

THE MERGER
CONTROL
REVIEW

TENTH EDITION

Editor
Ilene Knable Gotts

THE LAW REVIEWS

THE MERGER CONTROL REVIEW

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals, and high technology and media, in key jurisdictions to provide a more in-depth discussion of recent developments.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 32 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions

in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US\$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for

closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies who are found to be in violation. For example, the European Commission (EC) imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. The Korea Fair Trade Commission (KFTC) has imposed fines on over 50 transactions in the past two years that it deemed were not reported, were reported late, or were properly reported but implemented before the end of the waiting period. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the KFTC, but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the European Commission has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally

from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent CSC/Complete transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau

cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. This past year, for instance, many jurisdictions coordinated on the *Linde/Praxair* and the *Bayer/Monsanto* transactions. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a

number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts

Wachtell, Lipton, Rosen & Katz
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Part II

JURISDICTIONS

MEXICO

Rafael Valdés Abascal and Enrique de la Peña Fajardo¹

I INTRODUCTION

The Federal Law of Economic Competition became effective in Mexico in 1993. Congress approved important amendments to this statute in 2006 and 2011. In 2013, the Constitution was amended to improve the enforcement of competition law and policy and, as a result of this constitutional amendment, Congress enacted a new Federal Law of Economic Competition (the Competition Law) in 2014. The Federal Economic Competition Commission (COFECE) enforces the Competition Law in all areas of the economy, except the telecommunications and broadcasting sectors, where the Competition Law is enforced by the Federal Telecommunications Institute (IFT).

Under the Competition Law, pre-merger notification is mandatory when certain monetary thresholds are met. Since 2014, a notified transaction must be approved by the COFECE or IFT before consummation. Under the Competition Law, reportable transactions will not produce legal effects without such approval.

The Competition Law provides both a size of transaction test and a size of person test for determining whether a filing is required. For 2019, pre-merger notification is required when:

- a* the transaction's value exceeds 1,520.82 million pesos in Mexico;²
- b* an economic agent acquires 35 per cent or more of the assets or capital stock of an economic agent with assets or annual sales of at least 1,520.82 million pesos; or
- c* the acquired assets or capital stock amount to more than 709.61 million pesos,³ and the assets or annual sales of the parties involved in the transaction, jointly or separately, amount to more than 4,055.52 million pesos.⁴

The assets and sales that must be taken into account when assessing the thresholds are the ones located or originating in Mexico.

Failure to file can result in a fine of between 422,455 pesos⁵ and 5 per cent of the parties' annual sales.

¹ Rafael Valdés Abascal is the founding partner and Enrique de la Peña Fajardo is senior associate at Valdés Abascal Abogados SC.

² 18 million times the unit of measure and update (UMA), currently: 80.60 pesos. The value of the UMA is updated each year.

³ 8.4 million UMAs.

⁴ 48 million UMAs.

⁵ 5,000 UMAs.

The Competition Law provides certain exemptions to the pre-merger notification requirement. Some general examples of these are:⁶

- a* intra-corporate transactions;
- b* acquisitions of capital stock by an acquirer who holds control of the company since its incorporation or when such control has already been approved by the COFECE or IFT;
- c* transfers of assets or capital stock to administration or warranty trusts;
- d* international transactions not implying acquisition of control of Mexican companies or accumulation of assets in Mexican territory; and
- e* certain acquisitions solely for investment purposes.

Approved transactions may not be subject to further investigation unless the approval has been based on false information, or the approval has been subject to conditions and the parties do not comply with such conditions.

Transactions not surpassing the thresholds or falling under the exemptions may not be investigated after a year following their consummation. Transactions not subject to mandatory pre-merger notification may be voluntarily reported in order to seek approval and eliminate the possibility of further investigation.⁷

Note that the ninth transitory provision of the Federal Law of Telecommunications and Broadcasting⁸ states that as long as preponderant economic agents⁹ exist in the telecommunications and broadcasting sectors, mergers between concessionaries (i.e., telecommunications and broadcasting operators) will not require previous authorisation from the IFT whenever:

- a* the preponderant economic agent is not involved in the transaction;
- b* the Dominance Index shows a negative variation in the sector, as long as the Herfindahl-Hirschman Index does not show an increase that exceeds 200 points;
- c* as a result of the transaction, the economic agent has a share of less than 20 per cent in the corresponding sector; and
- d* the merger does not produce harmful effects to competition in the sector.

