

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 merger control in your jurisdiction?

Luis Gerardo García Santos Coy & Mauricio Serralde Rodríguez: The Federal Economic Competition Commission (COFECE) continues to be very thorough and formalistic in the analysis of mergers and continues to develop its own criteria. Furthermore, COFECE has recently modified guidelines and regulations to close loopholes and clarify certain concepts. Practitioners have also welcomed COFECE's staff initiative to open a communication channel to improve the merger control process. A lot of work is still to be done, but we are optimistic that it is on the right track. Additionally, we believe there is a trend for competition agencies all around the globe to be more rigid in their analysis of merger control, including by requesting more information from the merging parties and from customers and competitors, which has an impact on timing. The review periods established in the Competition Law are very long, and we can expect that in complex cases most of the available extensions will be used for the analysis. This is a challenge that must be addressed by practitioners to manage clients' expectations.

COFECE continues to be very active through its participation in the International Competition Network, the Organisation for Economic Co-operation and Development, and other forums. It has strengthened its relationships with international agencies, mainly in the United States, the European Union and Brazil. Communication and coordination among agencies takes place on a day-to-day basis.

In 2017 COFECE continued to focus on transactions in which the parties involved have overlaps and high market shares, on concentrated and regulated markets, and on transactions in which the parties do not comply with its 'technical criteria' (the Herfindahl–Hirschman Index). Nowadays, is it common for COFECE to request information from other participants in the market, as well as clients and suppliers, to analyse a transaction and its potential effects. In the past year, COFECE has improved in issuing such requests at an earlier stage, which is a positive development as it may reduce the review period. Nevertheless, there is always space for further improvement.

One of the new policies in the past couple of years 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 identities of all the limited partners of a fund, including the percentage of ownership and participation, as well as corporate rights, information the partners have access to, and confirmation on whether the limited partners participate in overlapping or related activities (upstream and downstream) to those of the target. We have found it difficult to explain to our clients why they need to comply with these requests. We have encouraged COFECE to prepare a whitelist of well-known and reputable private

equity firms, and to take a more relaxed approach to the information requested from them. Additional information will be needed from unknown private equity firms.

COFECE is a very strict agency in many aspects, and we feel it should aim to be more predictable with respect to timing and reasonable in its requests for information. For example, it has imposed fines on notifying parties and even on a notary public for not fully responding to a request for information issued during the review process or for closing a transaction with minimum formal variations. Some of these fines have been litigated in the federal courts, but success has been limited as in most of the cases the decision has been upheld. It would be beneficial to have technical and independent courts that could develop a system of checks and balances for COFECE. The authority has also recently been dismissing filings when certain non-material information is missing, or a minor formality is not complied with. In our view this approach is extreme and unnecessary in most cases, and obviously increases the transaction costs for clients.

Despite being far less busy in merger control than COFECE, the Federal Telecommunications Institute (IFT) continues to be an open and straightforward authority when analysing mergers, although the process can also be lengthy and clients should anticipate substantial information requests.

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: We continue to have interesting, and challenging, experiences with COFECE. As mentioned, it is a very rigid authority, not only in its substantive analysis, but also in terms of its focus on formalities. It has systematically requested robust internal evidence from the parties involved in a transaction and from other participants in the market to be confident that a transaction will not have anticompetitive effects. Although its staff has increased in number, considering the workload they have, this appears to be insufficient as new staff members require substantial training. Based on these factors, the first challenge for us is to manage clients' expectations on timing.

When it comes to remedies, COFECE is typically very cautious in trying to avoid any potential litigation by the parties, and is constantly trying to improve the follow-up mechanism and monitoring on the remedies. Substantial fines should be expected in the event of lack of compliance with reporting obligations, even for minor formalities. In our view, the risk of the merging parties seeking to litigate the remedies imposed is low, and the Competition Law provides COFECE with sufficient tools to enforce compliance and impose significant fines. We believe COFECE should use these tools and, when required, aim to develop court precedents that would ultimately strengthen its authority.

