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Mexico

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

All concentrations which occur or have effects in Mexico (*see Question 2, Triggering events*) are subject to the Federal Law on Economic Competition (Competition Law).

The Competition Law grants authority to the Federal Competition Commission (*Comisión Federal de Competencia*) (FCC) to review and investigate concentrations (*see box, The regulatory authority*).

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

Concentrations can trigger the obligation to file a notification with the FCC. These concentrations can include mergers and acquisitions, and other similar acts or transactions that combine corporations, associations, partnerships, shares of stock, assets or trusts between:

- Competitors.
- Suppliers.
- Customers.
- Any other economic agents.

Thresholds

The Competition Law establishes three monetary thresholds (*see below*). These are calculated based on the minimum daily wage (minimum wage) applicable in the Federal District, which is usually adjusted yearly. In 2011 the minimum wage is MXN59.82 (as at 1 November 2010, US$1 was about MXN12.3).

A concentration must be notified to the FCC if any of the following apply:

- A transaction or series of transactions giving rise to the concentration, regardless of the place of execution, represent within Mexico, directly or indirectly, a value greater than 18 million times the minimum wage (about US$87,541,463).
- A transaction or series of transactions giving rise to the concentration result in the acquisition of 35% or more of the total assets or shares of an economic agent. This only applies if the target economic agent has total assets or annual sales located/originated in Mexico that are worth more than 18 million times the minimum wage (*see above*).
- The total assets or annual worldwide volume of sales of the agents involved in the concentration, jointly or separately, are worth more than 48 million times the minimum wage (about US$233,443,902), and the transaction results in an accumulation of total assets or capital stock in Mexico in excess of 8.4 million times the minimum wage (about US$40,852,682). The FCC has interpreted that, to determine the value of the assets accumulated in Mexico, the parties must consider either, whichever is higher:
  - the value of the total assets as shown in the financial statements;
  - the price allocated to Mexico.

Notification

3. Please give a broad overview of notification requirements. In particular:

- **Is notification mandatory or voluntary?**
- **When should a transaction be notified?**
- **Is it possible to obtain formal or informal guidance before notification?**
- **Who should notify?**
- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**
- **Is there an obligation to suspend the transaction pending the outcome of an investigation?**

Mandatory or voluntary

Pre-merger filing. All concentrations occurring in Mexico or having effects in Mexico are subject to the Competition Law and can be investigated by the FCC. However, a pre-merger filing is only mandatory if any of the monetary thresholds is reached (*see Question 2, Thresholds*) (although the parties can voluntarily notify a transaction even if no threshold is reached).

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Reorganisation notice. The Regulations to the Competition Law provide certain exemptions from the obligation to make pre-closing filings for risk free transactions. Risk free transactions are:

- Transactions relating to shares or partnership interests of foreign entities, if the economic agents participating in the transaction do not either:
  - acquire control over Mexican entities;
  - accumulate in Mexico additional shares, partnerships interests, participation in trusts or assets in general, to those already owned.
- Corporate reorganisations where at least 98% of the shares or partnership interests of the economic agents involved were held, either directly or indirectly, by the same economic agent (for example, the ultimate parent company of a corporate group) either:
  - for at least three years before the reorganisation or since the economic agents were incorporated;
  - since the date on which the FCC cleared the original transaction through which the economic agents were acquired.

In the case of corporate reorganisations meeting these requirements, a reorganisation notice must be filed with the FCC. This must contain a description of the reorganisation and certain limited corporate information (for example, copies of by-laws and shareholding information) of the economic agents involved in the transaction. This notice must be filed no later than 15 business days after closing the transaction.

If the reorganisation notice is not filed on time or the transaction does not comply with the requirements, the parties must file a pre-merger filing. The parties may also be subject to fines for the late submission of a pre-merger filing.

Timing

A pre-closing notification must be filed with the FCC before any of the following events:

- A transaction is closed under applicable legislation.
- The acquisition of:
  - the direct or indirect exercise of, control over the target business;
  - assets, participation in trusts, partnership interests, or shares of other economic agents.
- The execution of a merger agreement.
- In the event of a series of transactions, the last act is completed, resulting in a monetary threshold being reached. Concentrations derived from transactions carried out abroad should be notified before they produce legal or material effects in Mexico.

Formal/informal guidance

The Competition Law and its Regulations provide the basic principles and requirements for a notification. The parties can contact the FCC before filing a notification for an informal meeting that may help to identify key information to be included in addition to the standard information provided in a notification.

See also *Question 39, Proposals for reform*.

Responsibility for notification

Standard review process. The economic agents directly participating in a concentration that reaches any of the monetary thresholds must file a notification of concentration. If for legal or factual reasons acceptable to the FCC, they are not able to do so, the notification can be filed only by one of the following:

- The merging company.
- The company acquiring control.
- The company that will accumulate the shares, partnership interests, assets and so on (that is, the subject matter of the transaction).

See also *Question 4, Standard review process*.

Expedited review process. The acquirer or purchaser can notify the transaction (*Regulations*).

