Concentrations: An Analysis of the Mexican Economic Competition Legal Framework

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CONCENTRATIONS

AN ANALYSIS OF THE MEXICAN ECONOMIC COMPETITION
LEGAL FRAMEWORK

RELEVANT CASES
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INTRODUCTION

In the middle eighties, Mexico initiated a structural reform based on free trade as an instrument for the economic development. The reform, which reached its peak in the 88-94 administrative period, included a series of measures such as the elimination of price controls, the privatization of state-owned companies, the liberalization of international trade and foreign investments, and the implementation of an ambitious deregulatory program. Among the measures comprehended in the reform, one of the most important was the creation of a legal and institutional framework for the effective development of an economic competition policy.

Notwithstanding the fact that since 1857 existed a Constitutional norm prohibiting monopolies, also adopted by the 1917 Mexican Constitution, in effect at present, it was not until the late 1992, when the most serious effort to effectively enforce the Constitutional norm took place, through the enactment of the Federal Law of Economic Competition (hereinafter LFCE by its acronym in Spanish), by means of conceptualizing the antitrust policy as an instrument to promote competition through a series of legal provisions which allow challenging monopolistic practices, prevent and penalize concentrations in restraint of trade and enhancing a general legal framework which eliminates restrictions to the efficient operation of markets, among other actions.

Prior to the economic reform, the State actions headed towards the implementation of the Constitutional norm referred to above, had been aimed to counter the effects of monopolies by means of price control and the involvement of the State as an economic agent in numerous sectors of the industry, instead of to challenge said monopolies.

The LFCE, reckoned as one of the most modern ordinances on economic competition, allots important consideration to setting the legal rules under which unions among economic entities, referred to by the aforementioned ordinance as concentrations, are to be executed in order to secure an environment of competition within domestic markets.

Due to the novel features of the LFCE, a complete understanding of the provisions contained therein generally, and concretely those regarding concentrations, has purported a process of interpretation and experimentation by means of which the scope and limits of the referred dispositions have been truly defined.

The purpose of this work is to provide a wide overview of the legal framework governing concentrations, exposing certain opinions on the insufficiency of diverse legal provisions and on the adequate criteria for its interpretation, as well as the proposal, in its case, of the amendments which, upon the experience derived from the practical application of the LFCE, I consider convenient to adopt in order to achieve a higher efficacy in the accomplishment of its objectives.\(^1\)

Hence, a general overview of the constitutional principles which set the grounds for an economic competition policy and the rules deriving therefrom is exposed, followed by an analysis of the rules governing concentrations including the methodology to determine whether these concentrations diminish, harm or hinder competition and free concurrence, the corresponding penalties and the procedures to impose and appeal them. Finally, some relevant cases are presented in order to exemplify the manner in which the legal framework examined throughout this work operates, as well as to expose how practical cases have been the basis for the creation of criteria which has been, in certain cases, later adopted in the Federal Law of Economic Competition Regulation (hereinafter RLFCE by its acronym in Spanish) and to depict some of the situations which sustain certain amendment proposals included within this document.

**LEGAL AND INSTITUTIONAL FRAMEWORK**

Article 28 of the prevailing Mexican Constitution sets the foundations for an economic competition policy and although it has been amended in various occasions since its enactment in 1917, its first two paragraphs, transcribed hereunder, remain essentially unchanged:

> "ARTICLE 28. In the Mexican United States the monopolies, the monopolistic practices, the state monopolies [estancos] and the tax exemptions are prohibited in the terms set by the laws. The same treatment shall be given to every prohibition raised under the protection of the industry.

> "As a consequence, the law shall severely punish and the authorities shall prosecute with efficacy, every concentration or hoard in one or few hands of primary consumer goods and having the purpose of raising prices; every agreement, procedure or combination among producers, industrials, merchants or service entrepreneurs, that in any way purports to avoid free concurrence or competition between themselves and compelling consumers to pay exaggerated prices and, in general, everything which constitutes an unlawful exclusive advantage in favor of one or many determined persons and in detriment of the general public or a specific social class."

Since 1917, the legislative branch has issued several ordinances in order to regulate the constitutional norm cited above, nonetheless it is not until 1992 when the most important of the administrative efforts aimed towards the enhancement of a modern free trade regulation took place which was reflected in the enactment of the LFCE.\(^2\)

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\(^1\) The proposed amendments and corresponding justifications contained in this paper are part of a broader reform package drafted by the author as a consequence of the counseling rendered to the Mexican Federal Regulatory Improvement Commission and might be also published, in part or in whole, by such agency, at any time as of the fourth quarter of 2000.

\(^2\) The LFCE was published in the Federal Official Gazette on December 24, 1992 becoming effective on
According to the LFCE, Article 23, the CFC, an administrative agency of the Ministry of Commerce, is to be in charge of enforcing the economic competition policy. The rules governing the administrative operation of the CFC, are compiled in its internal regulation, which together with certain provisions of the LFCE, set its structure. In this regard, the governance organ of the CFC is a Board of Commissioners, in charge of the decision-making processes, integrated by five Commissioners including its President, all of them appointed by the Mexican President. The operative and administrative coordination is under the responsibility of an Executive Secretary.

The personal jurisdiction of the CFC, as established in the LFCE, article 3, reaches all persons regardless of their legal nature, including departments and entities of the Federal Government, professionals guilds, trusts or any other entity participating in the economic activity. Materially, the scope of activities of the CFC extends to every area of the economic activity and concerns the protection of competition and free concurrence by preventing and eliminating monopolies, monopolistic practices and any other restraint against the efficient operation of the goods and services markets. Given that the LFCE is a Federal ordinance, the spatial jurisdiction of the CFC extends to all the economic activity having effects within national territory.

According to the LFCE and other ordinances governing regulated markets such as telecommunications, naval ports, airports, railroads and natural gas, among others, the main object of the CFC may be briefed in: (i) preventing, challenging and penalizing absolute and relative monopolistic practices and concentrations in restraint of trade; (ii) promoting a general legal framework in accordance with the economic competition policy; (iii) fomenting competition in regulated markets, and (iv) investigate conducts in restraint of interstate trade.

For what concerns concentrations, the subject of analysis of the present document, the LFCE, provides the definition of concentrations and qualifies those which are to be deemed in restraint of trade, the procedures to prevent, challenge and penalize them, the penalties imposed by the CFC and the procedures to appeal its decisions.

On March 4, 1998 the RLFCE, an ordinance issued by the Mexican President, was published in the Federal Official Gazette, to become effective the day after. The main purpose of the RLFCE is to clarify and elaborate on certain aspects of the LFCE, in order to provide for a better understanding and enforcement of the rules contained therein.
Even though some of the provisions of the RLFCE, according to their nature and scope ought to be contained in the LFCE, situation which could rise constitutional issues regarding the legal enforcement of said provisions, it is preferable to have norms which might be challenged, than to lack the existence of a legal framework setting the boundaries within which the authority is empowered to act. An example of this is the establishment in the RLFCE of specific timeframes which constrain the terms in which the CFC is to act, thus increasing the legal certainty of the persons acting before said authority. In this regard, it is also important to point out, that only the persons affected by an act of the authority derived from the RLFCE, are the ones entitled to exercise the right to challenge its validity. The authority is not empowered to challenge the validity of the RLFCE and it is compelled to fulfill the provisions set therein.

An additional legal source, issued in order to comply with the mandate set in the RLFCE, article 13, on July 24, 1998 the CFC published on the Federal Official Gazette, its resolution on the methodology for the calculation of the indices to determine the degree of concentration in the relevant market and the criteria for its application.

In addition to the ordinances and rules cited above, the CFC has issued diverse not-binding criteria disclosing its views and interpretations on aspects deemed unclear or ambiguous, as well as on certain fine points on its day-to-day operation. This criteria has been compiled, primarily, in the Annual Reports issued by the aforementioned authority, in which some cases deemed important have been also published. Notwithstanding, since the enactment of the RLFCE, all the decisions adopted by the CFC, as well as its criteria, are to be periodically published in an internal gazette and an abstract of them shall be published in the Federal Official Gazette.

