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Merger Control

Mexico

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Federal Economic Competition Law (FLEC) and its Regulatory Provisions, issued by the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT), set forth the applicable procedures and criteria for transactions that need to be reviewed by COFECE and the IFT before the transactions close or have full effect in Mexico.

Both authorities have issued regulatory provisions that act as regulations to the FLEC in their respective sectors.

In addition to the above, COFECE and the IFT have issued non-binding *Guidelines for the Notification of Concentrations* (“Merger Guidelines”) and COFECE also included a chapter on collaboration agreements and joint ventures between competitors in their *Guidelines on Information Exchange Between Economic Agents* (the “Information Exchange Guidelines”) as such type of agreements may or may not fall into the definition of “concentration” under the FLEC. It is important to note that such guidelines are not binding and serve only as a practical handbook for the parties involved in a notifiable transaction (notifiable transactions are defined by certain threshold, see **2.5 Jurisdiction Thresholds**).

1.2 Legislation Relating to Particular Sectors

There are certain provisions related to antitrust and economic competition in the Federal Telecommunications and Broadcasting Law (FTBL) which impose the obligation to IFT to preserve the competition in the telecommunications and broadcasting sectors, specifically in the direct or indirect concentration of the agents that participate in such sectors.

Competition related provisions are also included law relating to specific sectors, such as, transport, energy, financial sector and commerce.

1.3 Enforcement Authorities

COFECE and the IFT are the competent authorities in antitrust matters in Mexico. The IFT is the relevant competition authority and regulator for the telecommunications and broadcasting sectors, and COFECE is the relevant authority for all other markets.

Under the FLEC, COFECE and the IFT have procedures in place to determine which one is the competent authority in a certain case. In practice, this procedure has resulted in conflicts between both authorities claiming jurisdiction over the same case, such as in those involving the digital economy.

There are no other authorities involved in the review process of a merger and the decisions of the COFECE and IFT are deemed to be final. However, these final decisions are subject to judicial review by specialised federal courts on competition, telecommunications and broadcasting, see **8.1 Access to Appeal and Judicial Review**.

2. Jurisdiction

2.1 Notification

If a transaction meets any of the three monetary thresholds in the FLEC, then a notification is compulsory. If a transaction does not meet any of such filing thresholds, the parties may file a voluntary notification.

However, even if a transaction meets a filing threshold, it may also fall under one of the following filing exemptions:

- the transactions which involve a corporate restructure, in which the parties belong to the same economic group and no third party is involved in the transaction;
- the transactions involve only the increase of the participation of a previous stockholder in an economic agent;
- the transaction is a simple transfer of asset to a trust that is controlled by the party performing such transfer;
- the transaction affects only economic agents not residing in Mexico for tax purposes, as long as such transaction involves the direct or indirect acquisition of Mexican companies, nor accumulate any assets in general within the Mexican territory in addition to those which they directly or indirectly owned prior to the transaction;
- the transaction is made by an investment company and the transaction has only economic purposes, except if as a result or because of the transactions, the investment company may have significant influence over the decisions of the entity in which in the investment is made;
- acquisition of less than 10% of a publicly traded company that does not result in corporate control over such entity;
- the transaction is performed by funds merely for speculation purposes, and which do not have investments in companies or assets that participate or are employed in the same relevant market as the economic agent involved in the transaction.

Additionally, the exemption mentioned in **1.2 Legislation Relating to Particular Sectors** would also result applicable for the telecommunications and broadcasting sectors.

The Transitory Articles

The transitory articles of the FTBL set forth an exemption to the ex-ante review of certain transactions in the telecommunica-

tions and broadcasting sectors. Such exception applies when a dominant agent exists in the corresponding relevant market and that such dominant agent is not a party of the notifiable transaction. In this case, once the transaction exempted from the ex-ante filing closes, the involved parties still need to submit a post-closing notification describing the transaction and including all the elements required by the FLEC and the Administrative Provisions applicable to the IFT.