One of the lessons we have learned from recent cases is that in mergers that do not raise competition concerns, the best approach to avoid the notification being dismissed is to file a notification that is as complete as possible, and to maintain responsiveness with the authority. In more complex cases, we believe that the best approach is to be proactive in meetings with the staff of the agency to explain the transaction and any potential concerns, and to keep an open communication channel with them. As practitioners, we would like COFECE to clearly identify potential risks at an earlier stage in the process, as well as to start market tests and gather information from third parties as soon as possible, to be able to initiate a 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 coordinated and aligned analysis. This approach is aimed at achieving contemporary and consistent resolutions, and also helps to ensure that remedies are not excessive and eliminate competition concerns in the jurisdictions involved.

In cases where it is not entirely clear which agency has jurisdiction to review a merger, we strongly recommend approaching both authorities (COFECE and the IFT) to discuss the case and make sure that no jurisdictional challenge will be initiated down the line, which will delay the review process. Currently we have only two court precedents on determining jurisdiction: the *Nokia/Alcatel* and *AT&T/Time Warner* mergers. We participated in both transactions and the courts resolved the cases as we expected. Hopefully the courts will start creating clearer rules to determine jurisdiction, which should simplify the process for both agencies and will help to avoid unnecessary delays.

As 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 practicably possible) and as completely as possible, and to give a prompt response to each request from the authority. Although COFECE has, to some extent, reduced the amount of time devoted to analysis of multi-jurisdictional transactions and has tried to resolve contemporaneously with other jurisdictions, in some cases during the past year Mexico has taken the longest time to resolve.

Finally, although the Competition Law provides for an expedited review process, which can only be applied when there are no overlapping activities and when it is the first participation of the purchaser in the relevant market or related markets (upstream or downstream), among other requirements, in practice the process results in


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more risk regarding timing. We typically advise our clients to notify under a standard process rather than the expedited process because the information required for both cases is the same, and it means that we avoid the risk of the expedited process not being accepted or being rejected further down the line based on procedural aspects (which will restart the clock and may delay the process significantly). Typically, in very simple cases, a resolution under a standard process should take the same amount of time to be issued as in the expedited process. COFECE discourages the use of the expedited review 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 whether a transaction may harm competition or may have adverse effects in the market. In those concentrations where the Herfindahl–Hirschman Index established in the technical criteria is not met, the agency will thoroughly examine the proposed transaction, considering the specific conditions of the affected market. Among other elements, COFECE will analyse the possible substitutes, the existing competition (degree of concentration), the past behaviour of the parties involved in the transaction and the 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, will either impose remedies to eliminate such concerns (typically structural remedies, as opposed to behavioural) or will not authorise the transaction. COFECE's clear preference is for ex ante remedies.

Regarding market definition, COFECE has in some cases taken different approaches to other agencies around the world, which was the case in the three mega mergers in the agrochemical sector: *Dow/DuPont*, *Bayer/Monsanto* and *ChemChina/Syngenta*. In connection with the geographical scope, it is very difficult to convince COFECE that it could be broader than national, which in many cases complicates the analysis.

As practitioners, we believe that COFECE has been working hard and devoting its efforts to try to be more efficient and consistent in its analysis, but we believe that it should continue to improve to make the merger review process more expeditious, predictable and transparent. The Competition Law provides sufficient tools to enforce any remedies and impose fines, and having more court precedents would ultimately strengthen the ability of COFECE and the IFT to comply with their constitutional mandates.

In terms of industries of special interest, COFECE recently announced its Strategic Plan for 2018 to 2021, in which it establishes that the financial, agri-food, health, transport and energy sectors are its priority. This should not present a risk for the transactions within these sectors but may mean that more information is obtained from companies in those industries or previous analysis

THE INSIDE TRACK

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

We consider that it is essential for advisers to understand the business perspective of transactions, 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, an antitrust adviser must have a complete understanding of the legal framework, a clear understanding of the economic aspects and a close institutional relationship with the agencies. In complex cases, strategic thinking is essential.

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

Completeness, 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. Complex cases can be more difficult to manage.

Understanding the precedents and having the right experience is key as practices can change daily in Mexico.

