market intelligence

GETTING THE DEAL THROUGH

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Merger Control

Pre-emptive remedies support growth in Phase I clearances

John Davies leads the global interview panel



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A note from John Davies, Panel Leader

The past year has been one of the busiest for competition authorities around the world. The very active M&A market saw many large, cross-border transactions such as *AB Inbev/SABMiller*, *Halliburton/Baker Hughes*, *Staples/Office Depot*, *ChemChina/Syngenta*, *LSE/Deutsche Borse*, *Bayer/Monsanto* and *Dow/Dupont* reviewed by multiple agencies. In addition to managing a high merger control case load, competition authorities have also been active in protecting their mandates by investigating companies for gun-jumping and procedural failures within the merger control processes. For example, MOFCOM has shown an increased willingness to sanction companies for failure to file, as exemplified by its recent decision to fine Canon for failure to notify its acquisition of Toshiba Medical Systems Corporation. In another example, the European Commission sent Facebook a statement of objections in December 2016 alleging it provided misleading information in its acquisition of WhatsApp.

While recent political shifts have not yet seemed to chill global M&A, it is clear that merger control is sensitive to such developments. While changing economic dynamics may drive foreign investment, populist movements may bring about, for example, increased protectionism in the form of foreign investment controls and increased intervention in strategically important areas. In the US, a number of recent foreign investment transactions, in particular involving Chinese investors, were blocked on national security grounds or faced extensive reviews. Chinese investments in German technology companies have similarly led to calls for tighter foreign investment controls in key sectors. The French government changed its foreign investment regime following the *GE/Alstom* transaction and the UK government is expected to amend its regime in the near future.

This changing landscape will require stakeholders to keep a close eye on both competition and foreign investment developments. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* provide a good introduction to these developments locally. We hope that this will be helpful for readers operating in this active and dynamic environment.

We are grateful to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

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MERGER CONTROL IN MEXICO

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Luis Gerardo García Santos Coy

GTDT: What have been the key developments in the past year or so in the merger control in your jurisdiction?

Luis Gerardo García Santos Coy and Mauricio Serralde Rodríguez: As a relatively new authority, the Federal Economic Competition Commission (COFECE) has made it clear that it is forging its own path and establishing its own criteria when analysing a merger which, as you may imagine, has led to lack of consistency with precedents issued by the former Commission, changes of internal policies and a thorough analysis in almost every notified transaction. Unfortunately, the new Competition Law also brought substantial extensions to the review period – periods were extended from 35 to 60 business days to issue a resolution and from five to 10 business days to issue basic requests for information – that may restart the clock. With the former Commission, extensions in complicated cases were rare; however, over the past year, this type of extensions are much more frequently used, not only to issue a resolution, but also to extend the term to issue a request for information that will restart the clock. All these changes have increased significantly the average review periods in Mexico.

In the international arena, COFECE continues to be very active through its participation at the International Competition Network (ICN), and has strengthened its relationships with international agencies, mainly in the US and the European Union. Communication and coordination among agencies is a reality on a day-to-day basis.

In merger review, COFECE has continued to be focused on those transactions where the parties involved have overlaps and high market shares, on concentrated and regulated markets, as well as in transactions in which the parties do not comply with its new 'technical criteria' (Herfindahl Index). Nowadays, is it is more likely than not that COFECE will request information from other participants in the market to analyse a transaction and its potential effects. Although we believe it is important for COFECE to perform a thorough review, it is hoped that such requests be started at a much earlier stage of the review process to avoid further delays.

One of the new policies in the past year relates to transactions involving private equity firms. As a consequence of certain disclosures related to the Panama Papers, COFECE has been more cautious in requesting information, not only on the general partner but also on the identity of all of the limited partners of a fund, including the percentage of ownership or participation, as well as corporate rights, information they have access to, and confirmation on whether such limited partners participate in overlapping or related activities (upstream or downstream) to those of the target. We have been facing hard times trying to explain our clients why they need to comply with this type of requests. We may understand COFECE's

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Mauricio Serralde Rodríguez

concerns on this regard, but we believe they could be more relaxed where well-known and reputable private equity firms are involved.

COFECE is becoming a more rigid and severe agency in many aspects. For example, it has imposed fines to the notifying parties for not fully responding to a request for information issued during the review process. Some of these fines are being litigated in the Federal Courts and we will need to wait for the outcome. In our opinion, for being an authorisation process, the sanction to notifying parties for not fulfilling such requests for information should be not to authorise the notified transaction, as opposed to imposing fines.