This type of transactions will require a post-closing notice instead of the pre-merger notification filing.¹⁰

In addition to the Competition Law, the following regulations and guidelines are related to merger control:

⁶ It is noted that the Competition Law provides eight exemptions. Also, please bear in mind that some specific requirements need to be met to fall into each of the exemptions.

⁷ Transactions that do not meet the thresholds can still be illegal. An illegal merger is defined in the Competition Law as any merger that has the purpose or effect of hindering, diminishing, damaging or preventing free competition or economic competition. This type of merger is penalised with a fine up to the equivalent of 8 per cent of the infringing parties' annual sales.

⁸ Effective as of 13 August 2014.

⁹ Preponderant economic agents are agents that have a national share of more than 50 per cent in the corresponding sector. As of 6 March 2014, the IFT determined the existence of two preponderant economic agents, one for each of the telecommunications and broadcasting sectors.

¹⁰ This notice must be filed before the IFT within 10 days following the closing. The IFT will have 90 days to investigate the merger and, if substantial market power in the relevant market exists, such authority will be entitled to impose measures in order to protect competition.

- a* Regulations of the Competition Law, issued and amended by the COFECE on 30 October 2014, 21 January 2016 and 25 January 2018. These regulations complement the merger control provisions established in the Competition Law;
- b* Regulations of the Competition Law for the broadcasting and telecommunications sectors, issued by the IFT on 7 January 2015 and amended 12 December 2018. These regulations complement the merger control provisions established in the Competition Law;
- c* Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the relevant market, issued by the COFECE on 23 April 2015. This Technical Criteria maintains the application of the Herfindahl-Hirschman Index and determines the elimination of the Dominance Index;
- d* Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the markets related to telecommunications and broadcasting sectors, issued by the IFT on 17 March 2016. This Technical Criteria also maintains the application of the Herfindahl-Hirschman Index and determines the elimination of the Dominance Index (except for procedures under the ninth transitory provision of the Federal Law of Telecommunications and Broadcasting);
- e* Guidelines for the Notification of Concentrations, issued by the COFECE on 9 October 2015 and amended on 20 April 2017. These guidelines provide further details regarding application of thresholds, information and documents required for the filing, non-compete clauses, among other issues;
- f* Guidelines for the Notification of Concentrations for the telecommunications and broadcasting sectors, issued by the IFT on 28 June 2017. These guidelines provide further details regarding application of thresholds, information and documents required for the filing, and non-compete clauses, among other issues;
- g* Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers, issued by the COFECE on 22 June 2015. These guidelines explain in detail the investigation procedure of illegal mergers, among other issues;
- h* Guidelines for Exchange of Information between Economic Agents, issued by the COFECE on 10 December 2015. These guidelines provide the rules regarding information exchange during the due diligence, among other issues;
- i* Regulations of the use of Electronic Systems of the COFECE, issued by such authority on 2 November 2017. These regulations establish the rules for the operation of the Electronic System of Filings of the COFECE (including merger control filing); and
- j* Rules for the Notification of Concentrations via electronic systems, issued by the COFECE on 8 December 2017. These rules establish the requirements and the procedure, in case the parties opt to submit a concentration filing via the newly created electronic system. Under proposed amendments to these rules published by the COFECE on 9 May 2019, the submission of a concentration filing via the electronic system will become mandatory in January 2020.

II YEAR IN REVIEW

In 2018, the COFECE concluded reviews of 183 pre-merger notifications with the following outcomes: 172 transactions were authorised, one transaction was conditioned to comply with undertakings, three transactions were objected and seven did not finish their review. Also, in the first quarter of 2019, the COFECE reviewed 42 pre-merger notifications with the following outcomes: 40 transactions were authorised and two did not finish the process. Also, COFECE imposed fines in four cases: three for failing to notify a transaction when it was legally required and one for failing to comply with previously imposed undertakings. Information for mergers reviewed by the IFT is not published, but public information suggests that two transactions were conditioned to comply with undertakings.

