

# MERGER CONTROL

## Mexico



# Merger Control

Consulting editors

**Thomas Janssens**

*Freshfields Bruckhaus Deringer*

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Quick reference guide enabling side-by-side comparison of local insights into legislation and regulators; scope of legislation; thresholds, triggers and approvals; notification and clearance timetable; substantive assessment; remedies and ancillary restraints; involvement of other parties or authorities; judicial review; enforcement record and reform proposals; and recent trends.

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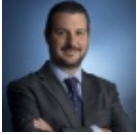
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## Contributors

### Mexico



**Luis Gerardo García Santos Coy**  
luis.garcia@creel.mx  
*Creel García-Cuéllar Aiza y Enriquez SC*



**Mauricio Serralde Rodríguez**  
mauricio.serralde@creel.mx  
*Creel García-Cuéllar Aiza y Enriquez SC*



**Jorge Kargl Pavía**  
jorge.kargl@creel.mx  
*Creel García-Cuéllar Aiza y Enriquez SC*



## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

What is the relevant legislation and who enforces it?

In Mexico, merger control is governed by:

- article 28 of the Constitution;
- the Federal Economic Competition Law (the Competition Law); and
- the Regulations to the Competition Law and the Regulations to the Competition Law for the Telecommunications and Broadcasting Sectors.

There are other specific provisions addressing antitrust matters in the legislation that applies to certain sectors, such as financial services and energy. Furthermore, the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Antitrust Authorities) have published guidelines for the notification of concentrations (the Antitrust Authorities' Guidelines). Although not binding, the Antitrust Authorities' Guidelines provide further information and explanations on the notification procedures for concentrations.

*Law stated - 23 May 2023*

### Scope of legislation

What kinds of mergers are caught?

Article 61 of the Competition Law employs a very broad interpretation of 'concentrations', a term that includes mergers, acquisitions of control, and any acts by which shares, trusts, equity, partnerships and assets of any kind are concentrated. Straightforward business vehicles that could meet monetary thresholds should be informally referred to COFECE before filing. In any case, any merger that meets the monetary thresholds defined in article 86 of the Competition Law must be notified to COFECE or the IFT, regardless of the vehicle used for the merger.

*Law stated - 23 May 2023*

What types of joint ventures are caught?

Joint ventures fall within the definition of 'concentrations' under the Competition Law. Therefore, joint ventures that trigger any of the monetary thresholds provided in the Competition Law are subject to review by the Antitrust Authorities.

Likewise, collaboration agreements may also fall within the definition of 'concentration' and trigger a filing obligation. The Antitrust Authorities' Guidelines provide parameters to determine if such agreements could be subject to analysis as concentrations, which include the duration, independence and scope of the agreement. In this sense, according to the Antitrust Authorities' Guidelines, a collaboration agreement could be considered a concentration if:

- its term is permanent or long;
- it involves the creation or incorporation of a new entity with functional and operational autonomy or the entities involved lose a certain degree of independence;
- the scope of the agreement does not reduce the competitive pressure between parties in other markets or activities outside the scope of the agreement; and

- competition between the economic agents involved disappears in certain markets.

*Law stated - 23 May 2023*

## Is there a definition of 'control' and are minority and other interests less than control caught?

Neither the Competition Law, the Regulations to the Competition Law nor the Regulations to the Competition Law for the Telecommunications and Broadcasting Sectors provide for a definition of 'control', so there is no test to determine whether a pre-merger filing is required. Nevertheless, having pre-existing control may qualify for an exemption from notifying or applying for an expedited review process.

Due to the lack of a definition of 'control' in the Competition Law, the Antitrust Authorities' Guidelines include some references to the definition of 'control' established in the Securities Market Law, pursuant to which control shall be understood as the power of a person or a group of persons to:

- impose, directly or indirectly, decisions in general shareholders' meetings (or an equivalent decisive body) to appoint or dismiss the majority of the board members (or an equivalent decisive body) of a company;
- exercise the majority of the voting rights of a company; or
- determine, directly or indirectly, the management, strategy or main policies of a company through stock ownership, agreements or otherwise.

Likewise, the Antitrust Authorities' Guidelines incorporate the precedents issued by Mexican courts, which establish that there are two types of control:

- real control, where there is effective direction from a holding company over its subsidiaries; or
- underlying control, where there is a potential exercise of control through persuasive means (even if there is no legal centralised and hierarchical relationship, but there is real power).

There is no exemption in the Competition Law that applies to the acquisition of minority, non-controlling shareholdings. Acquisitions by such minority participations shall be considered when analysing pre-merger filing thresholds.