See also *Question 4, Expedited review process*.

Relevant authority

The FCC is the relevant authority.

Form of notification

A hard copy of the notification must be filed in at the FCC's filing office. There is no standard notification form.

Filing fee

From 1 January 2011, the pre-merger filing procedure is no longer subject to the payment of a filing fee.

Obligation to suspend

There is a mandatory ten business days' waiting period (from the day following the pre-closing filing date), during which the:

- Parties cannot close the transaction.
- FCC can issue an order not to close the transaction (a stop order) until the FCC concludes its analysis of the transaction.

If after this term the FCC does not issue a stop order, the parties can close the transaction before clearance. The parties then bear the risk that the FCC may not approve it or may attach conditions to it.

Procedure and timetable

4. Please set out the procedure and timetable.

The following relates to the pre-closing filing procedure.

Standard review process

In principle, the FCC has 35 business days to review a notification and issue its resolution. This period starts on the date on which the

FCC has a complete file with all the information it requires for its analysis. If the FCC does not issue a resolution within this period, the transaction is deemed approved by operation of law.

The FCC can request additional information to complete the file:

- Within five business days from the date of filing, to request basic information that should have been included in the initial filing. The applicants have five business days to satisfy the request. The 35-day review period then starts from when the FCC receives the information.
- Within 15 business days from the date of filing, to request additional information that the FCC considers necessary for the analysis of the transaction. The applicants have 15 business days to satisfy the request. This term can be extended in justified cases. The 35-day review period then starts from when the FCC receives the information.
- At any moment during the review process (without restarting the 35-day review period).

In particularly complex cases, the President of the FCC can extend by up to 40 additional business days the time periods to (*Competition Law*):

- Request additional information.
- Issue a resolution.

The President of the FCC can order this extra extension at any time during the basic 35-day review period. A complex case is one which raises serious competition issues.

For an overview of the standard notification process, see flowchart, *Mexico: merger notifications*.

Expedited review process

If the parties to a transaction provide evidence that the transaction will not have any anti-competitive effects in the market (for example, the absence of overlapping or related activities), they can ask the FCC to apply the expedited (short form) review process (*Article 21bis, Competition Law*).

Under this process:

- Within five business days following the date of receipt of the notification, the FCC will issue a certificate of acknowledgement of receipt of the notification.
- Within 15 business days following the issuance of the certificate, the FCC must reach a final resolution on the transaction. If the FCC does not issue a resolution within this term, the transaction is deemed approved by operation of law.

If the FCC determines that a concentration submitted under this process does not have sufficient merits or the filing is incomplete, it issues an official communication denying the expedited review process and initiating a standard review process.

Confidentiality

5. In relation to merger inquiries:

- **How much publicity is given?**
- **At what stage of the procedure is information released?**
- **Is certain information automatically kept confidential?**
- **Can the parties request that certain information be kept confidential?**

Publicity

It is an FCC policy to disclose the identity of the economic agents that submitted a pre-merger filing. This is done in the excerpts of the official communications that are published on its website in relation to the pre-merger filing. If the pre-merger filing was submitted by a special purpose vehicle (SPV), the FCC tends to only disclose the SPV's name. However, although unlikely, the FCC can also disclose the identity of the economic group to which such SPV belongs.

Once the FCC has issued a resolution, it must publish a brief summary of the resolution (on its website and the FCC's gazette), including:

- The identity of the parties.
- A description of the transaction.
- The rationale followed by the FCC in relation to its analysis.

Procedural stage

Certain information is published when the notification is received and after resolution.

Automatic confidentiality

No information is automatically kept confidential.

Confidentiality on request

If there are grounds for considering that the information provided to the FCC should be kept confidential (for example, personal information or business secrets), the economic agents submitting the information can request the FCC to maintain its confidentiality.