THE CONCEPT OF CONCENTRATION

In order to analyze the concept of concentration to its full extent it is convenient to review the parts relevant to such figure within the first two paragraphs of Article 28 of the Constitution:

"Article 28. In the Mexican United States the monopolies... are prohibited...
"As a consequence, the law shall severely punish and the authorities shall prosecute with efficacy, every concentration or hoard in one or few hands of primary consumer goods and having the purpose of raising prices; ..."

It is possible to understand the aforementioned rules in the sense that the concept of concentration should equal the concept of hoard, which in the specific case is immediately branded by "...in one or few hands of primary consumer goods...", making it feasible to assume that a concentration must imply getting the referred goods out of the market for a specific purpose, and therefore opposing the definition of the referred concept provided in the LFCE, which states said concept in a manner much more related to the concept of accumulation of production assets. This

7. "Article 13: The Commission shall publish on the Federal Official Gazette the methodology for the calculation of the indices to determine the degree of concentration in the relevant market and the criteria for their application."
apparent contradiction regarding the different assumptions of concentration provided in the Constitution and the LFCE, may be cleared by interpreting the latter ordinance as a regulator of the norm provided in the first paragraph of the Constitution, by creating a hypothesis of those conducts which may equal a monopoly, instead of understanding that it shall regulate only those concentrations referred to in the Constitution, Article 28, second paragraph.

The LFCE, article 16, first paragraph, defines the concept of concentration as follows:

"Article 16: For the purposes of this law, concentration shall be understood as the fusion, acquisition of control or any other act by virtue of which corporations, associations, equity, shares, trusts or assets in general are concentrated among competitors, suppliers, clients or any other economic agent."

According to the provision transcribed above, the following hypothesis are comprehended in the definition of concentration:

(i) The fusion of corporations;
(ii) The acquisition of control over corporations or associations, and
(iii) The accumulation of equity, shares, trusts or assets in general.

The LFCE is silent for what regards the treatment to be given to notifications of concentrations carried out abroad and, according to the criteria adopted by the CFC in the years preceding 1997, all concentrations having any effect within Mexican territory were susceptible of notification. Notwithstanding, the provision set in the LFCE must be interpreted in the sense that a transaction is only relevant as long as it has legal or material effects within national territory, since due to the jurisdictional scope of the referred ordinance, it is only then that the transaction may be considered as a concentration.

Accordingly, an international transaction may only be considered a concentration if it conveys the acquisition of control of a Mexican entity, or the accumulation in Mexican territory of equity, shares, participation in trusts or assets.

An example of a transaction which may not be considered as a concentration in terms of the LFCE, article 16, is one which involves a foreign person who, having no prior interests in Mexican territory, by means of a merger becomes the indirect owner of a determined percentage of the shares representing the capital stock of a Mexican corporation, as long as said percentage is not sufficient for the foreign person to exercise control over it.

The aforementioned interpretation, has been expressly adopted in the RLFCE, article 21, fraction I, determining the jurisdictional scope of the LFCE and hence, renewing the criteria adopted by the CFC in the years preceding 1997.

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8. Articles 222 through 228 of the Mexican General Law of Mercantile Entities, regulates the fusion as a specific sort of merger. In this regard, being the fusion an act regulated under the laws as the outcome of the union of one or more mercantile entities the verification of this hypothesis need convey that it be carried out among corporations and in accordance with the aforementioned rules set in the General Law of Mercantile Entities.

9. The acquisition of control, according to various Mexican ordinances, is concretely referred to the power to exercise decisions solely over corporations or associations.

10. The accumulation described heretofore, refers to any other act which conveys bringing together the elements listed therein.
CONCENTRATIONS IN RESTRAINT OF TRADE

In like manner to the possible conceivable contradiction existing between the concept of concentration in the second paragraph of Article 28 of the Constitution and the LFCE, there exists also a conceptual contrast in both ordinances for what regards the consideration of concentrations in restraint of trade.

As exposed, according to the second paragraph of Article 28 of the Constitution, it could be assumed that only concentrations affecting "primary consumer goods" are prohibited, and hence the rules derived from this fundamental hypothesis are to be limited in their regulation and are not to trespass the boundaries set by the higher ordinance.

In this regard, the concept of concentrations in restraint of trade provided in the LFCE would literally trespass the aforementioned boundaries creating a loophole which would open the possibility for third party claimants to challenge the validity of the economic competition ordinance itself, when prosecuted under it.

As stated above, the adoption of the foregoing interpretation would attend to a literal understanding of the constitutional precept and would entail a misconception of the legislative intention behind the regulation of trade in benefit of competition and free concurrence. Once again, the interpretation to be embraced resides in the prohibition of monopolies provided in the first paragraph of the cited constitutional norm, for it sets the grounds upon which the legislative intention is to be construed. In this sense, the enunciation provided in the second paragraph is to be reckoned as a beacon of certain conducts and practices which among others, are to be deemed in restraint of trade and hence forbidden by the derivative regulating rules.

The LFCE, article 16, last paragraph, hereunder quoted, defines the concentrations which are to be considered in restraint of trade:

"... The Commission shall challenge and penalize those concentrations which have as an object or effect to diminish, harm or hinder competition and free concurrence for what regards equal, similar or substantially related goods or services"

According to the LFCE, article 17, hereunder quoted, the CFC will consider the elements contained therein as indicia of a concentration in restraint of trade:

"Article 17.- In the investigation of concentrations, the Commission shall consider as indicia of the hypothesis referred to in the preceding article that the act or intended act:

"I. Confers or may confer the person performing a fusion; the acquiring economic agent or the one resulting from the concentration, the power to unilaterally fix prices or to substantially limit output or supply in the relevant market, without the competing economic agents being able to, currently or potentially, counteract said power;

"II. Has or may have as an object to unlawfully shift out other economic agents or block their access to the relevant market; and

"III. Has as an object or effect to facilitate the participants in the referred act, or intended act, the performance of the monopolistic practices referred to on the second chapter of this law."
The wording of the preamble of the above cited article is inaccurate, for it mentions in a general manner those acts referred to by the preceding article, which as exposed above, contains both what is to be understood as a concentration and the general norm defining when such concentrations shall be deemed in restraint of trade, nevertheless, given the scope of the article it seems obvious that it refers to the second paragraph of the LFCE, article 16.

It is important to take account that the use of the word indicia in the referred article would entail that there are other hypothesis, which do not appear within the text of the economic competition ordinances, that must be verified in order for the CFC to determine whether it is facing a concentration in restraint of trade. This results in a situation of uncertainty, given that indicia in itself is not a basis upon which to demonstrate that a concentration diminishes, harms, or hinders competition and free concurrence.

Now, in relation to the contents of the fractions in article 17, it is relevant to point out that the first two of them in themselves, do represent hypothesis which accurately describe the cases in which a concentration may have as an object or effect to diminish, harm or hinder competition and free concurrence. For what regards equal, similar or substantially related goods or services.

For what regards the hypothesis referred to in fraction III above I consider it would be convenient to suppress it given the arguments exposed in the following paragraphs.

According to Chapter II of the LFCE, there are two different sorts of monopolistic practices, absolute and relative. In this sense, article 9 sets that absolute monopolistic practices are those contracts, agreements, arrangements or combinations among competitors which object or effect is to purport either (i) price fixing; (ii) output limitation; (iii) horizontal division of markets, and (iv) bidrigging. Likewise, article 10 states that relative monopolistic practices, are those acts which object or effect is, or may be, to unlawfully shift other persons out of the market, block their access, or set exclusive advantages in favor of one or several persons by purporting: (i) vertical price fixing; (ii) resale price maintenance; (iii) tying arrangements; (iv) exclusive dealings; (v) unilateral refusal to deal; (vi) boycott, and (vii) any other act that unlawfully harms or hinders competition and free concurrence in the production, processing, distribution and marketing of goods and services, as long as it is verified that the alleged responsible has substantial power in the relevant market.

In this sense, for what concerns the conducts considered as absolute monopolistic practices, it is impossible that there is a causal link between them and the execution of a concentration given that the required agreement of the former is not consequential upon the execution of the latter.

