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Dealing With Uncertainty: Procedural Aspects of Merger Control in Mexico

Luis Gerardo García Santos Coy and Edgar Martín Padilla

Amendments to the Mexican Constitution in 2013, with the main objective of leveling the landscape of the telecom industry in Mexico, resulted in a significant revision of Mexico's competition law framework and the creation of two new autonomous agencies with jurisdiction over competition matters.[1] The Federal Institute of Telecommunications (IFT) has jurisdiction over the telecommunications and broadcasting sectors and the Federal Economic Competition Commission (COFECE) has jurisdiction over all other industries.[2] As a consequence of these constitutional amendments, a substantially new Federal Economic Competition Law (Competition Law) was enacted that became effective on July 7, 2014.[3] A more sophisticated approach to merger review in the new Competition Law was accompanied by understandable institutional limitations, leading to mixed results in its implementation, especially in terms of efficiency and predictability.

Now that four years have passed since the creation of COFECE and three years since the implementation of the new Competition Law, it is timely to reflect on the challenges being faced by companies and practitioners in dealing with the Mexican merger control process, particularly in complex cases.[4] In our opinion, these amendments to Mexico's merger control regime have not resulted in more effective competition law enforcement. In this article, we analyze the most important challenges under the new merger review regime in Mexico and recommend possible improvements.

Merger Control and Filing Trends

Currently, COFECE is composed of a Board of seven Commissioners (one of whom is the Chairman), the Technical Secretariat, the Investigation Authority, and the Internal Comptroller's

[1] Decree by which several dispositions of articles 6, 7, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States are amended and added, Diaro Oficial de la Federation [DOF] 11-6-2013, http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013 (in Spanish).

[2] The first competition authority in Mexico, the Commission of Economic Competition (CFC), was created in 1992 as part of the Secretariat of Economy. The June 2013 constitutional amendment that created the new Commission gave COFECE regulatory independence. In addition, mechanisms designed to guarantee the professional, independent, technical, and impartial performance of its staff were implemented. *See* Decree by which several dispositions of articles 6, 7, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States are amended and added, DOF 11-6-2013.

[3] Federal Economic Competition Law [Competition Law], DOF 7-16-2014. According to the first transitional article of the Competition Law, the law became effective 45 days after its publication in the DOF.

[4] The law does not contemplate a specific definition of "complex cases," though more complex cases are generally understood as cases in which the parties have significant product overlaps or the industry is more concentrated. COFECE lists three factors on its website that are used to assess whether a competition risk exists under Article 64 of the Competition Law: (1) if the merger confers or could confer substantial power, i.e., the ability to unilaterally fix prices, to the resulting economic agent; or if the merger increases that power; (2) if the transaction's purpose or effect is to establish entry barriers, unduly displace other agents or impede their entry into the market; or (3) if the transaction's purpose or effect is to facilitate the execution of monopolistic practices. http://www.cofece.mx/cofece/ingles/index.php/cofece/que-hacemos/mergers.

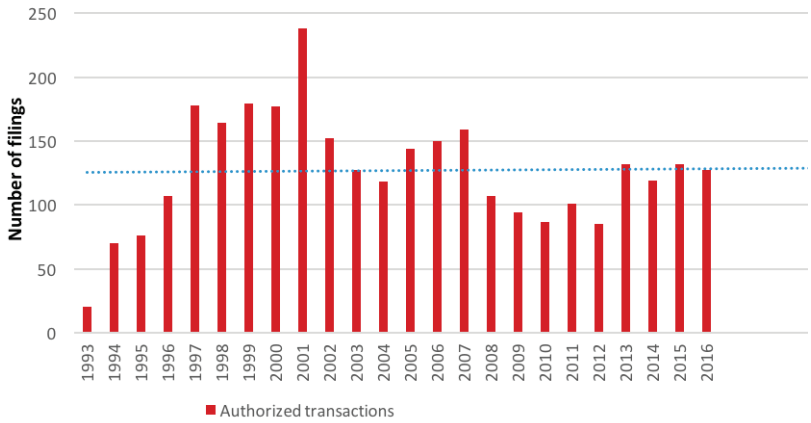
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Office. Merger Control falls under the authority of the Technical Secretariat, and day-to-day operations are managed by the General Directorate of Merger Control.