Regarding notification exemptions in cases concerning minority interests, acquisitions of shares in publicly listed companies are exempted if two cumulative conditions are met:

- the acquisition does not exceed 10 per cent of the capital stock of the issuer; and
- the acquirer is not entitled, as a result of the transaction, to:
  - appoint or revoke board members, managers or directors;
  - impose decisions in shareholders' meetings or equivalent bodies;
  - maintain any interest that would allow it to exercise 10 per cent or more of the voting rights; and
  - influence, directly or indirectly, the administration, operations, strategy or key policies of the target.

There is another exemption for private equity funds with speculation purposes, which applies when the fund acquires, on behalf of its passive investors, interests in other economic agents with the sole purpose of generating a return to its investors on the understanding that the fund shall not have the possibility (de jure or de facto) nor the intention to participate in, manage or influence (directly or indirectly) the management, operation or commercial policies of the

target. There are no clear guidelines on what is understood as 'speculation purposes' or to which specific funds this exemption may apply, so it is rarely used.

*Law stated - 23 May 2023*

### **Thresholds, triggers and approvals**

**What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?**

All concentrations that occur in Mexico or have effects in Mexico (in the case of foreign-to-foreign transactions) are subject to the Competition Law and may be investigated. However, the Competition Law sets forth certain monetary thresholds that trigger the obligation to notify concentrations before they are consummated. The monetary thresholds are calculated based on measure and adjustment units (the Measure Units). The thresholds for 2023 are the following:

- if the transaction, or series of transactions, that gives rise to the concentration, notwithstanding the place of execution, directly or indirectly represents within Mexico a value greater than 1,867,320,000 Mexican pesos (equivalent to 18 million Measure Units) – in this case, this threshold refers to the price allocated to Mexico in the relevant agreement between the parties (for this threshold, if the markets in which the target is active are within the telecommunications sector and are under the jurisdiction of the IFT, the commercial value of the Mexican portion of the transaction as a percentage of the overall purchase price will need to be estimated);
- if the transaction, or series of transactions, that gives rise to the concentration results in the acquisition of 35 per cent or more of the assets or shares of an economic agent, with total assets or annual sales located or originating in Mexico that are worth more than 1,867,320,000 pesos (equivalent to 18 million Measure Units); or
- if the transaction results in:
  - an accumulation within Mexico of assets or capital stock worth in excess of 871,416,000 pesos (equivalent to 8.4 million Measure Units); and
  - the assets located in Mexico or the annual volume of sales originating in Mexico of the economic agents involved in the concentration, jointly or separately, are worth more than 4,979,520,000 pesos (equivalent to 48 million Measure Units).

Specifically in connection with the final threshold mentioned above, to determine the value of the assets accumulated in Mexico, the parties shall consider whichever is the higher of:

- the value of the assets as shown in the financial statements of the target (ie, book value); or
- the price allocated to the assets (ie, market value).

The Antitrust Authorities can investigate concentrations that do not meet any of the thresholds described above and that are not required to be notified within one year of their consummation if they believe that the concentrations had anticompetitive effects.

*Law stated - 23 May 2023*

**Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?**

Filing is mandatory if at least one of the monetary thresholds is met. A voluntary filing is advised in cases where the transaction:

- comes too close to triggering the monetary thresholds, even if they are not effectively met;
- is below the thresholds but the parties are not willing to assume the risk of a potential investigation where there is a high degree of market share concentration; or
- is a product of horizontal cooperation agreements between competitors that otherwise may be considered illegal cartel activity (as in Mexico there are no formal exemptions for these types of agreements).

This approach is advised for parties to be able to conduct a transaction on a risk-free basis once the Antitrust Authorities have authorised it. Pursuant to the Competition Law, transactions that have been approved by the Antitrust Authorities cannot be subject to further investigation unless the approval was issued based on false information or when the conditions imposed on the transaction were not implemented on time.

*Law stated - 23 May 2023*

### Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions that have effects in Mexico need to be notified if they meet any of the monetary thresholds. Local effects are the direct or indirect ownership of assets, capital stock or revenues in Mexico by the economic agents involved in the merger.

*Law stated - 23 May 2023*

### Are there also rules on foreign investment, special sectors or other relevant approvals?

The Foreign Investment Law sets some limits on the participation of foreign investors in specific activities that are:

- reserved for the Mexican state (eg, electricity transmission);
- reserved for Mexican nationals (eg, transportation of freight and passengers within Mexico); and
- considered to be of strategic importance.