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 high-profile cases resolved by COFECE during 2017 (according to COFECE's report).

The most challenging case was the *Aeromexico/Delta* transaction, as it required a lot of discussion and very close communication with COFECE, almost on a daily basis, over the course of one year. Moreover filings with US agencies were being analysed at the same time, and a new air transport bilateral agreement between the US and Mexico was negotiated and finally implemented, which was a key element for the analysis of the transaction.

Another very interesting case was ChemChina's acquisition of Syngenta. This case required a lot of coordination with counsel in other jurisdictions, as well close communication with COFECE. Timing was essential for the transaction, and we faced an in-depth analysis of multiple product overlaps, and as the market was defined differently than in other jurisdictions, production of data under this definition was extremely difficult and time-consuming. Negotiation of remedies is always a challenge and fortunately we were able to meet the deadline despite being under tremendous pressure.

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of those markets conducted by COFECE may be sought in order to consider the merger filing.

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

LGGSC & MSR: The use of more varied evidence and more sources has been an important development.

As mentioned, the first approach COFECE and the IFT take when assessing a merger is to analyse the market shares and concentration indexes. The latter is analysed according to their own technical criteria (Herfindahl–Hirschman Index criteria are different for COFECE and the IFT).

In complex cases, COFECE always requests copies of the documents internally produced or exchanged between the parties that were used to evaluate, negotiate and implement the transaction, such as presentations, business plans, strategic plans, marketing plans, reports and studies, 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. Business people and bankers should be aware of this risk before preparing bold statements and presentations, and competition agencies should be more open to understanding the context and purposes for which such documents were prepared, and who the authors were.

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

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 2017, COFECE resolved 139 mergers, of which 133 were approved, one was opposed and the remaining five were subject to remedies or conditions. Our firm participated in advising clients in approximately 32 per cent of those filings, including four of the six complex mergers that were opposed or subject to conditions. This

means that COFECE unconditionally cleared nearly 96 per cent of the mergers subject to its analysis. On the other hand, the IFT only resolved four mergers, one of which was approved subject to certain conditions and in which our firm was also involved.

Three of the most complex merger cases reviewed by COFECE during 2017 where our firm represented one of the parties were the following:

(1) *Delta/Aeromexico*: the parties notified the acquisition by Delta of up to 49 per cent of Aeromexico's shares through a public offer. COFECE approved the transaction subject to the compliance of the ex ante remedies previously imposed on the parties in the transaction related to a joint cooperation agreement for transborder flights (Mexico–EU) of a certain number of slots in the AICM equal to the number of Delta's slots used during 2015.

(2) *Sanofi/Boehringer-Ingelheim*: the parties notified the acquisition by Boehringer (as part of a business swap) of Sanofi's animal health business worldwide. COFECE identified possible competition concerns in the market related to vaccines against poultry and swine diseases, and to eliminate such concerns approved the transaction, imposing as a remedy the ex ante divestiture of certain vaccines. This transaction was very challenging as it had to be closed in a number of global markets and the parties had to carve out Sanofi's Mexican business to achieve this, which delayed the Mexico closing. Organising this kind of carve-out is challenging and should be carefully tailored to the transaction at hand.

(3) *ChemChina/Syngenta*: the parties notified the acquisition of sole control by ChemChina of Syngenta. COFECE identified possible competition concerns in very specific markets (which were defined differently than in other jurisdictions), in selective broad-spectrum herbicides that attack broadleaf and grass weed used for sugar cane crops and contact fungicides used for multiple crops, and to eliminate such concerns approved the transaction, imposing as a remedy the post-closing divestiture of specific fungicides and insecticides products of Syngenta.

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 believe that COFECE is working on improving its internal policies and trying to make its criteria clearer, additional changes are needed (eg, reducing review periods), but unfortunately 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. The merger review process is an ongoing challenge, but we trust that COFECE will continue working towards becoming more flexible and reasonable, and implementing policies and internal procedures to make the merger review process more efficient and in line with international standards. In fact, COFECE just implemented a new procedure to make filings through electronic means, which we expect will expedite the review of simple cases.