2.2 Failure to Notify

The FLEC provides that parties to notifiable transactions are subject to a suspensory obligation which prohibits them from completing the transaction before receiving clearance from COFECE or the IFT, as applicable. Notably, completion of the transaction under the FLEC before clearance may include fulfilling all the conditions precedent to closing.

Any transaction completed in violation of the suspensory obligation may be considered null and void, and the parties' may still be liable in administrative, civil or criminal procedures.

The FLEC includes a sanction for up to 5% of the parties' accruable income, the foregoing, if they fail to file a notification of concentration and close such transaction.

COFECE has imposed fines as a sanction to companies for failing to file a notification, either by finding out of a potentially notifiable transaction through its analysis of the national and international press and also in the context of other transactions where it may question how and when the seller acquired the target. The most recent fines are listed in **9.2 Recent Enforcement Record**.

Fines are public, included in the non-confidential versions of COFECE's and the IFT's decisions available in their websites, and also in press releases and periodical reports published by COFECE.

2.3 Types of Transactions

All types of transactions that involve an acquisition or accumulation of assets or shares are caught by the definition of "concentration" under the FLEC. Such definition states that "...a concentration shall be understood as a merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, and which is carried out among competitors, suppliers, customers or any other Economic Agent".

Other transactions that do not involve a direct transfer of shares or assets may also be caught and a case-by-case analysis of the effects of such arrangements is warranted to confirm whether they fall under the FLEC's definition of "concentration".

Internal restructurings or reorganisations, as mentioned in 2.1 **Failure to Notify**, are exempted to the obligation of filing a notification as long as it does not involve any third parties that were not part of the pre-reorganisation structure, or grant control to a shareholder that did not have it before the restructure. Joint ventures and collaboration agreements between competitors may fall into the FLEC's definition of "concentration" and require clearance following a merger review process. Other transactions such as donations, inheritances, transfers or rights, and even certain leases, may fall under the definition of "concentration" and thus be subject to review.

2.4 Definition of "Control"

There is no definition of control in the FLEC or its Regulatory Provisions. However, in its non-binding Guidelines, COFECE refers to the definitions of control included in decisions of Mexico's Supreme Court of Justice and also the ones included in Mexico's Stock Exchange Law and the Regulatory Provisions of the Industrial Property Law.

The Supreme Court decisions refer to factual and actual control, and set forth for antitrust purposes that control can be actual if it refers to the effective conduct of a controlling company towards its subsidiaries, or factual when it is potentially possible to carry it out by means of persuasive measures that can occur between companies even when there is no centralised and hierarchical legal link, but there is real influence over the decisions of certain economic agent.

The FLEC has no safe harbour thresholds. As a result, acquisitions of minority or other interests less than control that meet any of the monetary filing thresholds will be caught as a notifiable concentration.

2.5 Jurisdictional Thresholds

Although all transactions/concentrations that occur or have effect in Mexico are subject to the FLEC and may be investigated by the COFECE or the IFT, regardless of whether they are notifiable or not, if a transaction does not meet any of the monetary filing thresholds, then COFECE and the IFT have the right to investigate them within one year from the date of their closing if they are not believed to be unlawful concentrations, or within ten years of their closing if they are believed to be illegal.

Article 86 of the FLEC sets forth three monetary thresholds that trigger the obligation of economic agents to notify concentrations before they are undertaken (the "Notification Thresholds"). The transactions are measured against the daily units of measure and update (*unidades de medida y actualización* or UMAs). The value of the UMA is updated every January, and takes effect on February 1st each year.

Threshold One

The first Notification Threshold is based on the value of the transaction (eg, purchase price) expressly allocated to the companies or assets located in Mexico, to the extent that a transaction provides for the payment of a consideration or purchase price and/or if such allocation is equal or more than 18 million daily UMAs (approximately MXN1,520). If this Notification Threshold is reached, a pre-merger filing with the COFECE or IFT is required.