Additionally, the Hydrocarbons Law provides that transactions that entail cross-participation require a favourable opinion from COFECE followed by approval from the Energy Regulatory Commission. Cross-participation is deemed to occur when a person or entity directly or indirectly holds equity interests that constitute direct or indirect control in two types of entities:

- end users, producers or marketers of hydrocarbons, oil products and petrochemicals that use pipeline transportation or storage services subject to open access obligations; and
- holders of open access hydrocarbons, oil products and petrochemicals transportation and storage permits.

*Law stated - 23 May 2023*

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A pre-merger filing has to be submitted to the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (the Antitrust Authorities) before:

- the closing of the transaction in accordance with the applicable legislation or, if applicable, satisfaction or waiver of the conditions precedent to which such a transaction is subject;
- the acquisition (or the direct or indirect exercise) of control over the target business;
- the acquisition of assets, participation (in trusts), partnership interests or shares of other economic agents;
- the execution of a merger agreement; or
- in the event of a series of transactions, completion of the last act and the subsequent reaching of the monetary thresholds as a result thereof.

Concentrations derived from transactions carried out abroad should be notified before they produce legal or material effects in Mexico.

The merger review process is suspensive in all cases, meaning that the parties are only permitted to close the transaction after receiving clearance from the Antitrust Authorities or once the corresponding review period elapses without the issuance of a resolution by the Antitrust Authorities (in which case, constructive assent will apply).

The Federal Economic Competition Law (the Competition Law) provides that, when economic agents fail to notify a transaction, a fine ranging from 518,700 Mexican pesos to up to 5 per cent of their annual local revenues can be imposed on each economic agent involved or, in the absence of Mexican revenues belonging to any of the involved economic agents, up to 41.49 million pesos. These fines are imposed on each of the parties involved in the transaction, considering their revenues separately (as opposed to considering their combined turnover). Recently, and based on the available precedents (approximately 18 investigations over the past five years), COFECE has been increasing the number of investigations for failure to notify and the amount of the fines imposed.

*Law stated - 23 May 2023*

## Which parties are responsible for filing and are filing fees required?

All parties directly involved in the transaction are responsible for the filing and shall jointly make the filing.

The Regulations to the Competition Law and the Regulations to the Competition Law for the Telecommunications and Broadcasting Sectors provide that, when the transaction involves more than one entity belonging to the same economic group, the controlling entity or entities may notify the transaction.

For 2023, the fee that must be paid to file a notification of concentration is 227,241 Mexican pesos. The filing fee is updated annually.

*Law stated - 23 May 2023*

## What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Antitrust Authorities have, in principle, 60 business days in which to review the notification and issue a resolution.

This term is counted as of the date on which they receive a complete file with the information required for analysis. If the Antitrust Authorities do not issue a resolution within this term, constructive assent applies. The merger review process is suspensive in all cases; the parties cannot close a transaction prior to receiving clearance.

*Law stated - 23 May 2023*

### **Pre-clearance closing**

**What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?**

The Competition Law does not provide any specific fines for closing a transaction prior to receiving clearance (ie, gun jumping), but it establishes that those transactions will be null and void, and shall not be registered in the corporate books or be registered in the Public Commerce Registry before obtaining approval from the Antitrust Authorities. The Competition Law imposes a fine of up to 18,673,200 Mexican pesos on the Mexican notary public who formalises a transaction without securing prior approval.

COFECE has dismissed filings related to the partial closing of a transaction or closed the merger review process and opened an ancillary proceeding to investigate the transaction, enabling COFECE to impose a fine for not filing a notification. In a very recent case, the merging parties decided to carve out the Mexican part of their business to be able to close the global transaction. COFECE considered that the transaction has been modified substantially. For this reason, it dismissed the filing, opened a verification procedure and imposed a fine for failure to notify. This decision is being challenged in court and a resolution is pending.

*Law stated - 23 May 2023*

**Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

In foreign-to-foreign mergers, COFECE has imposed fines for failure to notify when a global transaction closed and the Mexican part of the business had not been fully carved out.

*Law stated - 23 May 2023*

**What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

In general, the Mexican merger review process is suspensive in all cases; the parties cannot close a transaction prior to receiving clearance.

However, if the parties' timetable for a transaction does not provide sufficient time for obtaining approval in Mexico before closing, there are alternatives available (at least where the Mexican component is not an essential element of the transaction). For example, the parties may explore carving out the Mexican portion of the transaction so that the closing is not legally effective in Mexico until approval is granted.

The Antitrust Authorities are reluctant to accept the execution of hold-separate or similar arrangements to enable closing while approval is pending.