Rights of third parties

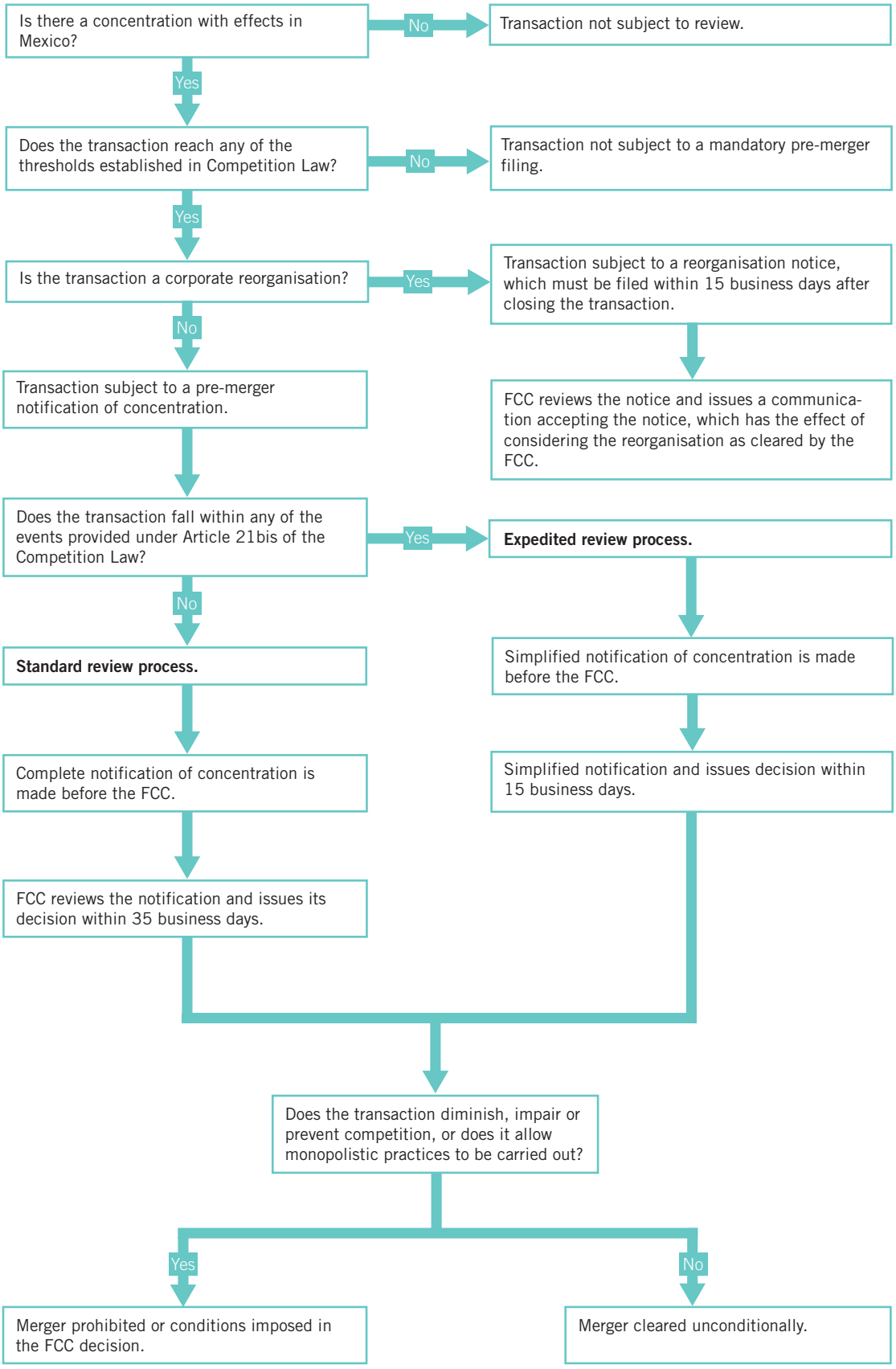
6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

Third parties cannot:

- Be involved in the review of a pre-merger filing notified to the FCC.
- Access documents contained in the relevant file.

An affected party can ask the FCC to initiate an investigation of a concentration (*Competition Law*). However, the FCC must dismiss a petition if the facts claimed are those contained in a

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notification of a concentration under FCC review. The petitioner can co-operate with the FCC by providing data and other information, which must be considered when issuing a resolution on the relevant transaction.

When a third party (either formally or informally) files a petition within the first ten business days following the date of filing, the FCC usually issues a stop order so that the parties cannot close the transaction until a resolution is issued. This can delay the review process.

Substantive test

7. What is the substantive test?

The substantive test is whether a proposed concentration will either:

- Diminish, impair or prevent competition.
- Allow monopolistic practices to be carried out.

The FCC weighs the pro-competitive benefits of the transaction against its anti-competitive effects. In the case of horizontal transactions, the FCC relies on concentration indexes such as the Herfindahl-Hirschman Index and the FCC's own Dominance index (before focusing on a concentration's substantive aspects).

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The FCC can impose conditions on a transaction that it considers would affect competition and free access to the markets. At any time before the FCC issues a final decision, the parties can submit commitments to remedy any competition concerns. For the commitments to be accepted, the parties must provide evidence that both:

- Any competition concerns are remediable.
- The proposed remedies will remove any harmful effects and are economically feasible. The parties must also provide the terms and time frame to implement the remedies.

The FCC usually only accepts structural remedies and has typically not accepted behavioural remedies.

9. What are the penalties for:

- **Failure to notify correctly?**
- **Implementation before approval or after prohibition of the merger?**
- **Failure to observe a decision of the regulator (including any remedial undertakings)?**

Failure to notify correctly

All transactions subject to a pre-merger filing that were not notified, or that were closed within the ten business days' waiting period or when a stop order was issued, are legally void (*Regulations*). (It appears that this may be challenged in court, as it is broader than the sanctions established in the Competition Law.)

In addition, a fine of up to 400,000 times the minimum wage (about US$1,945,365) can be imposed for failure to file when required. However, if the transaction does not raise any competitive issues, the fine has been usually closer to US$20,000 for late notification (depending on whether the filing was made voluntarily or as a result of an FCC order).