In regard relative monopolistic practices, it is possible to assume that the legislator intended to avoid the possibility that, as a consequence of the concentration, the persons resulting therefrom, would acquire or increase its market power to an extent which would allow them to cause damage when performing the conducts classified as relative monopolistic practices. However, this is irrelevant since the acquisition of market power is considered in fractions I and II of article 17, making the CFC to consider the concentration, under this hypothesis, to be in restraint of trade, without having to confirm if this situation enables the person to execute relative monopolistic practices.
The LFCE, article 18, quoted hereunder, sets the elements to be considered in order to determine if a concentration is to be challenged or penalized:

"Article 18: To determine if the concentration should be challenged or penalized in terms of this law, the Commission shall consider the following elements:

I: The relevant market, in the terms provided in article 12 of this law;

II: The identification of the economic agents which supply the market being treated, the analysis of their market power in the relevant market, according to article 13 of this law, and the level of concentration in said market; and

III: The rest of the criteria and analytical instruments provided in the Regulation of this Law."

The wording in the foreword of article 18 above is confusing, since it points out that the elements further provided in the contents of the article are the ones to be considered in order to determine if a concentration is to be challenged and penalized whereas, in fact, said elements are in themselves the ones to be considered in order to analyze the concentration.

In other words, the elements listed in article 18 are the ones used in order to get the results upon which it is possible for the CFC to acquaint that a concentration falls within the scope of article 17 and hence fits into the definition of a concentration in restraint of trade provided by article 16, last paragraph.

Now, the first salient element to be considered by the CFC in the analysis of a concentration is the relevant market, which according to the LFCE, article 12, must be set according to the following criteria:

(i) The substitution possibilities of the good or service for other domestic and foreign goods or services, considering the technological development, the extent to which the consumers have substitutes and the time required for such substitution.

(ii) The distribution costs of: (a) the good itself; (b) its relevant inputs; (c) its accessories and substitutes from other regions and abroad, considering freight charges, insurance, tariffs and non-tariffs restraints, restraints imposed by the persons or its organizations, and (d) the time required to supply the market from the aforementioned regions.

(iii) The costs and opportunities of the users or consumers to attend other markets.

11. The additional criteria and analytical instruments provided in the RLFCE, referred to by the LPCE, article 18, fraction III are hereunder quoted:

"Article 15. To determine if a concentration should be challenged and penalized, according to fraction III of article 18 of the law, the following criteria shall be additionally considered:

I: The valuation in the relevant market of the efficiency gains which, according to article 6 of this Regulation, may derive from the concentration, which shall be asserted by the economic agents executing it;

II: The effects of the concentration in the relevant market regarding the rest of the competitors and consumers of the goods or services as well as in other related markets and persons, and

III: The stock participation of the persons involved in the transaction in other persons participating, directly or indirectly, in the relevant market or in related markets.

When it is not possible to identify the indirect stockholders, this circumstance shall be duly justified."
(iv) The federal, local or international legal restraints limiting the access of users or consumers to alternative supply sources or the access of the suppliers to alternative clients.

The second salient element of analysis for the CFC, as set in article 18, fraction II, of the LFCE, comprises the determination of the market power in terms of article 13 of said ordinance, hereunder quoted:

"Article 13: In order to determine if an economic agent has substantial power in the relevant market, it is to be considered:

"I: Its participation in said market and if it is able to unilaterally fix prices or to limit output in the relevant market, without the competing economic agents being able to, currently or potentially, counteract said power;

"II: The existence of entry barriers and the foreseeable elements which may alter both said barriers as well as the offer of other competitors;\(^{12}\)

"III: The existence and power of its competitors;

"IV: The possibilities of access of the economic agent and its competitors to input sources;

"V: Its recent behavior; and

"VI: Any additional criteria set in the regulation of this law."\(^{13}\)

As it may be seen, the first element of the criteria above mentioned essentially duplicates the content of article 17, fraction I, of the LFCE, which represents a lack of precision since it is possible to assert that such element is in itself the essence of market power. Hence, the referred element is the outcome which derives from the consideration of the rest of the elements contained in article 13, above.

For what concerns the element referred to in article 18, fraction II, regarding the level of concentration in the relevant market, the CFC shall consider the methodology for the calculation of the indices to determine the degree of concentration in the relevant market and the criteria for its application.

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12. The RLFCE, article 11, establishes that the following elements, among others, are to be considered as entry barriers:

(i) The financial costs;
(ii) The alternative channels development costs;
(iii) The limited access to finance, technology or efficient distribution channels;
(iv) The amount, indivisibility and recovery term of the required investment, as well as the scarce profitability of using alternative infrastructure and equipment;
(v) The need for: concessions, licenses, permits or any other governmental authorization, as well as the need to obtain title to exploit intellectual property rights;
(vi) The publicity investment required for a brand or trademark to achieve an market position that allows it to compete with brands or trademarks already positioned;
(vii) The competition limitations in the international markets;
(viii) The restraints derived from common practices of the persons already established in the market;
(ix) The acts of federal, state and municipal authorities for what regards discrimination when granting incentives, subsidies or support to certain producers, marketers, distributors or service providers.

13. The additional criteria set in the regulation, referred to by the article cited above, fraction VI comprises primarily the following elements, as set by the RLFCE, article 12:

(a) The positioning level of the goods or services in the relevant market.
(b) The lack of access to imports or the existence of high importation costs.
(c) The existence of high differentials in the costs faced by consumers when accessing other suppliers.
In this regard, according to the aforementioned methodology, the indices to be used as standards to determine the level of concentration in the relevant market are the Herfindahl index and the Dominance index.\textsuperscript{14}

**PROCEDURES TO PREVENT, CHALLENGE AND PENALIZE CONCENTRATIONS IN RESTRAINT OF TRADE**

There are two different procedures by which the authority acquaints the existence of a concentration which execution should be prevented, challenged or penalized: (i) the notification procedure, initiated by the economic agents involved in the concentration, previous to the closing of the transaction, and (ii) the investigation procedure, that may be initiated by the authority, ex officio, or by affected third parties, through a law suit, against a concentration already executed.

**THE NOTIFICATION PROCEDURE**

The notification procedure has been reckoned as an efficient method for the authority to get acquainted with concentrations which may be deemed to be in restraint of trade, before such concentrations are accomplished.

Upon the notification the authority is able to analyze the impact of the concentration in the market or markets which are to be affected, and in its case, take one of three resolutions: (i) authorize the concentration; (ii) condition the concentration, in order for it to fulfill the requirements needed to avoid threatening competition and free concurrence in the market,\textsuperscript{15} or (iii) prohibit it.

**THE OBLIGATION TO NOTIFY**

The obligation of the persons involved in a concentration to notify it before the authority is founded in the LFCE, article 20, hereunder quoted:

"Article 20.- The following concentrations, prior to their accomplishment, are to be notified before the Commission:

'\textsuperscript{I} If the transaction is worth, in an act or a succession of acts, the equivalent of more than 12 million times the general minimum wage valid for the Federal District;

'\textsuperscript{II} If the transaction implies, in an act or a succession of acts, the accumulation of 35 per cent or more of the assets or equity of an economic agent whose assets..."
or sales are worth more than the equivalent of 12 million times the general minimum wage valid for the Federal District;

"III. If in the transaction take part two or more economic agents whose assets or annual sales, jointly or separately, are worth more than 48 million times the general minimum wage valid for the Federal District, and said transaction implies an additional accumulation of assets or equity superior to the equivalent of four million eight hundred thousand times the minimum wage valid for the Federal District."16

The rationale for the existence of thresholds is based on the assumption that those concentrations which exceed the thresholds are most likely to affect the competition and free concurrence process. Notwithstanding, a concentration not meeting the thresholds is not necessarily considered legal per se and hence, the CFC and interested third parties are empowered and have standing, respectively, to act against a concentration which may be deemed unlawful by means of the substantiation of the investigation procedure, which is exposed further in this work.