*Law stated - 23 May 2023*

## Public takeovers

### Are there any special merger control rules applicable to public takeover bids?

Acquisitions of shares in listed companies are exempted only if two cumulative conditions are met:

- the acquisition does not exceed 10 per cent of the capital stock of the issuer; and
- the acquirer is not entitled, as a result of the transaction, to:
  - appoint or revoke board members, managers or directors;
  - impose decisions in shareholders' meetings or equivalent bodies;
  - maintain any interest that would allow it to exercise 10 per cent or more of the voting rights; and
  - influence, directly or indirectly, the administration, operations, strategy or key policies of the target.

*Law stated - 23 May 2023*

## Documentation

### What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

On a general basis, the documents and information required from each of the notifying parties in a merger review process are the following:

- original power of attorney granted by each of the notifying parties (ie, the parties directly involved in the transaction), which must be ratified before a notary public. If power of attorney is granted outside Mexico, it must also be legalised through the inclusion of a Hague apostille (if the other country is a party to the Apostille Convention) or formalised and legalised before the Mexican consulate of the country in which it is granted. If there are several parties belonging to the same corporate group, the ultimate parent company may file the notification on their behalf;
- a receipt of the payment of the corresponding filing fees;
- a copy of the transaction documents;
- a copy of the documents internally produced or exchanged between the parties, or both, that were or will be used to negotiate and implement the transaction (eg, offer memos, PowerPoint presentations, business plans, strategic plans, marketing plans, reports and studies);
- a copy of the articles of incorporation and current by-laws of the parties involved in the transaction (eg, formation documents and operating or limited partnership agreement and articles of association);
- audited financial statements for the previous year of the parties involved in the transaction. If relevant financial events have taken place between the most recent audited financial statements available and the pre-merger filing, the latest interim reports (balance sheet and income statement) are also required;
- in the case of corporations, information on their capital stock structure, including the name and specific ownership or interest of each share or interest holder up to the level of individuals holding 5 per cent or more of the controlling entity;
- in the case of funds, the identity of the general and limited partners that hold 20 per cent or more of the interests before and after the transaction. Once a concentration is admitted for processing, the economic agents involved therewith cannot substantially modify the structure of the notified transaction;
- a description of the activities carried out by the parties and their corporate groups;

- a description of the products or services, substitute products or services, manufacturing capacity, market share information, clients' and suppliers' data, and efficiencies that are to be achieved as a consequence of the transaction;
- confirmation as to whether the parties (as corporate groups) and their main shareholders participate, directly or indirectly, in overlapping or related (ie, upstream or downstream) activities in Mexico to those of the other party or parties;
- if applicable, detailed information on overlapping or related activities in Mexico by the applicable party's corporate group (depending on the case and the market or markets involved, this information may also be required at a Mexican, North American Free Trade Agreement or global level);
- the market share information of the parties and their competitors (depending on the case and the market or markets involved, this information may also be required at a Mexican, North American Free Trade Agreement or global level); and
- a list of the parties' offices, properties and facilities in Mexico (specifying their addresses).

The Antitrust Authorities may request additional information and documentation on the parties or the transaction – including the information listed above if not submitted in the initial submission – that should be submitted within the period specified in the request.

Approval of a transaction based on false information may be challenged and eventually revoked.

*Law stated - 23 May 2023*

### Investigation phases and timetable

#### What are the typical steps and different phases of the investigation?

The typical steps in the review process of a concentration will depend on the type of procedure chosen by the parties (ie, standard or expedited review process). Below is a description of the phases provided in the Competition Law.

#### Standard review process

Once the filing is submitted, the Antitrust Authorities can request additional information (to complete the file) within the following terms:

- within 10 business days of the date of filing, the Antitrust Authorities can request basic information that should have been included in the initial filing – the applicants will have 10 business days in which to satisfy the request (this term can be extended in justified cases);
- within 15 business days of the date of filing or the date on which the request for information mentioned in the point above is satisfied, the Antitrust Authorities can request additional information that they consider necessary for the analysis of the transaction – the applicants will have 15 business days in which to satisfy the request (this term can be extended in justified cases); and
- the Antitrust Authorities may request further information that they deem relevant for their analysis from any person, including the notifying parties, authorities or other economic agents that may be related to the relevant market or the transaction – the applicants will have 10 business days to satisfy the request (this can be extended in justified cases) and such requests will not stop the clock.

If the Antitrust Authorities issue a request for additional information pursuant to the points above, the 60 business days

for review and resolution will start running on the date on which they receive all the requested information.