The FCC is diligent in imposing fines and actively monitors press reports and trade publications to discover transactions for which a required filing has not been made.

Individuals that participated or assisted in the illegal concentration can also be fined up to 30,000 times the minimum wage (about US$145,902).

In the case of perjury or providing false information to the FCC, the fines can be up to 30,500 times the minimum wage (about US$148,334), in addition to potential criminal sanctions.

Implementation before approval or after prohibition

If the transaction is determined to have anti-competitive effects, the FCC can order the parties to unwind the transaction or to take remedial steps, such as partial divestiture, to counteract the effects. Additionally, the FCC can impose a fine of up to 900,000 times the minimum wage (about US$4,377,073).

See also above, *Failure to notify correctly*.

Failure to observe

See above, *Implementation before approval or after prohibition*.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

In the first instance, decisions by the FCC can be appealed before the FCC itself by filing a motion for reconsideration. The reconsideration's objective is to revoke, amend, modify or confirm the resolution appealed. The motion should be filed within 30 business days following the date on which the challenged ruling is notified to the parties.

The motion must be:

- In writing.
- Addressed to the President of the FCC.
- Filed together with any relevant documentary evidence.

The FCC has 60 business days from the date the motion was filed to issue a resolution and notify the parties. If the FCC does not issue a resolution within this period, the challenged resolution is deemed to be confirmed.

An FCC resolution on a motion for reconsideration can also be contested through a constitutional proceeding (*amparo* proceeding) before the Federal Courts.

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

If the concentration contemplates any restrictive provision, such as a non-compete agreement, it must be disclosed to the FCC in the notification of concentration. The FCC:

- Evaluates any restrictive provision and its effects on the markets.
- When issuing its decision on the concentration, usually makes an express reference to the restrictive provisions, indicating whether they are justified in the context of the transaction.

If the restrictive provisions are considered to be too restrictive, the FCC usually clears a transaction subject to the condition that the parties modify or eliminate the restrictive provisions.

The FCC typically only allows non-competition covenants with an indefinite term if the economic agents are to remain as partners. A non-competition provision only binds those economic agents to be concentrated and remain as partners of the business, and is only in force as long as the parties remain as partners. However, the period can be extended for a transitory reasonable term after the parties terminate their partnership relationship. The FCC does not usually object to non-competition provisions among economic agents that do not have a partnership relationship, if they comply with certain criteria, for example:

- The non-competition provision does not exceed a term of three years (in special cases, the FCC can allow longer terms not exceeding five years).
- The parties to a transaction provide evidence that the provision is required to secure the transfer of the business.
- The transaction involves the transfer of intangible assets.
- The purchaser is not bound to the non-compete obligation.
- The provision does not include products or geographical zones different to those of the subject matter of the transaction.

Specific industries

12. Are any industries specifically regulated?

Certain sector-specific regulations in the telecommunications, energy and transport industries provide for special competition-related provisions, such as:

- Requiring a favourable opinion from the FCC to participate in a public bid.
- Establishing the rules for the regulation of tariffs.

RESTRICTIVE AGREEMENTS AND PRACTICES

Scope of rules

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

An absolute monopolistic practice (cartel) is any contract, agreement, arrangement or combination between competitors, which has as its purpose or effect any of the following:

- Price-fixing.
- Restricting the production or distribution of products.
- Allocating segments of a particular market.
- Bid-rigging.

The Competition Law prohibits these horizontal agreements.

In addition, the Federal Criminal Code establishes criminal sanctions for persons committing this conduct if it is related to basic needs products (for example, agricultural products for human consumption) or the raw materials required for industrial plants. Congress is discussing an amendment to the Competition Law to incorporate criminal sanctions for cartel activity in all markets.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The Competition Law and Regulations apply to formal and written agreements, and to non-binding arrangements or understandings (that is, concerted practices). A concerted practice arises where direct or indirect contact between parties alters one or more parties' commercial conduct in a way which is not wholly dictated by market forces and its effect on the companies.

Exemptions and exclusions

15. Are there any exemptions? If so, please provide details.

The Competition Law provides a certain number of limited exemptions for activities that are outside of its scope and therefore do not constitute monopolistic practices. These activities include the powers exercised exclusively by the state in strategic sectors, workers' associations, patent and copyright owners, and associations of exporters. However, in the case of associations of exporters, the exemption only applies if all of the following conditions are met:

- The products must be the main source of wealth in the region where they are produced or are not of basic need (*see Question 13*).
- Those products are not sold or distributed within the Mexican territory.
- The membership to the association is voluntary.
- The association does not grant permits or authorisations which are exclusively reserved to entities of the federal public administration.
- Incorporation of the association is authorised by the legislative body of its corporate domicile.

16. Are there any exclusions? If so, please provide details.

There are no exclusions. The FCC sanctions absolute monopolistic practices *per se*.

Notification

17. Please give a broad overview of formal notification requirements. In particular:

- **Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?**
- **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
- **Who should/can notify?**
- **To which authority should/can notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**

There is no requirement to notify.