As illustrated in Figure 1 below, the number of premerger filings submitted to and authorized by COFECE in the last four years has reached its historical average.[5] After a significant drop due to a revision of the notification thresholds in 2007 and the global financial crisis of 2008, the number of filings has stabilized at between 120 to 140 per year over the last four years. The average timing to clear notified mergers has significantly increased, however, from approximately 35 days in 2011 to nearly 60 days in 2016. (See Figure 2.) Furthermore, the willingness of the new author-

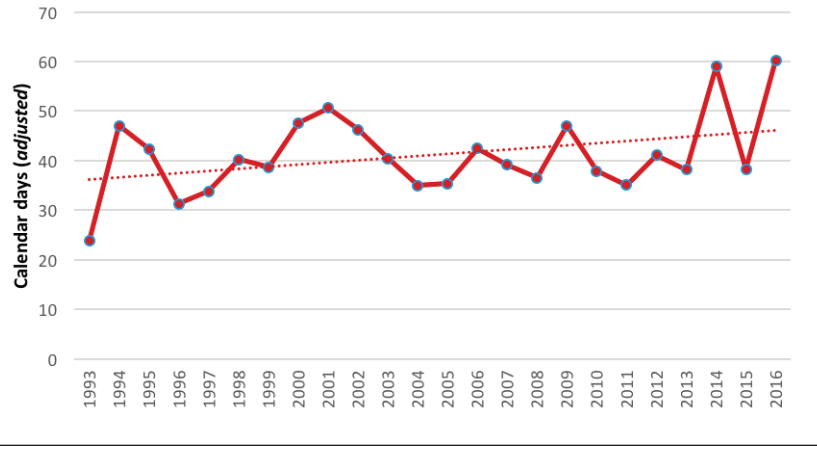
The average timing to clear notified mergers has significantly increased from approximately 35 days in 2011 to nearly 60 days in 2016.

Figure 1: Pre-Merger Filings Authorized by COFECE



Source: Authors' calculations based on COFECE's database, "Resoluciones y Opiniones."

Figure 2: COFECE's Average Decision Timing



Source: Authors' calculations based on COFECE's database, "Resoluciones y Opiniones."

Note: Expressed in calendar days, not including holidays.

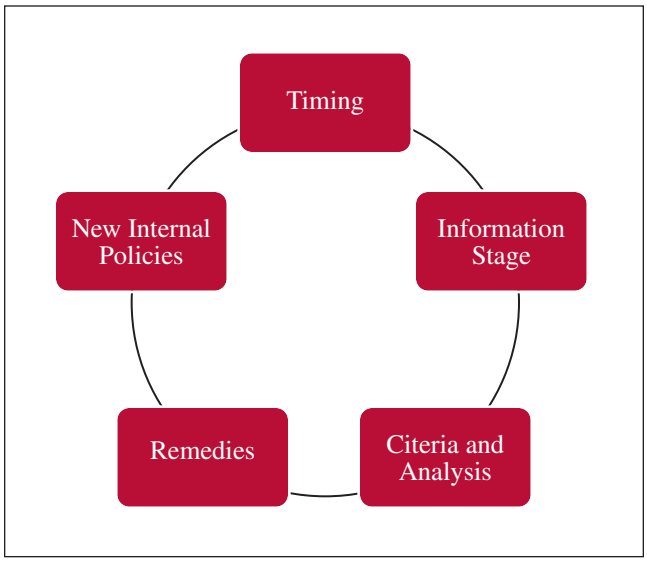
[5] Pursuant to Article 86 of the current Competition Law, a transaction will be subject to a mandatory premerger filing in Mexico if it reaches at least one of the following thresholds: (1) if the purchase price (or price allocation to the Mexican assets/entities/business) of the transaction or series of transactions that give rise to the concentration, notwithstanding the place of execution, has a value greater than MXN$1,358,820,000 pesos (approximately US $75.5 million); (2) if the transaction or series of transactions giving rise to the concentration, results in the acquisition of 35% or more of the assets or shares of an economic agent whose total assets or annual sales located or