In transactions where the Antitrust Authorities raise competition concerns, they shall inform those concerns to the parties at least 10 business days prior to the date on which the case is to be listed in the agenda of matters to be resolved by the Antitrust Authorities' plenum of commissioners. This is to ensure that the parties have an opportunity to offer remedies or conditions that may address the concerns. The 60 business days that the Antitrust Authorities have to issue a resolution will be restarted on the date on which the remedies or conditions are offered.

In particularly complex cases, the Competition Law allows the Antitrust Authorities to extend the term during which they can request additional information or issue a resolution by up to 40 business days.

## **Expedited review process**

In accordance with the Competition Law, if the parties to a transaction provide evidence to the Antitrust Authorities that the transaction will not have any anticompetitive effect in the market (ie, absence of overlapping or related activities), the parties may ask the Antitrust Authorities to analyse the transaction in an expedited review process. In this scenario, the Competition Law provides that, within five business days of the date of receipt of the notification, the Antitrust Authorities will issue an official communication accepting the expedited review process. Within 15 business days of the issuance of that communication, the Antitrust Authorities must reach a resolution on the transaction. If they do not issue a resolution within this term, constructive assent applies.

In cases where the Antitrust Authorities determine that a transaction submitted under this process does not meet the requirement of having no overlapping or related activities, or if the filing is not submitted with all the required information, an official communication denying the expedited review process and initiating a standard review process will be issued.

Although the Competition Law allows parties to request an expedited review process if they clearly evidence that the transaction will not have anticompetitive effects on the market, applying for this type of filing is more problematic than applying for a standard one as the Antitrust Authorities devote more time to discussing form (ie, applicability of the expedited procedure) over substance and do not have an opportunity to issue any requests for information if any piece of information is missing. Furthermore, under the Competition Law, the information that the parties must submit to the Antitrust Authorities is almost the same under both the standard and the expedited review processes. The Antitrust Authorities generally disincentivise the use of the expedited process.

*Law stated - 23 May 2023*

## **What is the statutory timetable for clearance? Can it be speeded up?**

Under a standard review process, the Antitrust Authorities have, in principle, 60 business days to review the notification and issue their resolution. This term is counted from the date on which the Antitrust Authorities have a complete file with the information that they require for the analysis (if requests for information are issued, the clock will start running on the date on which they are satisfied). If the Antitrust Authorities do not issue a resolution within this term, constructive assent applies.

In practice, in non-complex cases, a resolution is issued within one to two months. More complex cases usually take approximately six months but can take up to one year. Although there is no pre-notification stage in Mexico, when the economic agents' timetable is tight, discussing the case with the Antitrust Authorities prior to submitting the filing helps to make them aware of timing and speed up their review to the extent possible.

*Law stated - 23 May 2023*

## SUBSTANTIVE ASSESSMENT

### Substantive test

What is the substantive test for clearance?

Pursuant to the Federal Economic Competition Law (the Competition Law), during the review process, the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Antitrust Authorities) must analyse whether a proposed transaction must be authorised, opposed or conditioned based on the potential effects it may have on the relevant market and other related markets.

For these purposes, the Antitrust Authorities must consider the relevant market, the main economic agents participating in the relevant market, the degree of concentration in the relevant market, the effects of the concentration on other competitors or consumers and the potential efficiencies caused by the transaction.

Although there is no specific market share threshold in Mexico applied by the Antitrust Authorities when approving or investigating a transaction, the most relevant factors considered in their assessment are resulting market shares and the Herfindahl–Hirschman Index (HHI). The HHI helps to determine if a market is highly concentrated (ie, when the results are close to 10,000 points) or highly atomised (ie, when the results are close to zero points).

Both of the Antitrust Authorities have established their own interpretations of the HHI, which comprise three independent tests. For COFECE, each of the tests is considered to have been satisfied when:

- the increase from the HHI prior to the transaction to the HHI after the transaction is less than 100 points;
- the total value of the HHI after the transaction is less than 2,000 points; or
- the total value of the HHI after the transaction is more than 2,000 and less than 2,500 points, the increase from the HHI prior to the transaction to the HHI after the transaction is more than 100 points and less than 150 points, and the economic agent resulting from the transaction will not be one of the four economic agents with the largest market share participation in the relevant market.

For the IFT, each of the tests is considered to have been satisfied when:

- the total value of the HHI after the transaction is less than 2,000 points;
- the HHI after the transaction remains between 2,000 and 2,500 points, and the increase from the HHI prior to the transaction to the HHI after the transaction is no more than 150 points; and
- the total value of the HHI after the transaction is more than 2,500 and the increase from the HHI prior to the transaction to the HHI after the transaction is no more than 100 points.

