THE Merger Control Review

Thirteenth Edition

Editor
Ilene Knable Gotts

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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 such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). 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.

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, the international business community had a wake-up call when, 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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop 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 24 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 in 2018. 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 amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies, or, in other high-technology settings, a 'nascent' competitor, do not escape review.

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Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

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 is similarly no 'local' effect 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 have been in connection with these considerations. Notably, current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on 'consumers' and 'consumer welfare' to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will impact enforcement decisions and judicial challenges. Although a growing 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 the merger could have a potential impact on national security.

As we pass the two-year anniversary of the covid-19 pandemic, challenges continue both for transaction parties and enforcement agencies. Many jurisdictions (particularly China) have had protracted review times to account for covid-19 disruptions at the agencies. The Ukrainian–Russian conflict may also have business implications, including on supply chain and economic recovery, which in turn may increase the number of reviews of companies

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in financial distress, if not at the point of failure. Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

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 Patriarche 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. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

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 EC 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 that are found to be in violation. For example, the EC imposed the largest gun-jumping fine to date 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

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element of gun-jumping. 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 Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (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. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC 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 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. Even within the EC, there remain some jurisdictions 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. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

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

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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). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that 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, EC and UK 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 competition authority, 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 EC 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 US Federal Trade Commission 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

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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. 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 (e.g., Austria), 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, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). 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

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remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for 'change' by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the US, Canada, China and the UK), we are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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Part II

Jurisdictions

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Chapter 17

MEXICO

Rafael Valdés Abascal, Fabiola G Quezada Nieto and Enrique de la Peña Fajardo[1]

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 COFECE or the IFT before consummation. Reportable transactions will not produce legal effects without this approval.

The Competition Law provides both a size-of-transaction test and a size-of-person test to determine whether a filing is required. The Law requires pre-merger notification when:

a the transaction's value exceeds 18 million times the unit of measure and update (UMA) 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 18 million UMAs;[3] or

c the acquired assets or capital stock amount to more than 8.4 million UMAs,[4] and the assets or annual sales of the parties involved in the transaction, jointly or separately, amount to more than 48 million UMAs.[5]

The assets and sales that must be taken into account when assessing the thresholds are the ones located or originating in Mexico. The value of assets is the greater of book value and commercial value (i.e., the price paid).

1 Rafael Valdés Abascal is the founding partner, Fabiola G Quezada Nieto is a partner and Enrique de la Peña Fajardo is a senior associate at Valdés Abascal Abogados SC.

2 The value of the UMA (from 1 February 2022 to 31 January 2023) is 96.22 Mexican pesos. Taking this into consideration, this threshold amounts to 1,731.96 million pesos. Note that the value of the UMA is updated each year and the next update should be published by mid-January 2023.

3 1,731.96 million pesos

4 808.25 million pesos.

5 4,618.56 million pesos.

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Failure to file can result in a fine of between 5,000 UMAs[6] and 5 per cent of the parties' annual sales.

Even if the thresholds are surpassed, the Competition Law provides the following exemptions to the pre-merger notification requirement:

a the transaction involves a corporate restructure, in which the economic agents pertain to the same economic interest group and no third entity participates in the transaction;

b the holder of stock, partnership interest or participation units increases its relative participation in a company's capital stock that has been controlled by the holder since its incorporation or commencement of operations, or when COFECE had previously authorised the acquisition of this control and the holder increases its relative participation in the capital stock of the company;

c the transaction involves the creation of a management, guarantee or any other sort of trust, whereby an economic agent transfers its assets, stock, partnership interest or participation units without the purpose or consequence of transferring these to a company other than both the settlor and the corresponding fiduciary institution. However, in the case of the execution of a guarantee trust, the transaction must be notified when the thresholds are surpassed;

d the transaction involves legal acts of foreign companies, over stock, partnership interest or participation units, or under trust agreements executed abroad and related to companies not residing in Mexico for tax purposes, as long as the involved companies do not acquire control over Mexican companies, nor accumulate stock, partnership interest, participation units or participation in trusts or assets within the Mexican territory in addition to those that are directly or indirectly owned prior to the transaction;

e the buyer is a variable income investment company and the purpose of the transaction is the acquisition of stock, obligations, assets, securities or documents with resources resulting from the placement of the investment company's shares among the investing public, except if, as a result of or due to the transactions, the investment company would have significant influence over the decisions of the economic agent involved in the transaction;

f the acquisition of stock, assets, titles or representative documents of the capital stock of companies or whose underlying assets represent equity of legal entities, and that are traded on stock exchanges in Mexico or abroad, when the act or sequence of acts does not entitle the buyer to own 10 per cent or more of the capital stock, obligations convertible into stock, assets, securities or documents, and the buyer does not acquire the authority for:

- appointing or removing members of the board, directors or managers of the company;
- imposing, directly or indirectly, decisions on the general meetings of stockholders, partners or equivalent corporate bodies;
- holding ownership rights that allow, directly or indirectly, the exercise of voting regarding 10 per cent or more of a legal entity's capital stock; or
- directing or influencing, directly or indirectly, the management, operation, strategy or the main policies of the legal entity, by means of equity holdings, contractually or otherwise; and

6 481,100 pesos.

