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Notifications to the federal
commission of economic
competition in aircraft
related transactions.

by Viridiana Barquín and Jessi Saba

MAY NEWS on
Mexican Aviation

COELUM: Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

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Notifications to the federal commission of economic competition in aircraft related transactions.

by Viridiana Barquín and Jessi Saba.

The intention of this article is to provide a clearer view of the regulation in respect to the notification and authorization that might be required by law in case of certain aircraft related transactions.

The purpose of the Mexican Antitrust Law (*Ley Federal de Competencia Económica* (LFCE or the “Law”)¹), as stated in article 2 thereof, is to “promote, protect and guarantee the free economic competition, as well as to prevent, investigate, combat, efficiently pursue, severely punish and eliminate monopolies, antitrust practices, illicit concentrations, the barriers to the free concurrence and economic competition, and other restrictions to the efficient functioning of the markets”.

“Article 86 of the Law establishes the thresholds for when a notification and authorization from the Commission is necessary before the act takes place...”

Among other conducts, the Law specifically prohibits *“the entrance into acts, contracts or agreements which purpose or effect is or may be to displace or prevent the access of other agents to the market; (to) establish exclusive advantages, impose prices, or to enter into transactions subject to the acquisition of additional products or services; and the lobbying against any economic agent or the refusal to sell, trade or purchase goods or services to such economic agent.”*

Article 86 of the Law establishes the thresholds for when a notification and authorization from the Commission is necessary before the act takes place, as follows:

Article 86: The following concentrations should be authorized by the Commission² before they (shall) take effect:“

- I. When the act or series of acts from which such originate, independently of the place of its celebration, import into national territory, directly or indirectly, an amount greater than the equivalent to eighteen million times the current general minimum wage³ for the City of Mexico.*
- II. When the act or series of acts from which such originate, imply an accumulation of thirty five percent or more of the assets or stocks of an Economic Agent, whose annual sales originated in national territory or assets in national territory sum up more than the equivalent to eighteen million times the current general minimum wage for the City of Mexico; or*
- III. When the act or series of acts from which such originate, imply an accumulation within national territory of assets or share capital greater than the equivalent to eight million and four hundred thousand times the current general minimum wage for the City of Mexico and in such concentration two or more Economic Agents participate, whose annual sales originated in national territory or assets in national territory, jointly or separately, (shall) sum up more than forty-eight million times the current general minimum wage.*

Further to the above, Article 87 of the Law determines that the required authorization, in case necessary, must be obtained before certain actions take place. Such Article includes the need for concentrations that derive from acts conducted abroad, to be notified before any legal or material effects arise within Mexican territory.

1.- Published in the Official Gazette on 23 May 2014, and most recent update published on 1 January 2017. http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_270117.pdf

2.- Federal Economic Competition Commission (COFECE or the “Commission”).

3.- As of the date hereof, the minimum wage is \$88.36 (eighty-eight pesos and thirty-six cents 36/100). Therefore, the amount contemplated in the law sums \$1,590,480,000.00 Mexican pesos (approximately US\$80,735,025.38 at an exchange rate of \$19.70 pesos per \$1 US Dollar, which is the current exchange rate as of the date hereof). This amount is applicable to thresholds (i) and (ii).

This is especially important for the correct study of aircraft transactions, (whether an individual aircraft or a group of aircraft), regardless if it is a lease, financing, asset or beneficial interest sale, since the transaction has to be studied on a case by case basis in order to determine if such transaction needs to be notified, and authorized by the Commission; as they might or might not fall into the categories of Article 86 of the Law; provided that not all transactions, even when the assets are located within Mexican territory or operated by Mexican air carriers, are deemed to be taking place in Mexico. It must be taken into consideration that (i) aircraft are imported into Mexican territory under a temporary importation regime, as established in article 106 of the Customs Law; therefore, such assets should not be considered to be in Mexico; (ii) the companies involved are not Mexican residents, they are foreign companies so for tax purposes their obligations are within their own jurisdiction but not with Mexico. Therefore, a notification to the Commission will not be necessary, as such transaction is not deemed to be taking place within Mexican territory.

There are currently no precedents of notifications to the Commission specifically relating to the sale and purchase of aircraft assets. The cases where a notification was indeed conducted, are more related to mergers and acquisitions of entire companies owning aircraft objects, not related per se to the sale and purchase of an aircraft or a group of aircraft. Therefore, it is not entirely clear when a notification is required and when it is not, as different interpretations of the Law could indicate different views in respect to the need for a notification.