By meeting any of these tests, the Antitrust Authorities may preliminarily consider that a transaction has minimal potential to result in adverse effects on a relevant market.

The Competition Law does not provide a different procedure or analysis for failing firms, but the guidelines for the notification of concentrations published by the Antitrust Authorities recommend demonstrating the imminent risk of exit from the market, the absence of other plausible solutions, the ability of the acquirer to mitigate the problem and the permanence of the financial situation.

*Law stated - 23 May 2023*

## Is there a special substantive test for joint ventures?

No. The standard analysis for concentrations applies to joint ventures.

*Law stated - 23 May 2023*

## Theories of harm

### What are the 'theories of harm' that the authorities will investigate?

When investigating the potential effects of a concentration, the Antitrust Authorities usually analyse:

- horizontal overlaps, as well as if those overlaps could grant the acquirer or the economic agents resulting from the transaction power in the relevant market and the effects of the transaction on consumers and other participants in the market;
- any actual or potential vertical relationships between the economic agents involved that may give rise to any foreclosures, either upstream or downstream; and
- conglomerate effects.

*Law stated - 23 May 2023*

## Non-competition issues

### To what extent are non-competition issues relevant in the review process?

Pursuant to the rule of law principle established in the Constitution, the Antitrust Authorities may only consider competition factors when analysing a particular case. Particularly, only market-related factors are considered when the Antitrust Authorities carry out their analysis. The Antitrust Authorities have, to date, been disciplined in not formally or informally incorporating other factors such as public interest, industrial policy, sustainability or employment in their analyses.

*Law stated - 23 May 2023*

## Economic efficiencies

### To what extent does the authority take into account economic efficiencies in the review process?

Only efficiencies directly derived from the transaction that outweigh any potential anticompetitive effects and result in an increase in consumer well-being can be considered by the Antitrust Authorities in the review process. Such efficiencies may include, among other things:

- savings of resources that will allow the production or provision of the same amount of goods or services at a lesser cost, or a greater amount of goods or services at the same cost, without reducing the quality of the goods or services;
- cost reductions;
- transfers or developments to technology that result in an improvement to the production or provision of goods or services; or

- production or commercialisation cost reductions derived from the expansion of infrastructure or distribution networks.

In practice, it is very difficult to prove such efficiencies to the Antitrust Authorities.

*Law stated - 23 May 2023*

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (the Antitrust Authorities) can unconditionally authorise, reject or block a transaction or authorise a transaction subject to remedies.

*Law stated - 23 May 2023*

### Remedies and conditions

Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Remedies can be offered to address competition concerns identified by the Antitrust Authorities during their analysis.

Although both structural and behavioural remedies can be offered to the Antitrust Authorities, in practice, there is a strong preference for structural remedies. These remedies may be required to be complied with pre- or post-closing; in complex cases, COFECE usually requests pre-closing remedies.

Structural remedies usually comprise divesting certain assets, rights, partnership interests or shares to third parties that are viable competitors.

Regarding behavioural remedies, parties may offer remedies comprising, among other things:

- ceasing or refraining from carrying out specific actions or types of conduct;
- carrying out certain acts to enhance participation of competitors, or provide access or sell goods or services to competitors; and
- amending or deleting certain terms and conditions contained in the transaction documents.

*Law stated - 23 May 2023*

What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under the Federal Economic Competition Law, remedies may be offered by the economic agents and further accepted by the Antitrust Authorities or imposed by the latter.

In the first scenario, the economic agents may submit their proposals on any day as of the submission of the initial notification writ until one day after the case is listed in the agenda of matters to be resolved by the Antitrust Authorities' plenum of commissioners. If, after the submission of the pre-merger filing, the parties offer remedies or conditions to assuage any possible concerns, the Antitrust Authorities will have 60 business days in which to issue a decision as of

the date on which the remedies are offered.

Regarding a transaction concerning which the Antitrust Authorities have a competition concern, they shall inform the parties of the concern at least 10 business days before the date on which the case is to be listed in the agenda of matters to be resolved by the Antitrust Authorities' plenum of commissioners. This is to ensure that the parties have an opportunity to offer remedies or conditions that may address the concern. The time limit within which the Antitrust Authorities must issue a resolution will restart on the date on which remedies or conditions are offered. The parties may only modify the terms of the remedies offered once (in which case, the time limit will also restart).

*Law stated - 23 May 2023*

### What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In foreign-to-foreign mergers and based on market definition, if competition concerns are identified in Mexico, the Antitrust Authorities will request remedies to mitigate the identified concerns. The Antitrust Authorities can waive their demands for remedies or conditions if such measures have already been agreed upon in other jurisdictions and mitigate the competition concerns that they initially had.