Threshold Two

The second Notification Threshold combines two different tests. The first is an acquisition of 35% or more of the total assets or shares of a certain Mexican company (directly or indirectly); and the second is that the annual revenues that originated in Mexico for the last fiscal year, or total assets located in Mexico of the group to which such company belong, exceed MXN1,563 million. If both of these tests are met, a pre-merger filing with the COFECE or IFT is mandatory.

Threshold Three

The third Notification Threshold combines two different tests as follows. First, the accumulation, in Mexico, of assets or capital stock of Mexican companies exceeds 8.4 million daily UMAs (approximately MXN729.7 million); second, the total assets located in Mexico, or the annual revenues originated in Mexico of the corporate groups to which the target, seller and purchaser belong to jointly or separately, exceed 48 million daily UMAs (approximately MXN4,170.5 million). Both tests should be met in order to be obliged to submit a notification of concentration with the COFECE or IFT.

2.6 Calculations of Jurisdictional Thresholds

See 2.5 **Jurisdictional Thresholds** for information on Notification Thresholds.

For the calculation of the revenues, the parties shall consider the value included in the general balance of the most recently available audited financial statements. For the total assets value, the parties shall consider the higher value of either the “total assets” listed in the general balance sheet of the most recent audited financial statements, or the fair market value considering assets.

In this regard, if the assets or revenues are calculated in a foreign currency, they shall be converted to settle obligations in foreign currency payable in the Mexican Republic using the exchange rate published by the Bank of Mexico in the Official Gazette of the Federation, which is lower during the five days prior to the notification being made. This causes an obvious problem for transactions that may be just below a filing threshold, since the exchange rate may fluctuate between the signing of the agreement and the closing of the transaction. It is advisable for par-

ties’ in this situation to monitor the exchange rate fluctuations and agree on a course of action on how to handle a potential obligation to file a notification close to the closing of a transaction.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

See 2.5 **Jurisdictional Thresholds** for more detail on filing thresholds.

The first threshold refers exclusively to the value allocated to the transaction. The second threshold focuses on the target and covers both direct and indirect acquisitions of Mexican shares or assets; therefore, the audited financial statements of the Mexican entities being acquired shall be reviewed to determine if the threshold is met or not. The third threshold has two tests: the first test looks only at the Mexican shares and assets being directly or indirectly acquired; and the second test looks at the Mexican revenue and Mexican assets of both the seller and the buyer on a “group-wide” basis.

There is no definition nor criterion on what “group-wide” comprises, so a conservative approach is usually followed on identifying which group entities have presence in Mexico and determine their revenues and assets for purposes of this calculation.

Neither the FLEC, the Administrative Provisions nor the Merger Guidelines provide for the scenario of material business changes that may change the figures of a business’s financial statements from the close of their last fiscal year to the date of the potentially notifiable transaction. In such scenarios, it is advisable to carry out a detailed analysis to confirm whether the transaction is notifiable or not, given that the guidance is to base such assessment in the most recent audited financial statements available.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions may only be subject to merger control review in Mexico when the transaction involves the indirect acquisition of Mexican shares or assets, and if any of the Notification Thresholds are met (see 2.5 **Jurisdictional Thresholds**).

Since the Notification Thresholds are monetary-based and look at Mexican revenues, assets and capital stock that could be indirectly acquired in a foreign-to-foreign transaction, if a target has no sales or assets in Mexico, it is unlikely it would be subject to a filing in Mexico.

2.9 Market Share Jurisdictional Threshold

There are no market share-based jurisdictional thresholds in Mexico; the FLEC only provides for monetary based thresholds. See 2.5 **Jurisdictional Thresholds** further information.

2.10 Joint Ventures

Joint ventures in Mexico may be subject to merger control if the joint venture vehicle or the joint venture agreements trigger any of the Notification Thresholds.

In this regard, there are no special rules for determining whether joint ventures trigger the Notification Thresholds.

2.11 Power of Authorities to Investigate a Transaction

Both the IFT and COFECE may investigate any and all transactions that do not meet the Notification Thresholds. The statute of limitation for this specific cases is of one year after closing of such transaction.

