The Merger Control Review

Third Edition

Editor

Ilene Knable Gotts

Law Business Research

The Merger Control Review

THIRD EDITION

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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. Many of the jurisdictions that were 'early adopters' have either refined their processes and procedures in substantial ways or have proposals pending to do so, typically to conform their regime with the pre-merger regimes of other jurisdictions (e.g., Brazil, Canada and the UK). This book provides an overview of the process in each of the jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments in each of these. 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.

As shown in further detail in the chapters, 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 clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. 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 provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia

and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. But, there are some jurisdictions that take a more expansive view. For instance, 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. 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 UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. 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 and Serbia) for mandatory pre-merger review by federal antitrust authorities.

Most jurisdictions more closely resemble the European Union model than the US 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 Japanese Federal Trade Commission ('JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically 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 EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US 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 for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less 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 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

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. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese 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 merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last 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

environment, obtaining the approval of jurisdictions such as China and Brazil can be as important as the approval of the US or EU. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2012

Chapter 29

MEXICO

Luis Gerardo García Santos Coy, José Ruíz López and Mauricio Serralde Rodríguez[1]

I INTRODUCTION

In Mexico, antitrust matters are governed mainly by Article 28 of the Political Constitution of the United Mexican States, the Federal Law of Economic Competition ('the Competition Law')[2] and the Regulations to the Competition Law ('the Regulations').[3]

The Federal Competition Commission ('the FCC') is the independent governmental administrative body in charge of enforcing the Competition Law and the Regulations, and in doing so, preventing and investigating monopolistic practices (i.e., cartels and abuse of dominance) and concentrations whose purpose or effect is to diminish or impede free competition with respect to similar or substantially related goods.

The Competition Law addresses merger reviews under the heading of 'concentrations', which not only involve mergers but also acquisitions or any other similar acts or transactions that combine corporations, associations, partnerships, shares of stock, assets or trusts between competitors, suppliers, customers or any other economic agents.

Although all concentrations that occur in Mexico or have effects in Mexico are subject to the Competition Law and may be investigated by the FCC, the Competition

1 Luis Gerardo García Santos Coy and José Ruíz López are partners and Mauricio Serralde Rodríguez is an associate at Creel, García-Cuéllar, Aiza y Enríquez, SC.

2 The Competition Law was enacted in 1993, and amended in 2006 and 2011.

3 The Regulations were issued in 1998 and amended and restated in 2007. Furthermore, as a consequence of the amendments to the Competition Law enacted in 2011, new Regulations shall be enacted in the near future.

Law sets forth certain monetary thresholds[4] that trigger the obligation of economic agents to notify concentrations before they are undertaken.[5]

In basic terms, a concentration has to be notified if:

a a transaction or series of transactions that give rise to the concentration, notwithstanding the place of execution, represent within Mexico, directly or indirectly, a value greater than 18 million times the minimum wage (approximately 1.122 billion pesos);[6] or

b a transaction or series of transactions giving rise to the concentration, result in the acquisition of 35 per cent or more of the assets or shares of an economic agent that total assets or annual sales located or originating in Mexico are worth more than 18 million times the minimum wage (approximately 1.122 billion pesos);[7] or

c a transaction or series of transactions results in:

- an accumulation of assets or capital stock within Mexico in excess of 8.4 million times the minimum wage (approximately 523.6 million pesos); and
- the assets or annual volume of sales (on a worldwide basis) of the parties involved in the transaction, jointly or separately, are worth more than 48 million times the minimum wage (approximately 2.99 billion pesos).[8]

4 The monetary thresholds are calculated based on the equivalent in pesos to the general minimum daily wage in force in the Federal District ('the minimum wage'), which is updated on a yearly basis. Currently, the minimum wage is 62.33 pesos.

5 A pre-merger filing has to be submitted before the FCC before: (1) a transaction is closed in accordance with the applicable legislation or, if applicable, the conditions precedent to which such transaction is subject are satisfied or waived; (2) the acquisition (or the direct or indirect exercise) of control over the target business, or the acquisition of assets, participation in trusts, partnership interests, or shares of other economic agent; (3) the execution of merger agreement; or (4) in the event of series of transactions, the last act is completed and as a result thereof, any of the three monetary thresholds is reached. Concentrations derived from legal transactions carried out abroad should be notified before they produce legal or material effects in Mexico.

6 This threshold is based on the value of the transaction (e.g., purchase price); likewise, this threshold applies to the price allocated to the companies or assets located in Mexico.

7 This threshold applies only in the case of an acquisition of 35 per cent or more of the assets or shares of an economic agent, which total assets or annual sales (located/originated in Mexico) are worth more than approximately 1.122 billion pesos.