Of the past year's cases, two are worth mentioning. First, the *Disney/Fox* transaction, which required concurrent review by both agencies. In this case, COFECE decided to clear the transaction after its structure was modified. In mid 2018, the transaction was notified as a global acquisition, which included the cinema and television studios, entertainment and regional sports channels, and international businesses related to television. However, in January 2019, in order to eliminate risks to competition in the distribution of movies for the cinemas market, the parties modified the transaction to include the transfer, on behalf of Sony Pictures, of the participation of Disney in the company that participated in this market in Mexico. After this, COFECE proceeded to clear the transaction.¹¹

After reviewing 10 markets related to telecommunications and broadcasting, the IFT found that the transaction would harm competition in two markets: provision and licensing of restricted channels to cable TV providers in the categories 'factual' (which includes culture programmes, documentaries and reality TV) and 'sports'. Therefore, after asking the parties to propose undertakings, the IFT decided to clear the transaction with the condition to comply with the following undertakings: (1) for the factual category, several measures were imposed to avoid coordination between the new agent (*Disney/Fox*) and Discovery (main competitor); and (2) for the sports category, the divestiture of Fox Sports and its related assets was ordered.

The second relevant case is the *Nestlé/Lala* transaction, which was not notified before COFECE. After an investigation procedure for an illegal merger, the authority imposed fines of approximately 8 million pesos to the parties for failing to notify a transaction that took place in August 2013. The total sum of the fine was calculated taking into consideration the risks that were generated for not notifying.

¹¹ The other markets that were analysed by COFECE were: (1) licensing of audiovisual content for entertainment in physical and digital formats, both for direct acquisition and direct download; (2) licensing of music for entertainment in physical and digital formats, both for direct acquisition and direct download; (3) licensing of music in non-digital media; (4) live entertainment; and (5) licensing of intellectual property rights for books and magazines, and for consumer goods and development of interactive media and gaming.

III THE MERGER CONTROL REGIME

The notification must be filed by all parties involved in the transaction (e.g., buyer and seller), while a common representative appointed to act on behalf of the parties before the COFECE.¹² As of 1 January 2019, the mandatory filing fee is 184,539 pesos.

The initial filing must provide, in general, some corporate and financial information and documents (articles of incorporation, by-laws, capital structure, corporate charts and financial statements); the agreements governing the transaction; the scope of the non-compete obligations; an explanation of the transaction purposes; and a brief description of the products and market shares of the parties. Such information and documents are described in Article 89 of the Competition Law and are commonly known as 'basic information'.

Within any initial 10-business-day period, the COFECE may request basic information that was not provided with the initial filing, and such information must be submitted in a 10-business-day period, extendable under duly justified causes.

By reviewing the basic information, the COFECE should be able to determine whether the transaction produces relevant effects in the market, in which case they would issue an additional information request in order to proceed with a deeper analysis of concentration effects.

The additional information request may be issued and notified to the parties within a 15-business-day term after the compliance of the basic information request, or after the initial filing if such request was not issued. This additional information request may include such economic information that the authority deems necessary to analyse the effects of the transaction (description of products and substitutes, production processes, costs, investment amounts, distribution options, suppliers, clients, prices, market shares, etc.), and in many cases it has to be provided at a high level of detail. This information must be submitted within a 15-business-day term, extendable under duly justified causes.

