the effects of the operation (including divestment) and fine the economic agents that participated in it.

5. Recent experience: the dolphinarium case[4]

13. In October 2023, the Board of Commissioners of Cofece challenged a merger between companies participating in the market of entertainment services in dolphinariums in the state of Quintana Roo.[5] The merger consisted of the intention of *Ejecutivos de Turismo Sustentable* and *Triton Investment Holdings* to acquire two adventure parks and a water park located in the state of Quintana Roo, an amusement park in the state of Jalisco; as well as five dolphinariums (*Dolphinaris Cancún*, *Dolphinaris Tulum* and *Dolphinaris Riviera Maya*) also in the state of Quintana Roo and under the control of *Controladora Dolphin*. In this case, Cofece found that the transaction was part of a succession of acts, so in its analysis each and every one of the acts were considered.

14. The Board of Commissioners concluded that, with respect to entertainment services in amusement, adventure and water parks, the merger was unlikely to affect the process of competition, since the market shares met the Commission's criteria and there were no additional elements that could pose a risk to competition in such markets. However, regarding dolphinariums, the Commission found that the merger would imply the absorption of a competitor with the capacity to exert competitive pressure in market since the parties belonged to an economic interest group with several types of amusement attractions in Mexico and, specifically, in Quintana Roo they already had seven dolphinariums and an adventure park.

15. Additionally, the analysis identified high entry barriers in the market related to the difficulty of developing commercialization channels, the high investment amounts needed to open a dolphinarium and acquire dolphins, and the fact that entertainment services in dolphinariums are a highly regulated activity. As a result, no new competitors were identified and no possibilities for the market to grow and incentivize their entry were found.

16. Even though, the parties presented commitments to eliminate the risks identified, these were deemed as insufficient by the Board of Commissioners who resolved to challenge the operation regarding: (i) The acquisition of control by the buyers of the dolphinariums *Dolphinaris Cancún*, *Dolphinaris Tulum* and *Dolphinaris Riviera Maya*; and (ii) the acquisition of any of the five dolphinariums or their assets. It is worth mentioning, that per the LFCE, once the parties are notified of the resolution of Cofece they have the right to appeal before the Judicial Power to review the legality of the Commission's actions.[6]

[4] For more information on this case, see Press Release COFECE-034-2023 available at https://www.cofece.mx/wp-content/uploads/2023/10/Cofece-034-2023_ENG.pdf

[5] The merger was analyzed under file CNT-107-2022

[6] The public version of the resolution is not available yet. When published, it will be available at the Commission's website at https://www.cofece.mx/conocenos/pleno/resoluciones-y-opiniones/