8 This threshold combines two different tests: (1) the accumulation in Mexico of assets or capital stock exceeding approximately 523.6 million pesos; and (2) the value of the total assets or annual sales of the corporate groups to which the target, seller and purchaser belong to (jointly or separately) exceed approximately 2.99 billion pesos (both tests should be met in order to have the obligation to submit a pre-merger filing with the FCC). Specifically in connection with this threshold, the FCC interpreted that in order to determine the value of the assets accumulated in Mexico, the parties shall consider (1) the value of the total assets as shown in the financial statements; or (2) the price allocated to Mexico; whichever is higher. Although we

Note than none of these thresholds is related to acquiring actual control[9] of a party.

It is important to emphasise that a transaction would be subject to a pre-merger filing by reaching at least one of the aforementioned thresholds. Furthermore, even if the transaction does not reach any of these thresholds, the FCC has the ability to investigate for a period of one year after its completion.

II YEAR IN REVIEW

Since the enactment of the Competition Law, merger review is one of the areas in which the FCC has been more active (together with the analysis of public bids and concessions or authorisations). During 2011, 111 pre-merger filings and 31 post-closing notices were submitted to the FCC. Notwithstanding the foregoing, the FCC analysed some high-profile international transactions concerning diverse industries and business; among such cross-border transactions we can identify the following: *AMB Property Corporation/ProLogis*; *Technip SA/Global Industries Ltd*; *A.O. Smith Corporation/Regal Beloit Corporation*; *Nalco Holding Company/Ecolab Inc*; *International Paper Company/ Temple-Inland Inc*; and *Quad/Graphics Inc/Transcontinental Inc*. In addition, the FCC also analysed diverse local transactions involving important Mexican companies such as *Grupo ADO/FedEx/Multipack*; *Grupo ADO/Grupo Aeroportuario del Sureste, SAB de CV*; *Banco Santander (México), SA, Institución de Banca Múltiple, Grupo Financiero Santander/GE Consumer Finance*; *Grupo Convermex/Bank of America Merrill Lynch/Grupo Carvajal*; *Banco Mercantil del Norte, SA Institución de Banca Múltiple, Grupo Financiero Banorte/Afore XXI/Prudential International Investments Corporation*; and *Corporación de los Angeles/Coca-Cola FEMSA*. In general terms, during the past year, the FCC cleared all the transactions subject to its analysis and laid down conditions on only one of them.

III THE MERGER CONTROL REGIME

i Analysis of a concentration

When analysing a concentration, and in order to resolve whether a transaction should be cleared or contested, the FCC must determine: (1) the relevant market; (2) the identity of the economic agents that compete in the relevant market, their power in the

may disagree with this interpretation, as this issue has not been clarified in the Competition Law nor in the Regulations, from a conservative perspective, it is advisable that economic agents shall notify a transaction if any of the aforementioned considerations are met.

9 It should be noted that there is currently no definition of 'control' in the Competition Law or in the Regulations. So far, the Guidelines for the Notification of Concentrations (the 'Guidelines') is the only document containing an indication on how this concept should be understood; however, this interpretation is not binding. It is anticipated that the Regulations or official criteria to be issued by the FCC will establish such a definition.

relevant market, and the degree of concentration in such relevant market;[10] (3) whether the transaction would give the resulting entity the power to set prices unilaterally or restrict output in the relevant market, without actual competitors being able to challenge such power; (4) whether the purpose of the concentration is or could be to wrongfully displace other economic agents or impede their access to the relevant market; and (5) whether the purpose or effect of the concentration is to allow the parties thereto to carry out any of the monopolistic practices contemplated in the Competition Law (i.e., cartels or abuse of dominance). The Competition Law also includes additional concepts that the FCC must take into account when analysing a concentration, such as efficiency gains and barriers to the entry of new competitors. Based on the aforementioned elements, the FCC weighs the pro-competitive benefits of a transaction against its anti-competitive effects.

ii Merger review process

Standard review process

The FCC has 35 business days in principle to review the notification and issue its resolution on the concentration submitted for analysis. This term is counted from the date on which the FCC receives the complete file with all the information that it requires for the analysis. If the FCC does not issue a resolution within such term, constructive assent applies. The FCC has the authority to request additional information (to complete the file) within the following time frames:

a five business days from the date of filing to request basic information that should have been included in the initial filing (the applicants will have a period of five business days to satisfy such request);