According to the rationale under which thresholds have been adopted as a legal standard by means of which concentrations are to be notified before the CFC, said thresholds need reflect the behavior of domestic economy in order to be accurate. Therefore, the amounts set as thresholds in LFCE, article 20, are indexed to a number of times worth the General Minimum Wage Valid for the Federal District (hereinafter GMW) the day before the notification is to be filed, given that at the time the LFCE was enacted the aforementioned index was considered as an accurate indicator of domestic economy. Nevertheless, due to the current value of Mexican Peso given the inflation rate prevailing since the enactment of the LFCE, and the disparity this inflation maintains as compared to the GMW, thresholds are no longer accurate in establishing the sort of transaction which requires notification.17

The aforementioned situations leads to the notification of transactions which at the time the LFCE was enacted were not reckoned as concentrations which would require scrutiny. As a consequence, the CFC advocates a great deal of resources to the analysis and review of the aforementioned concentrations, which in fact should not be deemed relevant for scrutiny. Hence, it would be convenient to amend the LFCE in order to index the thresholds for the notification of concentrations to a more accurate sort of unit such as a UDI,18 which acknowledges the value of inflation.

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17. The difference in the value of the Mexican Peso may be represented through the following comparison: at the time the LFCE was enacted, December 24, 1992, a US Dollar was worth 3.12 Mexican Pesos, according to the exchange rate issued by Banco de México, valid for the referred date; at present, a US Dollar is worth, approximately, 9.42 Mexican Pesos, according to the exchange rate issued by Banco de México valid for September 1, 2000.

18. Unit of Investment, UDI by its acronym in Spanish See “Decree establishing the obligations which may be expressed in Units of Investment and reforms and adds diverse dispositions of the Federal Taxation Code and the Law of the Tax on the Rent.” ("Decreto por el que se establecen las obligaciones que podrán denominarse en Unidades de Inversión y reforma y adición diversas disposiciones del Código Fiscal de la Federación y de la Ley del Impuesto sobre la Renta.") published in the Federal Official Gazette on April 1, 1995.
EXEMPTIONS TO THE OBLIGATION TO NOTIFY

As briefly mentioned whilst explaining the concept of concentration, according to article 21, fraction I, of the RLFCE, transactions carried out abroad, having effects in Mexican territory but not implying the acquisition of control of Mexican entities or an accumulation of assets, need not be notified before the CFC, given that said transactions do not meet the legal hypothesis of concentration set in the LFCE. 19

Likewise, according to the RLFCE, article 21, fraction II, corporate reorganizations by means of which, a person has directly or indirectly, property or possession, during the three years prior to the concentration of 98% of the capital stock of the persons involved therein, need only file notice before the CFC within the next five days of the closing of the concentration. This provision, which in its conception was meant to represent a quick overlook of corporate reorganizations, in order to meet deregulatory goals, has not had the desired effect, since the drafting of the disposition ended up being so concrete and specific, that it is rare to fulfill the features required by it.

PROCEDURAL ISSUES

The salient elements and timeframe of the notification procedure, regulated in articles 21 of the LFCE and 20 of the RLFCE, are hereunder exposed:
(i) Filing of written statement, before the CFC, notifying the concentration;
(ii) Within the next five working days of the filing, the CFC will warn the person notifying if any basic data and information is missing, then the person notifying is to file the missing basic data and information within the next five working days;
(iii) Once the notification is filed, fulfilling the basic data and information requirements, or once these are fulfilled, within the next 20 calendar days the CFC may request additional data and information which has to be filed within the next 15 calendar days;
(iv) The CFC will issue a resolution within the next 45 calendar days period, which may be extended, in exceptionally complex cases and under the responsibility of the President of the CFC, for an additional 60 calendar days period. The 45 calendar day period will start running at the time of the filing of: (a) the notification, or (b) the basic data and information referred to in paragraph (ii), or (c) the additional data and information referred to in paragraph (iii).
(v) If no resolution is issued by the CFC upon expiration of the corresponding 45 calendar days period or its 60 calendar days extension, it shall be understood that the CFC has no objection against the concentration.

19. "Article 21: It shall not be required to notify in terms of articles 20 and 21 of the Law:
"I: The legal acts over equity or shares of foreign legal entities, when the economic agents involved in said acts do not acquire the control of Mexican entities, nor accumulate in national territory equity, shares, participation in trusts or assets in general, additional to those possessed, directly or indirectly, before the transaction, and II: ...."
As well as other provisions in the LFCE, certain rules governing the notification procedure present some loopholes which together with its conception, display the problems exposed in the following paragraphs.

Neither the LFCE nor the RLFCE grant affected third parties standing to intervene in the procedure and, as a consequence, to appeal the decisions of the CFC in the event a concentration is approved which would convey them damage. In this regard, it is important to point out that, according to fraction I of article 22 of the LFCE, the only opportunity for a third party to challenge a concentration already approved by the CFC is when the corresponding approval was granted upon false information. Notwithstanding, in practice, the initiation of a third party action under this hypothesis is almost impossible given that, not being part of the procedure, the referred third parties lack access to the file and, therefore, are not able to acquaint the information delivered to the authority by the persons filing the notification.

The terms set for the substantiation of the procedure are extremely long for what regards a great amount of cases which, by virtue of a simple analysis, may lead to conclude that no harm to the competition and free concurrence process is conveyed, such as those in which the concentration takes place among economic agents participating in unrelated relevant markets or those in which, although the economic agents participate in the same or related relevant markets, the increase on the market shares, derived from the concentration, is not significant. This problem may imply the lack of transparency in the operation of the CFC, since the economic agents under the law may perceive that such authority, when in presence of equally simple concentrations, for no express reason, in certain cases decides in a very short time whereas in other cases a decision is reached consuming the whole of the corresponding term.

The participation of the economic agents filing the notification is limited to the delivery of data and information, not existing within the procedure a stage prior to the decision, in which, in case the CFC intends objecting or conditioning the transaction, the right to be heard is exercised. No assertion of dissent towards the position adopted by the CFC is possible but until after a decision has been issued, throughout the administrative appeal, situation which may imply, in the event the CFC changes its view, the unnecessary delay of a favorable resolution.

A similar problem takes place when from the analysis of the concentration derives the need to condition it and the persons notifying agree with the analysis but not with the conditions imposed, which contents may be unilaterally determined by the CFC. Considering that in order to reach the purpose of avoid harming to the competition and free concurrence process, there may exist diverse options, it does not seem reasonable that the conditions tending to achieve the aforementioned purpose need be determined by the authority, since in most of the cases it is possible that the economic agents involved in the concentration are able to provide alternatives which are more convenient to their own interests and which, simultaneously, make it less likely to safeguard competition to an extent satisfactory for the authority. The RLFCE partially fills this gap by establishing in its article 16 that the persons filing the concentration are entitled to request the authority to consider their proposals prior to the issuance of a decision tending to impose conditions; nonetheless, a definite solution to the problem may only be given by the
modification of the LFCE, since it is necessary to suspend the decision periods while the analysis of the referred proposals is performed.

In order to counter the problems of the notification procedure described above, a conceptual reform to it, comprising a two tier method of analysis, could be adopted, by means of which, prior to the initiation of the procedure, a publication in the Federal Official Gazette including the relevant data of the concentration should be done, in order for possible affected economic agents to be part of the procedure and making it feasible for them to challenge the final decisions of the CFC on the matter.

The first tier would be a brief stage lasting about fifteen to twenty working days. Within it, the CFC would analyze the concentration, acknowledging the volume and contents of the opinions of interested third parties, regarding whether the concentration requires further analysis and therefore needs step to the second tier of the procedure, or whether it does not represent a threat to the competition and free concurrence process and is to be approved. The existence of a first tier, together with the increase in the amounts set as thresholds, resulting from the proposed amendment to article 20 of the LFCE, would imply an important deregulation achievement since the only concentrations which would step into the second tier would be those from which effects in restraint of trade are perceived. This would result in an increased efficiency in the operation of the CFC, given that it would be able to allocate significant time solely to those concentrations really requiring it.

The second tier of analysis would be substantiated in a period larger than the first, since it would comprise a more extensive analysis. During this second tier, the CFC would be empowered to request as much information as it would deem relevant for the analysis of the concentration and the person notifying and interested third parties would be entitled to provide evidence and to express what better serves their interests prior to the issuance of a decision.

