THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

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ISBN 978-1-80449-190-4

Chapter 18

MEXICO

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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, for which 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 completion. 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 measurement and update unit (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, whether 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 those located or originating in Mexico. The value of assets is the greater of book value and commercial value (i.e., the price paid).

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2 The value of the measurement and update unit (*unidad de medida y actualización* (UMA)) for the period from 1 February 2023 to 31 January 2024 is 103.74 Mexican pesos. This threshold therefore amounts to 1,867.32 million pesos. Note that the value of the UMA is updated each year; the next update is expected to be published by mid-January 2024.

3 1,867.32 million pesos.

4 871.41 million pesos.

5 4,979.52 million pesos.

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 exceeded, 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 located 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

6 518,700 pesos.

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 whether preponderant economic agents (i.e., agents whose national share exceeded 50 per cent) exist in the telecommunications and broadcasting sectors, which was confirmed by IFT on March 2014 and in 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 when:

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 exceeding the thresholds or falling under the exemptions may not be investigated once a year has passed following their completion. 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 change to the Mexican merger control regime in recent years 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

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 of up to the equivalent of 8 per cent of the infringing parties' annual sales.

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 2021 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 at a later stage. In this respect, the 2021 Guidelines provide the criteria under which collaboration 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.

d Failing firm defence: Recommendations are provided regarding 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 2021 Guidelines, the most important regulations, guidelines and rules relating to merger control include the following:

a Regulations of the Competition Law, issued and amended by Cofece per publication thereof 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 Regulations of the Competition Law for the broadcasting and telecommunications sectors, issued and amended by the IFT per publication thereof 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 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 Regulations of the Use of Electronic Systems of Cofece, issued and amended by Cofece per publication thereof 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).

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.

e Rules for the Notification of Concentrations via Electronic Systems, issued and amended by Cofece per publication thereof 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 2019 amendments to the Rules, the submission of a concentration filing via the electronic system has been mandatory since 24 January 2020.

f Rules for the use of electronic systems during the investigation, the administrative trial procedure, the verifications and incidents before the Federal Economic Competition Commission, issued by Cofece per publication thereof in the Official Journal of the Federation on 2 March 2023, which apply to investigations of illegal mergers.

Finally, other rules and guidelines that are relevant to the Mexican merger control regime are:

a Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the relevant market;

b Technical Criteria for the Calculation and Application of a Quantitative Index to determine concentration in the telecommunications and broadcasting sectors;

c Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers;

d Guidelines of the Investigation Procedure of Relative Monopolistic Practices (dominance) and Illegal Mergers in the telecommunications and broadcasting sectors; and

e Guidelines for Exchange of Information between Economic Agents.

II YEAR IN REVIEW

In 2022, Cofece concluded 161 reviews, resulting in 150 transactions being authorised and 11 transactions not finishing the review procedure. In addition, two fines were imposed for failure to notify a transaction. Furthermore, 43 transactions were deferred until 2023. The sectors involving the highest number of pre-merger notifications during 2022 were manufacturing (27), financial services and insurance (21), real estate and leasing (17), construction (13), transportation, postal services and storage (13), mining (11) and electricity, water and gas (10).[11]

In the first quarter of 2023, Cofece analysed 88 pre-merger notifications (43 that were pending from 2022 and 45 that were notified between January and March), with the following outcomes: 38 transactions were authorised, four were deemed as inadmissible, one was deemed as not filed and one was dismissed per the parties' request. Further, 44 cases were deferred until the following quarter.[12]

Of the 2022 cases, the most notable is *Elektrisola/Rea*, in which lawyers from the authors' firm represented both parties. As background, in December 2017, Cofece blocked a transaction between Rea and Xignus since the transaction would have represented the joining of two of the three main competitors in the production and distribution of magnet wire in North America, which would have favoured price increases without other agents being able

11 Cofece, 'Cofece en números', March 2023 (https://www.cofece.mx/wp-content/uploads/2023/03/Cofece-en-numeros-2022.pdf (accessed 14 June 2023)).