Notwithstanding the foregoing, if a non-notifiable transaction results in an unlawful concentration, the COFECE or IFT would have a period of one year counted from the closing of such transaction to investigate it. Unlawful concentrations are those that have, as their purpose or effect, obstructed, diminished, harmed or impeded free market access and economic competition.

COFECE and the IFT may not investigate transactions previously reviewed and approved, as long as such transactions were closed in the same terms and conditions as they were notified, and no false information was submitted for obtaining the corresponding approval.

2.12 Requirement for Clearance Before Implementation

The FLEC provides that the closing of a notifiable transactions (including transactions that are voluntarily notified) is subject to a suspensory obligation, prohibiting the parties from completing the transaction prior to receiving clearance from COFECE or the IFT, as applicable.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The wording of the FLEC can be interpreted as a factual distinction between “failing to file” and “gun-jumping”. In this regard, the FLEC includes a sanction of up to 5% of the parties’ accruable income in the event that they do not submit notification of concentration and close such notifiable transaction. The FLEC excludes actual gun-jumping, which would happen if a notifiable transaction is submitted to the relevant competition

authority and the parties close the transaction before obtaining clearance.

Notwithstanding the absence of a specific gun-jumping sanction, if such a transaction is one that may be considered illegal under the FLEC, then fines of up to 8% of the parties’ accruable income may be imposed. A transaction will be deemed illegal if it has the object or effect of hindering, diminishing, damaging or impeding competition and free access to the markets, and the COFECE will take as indications that a transaction is illegal if it confers or increases market power, establishes barriers to entry, or facilitates the commission of cartel conducts or abuse of dominance.

So far, while the COFECE and IFT have fined companies for failing to file, fines for actual gun-jumping involving a notified transaction that closed before receiving clearance have yet to be made public, if they have been imposed to this date.

2.14 Exceptions to Suspensive Effect

The FLEC does not include any exemption to the suspensory obligation which prohibits economic agents to close a transaction prior to receiving clearance.

It is not possible to seek a waiver or derogation of the suspensive effect, regardless of the context of the transaction.

In the case of acquisitions of failing firms, the Merger Guidelines expressly acknowledge that there is no specific procedure to process filings of this type of transactions, and it focuses on providing guidance on the type of information and evidence the parties must furnish in case significant market concentration results from the intended transaction. However, no waiver or suspensive effect is granted, given that it is not set forth in the FLEC.

2.15 Circumstances Where Implementation Before Clearance is Permitted

There are no circumstances where the IFT or COFECE may permit closing a transaction with effects in Mexico before clearance is granted.

On a case-by-case, the parties may explore a carve out structure that prevents effects from taking place in Mexico while closing a foreign-to-foreign transaction in Mexico, and discuss the circumstances and the structure itself with the reviewing authority, and in the understanding that there is no legal provision that regulates this nor that grants any guidance on what may or may not be acceptable to the reviewing authority.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

Transactions must be notified before any of the following occurs:

- the concentration is perfected under the applicable law, which includes the fulfilling of the corresponding conditions precedent;
- there is a direct acquisition or exercise of factual or legal control of another economic agent;
- there is a direct acquisition or exercise of factual or legal control of the assets, stock, trust beneficiary rights of another economic agent;
- a merger agreement is signed between the economic agents involved in the concentration; and
- in the context of a series of acts, before the one that, in the aggregate with the prior acts, will meet any of the Notification Thresholds.

Failing to submit a notification before such deadlines would result in a failing to file sanction, as described in **2.2 Failure to Notify**.

3.2 Type of Agreement Required Prior to Notification

The COFECE and the IFT do not require an specific agreement prior to the notification, the parties may submit a description of the transaction, the type of transaction and drafts of the documentation to be executed, and if applicable, draft of the non-compete clauses to be undertaken by the parties.

There are no prohibitions regarding a filing to be made even where there is nothing in writing, however, the description of the transaction is highly important, as the COFECE has imposed fines on agents that carry out the closing in different ways than those described in the notification. For example, if the COFECE approved a transaction in which “X” company of certain economic group would perform certain actions, and in the end “Y” company of the same group performed them, this has led to the imposition of fines as the closing was different from the one described in the initial notification.