The aforementioned notification must be in writing and must contain the following⁴:

- i. Name of the economic agent notifying the concentration and name of such agents directly or indirectly participating in the concentration.
- ii. Name of the legal representative and the corresponding power of attorney of document of the like, as well as domicile.
- iii. Description of the concentration, type of operation.
- iv. Documentation and information explaining the objective of the concentration.
- v. Constitutional documents of the involved economic agents.
- vi. Financial information of the prior immediate exercise of the involved economic agents.
- vii. Description of share structure of the economic agents involved, whether Mexican or foreign entities, identifying the percentage of each direct or indirect shareholder, prior and after the concentration, and of the individuals who will have control.
- viii. Information about the participation of the economic agents involved and its competitors.
- ix. Location or establishment of the economic agents, location of its primary distribution centers and the relation of these with the economic agents.
- x. Description of the goods and services produced or offered by each involved economic agent, stating precisely its use in the relevant market, as well as a list of similar goods and services and of the principal economic agents that produce, distribute or commercialize in Mexico.
- xi. Other elements considered necessary by the economic agents for the analysis of the same.

We can see from all the above, that a notification is not a task that can be taken lightly as it involves a lot of information, even confidential information. In any case, it is important to consider that if a notification is required by the Law, or by view of the Commission, the risk of not notifying would translate into enforcement measures (medidas de apremio) or fines and sanctions.

These measures and sanctions are envisaged in articles 126 to 131 of the Law. For this specific case, the Law establishes a fine of five thousand times the minimum wage⁵ and up to the equivalent of 5% of the income of the economic agent, for not notifying when it was legally required⁶. In addition, and another point to be considered especially by public

4.- Article 89 of the Law.

5.- A total of \$441,800.00 Mexican pesos (approximately 22,426.39 US Dollars). Please see footnote 3 above for exchange rate.

6.- Article 127 (VIII) of the Law.

notaries, is the sanction established to them in case of them intervening in acts related to a concentration not authorized by the Commission⁷, which can be of an amount equivalent to eighty thousand times the minimum wage⁸. If a concentration was not notified, then it cannot be authorized, so the notary's involved would also be liable. This will also cause public notaries to be more aware and therefore reviewing the day to day transactions to determine if a notification and authorization is required.

For the application of a fine or sanction, and in accordance with article 130, factors such as the severity of the infraction, damages, intentionality, the participation of the infringer in the market, the size of the affected market, the duration of the concentration or practice, as well as its economic capacity, are to be considering when a sanction or fine is to be imposed by the Commission.

“...in most sale and purchase transactions, a notification to the Commission is not necessary, subject to an in-depth review of the specific case.”

As of today, the thresholds established by the Law remain very ambiguous. Each transaction must be studied in detail to determine the required course of action. All transactions are different and must be addressed differently to avoid the imposition of any fine or sanction by the Commission. An in-depth analysis is now required in each and every transaction, regardless if it is between foreign entities, if the assets are located in Mexican territory (not only physically but for purposes of the Law), and the consideration of constituting an economic agents specifically for purposes of the Law. In our opinion, in most sale and purchase transactions, a notification to the Commission is not necessary, subject to an in-depth review of the specific case.

7- Article 127 (XIII) of the Law.

8- Up to \$7,068,800.00 Mexican pesos (approximately 358,822.335 US Dollars). Please see footnote 3 above for exchange rate.

Presidential Elections and Aviation Industry.

Aside from the proposed cancellation of NAFTA, Mexico's aviation industry has been largely forgotten by all candidates contending in the 2018 presidential election. However, given the importance of manufacturing for Mexico's economy, most contenders are bringing new proposals to the table that have the potential to strengthen local aerospace component SMEs. Find out more in 2018 Presidential Elections: Aerospace in Background but Faces Impact. <http://www.aerospacemx.com/the-week-in-aerospace-positive-first-quarter-results-and-fuel-controversy/> May 04, 2018.

NOM (Official Mexican Norm) project to sets new standards for aircraft with fixed wing in accordance to ICAO SARPS.

The denominated "PROY-NOM-069-SCT3-2017" which was published on 3 May 2018 in the DOF (Official Journal of the Federation), was issued by the Ministry of Communications and Transportation (SCT) with the purpose of implementing a new protocols for the Airborne Collision Avoidance System (ACAS). <https://a21.com.mx/normatividad/2018/05/04/propone-sct-nueva-regulacion-para-sistemas-anticolision-de-bordo> May 04, 2018.

CANAERO will present an aviation agenda to the presidential candidates.

The National Chamber of Air Transportation (CANAERO) reported that it will present the Mexican Aviation Agenda 2019-2024 to the presidential candidates. Its purpose of this agenda is to provide feedback to the Presidential candidates with respect to the aviation industry and its needs in order to secure an average annual growth in cargo of 5.6% and 10.2% in passengers. <http://t21.com.mx/aereo/2018/05/08/canaero-presentara-agenda-aviacion-candidatos-presidenciales> May 08, 2018.