Investigations

18. Can investigations be started by:

- **The regulator on its own initiative?**
- **A third party by making a complaint?**

Regulators

The FCC has extensive powers to investigate alleged infringements of the Competition Law on its own initiative.

Third parties

The FCC also has powers to investigate alleged infringements of the Competition Law on the basis of a formal complaint by third parties or following an informal tip-off.

In the case of absolute monopolistic practices, a complaint can be filed by any person or entity, even if it is not affected by the practice.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Complainants can assist the FCC during the investigation stage by providing evidence and information. During the administrative procedure (*see Question 20, Administrative procedure*), the complainant can access the file and be heard. In addition, the complainants can challenge the FCC's resolutions through a motion for reconsideration.

20. Please set out the stages of the investigation and timetable.

Investigation stage

During the investigation stage, the FCC gathers all elements required to determine that the illegal activities were carried out.

All the FCC's investigations are initiated through an order issued by the Executive Secretary of the FCC. An abstract of the order is published in the *Official Gazette of the Federation*. This allows all the parties related to the relevant market or affected by the conduct to offer elements that will assist the FCC in completing the investigation.

The investigation must be completed within 30 to 120 business days from the date of the abstract's publication. In justified cases, the FCC can extend the investigation by up to 120 business days, four times.

Administrative procedure

An administrative procedure follows the form of a trial. The presumed responsible parties can defend themselves against the FCC's allegations and findings derived from the investigation.

Once the investigation is concluded, if there are sufficient elements to sustain and determine the existence of a monopolistic practice or illegal concentration, the FCC issues a presumed responsibility order. The presumed responsibility order serves process to the parties presumed responsible.

The parties presumed responsible have 30 business days to:

- Submit their arguments to defend themselves.
- Provide the documentary evidence.
- Offer other evidence that should be analysed.

In the procedure, all evidence is admissible, such as documentary evidence, testimonies, expert opinions, legal assumptions and any other kind of evidence permitted by the Competition Law and the Federal Code of Civil Procedures (which is applied as supplementary to the Competition Law). The FCC has 20 business days to determine on the merits of the evidence submitted.

If required, the FCC can have an additional ten business days to gather additional evidence.

Once the evidence has been produced, the FCC sets a term of not more than ten business days for submission of closing arguments.

The FCC issues a final resolution within 40 business days from the date on which its file is complete and all evidence and submissions have been received.

21. In relation to an investigation into a potentially restrictive agreement or practice:

- **What details (if any) of the investigation are made public?**
- **Is certain information automatically kept confidential?**
- **Can the parties (or third parties) request that certain information be kept confidential?**

Publicity

During the investigation stage, only the details contained in the abstract of the order initiating the investigation are made public, for example the affected market and a general description of the alleged unlawful conduct.

Automatic confidentiality

During the investigation stage of the procedure:

- The FCC cannot disclose the identity of the economic agents under investigation.
- No person can have access to the file.

Once the administrative procedure is initiated, the presumed responsible parties will be able to identify the other parties also involved in the procedures. In addition, during this stage, the abstracts of the FCC's official communications that are made public may contain the names of the economic agents involved in the procedure. However, only the parties related to the procedure have access to the file.

In the case of the leniency programme, the applicants' names must not be disclosed at any time.

Confidentiality on request

All documents and information submitted to the FCC are available to other economic agents served process in the administrative procedure, to satisfy the due process principle. However, if there are grounds for considering that the information must be kept confidential (for example, personal information and business secrets), the economic agents submitting the information can ask the FCC to preserve it as strictly confidential.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The FCC can request information by written order and compel parties to provide all necessary information in connection with an investigation. This information usually includes details of the relevant businesses, market data, information about the alleged infringement and copies of relevant documents.

The FCC can also carry out on-site investigations at a company's premises or at any place in which the FCC presumes that the required information is located. The FCC:

- Must give prior notification for on-site investigations.
- Can only conduct on-site investigations in relation to information that was requested during the course of the main investigation (*see above*).
- Can start an on-site investigation immediately if a legal representative is available to attend the investigation. If there is no legal representative available, the FCC's officials order the on-site investigation to begin the next day.

The FCC can issue a warning or impose a fine up to 1,500 times the minimum wage (about US$7,295) per day to economic agents breaching its orders (for example, for not responding to a request for information or not allowing the FCC to carry out an on-site investigation).

23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

In relation to absolute monopolistic practices, the Competition Law does not contain provisions allowing the FCC to settle with the parties. However, there is a leniency programme (*see Question 24, Immunity/leniency*).

Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

- **What orders can be made?**
- **What fines can be imposed on the participating companies? What are the consequences if they are not paid?**
- **Can personal liability, including fines, attach to individual directors or managers?**
- **Is it possible to obtain immunity/leniency from any fines?**
- **Can an entire agreement be declared void (that is, not only any restrictive provisions)?**

Orders

Once the FCC issues a final resolution, it can issue orders requiring the infringers to stop the illegal activity (cease and desist orders).

