COMPETITION & ANTITRUST - MEXICO

COFECE approves commitments to restore competition in pharmaceutical market

13 December 2018 | Contributed by SAI Law & Economics

AUTHORS

Lucía Ojeda Cárdenas

Felipe García Cuevas

Introduction

In August 2015 the Federal Economic Competition Commission (COFECE) approved a concentration between Dutch fund Moench Coöperatif, UA and one of the major pharmaceutical product distributors in Mexico, Marzam, through which the former acquired control over the latter. The concentration was approved without commitments, as the COFECE was advised that Moench Coöperatif did not participate in the same market as Marzam and thus that there was no overlap between the agents involved.

However, in April 2016 new information regarding the concentration was published. Several news stories – based on documents allegedly leaked from Panamanian law firm Mossack Fonseca (the Panama Papers) – affirmed that Moench Coöperatif had acquired control over Marzam through a loan granted by Marina Matarazzo, wife of Nadro president, Pablo Escandón. Nadro is Mexico's leading pharmaceutical products distributor and Marzam's main competitor.(1)

Further, according to several public sources, Luis Doporto Alejandre, one of the fund's main shareholders, had created the structure through which Moench Coöperatif had received the loan from Matarazzo through its law firm Doporto & Asociados.(2)

Investigation and commitments

Based on this evidence, in June 2017 the COFECE's investigative authority initiated an investigation (File IO-001-2017) to determine the possible existence of an unlawful concentration between Nadro and Marzam. Because of the alleged loan, the COFECE considered that the concentration could have given Nadro direct or indirect control over its competitor, Marzam.

However, before the investigation concluded, and pursuant to Articles 100 and 101 of the Federal Economic Competition Law, both Moench Coöperatif and Alejandre (collectively, the parties) proposed a series of commitments to the COFECE in order to restore free competition in the market and enable the early conclusion of the investigation.(3)

The commitments proposed by the parties include the following.

Full repayment of loan

The parties have agreed to fully repay the loan granted by Matarazzo within a set period.(4) In this regard, should the parties need to obtain resources from a third party, such third party cannot be in any way linked to the wholesale pharmaceutical product market in Mexico (the investigated market).

The parties have also agreed to keep a registry of all of the actions that they undertake to fulfil this commitment and deliver a report to the COFECE every three months. They must also present a monthly report to the COFECE regarding the actions executed involving the shares and assets of Marzam derived from the loan.

Once the parties have fully repaid the loan, they must deliver to the COFECE all of the information necessary to credit their fulfillment of this commitment.

Divestment of Marzam shares or assets

The parties have proposed to divest the shares in or assets of Marzam which they have acquired, subject to COFECE approval.

Preferably, this divestiture should not be made to an economic agent that participates in the investigated market.

Further, should the parties decide to divest, they must keep a registry of all of the actions that they undertake to do so and deliver a report to the COFECE every three months.

Decision

Subject to some minor modifications, the COFECE's board of commissioners approved the above commitments and thus ordered the early conclusion of the investigation procedure. However, two commissioners (Eduardo Martínez Chombo and Alejandro Faya Rodríguez) voted against this resolution on the basis that the divestiture of all of the shares and assets that Moench Coöperatif has acquired from Marzam should be mandatory (and not optional) in order to eliminate any risk of an illegal concentration.(5)

Finally, the COFECE noted that:

- there are several mechanisms through which it may monitor the agents' compliance with the commitments; and
- failure to comply may result in a fine of up to 8% of the agents' annual income.

Comment

This concentration posed several risks to competition, as it could have granted one of Mexico's major pharmaceutical product distributors control over its biggest competitor.

Notably, the exemption and fine reduction benefit, which is obtained through the establishment of commitments, is an important tool that the Federal Economic Competition Law bestows on the COFECE to enable it to eliminate the competition risks associated with illegal concentrations and restore free competition in the markets.

Thus, it seems that through this benefit, the COFECE has managed to eliminate the risks to competition that the concentration of Moench Coöperatif and Marzam could have generated in the Mexican wholesale supply market for pharmaceutical, hygiene and personal beauty products.

For further information on this topic please contact Lucía Ojeda Cárdenas or Felipe García Cuevas at SAI Consultores SC by telephone (+52 55 59 85 6618) or email (loc@sai.com.mx or fgc@sai.com.mx). The SAI Consultores website can be accessed at www.sai.com.mx.

Endnotes

(1) Further information is available here.

(2) *Id.*

(3) Resolution to File IO-001-2017, pp 27-31, available here.

(4) Unfortunately, the term granted by the COFECE to the parties was not disclosed in the public version of the resolution.

(5) Resolution to File IO-001-2017, p 34.