Therefore, the parties must be careful in providing a detailed description of the transaction and cover all the possibilities regarding closing, always including in their submissions all the information available.

3.3 Filing Fees

The filing fees are set forth in the Federal Duties Law which is updated every year. For 2020, the applicable filing fee to be paid is of MXP190,050 (approximately USD7,910).

Proof of payment must be included with the initial filing of the notification.

3.4 Parties Responsible for Filing

Under the FLEC, all parties to a notifiable transaction have the obligation to file the notification.

The COFECE's criteria is to have all the signing parties to the main transaction documents as filing parties to the notification. Guarantors and special-purpose vehicles may be excluded from this if previously discussed and agreed with the COFECE.

If a transaction involves several sellers or acquirers belonging to the same economic group, the transaction may be notified by the entity or individual controlling such group, in the understanding that the COFECE and IFT may require any member of the group involved in the transaction to adhere to the notification process.

3.5 Information Included in a Filing Documents Required at Filing

A filing must include a series of documents that are required by the FLEC. Absence of such documents will result in a Request for Basic Information being issued and, failure to submit such required information, will result in the dismissal of the filing.

The documents and information required by the FLEC may be aggregated into three main categories of documents and information:

- relating to the filing parties, such as PoAs for the persons making the submission, incorporation documents and their amendments, financial statements and ownership structure;
- of the Mexican subsidiaries involved, directly or indirectly, in the transaction, and the Mexican subsidiaries of the acquiring party, incorporation documents and their amendments, financial statements, ownership structure and facilities; and
- relating to the transaction, relevant markets and competition assessment, such as vertical relationships, product and geographic market definitions and market shares (for the parties and also for their competitors), substitute products, list of products and services offered by the parties.

Additional Information

It is important to keep in mind that the COFECE or the IFT have the authority to request additional information and documentation, which they systematically do, with respect to the parties and/or the transaction. In this regard, in transactions with overlaps, and in addition to market-specific information and economic and competition related documents and infor-

mation, the COFECE and the IFT generally requests additional information such as:

- general organisational charts of the parties (if they have worldwide presence);
- internal organisational chart of the parties' Mexican business structure;
- list of all Mexican regulatory requirements, if USA or NAFTA requirements exist, they could be requested as well;
- list of patents and other intellectual property rights that are related to the parties' business in Mexico, if any;
- description on how the parties' Mexican subsidiaries sell their Products and Services to its clients;
- lists of the parties' Mexican subsidiaries business's (i) top suppliers and top ten customers for its business, (ii) top suppliers and top ten customers of its business;
- description of any vertical relationships between the economic agents involved;
- copy of the documents submitted or that will be submitted before the USA or the European antitrust authorities;
- list of those other countries in which premerger filings have or will be made before antitrust/competition authorities.

Likewise, both the COFECE and IFT allow the parties to provide photocopies of all documents, except for the powers of attorney that evidence the authority of the persons submitting the notification, which shall be submitted in original.

If the power of attorney is granted abroad, then it must be legalised or apostilled in order to be acceptable for the COFECE. Likewise, if the power of attorney is granted in a country that is a signatory party to the *Protocol on Uniformity Of Powers Of Attorney Which Are To Be Utilized Abroad*, of the Organization of American States dated 2 February 1940; and/or the *Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad*, of the Organization of American States dated 30 January 1975, then the requirements and provisions of such international treaties must also be observed. Finally, it is not necessary to formalise such powers of attorney before a Mexican notary public.

Further Filing Requirements

Documents must be filed in Spanish; if in foreign language they may be filed if accompanied with an expert translation to Spanish of their relevant sections.

Finally, it is worth noting that since the end of January 2020, the merger review process with COFECE is now exclusively made through an e-filing system (the "SITEC"), so every document is submitted electronically and the original power of attorney is shown to the case team in a physical meeting held between them and the parties' competition counsels.