If the notifying parties fail to comply with the information requests, it is legally tantamount to the notification not being filed. However, the transaction may be notified again and the procedure would start from the beginning.¹³

The COFECE will issue its decision within a 60-business-day period after the compliance of the additional information request; the compliance of the basic information request (if an additional information request was not issued); or the initial filing (if no basic or additional information requests were issued). In exceptionally complex cases, this 60-business-day term may be extended for up to 40 additional business days. The COFECE decision may approve, with or without conditions, or disapprove the transaction. If a decision is not issued within the established time frames, the notified transaction is deemed approved. The approval of the transaction will be valid for a six-month period, which may be extended for another six months when justified causes are credited to the parties. The transaction may not be closed after the expiration of such periods, unless a new notification is filed. The parties shall provide the COFECE with documents evidencing the transaction formalisation within 30 business days after closing.

If, during the notification process, the concentration raises competition concerns, the COFECE will inform the parties about the concerns at least 10 days before the case is included for decision in the board of commissioners' agenda. No later than one day before

12 Unless specified, the acronym COFECE will be used to refer to both competition authorities in this section.

13 The payment of a new filing fee would be required.

the case is included for decision in the board of commissioners' agenda, the parties may offer undertakings to prevent the risks found by the authority. The 60 or 40-day terms mentioned above will start to count again from the day the proposed undertakings are filed. Also, parties can offer undertakings from the beginning of the process (with the initial filing), in which case these terms will not be interrupted, although this is rarely recommended.

The COFECE is empowered to, and frequently does, request information to third parties who may be related to the market where the concentration will take place or have effects, being also empowered to request information of other authorities. Such information must be provided in a 10-business-day period, extendable for another 10 days when justified.

The Competition Law does not acknowledge the legal standing of affected third parties to challenge approval decisions issued by the COFECE in a pre-merger notification process. However, third parties may submit their concerns and provide information and documents, which shall be taken into account by the COFECE when issuing its decision.

During the notification process, access to the file is restricted to the notifying parties. Once the process concludes, the COFECE publishes its decision, excluding the information classified as confidential, and any person may have access to the rest of the non-confidential information contained in the file, through a specific petition filed under the transparency law.

Regarding concurrent review of mergers, Article 5 of the Competition Law provides that if one of the two agencies determines that a case that is being reviewed by the other should actually be reviewed by it, it will inform the agency that is reviewing the case of its views. If this agency declines jurisdiction, the case is sent to the requestor agency within five business days. However, if after such notice the agency does not decline jurisdiction, then the procedure will be suspended and the case will be sent to the economic competition, telecommunications and broadcasting circuit courts in order to determine which agency holds jurisdiction over the case. Also, whenever one of the agencies receives a case and deems that it should be reviewed by the other, the case should be sent within five business days to this agency. However, if the receiving agency declines jurisdiction the other agency should be informed within five business days, and the case should be sent to the circuit courts to determine which agency holds jurisdiction. Finally, when a transaction affects markets in which both agencies have jurisdiction, the transaction may be reviewed by both agencies. However, the decision may only be issued with regard to the markets in which each agency has jurisdiction.

IV OTHER STRATEGIC CONSIDERATIONS

Even if the parties believe that the merger is not expected to produce competition risks, it is recommended to provide economic information with the filling. Even though the parties are not obligated to provide such information at that time, providing it may avoid a request of additional information (such situation will speed up the process).

It is also recommended to approach the COFECE or the IFT at the early stages of the process and hold meetings with the officers in charge of the case. The purpose of such meetings will be to answer any questions and to explain every aspect of the merger. By having these meetings, the scope of the basic information request and the additional information request may be reduced.

COFECE or IFT decisions may be challenged before federal courts via *amparo*, which is a trial aimed to revoke unconstitutional or illegal decisions. These trials are before competition, telecommunications and broadcasting specialised federal district judges and circuit courts that were created after the 2013 constitutional amendments. *Amparo* trials have

no specific time frame and sometimes may last more than a year. Thus, in certain cases it is recommended to file a new notification offering suitable undertakings instead of challenging the COFECE decision before federal courts.

Finally, there is one very important aspect of the COFECE Guidelines for Notification of Concentrations regarding collaboration agreements (which are not regulated in the Competition Law). These Guidelines mention that such agreements may be reviewed under the merger control procedure whenever the transactions meet the characteristics of a concentration; therefore, the parties will have certainty regarding the legality of a collaboration agreement if they submit it to scrutiny by the COFECE before its closing. This implies that the agreement would be studied on a rule-of-reason basis, which will give the parties the possibility to submit economic arguments, such as efficiency gains and absence of substantial market power, for the authorisation of the agreement.