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g the acquisition of stock, partnership interest, participation units or trusts is performed by one or more investment funds merely for speculation purposes, that do not have investments in companies or assets that participate or are used in the same relevant market as the economic agent involved in a transaction.

Additionally, there is a special rule for the telecommunications and broadcasting sectors regarding the requisite of previous authorisation. The 2013 constitutional amendments ordered IFT to determine if preponderant economic agents (i.e., agents whose national share surpassed 50 per cent) exist in the telecommunications and broadcasting sectors, which was confirmed by IFT on March 2014 and other later decisions. Afterwards, the ninth transitory provision of the Federal Law of Telecommunications and Broadcasting, effective as of 13 August 2014, provided that as long as preponderant economic agents exist, mergers between concessionaries (i.e., operators in such sectors) will not require previous authorisation from 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.

These types of transactions will require a post-closing notice instead of the pre-merger notification filing. This notice must be filed before the IFT within 10 days of the closing. The IFT will have 90 days to investigate the merger and, if substantial market power in the relevant market exists, the authority will be entitled to impose measures to protect competition.

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 these 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 for approval and to eliminate the possibility of further investigation.[7]

The most important recent change to the Mexican merger control regime was the publication of the new Guidelines for the Notification of Concentrations, issued by COFECE on 8 April 2021. Alongside details regarding the information and documents required for filing and non-compete clauses, which were contained in the previous guidelines (issued on 9 October 2015 and amended on 22 November 2017), the new guidelines include criteria on the following topics:

a collaboration agreements and joint ventures: because the Mexican competition regime does not contemplate safe harbours for these types of agreements, they are often submitted to COFECE for scrutiny, to avoid an investigation further down the line. In this respect, the new guidelines provide the criteria under which collaboration

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.

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agreements and joint ventures meet the characteristics of a concentration (as defined in Article 61 of the Competition Law) and need to be notified. In this regard, the economic agents must take into account the term of the agreement,[8] the degree of autonomy[9] and the scope of the agreement;[10]

b notification thresholds: additional details are given regarding the calculation of the transaction value, the companies that must be considered for the application of thresholds, and the criteria regarding successive acts that must be notified;

c agents that must notify: the guidelines clarify which agents must notify a transaction that involves multiple purchasers; and

d failing firm defence: recommendations are provided on the documents that must be submitted to prove defence, which include documents that: (1) demonstrate the imminent risk of exiting the market; (2) prove the capacity of the acquirer to mitigate the problems of the failing firm; (3) prove that reasonable efforts have been made to find other buyers; and (4) show that the entity's precarious financial situation is permanent.

In addition to the Competition Law and the above-mentioned guidelines, some of the most important regulations, guidelines and rules relating to merger control are the following:

a the Regulations of the Competition Law, issued and amended by COFECE per the publications in the Official Journal of the Federation on 10 November 2014, 5 February 2016, 14 February 2018, 1 August 2019 and 4 March 2020. These Regulations complement the merger control provisions established in the Competition Law;

b the Regulations of the Competition Law for the broadcasting and telecommunications sectors, issued and amended by the IFT per the publications in the Official Journal of the Federation on 12 January 2015, 1 February 2019 and 22 November 2019. These Regulations complement the merger control provisions established in the Competition Law;

c the 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;

d the Regulations of the Use of Electronic Systems of COFECE, issued and amended by COFECE per the publications in the Official Journal of the Federation on 8 December 2017, 18 July 2019 and 1 November 2021. These Regulations establish the rules for the operation of COFECE's electronic system of filings (including merger control filings); and

e the Rules for the Notification of Concentrations via Electronic Systems, issued and amended by COFECE per the publications in the Official Journal of the Federation on 8 December 2017 and 18 July 2019. These Rules establish the requirements and the procedure via the electronic system. Significantly, under the latest amendments to the Rules, the submission of a concentration filing via the electronic system has been mandatory since 24 January 2020.

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8 Permanent, indefinite duration or long duration should be considered in concentrations.

9 When the created agent has functional and operational autonomy it should be considered a concentration.

10 If the competition between the participants of the collaboration disappears upon closing, it should be considered a concentration.

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Finally, other rules and guidelines relating to the Mexican merger control regime are the following:

a the Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the relevant market;
b the Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the telecommunications and broadcasting sectors;
c the Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers;
d the Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers in the telecommunications and broadcasting sectors; and
e the Guidelines for Exchange of Information between Economic Agents.