ity to establish its own criteria with respect to the information required for each transaction and not to follow precedents of the former agency has frequently led to uncertainty for multinational players on how best to deal with the Mexican jurisdiction in complex merger control cases.

It is also significant that COFECE appears to have been working with a limited number of technical staff[6] and that competition law is, to some extent, only a recent addition to the curricula of universities in Mexico. As time goes on, more and more professionals in Mexico are becoming interested in competition policy, thus it is expected that COFECE will keep benefiting from that trend and further increase its technical staff in the near future.[7] In the meantime, it has become clear that Mexican procedure and institutional shortcomings are demanding that practitioners be more careful, innovative, and rigorous than ever before.

New Rules, New Challenges

The most relevant obstacles facing merger control procedures in Mexico can be categorized diagrammatically as follows:



Timing. The first challenge for practitioners in Mexico is to manage the client's expectations on timing. The new Competition Law brought substantial extensions to merger review periods. Periods were extended from 35 to 60 business days to issue a clearance decision and from 5 to

originated in Mexico are worth more than MXN$1,358,820,000 pesos (approximately US$75.5 million); or (3) if the transaction results in (i) an accumulation within Mexico of assets or capital stock in excess of MXN$634,116,000 pesos (approximately US$35.2 million), and (ii) the assets located in Mexico or annual volume of sales originated in Mexico of the economic agents involved in the concentration, jointly or separately, are worth more than MXN$3,623,520,000 pesos (approximately US $201.3 million).

[6] In the 2017 GCR Rating Enforcement Report 2017, COFECE states that its Merger Control department is comprised of 63 officers, who in 2016 reviewed approximately 150 transactions, for a ratio of 0.42 officers per case. Such ratio is similar to or larger than other jurisdictions, such as Brazil (0.30), Colombia (0.10), Canada (0.22), the U.S. (0.30), and Europe (0.16). However, it appears to the authors that not all of the 63 officers reported to GCR are necessarily technical staff (i.e., professional staff directly devoted to the merger analysis) of the General Directorate of Merger Control. GCR, Rating Enforcement 2017: Mexico's Federal Economic Competition Commission (July 21, 2017), http://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144836/mexicos-federal-economic-competition-commission.

[7] The approach to merger control in Mexico has become more sophisticated in recent years. As in the United States and Europe, the Commission is seeking to apply an effects-based approach, which is leading to more extensive requests for detailed economic data to complete a deeper analysis of the transaction.

10 business days to issue basic requests for information. These and other information requests may restart the clock for the period to issue a clearance decision. In addition, COFECE carries out a thorough analysis in almost every notified transaction, even where the transaction involves limited competitive overlaps.

After the initial filing, COFECE has the authority to request additional information (to complete the file) within the following periods:[8]

(1) 10 business days following the date of filing, to request basic information that should have been included in the initial filing;[9] the applicants will have a period of 10 business days to satisfy such request, which period can be extended in justified cases; and

(2) 15 business days from (i) the date of filing or (ii) the date on which the request for information mentioned in paragraph (1) above is satisfied, to request additional information that COFECE considers necessary for the analysis of the transaction—the applicants will have a period of 15 business days to satisfy such request. This period can also be extended in justified cases.

[The] expedited review process . . . is rarely used in practice.