On the side of the Federal Institute of Telecommunications (IFT), although it is by far less busy in merger control than COFECE, it continues to be, in most cases, an open and straightforward authority while analysing mergers.

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

LGGSC & MSR: As you may imagine, we continue to face very interesting times with COFECE. Over the past year, and with the efforts to establish its own criteria, COFECE has become a more rigid authority, not only on the substantive analysis, but also focusing more on formalities. COFECE has systematically requested robust internal evidence from the parties involved in a transaction to be confident that a transaction will not have anticompetitive effects. On top of that, COFECE has been working with a very limited staff, which continued to be a major challenge for all competition practitioners. Based on these factors, the first challenge for us is to manage the client's expectations on timing.

When it comes to remedies, COFECE is typically very cautious to try to avoid any potential litigation by the parties. In some cases, this ends up in imposing remedies that are not commonly used by other more mature competition authorities. In our view, the risk for such litigation is very remote in most cases, and the Competition Law has provided COFECE with sufficient tools to enforce compliance and impose significant fines. We believe COFECE should use such tools and, when required, aim to develop court precedents which would ultimately strengthen its authority.

The lessons we have learned from recent cases are that in mergers not raising competition concerns, the best approach is to file a notification as complete as possible and to keep a responsive mood with the authority. On the other hand, in medium to complex cases, although it has been hard to predict the best approach, we file the notification as completely as possible, and are proactive in meeting with the staff of the agency to explain the transaction and any potential concerns, and to keep an open communication channel with them with a very insightful approach.

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As practitioners, we would like COFECE to identify potential risks at an earlier stage in the process, as well as to start market tests and gathering information from third parties as soon as possible, in order to be able to initiate a very straightforward, efficient and transparent discussion on remedies.

In complex cases involving several jurisdictions and where the geographical scope of the market could be broader than national, we always recommend analysing the possibility of granting waivers to the competition authorities of such jurisdictions to make sure that there is a coordinated and aligned analysis. This approach is aimed not only at receiving contemporary and consistent resolutions, but where remedies are to be imposed, to make sure that such remedies are not excessive and in fact eliminate competition concerns in all those jurisdictions.

Another important lesson learned is for those cases where it is not clear which agency has jurisdiction to review a merger. In such cases, we strongly recommend approaching both authorities (COFECE and IFT) to discuss the case and make sure that no jurisdictional challenge will be initiated down the road, which will obviously delay the review process. Currently we have only one court precedent on determining jurisdiction in the *Nokia/Alcatel* merger last year, and we will have a second precedent in the very near future on the *AT&T/Time Warner* merger. Hopefully the courts will start creating clearer rules for determining jurisdiction that should make both agencies feel more comfortable that will help to avoid unnecessary delays.

Based on the fact that the merger review process is suspensive in all cases, when timing is crucial, it is essential to file in Mexico at an early stage (as soon as practicable), as completely as possible, and have a prompt response to all requests from the authority. It should be noted that during the past year, Mexico has been one of the jurisdictions taking longer terms to resolve in multijurisdictional transactions.

Finally, although the Competition Law provides for an expedite review process that can only be applied when there are no overlapping activities, and is the first participation of the purchaser in the relevant market or related markets (upstream or downstream), among other requirements, in practice, such an expedite process creates more timing risks. We typically advise our clients to notify under a standard process rather than the expedite one, because the information required for both cases is exactly the same, we will avoid the risk that the expedite process is not accepted or even rejected down the road based on procedural aspects (which will restart the clock and may delay the process significantly), and typically, in very simple cases, a resolution under a standard process should be issued in a very similar term than in the expedite process.

GTDT: What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

LGGSC & MSR: COFECE has been consistent in using the criteria to assess if a transaction may harm competition or may have adverse effects in the market. In those concentrations where the Herfindhal Indexes (safe harbours) established in the technical criteria are not met, the agency will thoroughly examine the proposed transaction, considering the specific conditions of the affected market. Among other elements, COFECE will analyse possible substitutes, existing competition (degree of concentration), past behaviour of the parties involved in the transaction, and entry barriers in the market. In most of the cases where the parties do not meet the tests provided in the technical criteria, it is very likely that the agency will take a conservative approach and, therefore, either impose remedies to eliminate such concerns (typically structural remedies, as opposed to behavioural) or will not authorise the transaction. In the past year, COFECE has imposed ex ante divesture remedies or the obligation not to acquire certain products or business, rather than imposing typical post-closing divestiture obligations as most of the mature agencies and in accordance with ICN's guidelines.