The decision of the authority would have to be in the sense of either approving or objecting the concentration upon the consideration that it diminishes, harms or hinders competition and free concurrence. In this case, a new period would start in which the economic agents involved in the concentration would be entitled to submit for the consideration of the CFC, and revisable by possible affected third parties, proposals of conditions aimed to protect the competition process and making it feasible for the concentration to be accomplished.20

THE INVESTIGATION PROCEDURE

As mentioned above, the investigation procedure is an additional means to the notification procedure, upon which, the authority is empowered to review a concentration in order to determine if it harms competition and free concurrence and, in its case, challenge it; not being either procedure alternative or optional over the other. Notwithstanding that the LFCE does not contain an express provision, it is possible to interpret such ordinance and conclude that the feasibility of one or other procedure depends on the time of the closing of the transaction, in such a way

20. See case of concentration in the paper market in point VII of this work.
that the notification procedure is not feasible if the transaction has already been executed.

**Situations in which it is possible to initiate an investigation procedure**

According to the above, it is acceptable to identify the following as the hypothesis which if met make it possible to initiate the investigation procedure to challenge and dissolve an already accomplished transaction, which may harm the competition and free concurrence process:

(i) The concentration has not been notified because it did not exceed the thresholds set in article 20 of the LFCE. As mentioned above, the fact that the transaction does not exceed the thresholds is not reason enough to consider it legal per se and hence, it may be subject of review, situation which, as expressly contained in the LFCE, article 22, fraction II, may only occur within the year following the execution of the transaction. The existence of a specific term in which it is possible to challenge the transaction, obeys the need to provide legal certainty to the economic agents involved in it, about the legality of an act which has not been submitted for review.

(ii) The concentration has not been notified, breaching the obligation to do so, in which case, a fine as a penalty for said breach is due, apart from the possible dissolution of the concentration and of the imposition of an additional fine for executing a forbidden concentration.

(iii) The concentration has been notified and approval has been granted by the CFC, but said approval has been based upon false information. As exposed, third party lawsuit in this case is practically non-operational given the lack of access for third parties to the file.

(iv) The concentration, having been notified, has been closed prior to the termination of the notification procedure.

**Procedural Issues**

The investigation procedure, as established in the LFCE, article 32, and the RLFCE, article 23, hereunder quoted, may be initiated by two different means: (i) ex officio, and (ii) third party lawsuit, in the following cases:

"Article 32: Any person, in the case of absolute monopolistic practices, or the affected person in the case of any other practices and concentrations forbidden in this law, is entitled to demand in writing, before the Commission, the person presumed responsible, indicating what constitutes the practice or concentration..."

"Article 23: According to Chapter V of the Law, the Commission shall initiate an investigation when it has knowledge of facts upon which it may deduce the probable existence of:

"I: Monopolistic practices;

"II: Forbidden concentrations referred to in article 16 of the Law, even those which have obtained favorable resolution upon false information, or

"III: The breach on the obligation to perform the notification in terms of article 20 of the Law."
"In the cases of fractions I and II the procedure shall be initiated ex officio with the issuance of the corresponding resolution or ex parte by filing lawsuit. For the case of fraction III, said procedure shall be initiated only ex officio."

It is important to take account that, in essence, the analysis performed by the CFC as part of an investigation procedure is the same one it performs when analyzing a concentration under the notification procedure, being the primal difference the timeframe, which in the case of the former is quite long, and the manner by which the CFC is able to procure itself with the relevant data and information to carry out its analysis.

In order to expose an overview of the investigation procedure, the timeframe and an outline of the stages which are comprised within it, are briefed hereunder:

(i) The investigation procedure begins with the issuance of a resolution initiating the investigation. In order to acquaint possible affected third parties on the initiation of the procedure, an abstract of the referred resolution must be published in the Federal Official Gazette within the next ten working days containing, at least, the concentration in restraint of trade under investigation, and the market in which such concentration is taking place.

(ii) Upon the publication, an investigation period starts which is not to last less than thirty nor more than ninety working days, which may be extended by the Board of Commissioners in terms not exceeding ninety days, in exceptionally complex cases.

(iii) Once the investigation term has expired, if there are sufficient elements to suppose the concentration threatens competition, the CFC shall summon the presumed responsible, or it must declare the closing of the investigation file.

(iv) Within a thirty calendar day period, the person presumed responsible shall respond to the summons by filing and offering the corresponding evidence.

(v) The CFC shall call for the submission of final arguments (alegatos), upon expiration of the review of evidence stage of the procedure within the next fifteen calendar days term, or upon expiration of the thirty calendar days period referred to in paragraph (iv) above, when the person presumed responsible has not responded, confessed the facts or there is no evidence to review.

(vi) Within a thirty calendar day term, the final arguments shall be substantiated and therefore, within a sixty calendar day term, the CFC shall issue a decision.

THIRD PARTY LAWSUIT

Only the persons directly affected have standing to challenge a concentration by filing suit against it.

Some salient features of the elements the persons filing suit against a forbidden concentration must consider are:

(i) The necessary elements to determine the relevant market and the market power of the sued person in said market;

(ii) The assertion that the claimant is producing or intends to produce goods or render services identical, similar or substantially related to those produced or rendered by the persons involved in the concentration or that the claimant is a consumer, client or supplier of the relevant market;
(iii) If it were the case, the elements needed to determine the falsity of the information upon which the CFC rendered approval of the concentration.

The assertion referred to in paragraph (ii) above is wide and confusing, hence a literal interpretation might lead to conclude that even final consumers have standing to sue against the concentration, which is contrary to the purposes of the LFCE.²¹

For what regards the element of standing referred to in paragraph (iii) above, as exposed, due to the legally established confidentiality in the information filed when notifying a concentration, it is almost impossible for a third party to get to know precisely what parts of the information were indeed false.

**Penalties Imposed to Concentrations in Restraint of Trade**

When in presence of a concentration in restraint of trade, as a result of the substantiation of the investigation procedure, the CFC is empowered to order the divestiture of such concentration.

Additionally, the following fines may be imposed:

(i) Up to 225,000 times the GMW worth of fine for having incurred in a forbidden concentration.

(ii) Up to 7,500 times the GMW worth of fine for participating in a forbidden concentration in representation or by order of legal entities.

Apart from the fines above mentioned, which are necessarily related to the existence of a concentration in restraint of trade which shall be challenged, the CFC is empowered to impose fines for up to 7,500 times the GMW worth of fine for having delivered false information or having declared falsely before the CFC, regardless of the penal responsibility resulting therefrom, and for up to 100,000 times the GMW worth of fine for having breached the obligation to file notification of a concentration.

The fines imposed as a consequence for having incurred in a forbidden concentration, breached on the obligation to file notification, and for participating in a forbidden concentration in representation or by order of legal entities may be commuted when in the opinion of the CFC the violations are particularly critic, for a fine worth up to 10% of the annual sales earned by the violator during the prior fiscal year or up to 10% of its assets, whichever one is higher.

When imposing the aforementioned fines, the CFC shall consider, among other criteria, the graveness of the infraction; the damage caused; the size of the affected markets, and the duration of the concentration.

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²¹ The purpose and effect of the LFCE, as exposed in its article of purposes and subsequently in its Article 2, differ largely from a law intended to protect consumers as a primary object: "The law proposes a policy focused exclusively in promoting the economic efficiency and the competitive process. In itself, the law will not have any distributive purposes. Notwithstanding that the reduction of the monopolistic power may have, and generally has, a positive distributive effect, the latter must be reckoned as an effect of the law and not as purpose. In this manner, it is expressly recognized that the distributive effects are pursued through other instruments of fiscal and social policies, among others, and not through the economic competition legislation."
ADMINISTRATIVE APPEAL

The administrative appeal regulated in article 39 of the LFCE, and 52 and 53 of the RLFCE, is substantiated before the CFC and not before a higher administrative authority. The purpose of it is to revoke, modify or confirm the appealed resolution, and it may be filed within the next 30 working days upon receiving notification of a resolution, against those comprising the final decision of a notification or an investigation procedure, and the declaration of the non-notification of a concentration or of the non-filing of a lawsuit. No incidental appeals are admitted and solely the persons mentioned hereunder have standing to file it:

(i) Any of the persons involved in a notification procedure;
(ii) The person presumed to be responsible as a result from an investigation procedure, and
(iii) The person who filed lawsuit challenging an unlawful concentration.