If the authority issues a request for additional information pursuant to paragraph (1) and/or (2) above, the 60 business days for review and resolution will start running from the date on which COFECE deems all the requested information to have been duly received.[10] In particularly complex cases, the Competition Law allows COFECE to extend the review period for up to an additional 40 business days for COFECE to request additional information or issue a decision.[11] It should be noted that if, after the submission of the pre-merger filing, the parties offer remedies or conditions to resolve the antitrust authority's possible concerns, the 60 business day period for the antitrust authority to issue a decision will be restarted.[12] With the former Commission, extensions of time periods were rare, even in complicated cases. However, over the past couple of years, COFECE has much more frequently issued extensions, not only of the time to issue a clearance decision, but also to extend the period for issuing a request for information that will restart the clock. These types of extensions are now to be expected for moderately to highly complex cases.

Based on the above, it may come as no surprise that, particularly during the past couple of years, international practitioners have frequently pointed out to the authors that Mexico is one of the jurisdictions taking longer to provide clearances in multi-jurisdictional transactions, even when the transaction does not raise competition concerns or when those concerns are similar to other jurisdictions.

Although the new Competition Law provides for an expedited review process, it is rarely used in practice. In accordance with Article 92 of the Competition Law, if the parties to a transaction provide compelling evidence to COFECE that such transaction will not have any anticompetitive

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[8] Competition Law art. 90.

[9] In recent cases, COFECE has requested information that is not necessarily "basic," such as market shares and business documents. Considering that the parties have limited time to respond to such requests, it is important to be prepared beforehand for this type of scenario.

[10] Competition Law art. 90 V.

[11] Competition Law art. 90 VI.

[12] Competition Law art. 90. Please note that as timing agreements are not specifically contemplated in the Competition Law or its regulations, COFECE takes the position that they are not available. When possible (e.g., if the transaction was notified with a considerable anticipated timing in relation to the expected closing), COFECE seeks to accommodate the expected timing of the parties. However, this is considered on a case-by-case basis and only under informal communications with COFECE.

effects in the market (i.e., absence of overlapping or related activities),[13] then the parties may ask COFECE to analyze the transaction in an expedited review process.

The expedited review process reflects a well-intentioned attempt to have a method of treating simple cases differently, as was contemplated under the previous competition law.[14] Under this expedited process the Competition Law provides that COFECE shall issue an official communication accepting the pre-merger filing within five business days following the date of receipt of the notification. Within 15 business days following the issuance of such official communication, COFECE must issue a decision with respect to the transaction. If COFECE does not issue a decision within such time period, it will be deemed to have constructively cleared the transaction.[15]

In practice, however, use of the expedited process creates even more timing risks. The filing might not be accepted or even subsequently rejected by COFECE based on procedural issues. If this were to happen, the review periods will be restarted, with the potential to delay the review process significantly. Thus, the expedited process is not often used by practitioners in the country.

Finally, it is also important to note that the Mexican merger review process is suspensory in all cases. Thus, the parties cannot close their transaction prior to receiving clearance by COFECE. Nonetheless, in some cases, it may be possible to carve out the Mexico-based entities involved in a multi-jurisdictional transaction in order to be able to close the transaction in other jurisdictions. To do so, however, the transaction must not be legally effective, i.e., closed, in Mexico.[16] In addition, the parties will need to implement effective mechanisms to avoid any exchange of sensitive commercial information relating to the Mexican business during this period. These may include hold separate provisions to assure that the businesses will be managed independently, clean rooms, and non-disclosure agreements. Although COFECE is aware that a contractual carve-out (as opposed to a structural one as described above) is an option that may be used in some other jurisdictions, in practice it is still not accepted in Mexico.

Information Stage. COFECE is increasingly requiring additional internal evidence from the parties involved in a transaction to be confident that a transaction will not have anticompetitive effects, regardless of their initial level of potential concerns with the transaction. At all times, being transparent and open with COFECE, preparing a complete file, and having an open communication channel to react quickly to its requests, is crucial for keeping the process as smooth as possible.