II YEAR IN REVIEW

In 2021, COFECE concluded 154 reviews, with the following outcomes: 137 transactions were authorised, one transaction was conditioned upon undertakings and one transaction was rejected. Also, 15 transactions did not finish the review procedure and no fines were imposed for failure to notify a transaction. The sectors involving the highest number of pre-merger notifications were manufacturing (30), real estate and leasing (23), financial services and insurance (13), transportation, postal services and storage (13), construction (11), mining (9), wholesale trade (9), electricity, water and gas (6), and retail (6).[11]

In the first quarter of 2022, COFECE reviewed 85 pre-merger notifications, which concluded with the following outcomes: 44 transactions were authorised, four were deemed as not filed and 37 continued under review.

The 2021 case that was conditioned upon undertakings was the *G500/Glencore Energy Mx* transaction, in which COFECE initially allowed 213 service stations to sign a franchise agreement with G500 Network as franchisor, under the condition that the business will notify COFECE of other service stations intending to join the franchise model in the future.

The 2021 case that was rejected by COFECE is the *Soriana/Famsa* transaction. As background, in February 2015, Soriana notified a transaction that was conditioned upon certain undertakings, including a divestiture commitment. Within the scope of this programme, Soriana and Famsa notified a transaction in 2021 by which Famsa would become the operator of certain stores. COFECE notified the parties that it had identified certain risks to competition for which the parties had not offered suitable undertakings. Therefore, COFECE rejected the transaction because it considered that the divestment programme requirements were not met as Famsa did not have the capacity nor the means to become an effective competitor.[12]

11 2021 Merger Control Report, COFECE, April 2022.
12 2021 First Quarterly Report, COFECE, p. 41.

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III THE MERGER CONTROL REGIME

Notifications must be filed by all parties involved in the transaction (e.g., buyer and seller), and a common representative must be appointed to act on behalf of the parties before COFECE.[13] As of 1 January 2021, a filing fee of 196,347 pesos must be paid for COFECE's filings, while filings before IFT do not require such payment.

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);[14] 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 an initial 10-business-day period, COFECE may request basic information that was not provided with the initial filing, and this information must be submitted within a 10-business-day period, extendable under duly justified causes.

By reviewing the basic information, 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 to proceed with a deeper analysis of concentration effects.

Typically, the additional information request may be issued and notified to the parties within 15 business days of the compliance of the basic information request, or after the initial filing if such request was not issued. However, in exceptionally complex cases, the 15-business-day term may be extended for another 40 business days. 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 in a high level of detail. The response to the additional information request must be submitted within a 15-business-day term, extendable under duly justified causes for 40 additional business days.

If the notifying parties fail to comply with the information requests (basic and additional), 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.[15]

COFECE will issue its decision within 60 business days of 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. COFECE's 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 by the parties. The transaction may not be closed

13 Unless specified, 'COFECE' refers to both competition authorities in this section.

14 For transactions in which the seller does not retain any participation in the target, it is only required to provide information and documents of the direct seller (as opposed to providing information of the whole economic group).

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

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after the expiry of these periods unless a new notification is filed. The parties shall provide COFECE with documents evidencing the transaction formalisation within 30 business days of closing.

If during the notification process the concentration raises competition concerns, COFECE will inform the parties about these concerns at least 10 business days before the case is included for decision in the board of commissioners' agenda. No later than one day after 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 for issuing the decision will start to count again from the day the proposed undertakings are filed. Also, parties can offer undertakings at any time from the beginning of the process. If they are offered with the initial filing the terms will not be interrupted, although this is rarely recommended.

COFECE is empowered to, and frequently does, request information from third parties that may be related to the market where the concentration will take place or have effects, being also empowered to request information of other authorities. This 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 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 COFECE when issuing its decision.

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

Finally, it is worth mentioning that concurrent review of concentrations is possible when a transaction affects markets in which both COFECE and IFT have jurisdiction. However, the decision may only be issued with regard to the markets in which each agency has jurisdiction. Article 5 of the Competition Law provides that if one of the two agencies determines that it should be reviewing a case that is being reviewed by the other agency, it must inform the agency reviewing the case of its reasons for this determination. If this agency declines jurisdiction, the case is sent to the requesting agency within five business days. However, if after such notice the agency does not decline jurisdiction, the procedure will be suspended and the case will be sent to the economic competition, telecommunications and broadcasting circuit courts 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 agency, the case should be sent within five business days to this agency. 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.

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IV OTHER STRATEGIC CONSIDERATIONS

The legal time frames provided for the merger control procedure cover many months, and the actual time for obtaining an authorisation can only be estimated on a case-by-case basis. In the authors' experience, an authorisation for a case that does not produce effects (i.e., no overlaps or vertical integration) can be obtained in one and a half to two months. The review of a case with no significant overlaps, combined with other factors (availability of market share information, non-relevant market effects and presence of important competitors), may take two to three months and more complex cases may take six to 12 months or even longer.