10 The FCC has published a 'Method for the calculation of the indexes to determine the degree of concentration that exists in the relevant market', based on which the FCC carries out the analysis of the Herfindahl and Dominance indexes, which help the FCC to analyse the degree of concentration in a relevant market and the possibility for an economic agent to have substantial power in a certain relevant market. The Herfindahl and Dominance indexes help to determine if a market is highly concentrated, when the results of such indexes are closer to 10,000 points or is highly atomised, when the results of such indexes are closer to zero points. Such indexes comprise four independent tests, being each of the tests considered to be met when: (1) the increase of the Herfindahl index after the transaction is less than 75 points; (2) the total value of the Herfindahl index after the transaction is less than 2,000 points; (3) the Dominance index decreases as a result of the transaction; and (4) the total value of the Dominance index after the transaction is less than 2,500 points. By meeting only one of such four tests, the FCC should consider that there are sufficient elements to assume that a transaction should not have adverse effects in a relevant market. It is important to point out that negative results derived from the analysis of such indexes are not conclusive, as arguments, such as efficiency gains can be made to evidence that even though the FCC's criteria on the indexes are not met, a transaction will not have adverse effects in a relevant market.

b 15 business days from the date of filing or the date on which the request of information mentioned in (a) above is satisfied to request additional information that the FCC considers necessary for the analysis of the transaction (the applicants will have a term of 15 business days to satisfy such request, which term can also be extended in justified cases); or

c at any moment during the review process (without restarting the clock).

If the FCC issues a request of additional information, the 35-business-day period for review and resolution will commence from the date on which the FCC has received all the information requested. In particularly complex cases, the Competition Law allows the President of the FCC to extend the term for up to 40 additional business days to request additional information or issue a resolution.

Expedited review process

If the parties to a transaction provide evidence to the FCC that such transaction will not have any anti-competitive effects on the market, then such parties may ask the FCC to analyse the transaction in an expedited (short-form) review process. In this regard, the Competition Law provides that in order to ensure that such transaction will have no anti-competitive effects on the market, the purchaser shall not participate in related markets, nor be a current or potential competitor of the target, and any of the following scenarios takes place:

a the transaction is the first participation of the purchaser in the relevant market; for such effect, the relevant market's structure must not be modified – the transaction will only imply the substitution of the target by the purchaser;

b the purchaser has no control over the target prior to the transaction, and increases its participation in the acquired agent as consequence of the transaction, but without gaining more power to influence the operation, management, strategies and main policies of the target, including the appointment of members of the board of directors, officers and managers; or

c the purchaser has control over the target, and increases its participation in the target.

In this scenario, the FCC will issue within five business days of the date of receipt of the notification an official communication allowing the notification or denying the expedited review (in which case, it will be subject to a standard review process). Within the 15 business days of the issuance of such communication allowing the notification, the FCC must resolve the transaction. If the FCC does not issue a resolution within such term, constructive assent is applicable.

Waiting period

There is a mandatory 10-business-day waiting period during which the parties are prevented from closing the transaction and the FCC may issue an order not to close such transaction. If after this term the FCC does not issue such an order, the parties are allowed to close the transaction before clearance, in the knowledge that the FCC may yet not approve it or may place conditions on it.

Pre-merger filing exemptions

As previously described in Section I, *supra*, the Competition Law provides that pre-merger filings are required if a transaction meets any of the monetary thresholds; however, the following 'risk-free' transactions are exempt from a pre-merger filing:

a the transaction is a corporate reorganisation in which the economic agents belong to the same economic group and no third parties are involved;

b a controlling entity (that has had control since incorporation of the target or since the FCC authorised such acquisition) increases its participation in the controlled entity;

c the incorporation of management, guarantee or any other kind of trusts to which an economic agent contributes assets, shares, partnership interests or participation units, as long as the purpose or consequence of such trust is not the transfer of such assets, shares, partnership interests or participation units in favour of a third party other than the trustor or the trustee. In the case of foreclosure of the trust estate, such transaction shall be notified if one of the thresholds provided for in Article 20 of the Competition Law is met;

d transactions over shares or partnership interests of foreign entities, as long as the participating economic agents do not acquire control over Mexican entities, nor accumulate in Mexico shares, partnership interests, participation in trusts or assets in general in addition to those already owned;

e the purchaser is an investment company and the purpose of the transaction is the acquisition of securities in the stock markets, except when such transaction allows the purchaser to acquire decisive influence over the target;

f transactions in the stock exchange not exceeding 10 per cent of the capital stock of the issuer, and the purchaser is not entitled to:

- appoint or revoke 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 per cent or more of the voting rights;
- influence, directly or indirectly, the administration, operations, strategy or principal policies of the target; and

g a transaction involving shares, partnership interests or trusts when made by private equity funds with speculation purposes, and such funds do not participate, directly or indirectly, in the same relevant market as the target.