*Law stated - 23 May 2023*

### Ancillary restrictions

#### In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Decisions by the Antitrust Authorities do not cover any related arrangements apart from remedies that they can impose if the transaction raises competition concerns and can be linked to a prior authorisation of economic agents also subject to remedies, unless those related arrangements were included in the merger review process.

*Law stated - 23 May 2023*

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### Are customers and competitors involved in the review process and what rights do complainants have?

The Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (the Antitrust Authorities) may contact customers, suppliers and competitors to request specific information related to transactions that raise competition concerns to gain a better understanding of the applicable market dynamics.

Under the Federal Economic Competition Law, any third party may file a claim for the Antitrust Authorities to investigate an illegal concentration. The claim, however, shall be dismissed if:

- it is evident that the involved economic agent does not have market power in the relevant market; or
- the facts claimed are those contained in a notification of concentration currently being analysed by the Antitrust Authorities, in which case the claim shall be dismissed but the claimant will be allowed to offer information to aid the Antitrust Authorities' analysis.

**Publicity and confidentiality**

What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Antitrust Authorities publish the names of the parties submitting pre-merger filings and abstracts of certain stages of the review process (unless the parties request that this information not be published and submit evidence that the disclosure of the information could result in an adverse effect on the parties) on their websites. These notices are published on a daily basis, but there is no specific time frame within which the Antitrust Authorities should publish a specific file's information. For COFECE, as all proceedings before it are conducted electronically, generally only the names of the parties submitting pre-merger filings and a notification once the case is published for discussion are published on COFECE's website. If COFECE issues a third-party request during the filing process, it publishes an abstract with the economic agent from whom they required information and the status of the request.

Furthermore, a non-confidential version of Antitrust Authorities' decisions shall be published within 20 business days of the date on which the decision is formally notified to the parties. Subject to a prior request by the parties to a transaction, the publication of a non-confidential version of the Antitrust Authorities' decision may be postponed until five business days after the consummation of the transaction. The pre-merger filing writ, its supporting documents and any other submissions made by the parties are not publicly available.

The parties can request that certain parts of the filing be treated as reserved or confidential information. Reserved information will only be available to the parties to the transaction and the Antitrust Authorities' officers, whereas confidential information will only be available to the party that requested such treatment and the Antitrust Authorities' officers.

Law stated - 23 May 2023

**Cross-border regulatory cooperation**

Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Antitrust Authorities have entered into several collaboration agreements with competition authorities in other jurisdictions. Through these agreements, it is possible for the Antitrust Authorities' officers to hold conversations with their peers in other jurisdictions regarding certain transactions, which typically happens in transactions that involve several jurisdictions. In any case, the information and documents provided to the Antitrust Authorities shall not be exchanged with other competition authorities unless applicants to a pre-merger filing provide a waiver in connection thereto.

Law stated - 23 May 2023

**JUDICIAL REVIEW****Available avenues**

What are the opportunities for appeal or judicial review?

According to article 28 of the Constitution, only the final decisions of the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Antitrust Authorities) can be challenged by means of a constitutional trial before a specialised federal court with no injunctive relief available to them. This does not apply

in cases where COFECE imposes fines or orders a divestiture, following which the constitutional trial will suspend the application of COFECE's determination until a definitive ruling is issued by the courts. This suspension does not apply to decisions issued by the IFT.

Parties to the merger control process will be able to file a constitutional claim because their interest in the matter is automatically proven by the decision. In practice, it is not common for a constitutional claim to be filed due to the time the judicial review takes, which is usually incompatible with the timeline for closing the transaction.

Constitutional claims have been made and the rulings have been followed by the Antitrust Authorities in cases where remedies were imposed on the parties in the merger control process, but this option is rarely used.

There are no definitive guidelines as to whether third parties are entitled to access a constitutional trial to challenge a merger notification process or its decision before the specialised courts. There is currently one proceeding that is pending a resolution.

*Law stated - 23 May 2023*

### Time frame

What is the usual time frame for appeal or judicial review?

According to the Constitutional Appeal Law, if a decision by COFECE or the IFT is challenged, the appeal must be submitted to the specialised courts within 15 calendar days of the date on which the decision became effective (ie, the day after it was duly notified to the parties). In practice, rulings on such appeals take between one and two years.