Upon filing of the appeal, the CFC shall admit or dismiss it within the next five working days. In the event of an admission, it shall inform it to the counterpart, in its case, in order for it to express what better serves its interests within the next ten working days. The CFC shall decide the appeal within the next 60 working days term upon its filing, once it has expired, it is to be understood that the CFC confirms its resolution.

According to the third paragraph of article 39 of the LFCE, the demand for an appeal suspends the execution of the appealed resolution. In the case of the resolution ordering the suspension, correction, suppression or divestiture of the concentration and when damage may be caused to third parties, "... the appeal will be granted to the appealing party if it provides sufficient guarantee as to remedy and indemnify for the damages in the event it fails to get a favorable resolution on the appeal."

The wording of the afore cited provision comprises two different matters: the first, regarding the insertion of the expression "appeal", which would convey that upon guaranteeing the damages, the decision of the appeal in itself would be granted in favor of the appealing party, therefore, the expression "appeal" should read "suspension". The second matter concerns the identification of the person having to guarantee the aforementioned damages. The drafting "appealing party" is correct as long as it is addressed to the person presumed responsible, but it is not so in the presence of a third party administrative appeal, given that it would seem illogical for a demanding party to be compelled to secure for anything which is the sole responsibility of the demanded party.

I consider it unnecessary to have an administrative appeal of the type afore explained applicable to the decisions reached after the whole substantiation of the investigation procedure, since both the person presumed responsible of an unlawful concentration and in its case the claimant party are part of an extensive procedure by means of which both become close to the authority and have enough opportunity to defend and challenge, correspondingly, in a wide range of moments.

22. As mentioned when explaining the notification procedure, in point V.I. of this work, third parties lack standing to intervene in the referred procedure and so lack it as well to demand on the administrative appeal against a concentration, regardless the decision of the CFC may convey them prejudice.
Furthermore, it is highly improbable that the authority will withdraw its decision in a case on which it has had so much input and time for analysis as in the investigation procedure.

In this regard, it is important to point out that the person dissenting on a resolution of the CFC on an administrative appeal, still has standing to seek review before the Federal Courts.

Finally, it would seem adequate for the administrative appeal to be applicable to the notification procedure valid at present, given that the opportunity to be heard prior to the issuance of a resolution deciding the case is non-existent in said procedure, situation which would be alleviated through the adoption of the amendments of the notification procedure proposed earlier in this work, given that the relation between the person notifying, entitled third parties and the authority would be promoted to an extent which would make it unnecessary to have an additional decision making process before the same authority.

RELEVANT CASES

Concentration in Diverse Paper Markets: Notification

One of the most relevant cases which have taken place in Mexico, for what regards economic competition is undoubtedly, the concentration derived from the international merger entered between Kimberly Clark Corp. (Kimberly) and Scott Paper Company (Scott), both participating in the capital stock of the Mexican companies Kimberly Clark de México, S.A. de C.V. (KCM) and Compañía Industrial San Cristobal, S.A. de C.V. (Crisoba), respectively.

The importance of this case lies in its high degree of complexity due to the generality of the provisions of the LFCE, the non-existence of the RLFCE at the time the concentration was reviewed and the lack of similar precedents upon which the CFC was able to base its actions, when facing the circumstances described hereunder.

The first circumstance was the existence of actions initiated by some of the economic agents who considered that they might be affected as a result of the concentration. Procter & Gamble, potential entrant to certain markets in which KCM/Crisoba operated, filed a lawsuit against the concentration, before it was notified by the economic agents involved therein. An action of the same kind was initiated by Copamex, one of the main competitors of KCM/Crisoba, after the concentration had been notified.

As exposed earlier in this document, the LFCE regulates two totally different procedures by means of which it is empowered to review a concentration: the investigation procedure, which may be initiated through lawsuit by any affected third party, and the notification procedure, which must be initiated by the economic agents involved in the concentration.

According to the above, the first of the definitions which had to be adopted in connection with the case was one regarding the procedure which had to be followed.

23. The purpose of the exposition of this case is to remark the elements related to the procedure. The data on the analysis of the effects of the concentration in the diverse relevant markets is contained in the Federal Competition Commission Annual Report 1995-96, pp. 23-27.
in order to review the concentration. The CFC, upon an interpretative analysis of
the LFCE, reached the conclusion that it was not legally feasible to admit the
lawsuit filed by Proctor & Gamble, unless the concentration was executed without
it being notified by the economic agents involved therein. The rationale to hold this
position was based on the following:

(i) It is not possible to substantiate the two simultaneous procedures having the
same purpose.

(ii) It is not possible to accumulate the lawsuit and the notification given that they
are procedures of a different nature with incompatible timeframes, hence the
substantiation of only one of them is due.

(iii) The consequence of substantiating a procedure initiated through lawsuit may
only be to order the dissolution or the correction of the concentration, for
which, it is needed to face acts already accomplished.

(iv) According to the LFCE, the ad hoc procedure to review a concentration which
has not been accomplished is the notification procedure.

According to the rationale above, the CFC decided the concentration was to be
resolved through the substantiation of the notification procedure and, that only in
the event that the concentration was closed breaching the obligation to notify, a
lawsuit for its review would be admitted and the corresponding penalties would be
imposed.

The criteria adopted in this case was later integrated in the RLFCE, which in its
article 26, fraction IV, sets as a cause for the dismissal of a lawsuit, that a
notification procedure of a non-accomplished concentration is being substantiated
at the time the lawsuit is filed.

As it was expected, the concentration was notified and the respective procedure
was initiated. Notwithstanding that the LFCE does not recognize standing to
affected third parties in the notification procedure, the CFC considered that not only
was it fair but convenient to consider the arguments entailed in the Procter &
Gamble lawsuit and to allow this company to participate throughout the whole
process of review of the concentration. The same treatment was given to Copamex,
who also filed a lawsuit during the substantiation of the procedure. The positive
results derived from this process gave place to an express provision in the RLFCE
in the sense that nonetheless the adequacy of the dismissal of the lawsuit, according
to the preceding paragraph, the CFC must consider the arguments of the suing party
in the resolution of the notification. However, this does not mean that affected third
parties are able to challenge the decisions of the CFC, reason why the express
acknowledgment of affected third parties in the notification procedure is proposed
in this document, which implies its reformulation through amendments to the LFCE,
given that the RLFCE may not contravene it, being the latter a lower hierarchy
ordinance.

Another circumstance which complicated the process had to do with the
timeframe scheduled for the closing of the transaction at an international level. If
indeed the LFCE is explicit regarding that the concentration is to be filed prior to

24. This situation seemed remote, given that the value of the transaction notoriously exceeded the amounts
set as thresholds in article 20 of the LFCE, not being foreseeable that the economic agents involved therein would
choose to breach the obligation to notify.
its execution, it provides nothing which impedes its accomplishment before the CFC issues a decision. Probably due to the latter situation, the notification was filed with short anticipation to the date scheduled for the closing of the international transaction.

Confronted with this situation and, given that the concentration implied an imminent threat to competition, the CFC asserted two possible alternatives: (i) the delay on the closing of the international merger, or (ii) the suspension of its effects in Mexico, until after having completed the corresponding analysis, and in its case, approved the concentration.

Facing the need to safeguard the competition process, on one hand, and obeying the purpose of not hurdling the course of the transaction in other countries, on the other, a scheme which made it possible for the substantiation of the procedure in Mexico without interrupting the international closing of the merger was executed. The scheme consisted in the negotiation, issuance and execution of a consent decree which had as an object to suspend the effects of the merger within national territory, as well as to establish the limits which would safeguard the competition process during the review period of the case, by setting diverse obligations to Kimberly/Scott, among which the following stand out: the deposit of the shares representing the capital stock of Crisoba owned by Scott, in a financial institution which would have to exercise the voting rights until the concentration was approved, in its case; the obligation to instruct the financial institution to sell the shares, in the event that the CFC decided to object the concentration; and the prohibition to Kimberly/KCM to access information of Crisoba during the review of the concentration.