Contest of transactions by the FCC and imposing of conditions

The FCC has a term of one year (as from its closing) to contest a transaction that was not subject to a mandatory pre-merger filing. Likewise, the FCC has a five-year term to contest a transaction that was subject to a pre-merger filing but was not notified to the FCC. A transaction that has been approved by the FCC may not be challenged, except on grounds that the parties furnished false information to the FCC.

If the FCC finds that a concentration may result in anti-competitive effects, it may impose the following conditions or obligations to economic agents participating in such concentration: (1) the obligation to carry out or refrain from carrying out specific actions or conducts; (2) to transfer certain assets, rights, partnership interests or shares

to third parties; (3) to eliminate a certain lines of business; (4) to amend or delete terms and conditions of the transaction documents; (5) to assume the obligation to carry out certain acts in order to enhance the participation of competitors in the market, as well as to provide access or sell goods and services to such competitors; or (6) other obligations to avoid or mitigate distortions in the relevant market. In practice, the FCC prefers to accept structural rather than behavioural conditions, as behavioural conditions are difficult to monitor.

Challenge by a third party

According to the Competition Law, an affected party may request that the FCC initiates an investigation of a forbidden concentration. Notwithstanding this, the FCC shall dismiss any such petition if the facts claimed are those contained in a notification of concentration already being analysed by the FCC, provided, however, that in such event the petitioner may cooperate with the FCC in its analysis by providing data and other information, which shall be considered when issuing a resolution on the relevant transaction. In our experience, whenever such a petition is filed by a third party (either formally or informally), the FCC issues a stop order so that the parties may not close the notified transaction until a resolution is issued. This circumstance will most probably delay the review process, but in any case, within the legal time frame.

Sanctions

A fine of up to 5 per cent of the annual income of the economic agent may be imposed for failure to file when required. Prior to the enactment of the amendments to the Competition Law in 2011, it was usual for the fine to be closer to US$20,000 for late notification if the transaction did not raise any competitive issues, depending on if the filing was made voluntarily or as a result of an order issued by the FCC. In this regard, please note that, to our knowledge, the FCC has not implemented a fine for late notification based on the new provisions, thus, it is unknown whether the FCC will follow the same criteria used prior to such amendments.

If the non-notified 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, in such case or breach of an order not to close a transaction, the FCC can impose a fine of up to 8 per cent of the annual income of the economic agent. Individuals that participated or assisted in the illegal concentration may also be fined, up to 200,000 times the minimum wage, respectively (approximately US$1 million).

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

If the parties' timetable for a transaction does not provide sufficient time for obtaining approval before closing, there are ways of reducing the risk of a fine, at least where the Mexican component is not an essential element of the transaction. For example, the parties may include a provision in their merger agreement or in a subsequent agreement that the transaction will not have effects in Mexico prior to approval by the FCC. Depending on the circumstances, such a provision may be satisfied

by the acquiring party taking a 'hands-off' management approach to the newly acquired Mexican business until FCC's approval is obtained.

Appeal process

The Competition Law establishes the possibility of contesting resolutions of the FCC first by filing a motion for reconsideration with the same FCC, which will have the objective to revoke, amend, modify or confirm the resolution appealed. Such remedy should be initiated within the 30 business days following the date in which the challenged ruling is notified to the parties. The motion for reconsideration has to be filed in writing, addressed to the President of the FCC and shall be filed together with any relevant documentary evidence. The FCC has to rule and notify the parties of such appeal within 60 business days of the date the motion was filed. If the FCC does not issue a resolution within such term, the challenged resolution will be deemed as confirmed. Alternatively, an ordinary administrative claim can be filed before the specialised courts in competition matters. The claim should be filed within the 30 days of the date on which the challenged ruling is notified to the parties. An ordinary administrative claim is also available against a resolution issued in response to a motion for reconsideration.

The ordinary administrative claim is a completely new procedure under Mexican law, therefore pursuant to the amendments to the Competition Law enacted in 2011, the applicable rules should have been enacted and specialised courts should have been created within 180 days of the date on which the amendments became effective; however, this has not yet occurred. In theory, an *amparo* (constitutional proceeding) before the federal courts may be submitted against a resolution issued in response to an ordinary administrative claim. Furthermore, an *amparo* may also be used to challenge the constitutionality of the Competition Law or its Regulations.