3.6 Penalties/Consequences of Incomplete Notification

In the event that the parties do not at least submit the information and documentation specified in Article 89 of the FLEC, COFECE or the IFT will serve a Request for Basic Information, requiring the parties to submit the missing information.

If the order is not duly addressed, the notification will be dismissed and deemed as not submitted, and the parties would require to start the notification process all over again.

According to public information, during 2019, the COFECE dismissed ten filings, which included certain filings for missing information and other reasons, such as the COFECE not being the competent authority.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The party that submits false information or false claims could be fined for an amount up to the equivalent to 175,000 UMAs, which for the year 2020 would be circa MXP15.2 million (approximately USD633,000), and which does not exclude possible criminal prosecution for perjury. These penalties are not public, so there is no way of knowing if they have been applied in practice.

3.8 Review Process

There are no formal review phases as in other jurisdictions. The equivalent to a Phase I review period begins with the initial filing, but the authority's term to adopt a decision only starts once COFECE or the IFT have a "complete file". This happens when all the requests for information issued and served by the reviewing authority to the filing parties are duly answered.

In general, it may take six weeks to three months for the parties to complete the file, as this involves answering market and competition related information requests. The standard review period is 60 business days from the date a file is deemed "complete". In 2019, transactions with no substantive competition issues were cleared in an average of 17.5 business days (according to the COFECE's most recent published metrics; there is no information regarding the IFT).

When remedies are offered by the filing parties, the review clock stops and resets, and the authority has 60 business days to resolve. If an amendment to the remedies is submitted, the clock stops and resets again. Generally, the reviewing authority never spends such additional period to adopt a decision, and they work to discuss and issue it close to the restarted term.

Complex Transactions

In complex transactions, the equivalent to a Phase II review occurs when the reviewing authority may extend for up to 40 business days the standard 15 business day term it has to issue a substantive Request for Additional Information (from the date the parties answered the Request for Basic Information). These Requests for Additional Information usually involve multiple rounds of extension requests by the parties to respond and follow-up clarification requests from the authority that prolong completing the file until the authority is satisfied with the responses.

Once the file is complete in such a complex case, the authority has the right to extend its standard 60 business day review term for an additional 40 business days. Complex cases may take up to 100 business days (from the date the file is complete) for a decision to be adopted (which may be well over a calendar year from the initial filing).

3.9 Pre-notification Discussions with Authorities

There is no official pre-notification discussion with the Mexican antitrust authorities. However, in practice, Mexican antitrust counsels usually touch base with the COFECE or IFT on no-name discussions of specific items of interest of a filing or transaction structure.

3.10 Requests for Information During Review Process

Both COFECE and the IFT systematically issue request for “basic” and “additional” information. They can range from simple to extremely burdensome, and vary both depending on the specifics of each case, and also on the depth and completeness of:

- the information and documentation provided by the parties in the initial filing;
- the previous knowledge and understanding of the reviewing authority of the relevant markets involved and the IFT; and
- if the reviewing authority has any competition concerns on the transaction.

3.11 Accelerated Procedure

There is a fast track review procedure available to the parties of a transaction, which should result in transactions being resolved 15 business days after filing. However, it is seldom used because in practise it imposes a high burden of proof on the parties and also additional review obligations on the reviewing authority.

Accelerated Procedure

A transaction opting for this accelerated procedure shall be one in which it is “evident” that it has no purpose or effect to diminish, hinder or impede free competition and access to the

markets, which, usually, are those that meet at least one of the following requirements:

- the acquiring party shall be entering the market for the first time, in consequence the market should not be modified (no overlaps nor vertical effects);
- a party that has no control over the target entity and only increases its participation in such entity without acquiring control or additional rights to influence its management; and/or
- the acquiring party already has control over an entity and only increases its participation.

As indicated, the filing parties have a high burden of proof, as they must file a complete set of documents and information that clearly and irrefutable evidence that it is “evident” that the transaction has no adverse competitive effects, and meets any of the above scenarios. If any document is missing or the reviewing authority wants additional information or has any questions on the transaction, then it refuses to process the transaction under the accelerated procedure and transfers it to the standard review process.