Documents and information required from the parties to a transaction are determined on a case-by-case basis. At the outset, the parties should carry out a detailed analysis in order to determine the information that will be submitted and whether any of the information is confiden-

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[13] The Competition Law article 92 provides that, in order to conclude that a transaction will not have anticompetitive effects in a relevant market for the purposes of the expedited review process, (1) the purchaser may not participate in any markets vertically or horizontally related to the relevant market, (2) the purchaser may not be a current or potential competitor of the target, and (3) one of the following three scenarios must be applicable: (a) the transaction is the first entry by the purchaser into the relevant market; (b) prior to the transaction, the purchaser does not control the target and, as a consequence of the transaction, the purchaser increases its ownership stake in the target without obtaining more power to influence the operation, management, strategies and main policies of the target, including power to appoint members of the board of directors, officers and managers; or (c) the purchaser already has control over the target and increases its ownership of the target.

[14] Federal Economic Competition Law (1992). http://www.diputados.gob.mx/LeyesBiblio/abro/lfce/LFCE_abro.pdf.

[15] Competition Law art. 92.

[16] In this regard, the purchaser must not acquire shares or assets in Mexico, nor acquire control (de jure or de facto) over the Mexican assets, shares or business, nor have the ability to participate in, manage or influence, directly or indirectly, the management, operation or commercial policies of the Mexican assets or business.

tial.[17] The parties should provide, to the extent possible, all potentially relevant information for COFECE's competitive impact analysis when submitting the original filing. Otherwise, as previously described, the review period for COFECE to analyze a transaction will not commence as COFECE will not consider the file complete.

In complex cases, it is now well accepted that COFECE will request copies of documents internally produced or exchanged between the parties that were used to evaluate, negotiate, and implement the transaction. These include presentations, business plans, strategic plans, marketing plans, reports, and analyses. Such documents are similar to those submitted in accordance with items 4(c) and 4(d) of U.S. Hart-Scott-Rodino Act (HSR) filings and section 5.4 of the European Commission's Form CO.

[D]elays in third parties' responses can cause COFECE to take more time to complete its review . . .

Although we believe it is important for COFECE to perform a thorough review, we always advocate for and recommend that such requests are (i) proportional with the level of complexity of the transaction (based on a theory of harm), and (ii) realistic in terms of the availability of the parties' internal information.

More recently, it has become very common for COFECE to request information from competitors and other third parties to corroborate the market data provided by the parties. Once again, this mirrors the general practice followed in the United States, the European Union, and other worldwide jurisdictions. The persons receiving such requests for information usually have a period of 10 business days to comply, which can be extended in certain cases. Such requests to third parties will not restart the time periods for COFECE's merger review, but delays in third parties' responses can cause COFECE to take more time to complete its review or possibly even extend relevant statutory time periods for its review.[18] Parties should always be ready to provide such third-party contact information to COFECE as soon as practicably possible after filing so that the agency can quickly begin contacting third parties to avoid potential delays. We would also urge COFECE to make such requests early in the process to avoid potential delays.

Criteria and Analysis. On May 14, 2015, COFECE issued technical criteria for the estimation and application of a quantitative index to measure market concentration and analyze a transaction's effect on competition.[19]

COFECE applies the Herfindahl-Hirschman Index (HHI) as a first indication of the competitive pressure in the post-merger market. COFECE will consider the transaction to have a low probability of having anticompetitive effects, without—usually—needing to engage in a more detailed competitive analysis, if (1) the HHI increases by less than 100 points; (2) the HHI post-transaction is under 2000 points; or (3) (a) the HHI post-transaction is between 2000 and 2500, (b) the HHI increases between 100 and 150 points, and (c) the resulting economic agent is not among the top four competitors. In the real world, the test in (3) above is difficult to pass.