IV OTHER STRATEGIC CONSIDERATIONS

i Non-competition provisions

The FCC typically allows non-competition covenants with an indefinite term only when the economic agents are to remain as partners. Such non-competition provisions will only be binding on those entities to be concentrated and remaining as partners of the business, and will only be in force as long as the parties remain as partners; nevertheless, such period may be extended for a transitory reasonable term after the parties terminate their partnership relationship. Non-competition provisions among economic agents that do not have a partnership relationship are not usually rejected by the FCC when they comply with certain criteria such as (1) the non-competition provision does not exceed a term of three years (in special cases, the FCC may allow longer terms not exceeding five years); (2) the parties to a transaction provide evidence that such provision is required to secure the transfer of the business; (3) the transaction involves the transfer of intangible assets; (4) the purchaser is not bound by the non-compete obligation; and (5) the provision does not include products or geographical zones different to the subject matter of the transaction. These criteria have also been incorporated into the Guidelines.

ii Information and documentation required for the preparation of the pre-merger filing

The information and documentation required to be submitted in a pre-merger filing before the FCC varies depending on the type of review process that will apply to a transaction (standard or expedited). Basically, the filings for both types of process require the parties to provide information on the transaction (description of the transaction, letters of intent, agreements, non-compete obligations), corporate documents (powers of attorney granted in favour of the representatives, by-laws, description of activities and shareholding structure) and financial information (financial statements and annual reports) of the involved parties.

Furthermore, standard filings also require submitting of economic information, such as the description of the products or services, substitute products or services, location of facilities and manufacturing capacity, market share information, clients' and suppliers' data, market barriers, as well as the efficiencies that are to be achieved as a consequence of the transaction. The Guidelines also provide some guidance to assist the parties in this process. In the case of standard filings, the parties directly involved in the transaction shall jointly file the pre-merger notice, while in expedited filings the FCC allows only the buyer or acquirer to be responsible for such submission; however, some exceptions may apply. The FCC allows the parties to provide copies of all documents, except for powers of attorney and the writ of notification itself, which shall be filed in original. It also accepts, in principle, documents in English together with a Spanish translation of their most relevant provisions. The parties should provide, to the extent possible, all the information required for the analysis of the FCC, when submitting the original filing; otherwise, as previously mentioned, the review period that the FCC has to analyse a transaction will not commence until it has a complete file. The parties should carry out a detailed analysis in order to determine the information that will be submitted to the FCC and whether any of such information is confidential, as well as identifying the entities belonging to each group about which the relevant information is submitted.

It is worth mentioning that the parties need to take the necessary precautions in order to avoid sharing any sensitive information that could result in an anti-competitive conduct, before closing the transaction. This is even more critical in the event that the parties are competitors in the same market.

iii Financial distress and insolvency, and hostile transactions

The Competition Law and Regulations do not contain any specific provision referring to transactions involving financial distress or insolvency. However, in practice, the FCC has been always open to discuss these special circumstances and, where possible, to accommodate any sensitive timing issues. Similarly, the FCC should analyse the implications of not authorising a concentration, which involves an economic agent that, if not concentrated, will exit the market, which will nevertheless result in a concentration of market share by other participants in the market.

Likewise, the Competition Law and the Regulations do not contain any specific provision or procedure for filing a notification in the case of hostile transactions. However, in such case, the FCC understands the impossibility of gathering information

from those agents not actively participating in the transaction, including the filing of the notification itself.

In these cases, it is always advisable to meet with the staff of the FCC and explain the particulars of each transaction in order to be able to complete the filing process in due course.

The Guidelines provide certain limited guidance in connection with these topics.

iv Governmental fees

No governmental fees need be paid in order to submit a pre-merger filing.

V OUTLOOK AND CONCLUSIONS

In terms of volume of cases, in 2011 the number of pre-merger filings increased by approximately 20 per cent compared with 2010, and even though merger levels have not reached the levels prior to 2007, merger control has remained one of the core activities concerning economic competition matters in Mexico.

It is anticipated that upon the enactment of the amendments to the Regulations, there will be more certainty on certain sensitive matters regarding the pre-merger filing process, as the Regulations are currently inconsistent with certain provisions of the Competition Law.

Appendix 1

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Luis Gerardo García Santos Coy is a partner and co-heads the competition and antitrust practice at the firm. He obtained his law degree (LLB) from Universidad Iberoamericana in 1993, and is a member of the Mexican Bar Association. A survey published in the *Global Competition Review* '40 under 40: the world's brightest young antitrust lawyers and economists' (2004), cited him as one of the world's top young antitrust lawyers. Mr García has also been included in *The International Who's Who of Competition Lawyers* since 2005, and has been recognised by *Chambers & Partners* as an expert in the fields of M&A, corporate and competition/antitrust.

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