In practice, since a transaction with no competition concerns may be resolved “quickly” under the standard review process without imposing such a high standard on the filing parties, it is common to follow this route even if a transaction may qualify for the accelerated process, since preparing an accelerated filing will usually be more burdensome than preparing a standard filing.

4. Substance of the Review

4.1 Substantive Test

COFECE and the IFT have a mandate to block and investigate “unlawful concentrations”, which are transactions that have as purpose or effect diminishing, damaging or impeding competition and free access on the same, similar or substantially related goods and services.

The analysis performed by the COFECE and the IFT to determine whether a transaction in an unlawful concentration and, therefore, whether it will be authorised, conditionally approved or blocked, has to consider the following:

- the relevant market affected by the transaction;
- the agents which participate on the market and the degree of concentration;
- the possible effects of the transaction over other agents;
- if the parties of the transaction have participation in other agents that participate in the relevant market; and

- the information submitted by the parties to demonstrate that the transaction generates greater efficiency.

When reviewing or investigating a concentration, the following are example of situations that reviewing authority will take as an indication on the existence of an unlawful concentration:

- that the transaction confers market power to the acquirer or resulting entity, or increases or may increase such power if already existing;
- that the transaction establishes or will allow the establishment of barriers to entry to the relevant markets, related markets or essential facilities, or to displace other economic agents; and
- that the transaction will facilitate the parties to carry out prohibited cartel conducts (absolute monopolistic practises) or abuse of dominance (relative monopolistic practises).

4.2 Markets Affected by a Transaction

All markets where the target entity(ies) are active, are subject to be analysed and reviewed by COFECE and the IFT, with focus on the overlap of the parties taking main focus, and vertical and conglomerate effects also analysed depending on the specifics of each case.

There is no de minimis level of market share participation under which a relevant market may be in a safe harbour from review in a notification filing.

By interpreting a section of the FLEC, the reviewing authorities require the filing parties to disclose ownership and control of, including interlocking directorates in, competitors and also substantially related products and services, not only by the filing parties and their respective corporate groups, but also of their owners and controlling persons, up to the level where you either find a controlling individual or a diluted ownership. The scope of this interpretation and the requirements to fulfil the expectations of the reviewing authority is usually matter of great discussion between the parties, their competition counsels and the authorities.

4.3 Reliance on Case Law

Under Mexican competition law, there is no system of binding local precedent. Therefore, while the authorities do look at past decisions and market definitions when defining markets, they also consider if there is a need to take a different approach, in any specific case, due to varying circumstances or facts.

If the authority has no precedent in a specific market, they do look at the decisions of other jurisdictions for guidance as long as there are no reasons to have a different market definition (eg, regulatory requirements that could limit a market to a national

geographic definition, when it may be international in the rest of the world).

In practice, the main jurisdictions that the reviewing authorities tend to look at are the United States of America and the European Commission.

4.4 Competition Concerns

Both the COFECE and the IFT will investigate all the anticompetitive effects that may arise from the specific transaction, including, unilateral effects, co-ordinated effects, conglomerate or portfolio effects, vertical concerns and elimination of potential competition.

They also consider if:

- as a result of the transaction a party would acquire substantial market power or could increase said substantial market power, and hence the economic competition may be hindered, diminished, harmed or impeded;
- the transaction has or may have the purpose or effect of imposing barriers to entry; or
- its purpose or effect is to substantially facilitate the concentrating parties to incur in monopolistic practices.

4.5 Economic Efficiencies

The COFECE and IFT will also consider the economic efficiencies if the parties are able during the notification process to demonstrate that the adverse competition effects are outweighed by the efficiency gains derived from the transaction and there is a positive consumer welfare effect.

In this case, for the reviewing authority to consider efficiency gains, the filing parties must prove that they are directly derived from the transaction, that the adverse effects are continually outweighed by the efficiency gains, and that such gains will result in demonstrable consumer welfare.