Fines

The following administrative fines apply to companies:

- For an absolute monopolistic practice: up to 1,500,000 times the minimum wage (about US$7,295,121).
- For entities that assisted in the illegal activity: up to 28,000 times the minimum wage (about US$136,175).
- In the case of perjury or providing false information to the FCC: up to 30,500 times the minimum wage (about US$148,334).
- For recurrence (that is, when an infringer who has been sanctioned for any conduct under the Competition Law commits another sanctioned act of the same type or nature): either (whichever is higher):

- up to 10% of the infringer's annual sales during the preceding fiscal year. It appears that this sanction has never been applied and there is no public precedent. However, it appears that the 10% should be calculated in relation to the infringer's total sales in Mexico or originated in Mexico during the fiscal year before the date on which the resolution on the sanction is issued;
- 10% of the value of the infringer's assets.

In addition, under certain specific circumstances, the FCC can force the sale of assets of companies that participate in a third monopolistic practice (that is, when they have been sanctioned by the FCC for two prior illegal activities in the same relevant market).

Personal liability

The following sanctions apply:

- Administrative sanctions:
  - for making false statements or providing false information to the FCC: a fine up to 30,500 times the minimum wage (about US$148,334);
  - for individuals participating directly in illegal practices or prohibited concentrations on behalf of corporations: a fine up to 30,000 times the minimum wage (about US$145,902);
  - for individuals assisting or participating in illegal practices or prohibited concentrations: a fine up to 28,000 times the minimum wage (about US$136,175).
- Criminal sanctions:
  - for participating in illegal practices regarding goods of basic need (*see Question 15*): a fine up to 1,000 times the minimum wage (about US$4,863) and imprisonment for three to ten years;
  - for making false statements or providing false information: a fine up to 300 times the minimum wage (about US$1,459) and imprisonment for two to six years.

Immunity/leniency

Economic agents participating in absolute monopolistic practices can confess their participation in these practices and request a substantial reduction in the fine. The FCC can reduce the fine to as little as MXN59.82 (that is, the current minimum wage).

To request a reduction, the economic agent must fulfil all of the following requirements:

- Be the first one to provide sufficient evidence to allow the FCC to demonstrate the existence of the practice.
- Fully and continuously co-operate with the FCC in the investigation and administrative proceeding.
- Carry out all the necessary actions to stop its participation in the illegal conduct.

The Competition Law also provides the possibility to reduce the fine for economic agents that are not the first ones to co-operate, if they provide additional evidence.

If the relevant requirements are fulfilled, the FCC can reduce the fine by 50%, 30% or 20%, depending on the chronological order in which the corresponding request is filed.

To obtain these benefits, the economic agents must provide the evidence before the publication of the order that concludes the investigation.

Impact on agreements

Any agreement, contract or arrangement which is declared an absolute monopolistic practice is automatically void.

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

After the FCC's final resolution is issued, affected parties that suffered damages as a consequence of the monopolistic practice can file a civil lawsuit seeking indemnification for damages and losses suffered. The competent court can ask the FCC to prepare an estimate of the damages and loss profits caused by the illegal practice. Mexican law does not contemplate punitive damages, but only direct damages and loss of profits.

Although a recent constitutional reform has been passed to contemplate class actions, no specific legislation has been enacted.

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

See *Question 10*.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

The Competition Law treats abuse of dominance as a relative monopolistic practice (*see Question 28*). These relative monopolistic practices are illegal if the infringer has market power.

However, monopolies themselves are not regulated under civil or criminal law.

28. How is dominance/market power determined?

For a practice to be considered an illegal relative monopolistic practice, all of the following must apply:

- The economic agent carrying out the practice has dominant position in the relevant market.

- The practice is carried out in relation to goods or services in the relevant market.
- The aim or effect of the act, contract, agreement, procedure or combination is to improperly displace other agents from the market, hinder their access to the market, or establish exclusive advantages.

In addition, the FCC must analyse the efficiency gains derived from the practice, before determining if the practice is illegal.

To determine if an economic agent has market power, the FCC considers:

- The agent's market share and ability to set prices unilaterally or restrict output in the relevant market, without competitors being able to challenge this power.
- Market entrance barriers.
- The existence of competitors and their market power.
- The agent's access (and its competitors' access) to supplies sources.
- The agent's recent behaviour.
- The degree of positioning of the agent's products/services in the relevant market.
- Access to imports or existence of elevated costs to import.
- The existence of other elements that may increase consumers' costs if they purchase from other suppliers.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The Competition Law lists those activities that may be considered relative monopolistic practices, which include:

- Resale price maintenance.
- Imposing distribution conditions.
- Tying sales.
- Exclusivity purchasing obligations.
- Condition not to distribute products of third parties.
- Increasing a competitor's costs.
- Fidelity rebates.
- Predatory pricing.
- Refusal to supply.
- Price discrimination.
- Agreement between economic agents to pressurise third parties.
- Cross subsidies.
- Conditions to suppliers.