The third circumstance is related to the results of the analysis of the effects of the concentration. The transaction implied a substantial increase in the concentration indices of some products; in Mexico; nevertheless, not all the markets in which KCM and/or Crisoba participated registered levels which called for the total objection of the transaction.

The final result of the analysis set the need to take, for the first time in the then brief history of the CFC, a decision in the sense of approving the concentration conditioning it to the sale of an important part of the assets of the companies. Notwithstanding, although the LFCE empowers the CFC to unilaterally establish the conditions, a process for the review of the proposals of the economic agents involved in the concentration to neutralize its negative effects was instrumented, and participation was given to the current and potential competitors. Upon this experience, the integration in the RLFCE of a provision in the sense of providing the notifying parties the opportunity to file condition proposals before the CFC issues a conditioned resolution, was promoted. Notwithstanding, as mentioned when exposing the notification procedure earlier in this work, the substantiation of this stage would require amending the LFCE.

Facing the lack of a legal framework to substantiate this procedure, the proposals were reviewed in the remaining timeframe available, considering the limits established by the terms set in the LFCE for the issuance of a decision, in such a manner that, with the consent of the persons notifying the concentration and of affected third parties, a decision setting the general guidelines for the divestiture, which had to be carried out within a one year period, was reached. As well, Kimberly was imposed a thirty day term to submit for the consideration of the CFC
the detailed scheme upon which the divestiture would take place, subjecting the validity of the decision to the approval of the definitive scheme.

The measures adopted in the substantiation of this procedure allowed to reach a resolution which safeguarded the competition process, with no further challenges from the persons involved. Nonetheless, I consider it convenient to restate the need for a reform to the LFCE in order to grant standing to interested third parties and to institutionalize the methods required to hear both these and the persons notifying before the issuance of a decision.

Concentration in the Tequila and Agave Markets. Lawsuit and Notification of Concentration.25

On July, 1999, affected third parties filed suit before the CFC, in order to challenge the acquisition of 99.9 per cent of the capital stock of Romo Hermanas, S.A. de C.V. which owned 49.8 per cent and 50 per cent of Tequila Herradura, S.A. de C.V. and Comercializadora Herradura, S.A. de C.V. (both companies referred jointly as Herradura), correspondingly, on the following arguments:

(i) The transaction implied a concentration among Herradura and José Cuervo, S.A. de C.V. and its affiliate companies (all of them referred to jointly as "Cuervo") in terms of article 16, first paragraph of the LFCE, since the familiar links among the person who holds control of Romo Hermanas, S.A. de C.V. and the person who holds control of Cuervo.

(ii) Although Romo Hermanas, S.A. de C.V., did not have the in-law control of Herradura, it did have the virtual control of them given that the remaining 50.2 per cent and 50 per cent of the capital stock of the corporations of such group is distributed among other two individual shareholders, situation which does not guarantee that the referred remaining shares are to be voted in the same manner.

(iii) Cuervo is a group of companies which participate with the largest share in the market in which Herradura participates. The links between Cuervo and Herradura derived from the concentration represented an imminent harm to the competition and free concurrence process given the non-competition incentives among both groups.

Upon the considerations afore described, the suing parties exposed the analysis of the contents of article 18 of the LFCE, in order to demonstrate that the hypothesis contained in article 17 of said ordinance were met, and so the concentration should be challenged and penalized.

The first part of the analysis comprises the determination of the relevant market according to the LFCE, article 12, upon which, the relevant product is the alcoholic beverage "tequila", name protected under a geographic distinctive mark which provides that only those alcoholic beverages produced with a plant known as agave tequilana weber, blue variety, which can only be found in the state of Jalisco and certain municipalities of the states of Guanajuato, Michoacan, Nayarit and Tamaulipas are to bear the referred name. Likewise, tequila may be named

25. See Federal Competition Commission at www.cfc.gob.mx/cfc99e/Resoluciones/concentraciones/Marzo2000/ROMO.htm. The data and information is presented in the terms it was filed by the suing parties. Thus, it may present some differences in comparison to the one published by the CFC.
according to the quantity of "agave" used in its production. In this regard, it is possible to have "Tequila 100% of "agave"" (T100) or plain "Tequila" which is produced with at least 51% of "agave" as primal input.

The tequila market is an isolated one which admits no substitutes, mainly because, as mentioned above, it is an alcoholic beverage produced under a geographic distinctive mark which imposes specific conditions for its production, as well, because international producers and distributors of alcoholic beverages are interested in having, among their products lines, tequila given that it is a specifically demanded brand, and finally, because products such as Mezcal, which is similar to tequila in various aspects, is not considered as a substitute by consumers, which can be clearly stated by the low market penetration that said spirit has had, though being considerably less costly.

The geographic area which composes the relevant market comprises Mexico and abroad, given that approximately 50 per cent of the tequila production is destined to its exportation to more than forty countries around the world.

According to article 18 of the LFCE, the next element to be analyzed is the determination of substantial power of the economic agents involved in the transaction, in terms of article 13 of the LFCE, which embraced the considerations described in the paragraphs that follow.

The tequila producers market structure on 1998 resulted in 54 tequila producers, of which, four concentrated 57 per cent of the market, among which were Cuervo holding 18.31 per cent, and Herradura holding 8.88 per cent. On 1999, the tequila market structure presented a 6.8 per cent increase for what regarded the four main producers, resulting in the said main producers concentrating 63.8 percent of the market with Cuervo holding 29.4 percent and Herradura holding 8.8 per cent.

The analysis of the Herfindahl (H) and the Dominance (D) indices, as required in the LFCE, articles 18, fraction II and 13, fraction I, was performed for what regards sales in value within the domestic market, resulting in a concentration of 662 points, with an absolute value of 2,262 points for what concerns the H index, and a concentration of 1,720 points, with an absolute value of 4,390 in the case of the D index. These results exceed the maximum levels set to assert the competitive operation of the market, 2,000 points in the H index, and 2,500 points in the D index.

Subsequently, the analysis referred to above was performed from the volume (liters) of sales per economic agent, resulting in the concentration having negative effects since in the H index presented an increase of 591 points with a 2,065 points total value, whereas D index increases 1,562 points with a 4,403 points total value.

Thirdly, the production per economic agent was considered, resulting in the H index being shifted 524 points, resulting in 1,937 points total value while the D index shifted 1,704 points to produce a total value of 1,390 points. It is important to point out, that although for what regards the H index, the maximum level was not exceeded by the resulting absolute value, it must be considered that small tequila producers which lack financial strength and prestigious trademarks sell their product to Cuervo, becoming manufacturers of it. In this sense, if the analysis were to incorporate the production of the persons producing for Cuervo the result of the analysis would clearly exceed the maximum level set.

Finally, the analysis of the exports market reveals, once again, the threat that the concentration poses to competition. The H index is moved up 79 points, with an
absolute value of 2,232 points while the D index is raised 131 points and its absolute value reaches 5,878 points. The exports market analysis is important given that the economic agent who gets to have market power in such portion of the market is to have significant advantages which will allow it to drive its competitors out of the market.

Another element to determine substantial power in the relevant market, as established in article 13 of the LFCE, are the barriers to entry, among which the following are worth mentioning. One of the main barriers to entry is the existence of well known trademarks which absorb most of the domestic demand. In this respect, it is important to point out that the main tequila producers have achieved to gain a reputation throughout decades, which allows them to have public goodwill, whereas new producers represent a "risky" alternative for the consumer. As a consequence, the new market niches may be occupied by the brands already established in a faster and easier manner, as compared to younger trademarks.

As well, the entry to the tequila market may purport the investment of large amounts of resources, when selling a costly product at a price lower than that its competitors get due to selling in a market in which they are already established, or because of high publicity expenditures. Hence, for instance, Herradura has been able to keep remarkably low publicity costs while simultaneously registering radically high sales.