Expectations with the opening of the fuel sector in Mexico.

After 39 years, Airports and Auxiliary Services (ASA) will stop being the only entity responsible of the supply, storage and transport of jet fuel, in the country. One of the greatest advantages that are expected with the opening of the aviation energy sector is the decrease in the cost of jet fuel as a consequence of hire rates of competition generated with the entrance of new stakeholders. Additionally, safety process are expected to increase with the adoption and homologation of the best practices recommended by the International Air Transport Association (IATA). On the other hand, one of the challenges will be the possible lack of transparency in the rates, which is why Felipe Pereira Dos Reis, Regional Director Airport Passenger, Cargo and Security the Americas of IATA, underscored the need for rates to be disclosed. <http://t21.com.mx/aereo/2018/05/16/turbosina-mexico-pista-hacia-apertura> May 16, 2018.

The new airport will generate substantial income: air sector.

The New Mexico City International Airport (NAIM) can generate revenues of 2,300 million dollars in its first year of operation, according to estimates from the National Chamber of Air Transport (CANAERO). Such estimation derives from prospective traffic of 50 million passengers per year and an average payment of 35 dollars per Airport Use Fee (TUA), plus an additional 30% for the operation of the airlines and the rent of commercial spaces, as explained Sergio Allard, president of CANAERO. <http://obrasweb.mx/construccion/2018/05/16/el-nuevo-aeropuerto-dara-ingresos-millonarios-dice-el-sector-aereo> May 17, 2018.

Mexico suspends Damojh's airline operations after fatal Cuba crash.

To ensure that Aerolineas Damojh is complying with Mexican regulations, particularly after the accident that occurred on 18 May 2018 in Cuba, the Civil Aviation Authority in Mexico has suspended operations of Aerolineas Damojh while it conducts a thorough investigation on the operations and compliance of the carrier. <https://www.reuters.com/article/cuba-crash-mexico/mexico-suspends-damojhs-airline-operations-after-fatal-cuba-crash-idUSE5N10T00S> May 21, 2018.

U.S. targets airlines in latest Iran sanctions move.

The United States imposed sanctions on four Iranian airlines. They affirmed the airlines had ferried weapons, fighters and money to proxies in Syria and Lebanon. The U.S. also threatened sanctions against those granting landing rights and providing services to such carriers. As stated by a representative of the U.S. Treasury "The deceptive practices these airlines employ to illegally obtain services and U.S. goods is yet another example of the duplicitous ways in which the Iranian regime has operated." <https://www.reuters.com/article/us-iran-nuclear/u-s-targets-airlines-in-latest-iran-sanctions-move-idUSKCN1IP2LD> May 24, 2018.

New Cluster, New Company, New Flight and New Service for Mexico.

Queretaro Aerocluster aims to create its own aerospace company to address local supply chain problems. This initiative is aimed to encourage the participation of small and medium Mexican companies into the supply chain. With investments of over US\$100 billion from European and Asian companies, Yucatan aims to start an aerospace and automotive cluster. <http://www.aerospacemx.com/this-week-in-aerospace-new-cluster-new-company-new-flight-and-new-service-for-mexico/> May 27, 2018.

Additional requirements from the DOT to grant immunity to Delta and AeroMexico.

The U.S. Department of Transportation (DOT) has ordered Aeromexico to surrender two slots in the Mexico City International Airport (AICM) and Delta to surrender one in the John F. Kennedy International Airport (JFK), in New York. The slots to be surrendered in the AICM are expected to be granted in favor of Volaris and Viva Aerobus, respectively; this, as part of the condition for the approval of the airline alliance reeisted by Aeromaexico and Delta who are seeking for antitrust immunity. <http://www.eluniversal.com.mx/cartera/negocios/eu-asigna-horarios-de-aterizaje-y-despegue-aeromexico-y-delta> May 28, 2018.

ALTA and IATA subscribe an agreement to improve Aviation Safety in LATAM.

Both associations subscribe a Memorandum of Understanding (MoU) aiming to work together to improve operational security in Latin America air transport industry. Within this framework, ALTA will help promoting IATA Standard Safety Assessment (ISSA) in Latin America and will continue promoting the acceptance of the IATA Operational Safety Audit (IOSA). This partnership will enable better practices and create awareness about the importance of the implementations of safety standards such as de ISSA. <http://t21.com.mx/aereo/2018/06/05/alta-iata-firman-acuerdo-mejorar-seguridad-aerea-latam> June 05, 2018.

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