*Law stated - 23 May 2023*

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Federal Economic Competition Commission and the Federal Telecommunications Institute have been very focused on initiating investigations for failure to notify transactions by actively monitoring press releases, trade publications and prior transactions when analysing pre-merger filings to discover transactions for which a filing – when required – has not been made. This has led to several fines over the past five years, which have become more common in the past year.

*Law stated - 23 May 2023*

### Reform proposals

Are there current proposals to change the legislation?

No.

*Law stated - 23 May 2023*

## UPDATE AND TRENDS

### **Key developments of the past year**

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

With the continuous growth and development of the digital market, over the past few years, the Federal Economic Competition Commission and the Federal Telecommunications Institute have been fighting each other in the courts to obtain jurisdiction in that market. This has led to several delays in the analysis of these transactions because jurisdictional conflicts can take several months to resolve. The most recent cases took up to six months to be resolved.

\* The authors would like to thank Aleine Obregon for her assistance in writing this chapter.

*Law stated - 23 May 2023*

## Jurisdictions

	<b>Albania</b>	Wolf Theiss
	<b>Australia</b>	Allens
	<b>Austria</b>	Freshfields Bruckhaus Deringer
	<b>Belgium</b>	Freshfields Bruckhaus Deringer
	<b>Bosnia and Herzegovina</b>	Wolf Theiss
	<b>Brazil</b>	TozziniFreire Advogados
	<b>Bulgaria</b>	Boyanov & Co
	<b>Canada</b>	McMillan LLP
	<b>China</b>	Freshfields Bruckhaus Deringer
	<b>Costa Rica</b>	Zurcher Odio & Raven
	<b>Croatia</b>	Wolf Theiss
	<b>Cyprus</b>	Antoniou McCollum & Co LLC
	<b>Czech Republic</b>	Nedelka Kubáč advokáti
	<b>Denmark</b>	Kromann Reumert
	<b>Egypt</b>	Zulficar & Partners
	<b>European Union</b>	Freshfields Bruckhaus Deringer
	<b>Faroe Islands</b>	Kromann Reumert
	<b>Finland</b>	Roschier, Attorneys Ltd
	<b>France</b>	Freshfields Bruckhaus Deringer
	<b>Germany</b>	Freshfields Bruckhaus Deringer
	<b>Ghana</b>	Bentsi-Enchill Letsa & Ankomah
	<b>Greece</b>	Vainanidis Economou & Associates
	<b>Greenland</b>	Kromann Reumert
	<b>Hong Kong</b>	Freshfields Bruckhaus Deringer
	<b>India</b>	Shardul Amarchand Mangaldas & Co

	<b>Italy</b>	Freshfields Bruckhaus Deringer
	<b>Japan</b>	Freshfields Bruckhaus Deringer
	<b>Liechtenstein</b>	Sele Frommelt & Partner Attorneys at Law
	<b>Malta</b>	Camilleri Preziosi
	<b>Mexico</b>	Creel García-Cuéllar Aiza y Enriquez SC
	<b>Morocco</b>	UGGC Avocats
	<b>Netherlands</b>	Freshfields Bruckhaus Deringer
	<b>New Zealand</b>	Russell McVeagh
	<b>Nigeria</b>	G Elias
	<b>Norway</b>	Wikborg Rein
	<b>Pakistan</b>	Axis Law Chambers
	<b>Peru</b>	Payet Rey Cauvi Pérez Abogados
	<b>Poland</b>	WKB Wiercinski Kwiecinski Baehr
	<b>Portugal</b>	Gomez-Acebo & Pombo Abogados
	<b>Romania</b>	Wolf Theiss
	<b>Saudi Arabia</b>	Freshfields Bruckhaus Deringer
	<b>Serbia</b>	Wolf Theiss
	<b>Singapore</b>	Drew & Napier LLC
	<b>Slovakia</b>	Wolf Theiss
	<b>Slovenia</b>	Wolf Theiss
	<b>South Korea</b>	Bae, Kim & Lee LLC
	<b>Spain</b>	Freshfields Bruckhaus Deringer
	<b>Sweden</b>	Mannheimer Swartling
	<b>Switzerland</b>	Lenz & Staehelin
	<b>Taiwan</b>	Yangming Partners

	<b>Turkey</b>	ELIG Gurkaynak Attorneys-at-Law
	<b>Ukraine</b>	Asters
	<b>United Arab Emirates</b>	Freshfields Bruckhaus Deringer
	<b>United Kingdom</b>	Freshfields Bruckhaus Deringer
	<b>USA</b>	Davis Polk & Wardwell LLP
	<b>Vietnam</b>	Freshfields Bruckhaus Deringer
	<b>Zambia</b>	Corpus Legal Practitioners