Exemptions and exclusions

30. Are there any exclusions or exemptions?

There are no specific exclusions or exemptions.

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.

It is not necessary to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator. However, the economic agents can submit in writing a formal consultation before the FCC (*see Question 17*).

Investigations

32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

See *Question 20*.

33. Please summarise the regulator's powers of investigation.

See *Question 22*.

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

Orders

The FCC can issue cease and desist orders once it has issued a final resolution.

Fines

The FCC can impose a fine of up to 900,000 times the minimum wage (about US$4,377,073) for a relative monopolistic practice.

For information on other fines that can be imposed for assisting in an illegal activity, perjury, providing false information, recurrence, and for information on personal liability, see *Question 24*.

Reduction of fines

If an economic agent under investigation commits to cease his participation in illegal practices (or concentrations), he may receive a substantial fine reduction (to as little as the minimum wage) if (*Competition Law*):

- The commitment is filed before the FCC issues a final resolution.
- Competition can be restored after the practice is stopped.
- The proposed course of action to stop the illegal practice is acceptable and economically viable.

A fine reduction can only be requested once every five years and will not avoid potential civil claims for damages.

If the economic agent infringes the commitments, a fine up to 1,500,000 times the minimum wage (about US$7,295,121) can be imposed.

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

See *Question 25*.

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

37. Please explain how joint ventures are analysed under competition law.

The FCC typically treats joint ventures (JVs) as concentrations (*see Questions 1 to 12*). However, in some cases, joint ventures fall within the definitions of, and are treated as, absolute or relative monopolistic practices.

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority(ies) in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

Mexico is party to many free trade agreements relating to co-operation between the competition agencies. These agreements have been signed with:

- Canada and the United States (US), as members of the North America Free Trade Agreement.
- Colombia and Venezuela, as members of the G-3 Free Trade Agreement.
- The EU.
- The European Free Trade Association (Iceland, Norway, Liechtenstein and Switzerland).
- Chile.
- Israel.
- Uruguay.
- Japan.

THE REGULATORY AUTHORITY

Federal Competition Commission (*Comisión Federal de Competencia*) (FCC)

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Outline structure. The FCC consists of a Plenum of five commissioners, one of which is the President. The President is responsible for co-ordinating the FCC's activities and for these purposes it has a staff including:

- An Executive Secretary, which co-ordinates eight General Directorates (Concentrations, Investigations of Absolute Monopolistic Practices and Restrictions to Inter-State Commerce, Investigations of Relative Monopolistic Practices, Regulated Markets, Privatisation and Bid Processes, General Economic Studies, Contentious Matters and Legal Matters).
- A Planning, Liaison and International Affairs Unit, consisting of two General Directorates (Liaison and General Management).

Responsibilities. The FCC's responsibility is to protect competition and free access to the markets through the prevention and elimination of monopolistic practices, and other restrictions to the efficient functioning of the markets.

Procedure for obtaining documents. All FCC decisions on concentrations are available through the recently developed search engine available on the FCC's website. Decisions on investigations, opinions for the granting of concessions by the government, opinions issued by the FCC and decisions on motions for reconsideration are being uploaded to the website.

Parties with legal standing can request copies of documents contained in the FCC's files in relation to matters in which they were parties and that do not represent third party confidential information.

In addition, Mexico has executed bilateral co-operation agreements with the US, Canada, Chile and the Republic of Korea that aim to promote:

- Effective application of the competition laws.
- Co-ordination between agencies, to avoid jurisdiction conflicts.

These treaties and bilateral agreements regulate the exchange of information.

PROPOSALS FOR REFORM

39. Please summarise any proposals for reform.

There is a draft Guide for the Notification of Concentrations, which the FCC published for public comment on 26 March 2010. The purpose of the Guide is to explain the FCC's concentration review procedure.

A proposal to substantially amend the Competition Law has recently been approved by the chamber of deputies, but is still being reviewed by the Senate. The main general purpose of this proposal is to enhance economic competition in Mexico (and therefore improve competitiveness in the Mexican economy) by strengthening the FCC's authority and establishing higher sanctions.

The main provisions are:

- To broaden the exemptions for submitting a pre-merger filing or post closing notice when:
  - the transaction is a corporate reorganisation in which the economic agents belong to the same economic group and no third parties are involved;
  - a controlling entity (that has had control since incorporation of the target or since the FCC authorised the acquisition of control) increases its participation in the controlled entity;
  - in a transaction over shares or partnership interests of foreign entities, the economic agents participating in the transaction do not:
    - acquire control over Mexican entities;
    - accumulate in Mexico shares, partnership interests, participation in trusts or assets in general, additional to those already owned.
  - the purchaser is an investment company or fund, and the transaction has as its purpose the acquisition of securities in the stock markets. This will not apply if the transaction allows the purchaser to acquire decisive influence over the target;
  - for transactions in the Mexican Stock Exchange, the transaction does not involve more than 10% of the capital stock of the issuer and the purchaser is not entitled to:
    - appoint members of the board, managers or directors;
    - impose, directly or indirectly, decisions in the shareholders meetings or other equivalent corporate bodies;
    - maintain any interest, directly or indirectly, that would allow it to exercise 10% or more of the voting rights;
    - influence the administration, operations, strategy or principal policies of the target.
  - the transaction involves shares, partnership interests or trusts made by private equity funds with speculation purposes, and the funds do not participate in the same relevant market of the target.
- To increase the fine for:
  - carrying out transactions with anti-competitive effects;
  - breaching an order not to close. The fine would be increased to up to:
    - 8% of the annual revenues of the economic agent;
    - 5% of annual revenues for failure to file when required.
- In the case of relative monopolistic practices (abuse of dominance), the FCC can consider two or more economic agents jointly to determine the existence of market power.
- The term of the office of the FCC's President will be reduced from six to four years (extendable once for an additional four years).
- The requirements that the FCC must comply with for inspection visits would be relaxed (for example, surprise visits would be allowed). Inspection visits will not be allowed to exceed two months (extendable once for two months).
- Before resolution, the parties can request an oral hearing before the Plenum of the FCC to discuss matters being reviewed.
- When initiating an administrative procedure in the form of a trial, the FCC can order preventive measures requesting the alleged guilty parties to suspend the presumed illegal activities for a term up to four months (extendable for two equal terms).
- Quantification of the fines for absolute and relative monopolistic practices, illegal concentrations and for not notifying concentrations when required will change. Fines are currently quantified based on the minimum wage. The amendment proposes that fines will be quantified based on a percentage of the annual revenues of the sanctioned agent:
  - absolute monopolistic practices: up to 10%;
  - relative monopolistic practices: up to 8%;
  - illegal concentrations: up to 8%;
  - for not notifying concentrations when required: up to 5%.
- Fines that can be imposed for assisting in the illegal activity, perjury and providing false information are substantially increased.
- Economic agents can choose to challenge the FCC's resolutions through a:
  - nullity claim before an administrative court with a specialised competition chamber;
  - motion for reconsideration before the FCC.
- Absolute monopolistic practices (cartels) are specifically classified as a criminal offence in the Federal Criminal Code.

CONTRIBUTOR DETAILS



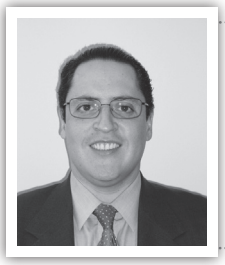
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Qualified. Mexico, 1993

Areas of practice. Competition law; mergers and acquisitions; corporate law.

Recent transactions

- Representing Canada Pension Plan Investment Fund and Onex Corporation in the indirect acquisition of joint control over Tomkins plc.
- Representing Oaktree Capital Group LLC and Aleris international, Inc. in the indirect acquisition of control over the assets of Aleris international, Inc. by Oaktree.
- Representing Volaris in the indirect acquisition of a participation in its capital stock by Indigo Partners LLC.
- Representing multinational corporations in several cartel investigations in the technology sector.



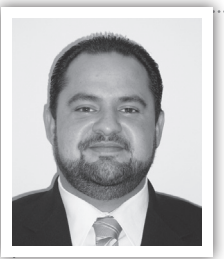
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Qualified. Mexico, 1994

Areas of practice. Competition law; mergers and acquisitions; corporate law.

Recent transactions

- Representing Nucor Corporation in the indirect acquisition of a 50% interest in Steel Technologies, Inc.
- Representing Seek Limited's indirect acquisition of 40% of the fully diluted capital stock of Online Career Center Mexico, S.A. de C.V., owned by Tiger OCCM Holdings I, GmbH.
- Representing Prudential Financial's in the indirect purchase of three shopping malls, owned by Grupo Acosta Verde.
- Representing a multinational corporation in a cartel investigation in the hermetic compressors market.



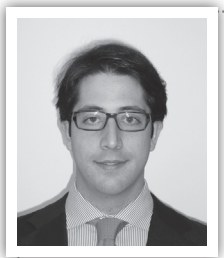
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Qualified. Mexico, 2005

Areas of practice. Competition law; mergers and acquisitions; corporate law.

Recent transactions

- Representing Valeant Pharmaceutical International in the merger with Biovail Corporation.
- Representing GE Consumer Finance Central Holdings Corp. in the sale of BAC Credomatic GECF Inc. to Grupo Aval Acciones y Valores, S.A.
- Representing Provimi S.A. in the acquisition of shares and assets of Nutrición y Alimentos de Sonora, S.A. de C.V.
- Representing diverse clients in cartel investigations in the technology sector and in the hermetic compressors market.



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Qualified. Mexico, 2005

Areas of practice. Competition law; mergers and acquisitions; corporate law; mining law.

Recent transactions

- Representing a Spanish investment firm in the acquisition of several assets owned by a non-regulated Mexican credit institution.
- Representing a client in a cartel investigation in the hermetic compressors market.