12 Cofece, 2023 First Quarterly Report, April 2023 (https://www.cofece.mx/monthly-report-april-2023/#nota 2 (accessed 14 June 2023)).

to counter those increases. Further, in this case, Cofece determined that all gauges of magnet wire were part of the same relevant market. When the *Elektrisola/Rea* case was filed in July 2022, the lawyers' approach was to prove that there were two separate relevant markets, heavy and fine wire, depending on the gauge of the magnet wire. The precedent did not analyse this possibility and the parties' activities were highly complementary if the relevant markets were defined. Whereas Rea focuses on the production of heavy wire, Elektrisola focuses on the production of fine wire. To prove the existence of two markets, the lawyers filed an economic white paper specifying the main differences between heavy and fine magnet wire in terms of equipment, applications and clients. In addition, visits were arranged to the parties' facilities for Cofece's officials to fully appreciate the industrial processes of the production of heavy and fine wire. After almost eight months of answering Cofece's requests for information, the lawyers managed to revert the 2017 precedent by proving to Cofece that heavy wire is a completely different product from fine wire in terms of its production, applications and prices. This resulted in the definition of two separate magnet wire markets and the approval of the transaction owing to complementarity of the parties' activities.

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 2023, a filing fee of 227,241 pesos must be paid for Cofece's filings, whereas 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 purposes of the transaction; and a brief description of the products and market shares of the parties. This 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. This information must be submitted within 10 business days; this period may be extended for duly justified reasons.

By reviewing the basic information, Cofece should be able to determine whether the transaction produces relevant effects in the market, in which case it 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 compliance with the request for the basic information, or after the initial filing if such a 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,

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 about the whole economic group).

prices, market shares, etc.), and in many cases it has to be provided with a high level of detail. The response to the additional information request must be submitted within 15 business days; this period may be extended for duly justified reasons by 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 compliance with the additional information request, compliance with 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, the 60 business days may be extended for up to 40 additional business days. Cofece's decision may approve, with or without conditions, or reject 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 six months, which may be extended for another six months when justified causes are credited by the parties. The transaction may not be closed after the expiry of these periods unless a new notification is filed. The parties shall provide Cofece with documents evidencing the formalisation of the transaction within 30 business days of closing.

If during the notification process the concentration raises competition concerns, Cofece will inform the parties of these concerns at least 10 business days before the case is included for decision on the board of commissioners' agenda. No later than one day after the case is included for decision on the board of commissioners' agenda, the parties may offer undertakings to prevent the risks found by the authority. The 60-day or 40-day terms for issuing a decision will start to count again from the day the proposed undertakings are filed. Further, 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 relevant to the market where the concentration will take place or have effects, being also empowered to request information from other authorities. This information must be provided within 10 business days, which is 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 that is 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, 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

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

case will be sent to the economic competition, telecommunications and broadcasting circuit courts to determine which agency holds jurisdiction over the case. Further, whenever one of the agencies is notified of a case and deems that it should be reviewed by the other agency, the case should be sent within five business days to that 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.

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 case by case. 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 three months. The review of a case with no significant overlaps, combined with other factors (such as availability of market share information, non-relevant market effects and presence of important competitors), may take three to four 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 for 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 specialist competition, telecommunications and broadcasting federal district judges and circuit courts that were created after the 2013 constitutional amendments. *Amparo* trials have no specific time frame and can sometimes last for 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.

V OUTLOOK AND CONCLUSIONS

During the pandemic, Cofece lost three of its commissioners. Two of them completed their terms of office while another one unfortunately passed away. Owing to the lack of appointment of new commissioners, Cofece initiated a constitutional controversy for the omission by the Executive Power of sending the corresponding lists to the Senate for the ratification of the persons selected by the President. In both December 2022 and March 2023, the Supreme Court ordered the Executive Power to send the candidates to the Senate, where they were ratified, allowing Cofece to be fully operational. The lack of the three commissioners did not hold back the decisions in merger control cases since they can be approved by a majority of four out of seven. However, this meant that all acting commissioners would have to vote in favour of the approval.