As practitioners, we would like to have a more confident agency that analyses a merger for what it is – an authorisation process and not an adversarial process. The Competition Law provides sufficient tools to enforce any remedies and impose fines and, as mentioned before, having more court precedents would ultimately strengthen the agencies' ability to comply with their constitutional mandate.

GTDT: Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?

LGGSC & MSR: As mentioned before, the agencies' first approach when assessing a merger is to analyse the market shares and concentration indexes. The latter is analysed according to the new technical criteria (Herfindhal Indexes, which are different for COFECE and the IFT).

In complex cases, it is now a given that COFECE will request copies of the documents internally produced or exchanged between the parties, and which were used to evaluate, negotiate and implement the transaction, such as presentations, business plans, strategic plans, marketing plans, reports, studies, and so on, similar to the documents that are usually submitted in terms of sections 4(c) and 4(d) of HSR filings and in section 5.4 of a Form CO.

Finally, in complex cases, it is very likely that COFECE will request information from third parties and competitors to corroborate the market data provided by the parties involved in

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the merger. Although COFECE's approach is no doubt correct, we strongly believe that the agency should start this request at an earlier stage in the process in order to avoid unnecessary delays in the analysis of the transaction.

GTDT: Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.

LGGSC & MSR: During 2016, COFECE concluded the analysis and resolved 134 mergers, approving 132, and imposing remedies or conditions in two of them. Our firm advised clients in approximately 35 per cent of those filings, including the two conditioned transactions. These numbers entail that the regulator unconditionally cleared nearly 99 per cent of the mergers subject to its analysis. On the other hand, during the same period, the IFT only resolved one merger, which was approved subject to certain conditions.

The two most important merger cases reviewed by COFECE during 2016 (according to COFECE's 2016 report) – where, as mentioned before, our firm had the privilege of representing its clients – were the following:

- *Delta/Aeroméxico* – the parties notified a joint cooperation agreement for trans-border flights (Mexico-EU). COFECE identified possible competition concerns in flights departing or arriving from Mexico City International Airport (AICM), and after a one-year review process, approved the transaction imposing as a remedy the ex ante divestiture of a number of slots in the AICM equal to the number of Delta's slots used during 2015, which eliminated all of the effects in slots in the AICM resulting from the transaction. In other words, it was as far as COFECE could go on slots' remedies based on a traditional competition analysis.
- *Sanofi/Boehringer-Ingelheim* – the parties notified the acquisition by Sanofi (as part of a business-swap) of Boehringer's Consumer Health Care business worldwide. COFECE identified possible competition concerns in the cough market, and to eliminate such concerns approved the transaction imposing what we believe is not a usual remedy, consisting in the obligation of Sanofi not to acquire the products sold by Boehringer in such market, as opposed to a typical post-closing divestiture remedy in accordance with ICN's guidelines.

GTDT: Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?

LGGSC & MSR: Although we do believe changes are needed, especially to reduce review periods, we do not anticipate any significant amendments to merger control rules in the near future. Changes will continue to be seen in the application and interpretation of the competition framework and internal policies of both agencies. As mentioned, during the past year, merger review has been unpredictable and an ongoing challenge, but we trust that COFECE will continue working to become a more mature, confident and predictable agency, implementing policies and internal procedures to expedite the merger review process to international standards.

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

We believe it is essential for advisers to understand the business perspective of transactions in order to be able to foresee broader aspects that may affect the client, not only in the specific transaction, but also in further transactions and activities. Needless to say, the antitrust adviser shall have a complete understanding of the legal framework, a clear understanding of economic aspects, and a close institutional relationship with the agencies.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

Transparency, responsiveness and communication. In our view, as long as you are transparent and open with the antitrust agencies, prepare a complete file and have an open communication channel to react quickly to their requests, then the process should move smoothly in an ideal world.

What were the most interesting or challenging cases you have dealt with in the past year?

Our firm had the privilege of participating in the two most relevant cases resolved by COFECE during 2016 (according to COFECE's report).

The most challenging of these was the *Aeroméxico/Delta* transaction, as it required a lot of discussions and a very close communication with COFECE (almost on a daily basis) over a complete year. Moreover, at the same time and in parallel, filings with US agencies were being analysed and a New Air Transport Bilateral Agreement between the US and Mexico was being negotiated and finally implemented, which was a key element for the analysis of the transaction.

Another very interesting case was Sanofi's acquisition of Boehringer's worldwide Consumer Health Care business. This case required a lot of coordination with co-counsels in other jurisdictions, as well as close communication with COFECE. It required immediate responsiveness at the moment of negotiating remedies, which should be able to eliminate competition concerns in Mexico. Timing was of the essence and substantial efforts were made to meet the deadline under a tremendous pressure.

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