Failure to meet these criteria, does not necessarily mean that the transaction will not be cleared, but the parties will need to provide additional information and arguments to explain why it will not have anticompetitive effects. In practice, however, not meeting such criteria will result in the case

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[17] Pursuant to article 125 of the Competition Law, the parties are allowed to identify which documents and information should be deemed confidential, explaining the reasons to do so. In that case, COFECE will not disclose such information in the public version of its decision or in press releases that may be issued by COFECE.

[18] If such third parties fail to respond COFECE's request for information, fines for up to MXN $226,470 pesos (approximately USD $12,580) for each day in default may be imposed, according to article 126 II of the Competition Law.

[19] Technical Criteria for the Calculation and Application of a Quantitative Index to Measure Market Concentration, DOF 14-05-2015, http://www.dof.gob.mx/nota_detalle.php?codigo=5392185&fecha=14/05/2015.

being treated as complex, which would lead to further analysis of the parties and their competitive overlaps. As a result, parties to such a complex transaction can expect requests for substantial information.

Remedies. If COFECE finds that a concentration is likely to have anticompetitive effects, it may impose the following requirements on the parties (1) carry out or refrain from carrying out specific action or conduct; (2) transfer certain assets, rights, partnership interests or shares to third parties; (3) amend or delete terms and conditions of the transaction documents; (4) take certain actions to enhance the participation of competitors in the market, including providing access or selling goods and services to such competitors; or (5) otherwise avoid or mitigate distortions in the relevant market.[20]

COFECE [has] started to request extensive information from private equity firms involved in notifiable transactions.

However, in the past year, most of the cases in which COFECE required remedies involved pre-closing divestures or an obligation not to acquire certain products or businesses, rather than typical post-closing divestiture obligations in accordance with the International Competition Network's (ICN) best practices.[21] It seems that COFECE prefers the use of pre-closing divestures in order to avoid having to monitor and potentially commence litigation over a potential breach of the remedies imposed. In our view, the risk of litigation over remedies is remote and the Competition Law has provided COFECE with sufficient tools to enforce compliance, including the imposition of significant fines.[22] COFECE will likely benefit from using such tools and, when required, aim to develop court precedents which would ultimately strengthen its authority to enforce remedial measures.

As mentioned above, in some cases, COFECE's approach results in the imposition of remedies that are not commonly used by other more established competition authorities. For instance, other regulatory authorities generally do not allow for an acquisition to be completed with an exclusion of the problematic lines of business or products when the seller is exiting those markets as such a remedy may jeopardize the future viability of the business retained by the seller.[23]

COFECE's New Internal Policies. Probably the most challenging new policy in the past year relates to transactions involving private equity firms. As a consequence of investigations related to the Panama Papers,[24] COFECE started to request extensive information from private equity firms involved in notifiable transactions. The level of required disclosure now includes not only

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[20] In such transactions, according to article 90 V of the Competition Law, COFECE must inform the parties of its concerns at least 10 business days prior to the date on which the case is to be included in the agenda of the matters to be resolved by the Commissioners in order for the parties to have the opportunity of offering remedies or conditions which may address such concerns. However, as mentioned above, the time period for COFECE to issue a decision will be restarted as of the date on which such remedies or conditions are offered.

[21] Int'l Competition Network (ICN), ICN Recommended Practices For Merger Notification And Review Procedures (2017), http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf.

[22] Article 127 of the Competition Law provides a sanction of "a maximum fine equivalent to ten percent of the Economic Agent's revenues, for failing to comply with the conditions established in a decision without prejudice to an order for divestiture."