Given that the economic agents involved in the concentration are two of the tequila producers with greatest goodwill through their trademarks, it was undesirable for them to merge since that would raise the barrier to entry to an even higher level and furthermore it would expose competitors to be shifted out of the market, which would probably end up in higher prices to consumers and a reduction in the alternatives faced by them.

Another barrier to entry to be acknowledged, is the restrained access that tequila producers have to "agave", the essential input. As exposed, tequila is a name protected under a geographic distinctive mark which purports that it may only be produced from the "agave" harvested in certain areas of Mexico. Additionally, around 25 per cent of the "agave" plants are infected with a long-term plague for which, at present, no cure has yet been developed and which conveys the use of more "agave" plants than would normally be necessary for the elaboration of the same volume of tequila. In order to illustrate the aforementioned situation, currently, the average kilograms needed to produce a liter of tequila is 6.5 kg/l, while in 1995 the average kilograms of "agave" needed to produce a liter of tequila was 4.8 kilograms.

Given the market conditions for what concerns access to "agave", the majority of the tequila producers have tried to enter into as much supply agreements as possible, purchasing future crops, which entail buying "agave" plants one or two years of age, when the optimal maturity is reached at eight or ten years of age. In this regard, "agave" farmers are reluctant to enter into this sort of agreements given that the "agave" price keeps rising, situation which incentives them to wait for the best moment to sell. Thus, those tequila producers which do not have "agave" supply guaranteed find it very hard to enter the referred future agreements, pressuring them to buy in the spot market, which entails extremely high costs due to the situation of scarcity. In this regard, it is important to point out that tequila
producers such as Cuervo and Herradura have most of their “agave” needs already covered through agreements with diverse companies.

An additional factor, which allows exporting tequila producers to obtain extraordinary gains is the brokerage systems generally used to market tequila abroad. Tequila producers enter into reciprocal exclusivity agreements with companies which are in charge of marketing in the main exports markets. Said marketing companies control considerable percentages of the wines and spirits markets. Exclusivity abroad allows for a strong differential between exports and domestic prices, by eliminating the arbitrageur mechanisms which would reduce said differentials. Exclusive agreements block other companies access to this distribution channels.

Economic barriers to exports, also represent hurdles for small and medium companies to carry out sales abroad, which sets a competitive advantage of the exporting tequila producers over the non-exporting ones. New competitors in opposition to large producers face adverse finance conditions for what regards the obtainment of work and investment credits, while large producers are able to access international credits at relatively low interest rates. Small competitors with no access to external markets have as an only option to get domestic credits under high interest rates and with extremely short maturity terms or, in the worst of the cases, there is no possibility to access the required operational capital.

According to fractions III and IV of article 13 of the LFCE, the next two elements to consider imply analyzing the existence and power of competitors and the access to inputs, respectively, both which have already been analyzed while exposing the market structure and the barrier to entry raised by “agave”.

According to the foregoing analysis, it is possible to conclude that the concentration would verify the hypothesis set in article 17 of the LFCE and therefore, it meets the definition of a forbidden concentration in terms of article 16 of the referred ordinance.

Herradura and Cuervo would increase their market power both in the relevant market as well as in the “agave” market. The concentration would grant the persons involved therein enough market power to influence the final price of tequila, since at present they hold 37 per cent of the total domestic market sales, more than 65 per cent of the sales of the medium and high price segments, and 41 per cent of exports. This, regardless of the automatic concentration derived from the scarcity in the “agave”.

In this last regard, both Cuervo and Herradura would be empowered in-fact to fix “agave” prices to such an extent that it would be likely for competitors to be unable to face the spot market prices. Influencing its competitors inputs prices would allow Cuervo and Herradura to strangle them, given that the former would only have two possible selling actions: sell at prices above Cuervo and Herradura in order to reflect the “agave” price increase and accept the consequent market share loss in favor of the concentrating producers, or to maintain competitive prices and confront financial and economic losses at least for five years more. In either case, results in the medium run would inevitably be a substantial increase in the market concentration due to the accelerated disappearance of competitors.

For what regards persons demanding the product, this would have to meet tequila price fixing, which in an incipient stage might be manipulated by Cuervo and Herradura in order to represent a stability. Eventually, said prices would be
increased up to the point which would allow the referred producers to maximize the quasi-monopolistic gains, at least in the price segments and in the distribution channels where Cuervo and Herradura have major joint impact. Likewise, the consumers could face a strong reduction in the products choices due to the vanishing and close of tequila producers.

The effects of the concentration in other related markets and economic agents would necessarily affect “agave” farmers and tequila brokers, given that once the market shares are added, the concentrating persons would be able to raise “agave” prices temporarily in order to eliminate a significant part of the competition and therefore strengthen its role in the market setting the conditions for trade in the medium and long run. To the same extent the concentration may affect brokers which at certain point would be compelled to grant anti-competitive preferences and special advantages to Cuervo and Herradura due to their weight in the tequila sales in their stores and the importance of brands in this market.

As a consequence, the concentration would have as an effect that Cuervo and Herradura would shift as many competitors as possible by manipulating prices of the input and the final products, and following would obtain additional gains from the consumers, tequila brokers and “agave” harvesters.

On October 1999, the CFC decided to challenge the concentration, ordering its divestiture. Notwithstanding, said decision was adopted as a result of the notification filed by the economic agents involved in the transaction instead of the investigation procedure initiated as a consequence of the lawsuit afore described.

In this regard, it is important to point out that prior to the filing of the lawsuit but once the concentration had already been executed, the aforementioned notification was filed extemporaneously before the CFC, which admitted it and moved on to its analysis, despite the fact that what would have been legally proper, as exposed earlier in this document, would have been the initiation of an investigation procedure, given that the concentration had been previously executed.

Notwithstanding the notification procedure had been initiated, the lawsuit had to be admitted given that, according to the RLFCE, article 26,26 the CFC was not empowered to dismiss the lawsuit filed against the concentration, since if it would have done so, it would have denied suing parties its right to initiate an action against a concentration in restraint of trade, granted in articles 32 of the LFCE, and 23 of the RLFCE. As a consequence, the CFC substantiated both procedures simultaneously.

26. “Article 26: The Commission shall reject the complaint as being clearly contrary to law, when:
   “I. The reported facts are not considered pursuant to the Law to be monopoly practices or prohibited concentrations;
   “II. The facts and conditions in the indicated relevant market have already been subject to a judgment in terms of Article 33 of the Law;
   “III. Proceedings are pending before the Commission in reference to the same facts, after having issued a summons against the alleged violator;
   “IV. There are notification proceedings already under way regarding of a concentration which has still not taken place. In this case the Commission shall take into consideration the elements contributed in the complaint in order to resolve the notified concentration; nevertheless, the complainant shall not have access to the documentation relating to the said concentrations nor shall be entitled to question the proceedings, and
   “V. When the reported facts are not likely to take place in the near future.”
For the sake of fastness, the authority decided to substantiate the analysis of the concentration through the notification procedure given the timeframe to decide is clearly shorter than that of the investigation procedure, and so, it proceeded to close the investigation procedure file, on the grounds that the matter of the controversy had already been resolved according to the claims of the suing parties and hence, the investigation procedure had no further object.

Since it was quite clear that the persons involved in the concentration would file an administrative appeal against the decision of the authority, the suing parties, although in accordance with the decision of the CFC on the divestiture, challenged the decision on the closing of the investigation file in order to maintain standing in case the authority changed its view and revoked the divestiture decision.

As a result of the substantiation of the administrative appeal filed by the parties involved in the transaction, the CFC confirmed its decision on the divestiture. Therefore the suing parties decided not to move towards further proceedings.

CONCLUSION

The LFCE represents the most important advance undertaken in Mexico towards the efficient execution of an antitrust policy. Seven years since its enactment there exists now practical experience which allows to define certain reforms in order to improve its enforcement. Some of these reforms have to do with the regulation governing concentrations, being the most important the one in connection to the notification procedure, which would have to include, as a fundamental aspect, the granting of standing to affected third parties and the methods to hear both the persons notifying as well as said third parties. This would allow for a greater transparency and quality in the analysis of the effects of concentrations and a broader efficacy in the prevention of those in restraint of trade.