V OUTLOOK AND CONCLUSIONS

As previously mentioned, in 2013 the Mexican Constitution was amended to improve the enforcement of competition law and policy. Another one consisted of improving the telecommunications and broadcasting law, and enhancing its enforcement. Some of the most important changes are as follows:

- a* the Federal Competition Commission and Federal Telecommunications Commission (both agencies within the executive branch) were replaced by the new autonomous constitutional entities COFECE and IFT, respectively;
- b* the five former commissioners were replaced by seven commissioners for each entity;
- c* the power to enforce the Competition Law in the telecommunications and broadcasting industries was transferred to the IFT;
- d* the COFECE and IFT were empowered to issue Competition Law regulations (before the constitutional reform, the Competition Law regulations were issued by the president);
- e* new federal courts specialised in competition, telecommunications and broadcasting were created; and
- f* the reconsideration appeal was eliminated, so the COFECE and IFT decisions may only be challenged through *amparo* trial before the specialised federal courts.

In order to implement the constitutional reform, in 2014, a new Federal Law of Economic Competition and a new Federal Law of Telecommunications and Broadcasting were enacted.

Besides the above, the main changes to the competition legal framework that had an impact on the merger control regime are the following:

- a* concentrations surpassing the monetary thresholds require approval from the COFECE or IFT prior to its consummation. No agreement or legal act executed to formalise the transaction will be valid without said authorisation;
- b* a new stage of the notification procedure was created, where the parties may offer conditions or remedies in order for the concentration to be approved;
- c* the time frame to request basic information was extended from five to 10 business days and the time frame to issue a decision was extended from 35 to 60 business days. As a consequence, a notification procedure may last seven months, plus the time consumed by the parties in gathering and submitting requested information. In the cases that the parties propose conditions or remedies, the procedure may last about one year;

- d* generation of competition barriers as a consequence of the proposed transaction was included as a cause for objection. Acquiring or increasing substantial market power, as well as acquiring the ability to displace other economic agents or to perform monopolistic practices, remained as causes to object the transaction; and
- e* the Herfindahl-Hirschman Index is still applicable for the analysis of market concentration levels and the proposed transaction effects. However, the Dominance Index, which acknowledged positive effects on competition derived from mergers between small players, was eliminated.

In December 2018, a new President started his mandate and an austerity policy was implemented. This meant that the federal budget for 2019 was reduced for all public entities. In the case of COFECE, the reduction was 5 per cent of the previous year's budget. Also, a new Federal Remunerations Law was enacted, which provides that public officials, no matter how specialised, cannot receive a higher salary than that of the President. This law is currently under review by the Judicial Power via *amparo* trials that several officials of the public administration started against such determination. Some of the officials that initiated these trials are officials at both COFECE and the IFT. Notwithstanding, is too early to foresee the effects of both the new austerity policy and the Federal Remunerations Law, and there have not yet been significant losses of talent from the competition authorities (in other regulatory entities, several commissioners have resigned).

Appendix 1

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Rafael Valdés Abascal obtained his law degree from the Universidad Panamericana Law School, where he has the chair as competition law professor and has been member of its Academic Council.

He began his practice in the corporate law area. He joined the public sector in 1990 where he held office, among others, as head of the legal counselling office for the chief of staff of the Mexican president. Later, he was appointed as the executive secretary of the Federal Competition Commission (CFC).

In 1996, he left the public sector to start his own law firm (then Valdés Abascal y Brito Anderson). He has undertaken an intensive practice on competition and antitrust counselling and litigation, being involved in several of the most important cases that have taken place since the creation of the CFC. He has rendered services to several important domestic and foreign companies, and has advised several federal government agencies.

He has headed the Competition Law Committee of the Corporate Lawyers National Bar Association (ANADE) and has been appointed by the competition authority as non-governmental adviser for the International Competition Network.

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