[23] For example in order to clear a swap of businesses between Sanofi and Boehringer in 2016, COFECE required the parties to avoid acquiring specific medicines, even when the seller was exiting the relevant market. Condiciona Cofece Operación de Sanofi y Boehringer en el Sector de Salud Humana para Preservar Condiciones de Competencia en Medicamentos para la tos con Flema, COFECE-62-2016, 19-12-2016, https://www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/condiciona-cofece-operacion-de-sanofi-y-boehringer-en-el-sector-de-salud-humana-para-preservar-condiciones-de-competencia-en-medicamentos-para-la-tos-con-flemas (in Spanish).

[24] According to media reports, in 2016 COFECE authorized the acquisition of a leading company in the Mexican pharmaceutical sector by a Dutch investment fund. Afterwards, with the release of the Panama Papers, COFECE learned that the owner of one of the main competitors controlled the indirect buyer of such company through several investment funds and with the help of his wife. COFECE initiated a procedure to verify ownership of notifying parties since it was believed that several legal mechanisms were used to deceive COFECE in order to receive clearance of the concentration. Juan Montes, *Secret Deal Squeezes Mexico's Drug Sector*, Wall St. J. (June 20, 2016), https://www.wsj.com/articles/secret-deal-squeezes-mexicos-drug-sector-1466381531.

information related to the general partner, but also the identity of all of the limited partners of a fund, including their ownership or participation percentages. COFECE also requires disclosure of their partnership rights, information to which they have access, and whether such limited partners participate in overlapping or related activities upstream or downstream to those of the target. These information requirements can be very difficult to explain to clients. While COFECE has understandable concerns in this regard, we believe the information requests should be more relaxed in cases where well-known and reputable private equity firms are involved.

In addition, COFECE has recently imposed fines on notifying parties for not fully responding to a request for information issued during the review process.[25] Being a suspensory authorization process, the sanction to notifying parties for not fulfilling such requests for information should be to not authorize the notified transaction, as opposed to imposing fines. Although we understand the need to send the message that COFECE is a strong watchdog, this seems to be unnecessarily aggressive for an authorization process. Regrettably, the specialized courts have confirmed the authority of COFECE to impose such fines.[26]

Facts and Significant Cases

During 2016, according to public data, COFECE reviewed 134 mergers. They cleared 132 and imposed remedies or conditions on two. These numbers imply that the regulator unconditionally cleared nearly 98.5 per cent of the mergers subject to its analysis, as is typical for other agencies.[27]

As mentioned above, if we look at historical data, the new Commission has experienced an increase in the average time for issuing a decision. The reasons may be found in the amendments to the merger control process, application of a more thorough economic analysis, staffing capacity limits, and the failure of the expedited review process.

Below is a summary of two of the most important merger cases reviewed by COFECE, according to COFECE's 2016 report:[28]

Delta/Aeroméxico.[29] The parties notified a joint cooperation agreement for trans-border flights (Mexico-EU). COFECE identified possible competition concerns in relation to flights departing or arriving from Mexico City International Airport (AICM) and, after a one-year review process, approved the transaction subject to the pre-closing divestiture of a number of departure/arrival slots at the AICM equal to the number of Delta's slots used during 2015. This divestiture eliminated all of the effects on slots at 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.

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[25] Such fines were issued pursuant to article 126 of the Competition Law.

[26] Final decisions issued by the COFECE may be challenged by economic agents only by way of a constitutional appeal (amparo) before a federal specialized court with no injunctive relief available to them, except for those cases in which the COFECE imposes fines or orders a divestiture, in which case a constitutional appeal will suspend application of the COFECE's determination until a definitive ruling is issued by the courts (this injunction does not apply to decisions issued by the IFT), according to the constitutional amendment of June 2013.

[27] According to the 2017 GCR Rating Enforcement Report, unconditional clearances in other jurisdictions were well above 90%, for example, Brazil (98.4%), Canada (95.19%), Colombia (96.25%), the European Union (92.54%), and the United States (97.54%). GCR, Rating Enforcement Report 2017 (2017), http://globalcompetitionreview.com/edition/1001035/rating-enforcement-2017.