There are some strategies that parties may use to accelerate the procedure. For example, if the parties believe that the merger is not expected to produce competition risks, they should provide economic information with the filling. Even though the parties are not obliged to provide this information at that time, its provision may avoid a request of additional information, which would speed up the process.

It is also recommended to approach the competition authorities at the early stages of the process and hold meetings with the officers in charge of the case. The purpose of these meetings will be to answer any questions and to explain every aspect of the merger. The assistance of executives of the concerned parties, especially those involved in the operation and commercial divisions, is very helpful at these meetings, and the meetings themselves may reduce the scope of information requests (basic or additional).

COFECE and 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 decision before federal courts.

Finally, regarding international transactions, there are two important aspects to note. First, the Mexican competition authorities have well-established communication channels with other competition authorities (especially those in the United States), and it is common for the Mexican authorities to ask for waivers and to follow the investigation lines or approaches that other authorities are adopting. Second, there are no derogations from the standstill provisions in the Mexican merger control regime, which means that a notified transaction must be approved before its consummation. Notwithstanding this, if the legal time frames provided in the merger control procedure are not compatible with the transaction calendar or closing date, a carve-out might be designed by the parties to enable the transaction to close in other jurisdictions without producing effects in Mexico. For example, the shares of the Mexican subsidiaries could be transferred to a trust while the merger control procedure is taking place, with the shares being reverted to the acquirer once the transaction is approved.

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V OUTLOOK AND CONCLUSIONS

As 2021 was a better year, economically, for Mexico (the economy increased by 4.5 per cent, according to the National Institute of Statistics and Geography), the number of cases filed before COFECE increased by 30 per cent compared with 2021 (165 versus 127 filings).

In this regard, it is important to point out that, even though Mexico faced adverse economic effects due to the global pandemic, COFECE took all necessary measures to ensure the health crisis was no obstacle to former, current or future transactions. First, while COFECE suspended some of its procedures during 2020 and part of 2021, merger control was an exception. This was due to two factors: (1) COFECE knows that suspending merger control procedures could mean transactions being terminated; and (2) the electronic system for the merger control procedure allows for all stages of the notification procedure to take place electronically (notifications with their corresponding annexes, receipt of requests for information and decisions, filing of responses and documents) and provides remote access to files 24 hours a day.

Finally, with the expectation that the health crisis will result in future mergers of firms in financial distress, it is also worth mentioning that COFECE issued the new Merger Control Guidelines, which included recommendations on documents that must be submitted to argue the failing firm defence, to provide the economic agents the necessary guidance if they face this scenario.

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Appendix 1

ABOUT THE AUTHORS

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Rafael Valdés Abascal obtained his law degree from the Panamerican University Law School, where he holds the position of chair as competition law professor and has been a 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 as, among other things, 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 and has been appointed by the competition authority as non-governmental adviser for the International Competition Network.

He is ranked as a 'Leading Lawyer' in competition and antitrust in Mexico by *Chambers and Partners*, *The Legal 500*, *Who's Who Legal*, *Best Lawyers* and *Expert Guides*, among other publications.

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Fabiola G Quezada Nieto obtained her law degree from the Panamerican University Law School, where she specialised in corporate law. She has a master's degree in international business law from the Ibero-American University. She also studied international business law at the Complutense University of Madrid, anti-corruption at the International Chamber of Commerce, Mexico and the Panamerican University Law School and health law at Anáhuac University. She also completed the D-1 Direction Programme at the Panamerican University Business School.

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Prior to joining the firm, she was the general counsel of a Mexican pharmaceutical group, which includes Farmaceuticos Maypo and Stendhal, with presence in Mexico and Latin America. She also oversaw the corporate, securities and competition law areas of one of the biggest Mexican industrial conglomerates (*DESC/Grupo KUO*), which involved dealing with M&A transactions, financial restructures and the issuance of securities.

She was a professor in the corporate law programme of the Mexico Autonomous Institute of Technology.

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Enrique de la Peña Fajardo obtained his law degree from the Mexico Autonomous Institute of Technology. He has also studied public and private international law at The Hague Academy of International Law.

His practice at Valdés Abascal Abogados SC focuses mainly on merger control, litigation and counselling in competition law. Prior to joining the firm, he worked in the areas of litigation (civil, commercial and administrative law), commercial arbitration and corporate law. In the federal government, he served in the areas of budget law and consultancy.

He is a member of the Antitrust Section of the American Bar Association and of the International Competition Network Merger Working Group. He is ranked as a 'Rising Star' in competition and antitrust in Mexico by *The Legal 500* and as 'Leading Lawyer' by *Who's Who Legal* and *Best Lawyers*.

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