[28] As of 2017, the current administration has withdrawn this report.

[29] COFECE, Análisis de Caso, Acuerdo Conjunto de Cooperación Entre Delta y Aeroméxico Para Sus Vuelos Entre México y Estados Unidos (Sept. 2016), https://www.cofece.mx/cofece/images/Promocion/Historias/AMX-DELTA-v2.pdf (in Spanish).

Sanofi/Boehringer-Ingelheim.[30] 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 medicine market. To eliminate such concerns, it approved the transaction subject to an unusual remedy prohibiting Sanofi from acquiring any of the cough medicine products sold by Boehringer, as opposed to a typical post-closing divestiture remedy in accordance with the ICN's best practices.

Considerations for Practitioners

A first lesson for practitioners is that, for Mexico, even in those mergers that do not raise competition concerns, the best approach is to file as complete a notification as possible and to be continually responsive to the authority. In cases that are at least moderately complex, it is recommended to not limit the information to the minimum Competition Law requirements.[31] It is advisable to be proactive in meeting with agency staff and explaining the transaction and any potential concerns, as well as keeping an open communication channel.[32] We also advise thinking strategically about the timing of when to meet with higher level officers, such as the Technical Secretary, and Commissioners.

In complex cases involving several jurisdictions and where the geographic scope of the market extends beyond national boundaries, it is recommended to consider granting confidentiality waivers to the competition authorities of those other jurisdictions to facilitate a coordinated and aligned analysis. A waiver authorizes COFECE to make exceptions to its confidentiality obligation regarding the applicant's identity, procedural information, and documents so that COFECE will be able to communicate with foreign competition authorities in connection with an application.

Policy Recommendations for COFECE

In our view, COFECE should try to identify potential competition concerns at an earlier stage in the process. In particular, the agency should start market tests and begin gathering information from third parties as soon as possible. COFECE should base its information requests on a sound theory of harm. This will allow a more straightforward, efficient, and transparent discussion with the merger parties on the transaction and potential remedies, if necessary.

If COFECE were to start viewing merger review as more of an authorization process than an adversarial process, then we would expect COFECE to become a more confident, and predictable agency, implementing policies and internal procedures to ensure the merger review process meets international standards. After all, the Competition Law provides the agency with sufficient tools to enforce any remedies, including the imposition of significant fines, and having more court precedents would ultimately strengthen the agency's ability to carry out its constitutional mandate.

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[30] Condiciona COFECE Operación de Sanofi y Boehringer, *supra* note 23.

[31] Although the Competition Law provides for "basic" information that needs to be included in the initial filing, in complex cases further information will be required, such as detailed market information, market shares for previous years, relevant inputs, barriers to entry, potential overlaps (vertical and horizontal), among others. COFECE has issued guidelines which are recommended to be followed from the beginning of the process. *See* Información que Pueden Presentar Los Agentes Económicos en Términos de aa Fracción XII del Artículo 89 de la ley Federal de Competencia Económica, Para Facilitar el Análisis de una Concentración, https://www.cofece.mx/cofece/attachments/article/448/DOCUMENTO-CONCENTRACIONES-v3.pdf (in Spanish).

[32] It is important to note that COFECE has been open to start conversations with the parties regarding the details of the transaction and the relevant industry. It is very important to maintain an open channel with the authority, particularly in complex cases. Meetings with technical experts from the company are also advisable as they can explain the particularities of the industry to the Authority.

In sum, the landscape after Competition Law reforms in Mexico is constantly evolving, and significant areas of uncertainty arise from COFECE's shifting merger review criteria and its development of new precedents. Parties to international merger transactions should be prepared for the specific requirements of the Mexican merger control process and take the necessary steps to ensure that multijurisdictional transactions are carried out as smoothly as possible, such as preparing robust filings and being responsive and proactive with the authority, which in our experience is the best approach to complex cases and the most effective way to reduce timing to the extent possible. ●