4.6 Non-competition Issues

The COFECE

The COFECE's mandate in the review of concentrations is exclusively competition-related. Other non-competition issues such as industrial policy, national security, foreign investment, employment or other public interest issues are not part of such mandate. If in the course of its investigations other issues such as barriers to entry and essential facilities are identified, it may start a separate process to address potential market structure problems, which would result in recommendations to the Executive Government (federal or local) to address such market structure problems under the applicable regulatory statutes.

The IFT

In the IFT's case, its mandate is both of competition and industrial relating to the telecoms and broadcasting sectors, as it has to promote the competition and efficient development of such sectors as it also regulates and supervises the use of the radio-electrical and satellite spectres and telecomm networks.

Other Authorities

There are separate authorities for non-competition issues, such as foreign investments (the National Commission of Foreign Investments, under the Ministry of Economy), and consumer protection (the Consumer Protection Federal Bureau); however, these authorities and their non-competition issues have no involvement whatsoever in the adoption of a decision relating to merger review.

4.7 Special Consideration for Joint Ventures

There are no special considerations or immunities to joint ventures for notification purposes or the application of the FLEC. All types of joint ventures, regardless of whether they are full-function or not, may be subject to merger review if any of the Notification Thresholds are met, for example by the combination of assets, and if no threshold is met, they could also be investigated as potentially unlawful concentrations.

A joint venture or collaboration agreement would be notified if it includes elements that are analogous to a merger, such as the accumulation or assets or shares, the legal or de facto transfer of control of the assets contributed to the joint venture, the possibility of influence or interfering in the other parties' decisions, the establishment of a long term relationship that would go over the usual commercial standards, etc.

In such cases, the reviewing authority will also look at the joint venture and its governing documents and agreements for potential areas of coordination between joint venture parents that are competitors or vertically related.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

COFECE and/or the IFT may authorise, conditionally approve or prohibit the closing of the notified transaction. In the case of non-notifiable transactions and transactions that failed to file a notification when required to do so, COFECE and the IFT may also order the unwinding of the transaction if it is found to be an unlawful concentration. If competition concerns arise on a notified transaction, such situation is made know to the parties and they have the option to offer remedies to address such concerns.

If the remedies address the concerns, then COFECE and the OFT would impose conditions on the parties based on the remedy offer, in the understanding that they may modify the remedy offer as they consider appropriate. If the remedies offered by the parties are not sufficient to address the competition concerns, the COFECE and the IFT would prohibit the parties from closing the transaction.

Decisions that impose conditions and prohibit transactions from closing usually include details on the economic and competition law analyses carried out by the authorities on the contents of the case file, which may include not only the information and document submitted by the parties, but also the investigation of the authority and the requests of information made to third parties such as customers, suppliers and competitors (who are not given access to the file, nor are considered part of the merger review procedure). The decision would set forth the theory of harm followed by the authority and analyse all the elements required to conclude that the transaction, as presented by the parties, would result in an unlawful concentration. In the case of conditioned clearances, the analysis would also include a section on how the remedies offered, and as modified by the authority when deemed appropriate, address such competition concerns.

5.2 Parties' Ability to Negotiate Remedies

If the reviewing authority has concerns that the adverse competitive effects of a transaction result in it potentially being considered as an unlawful concentration that would be blocked by them, they are bound under the FLEC to inform the parties of such concerns, which allows the parties to offer remedies tailored to address such concerns.

In any case, the remedy proposal is discussed with the authority and is ultimately analysed and approved, or modified, by the Board of Commissioners of the reviewing authority.

5.3 Legal Standard

The remedies proposal made by the filing parties must be directly related to the correction of the adverse competition effects identified by the authority and they must be proportional to the intended correction.

5.4 Typical Remedies

The most favoured remedies by the COFECE and the IFT are structural remedies, and they tend to shy away of behavioural remedies due to the difficulty of their follow-up.

Behavioural remedies, such as prohibiting interlocking directorates or requiring a party to modify the terms and conditions of existing agreements, have faced difficulties in their enforcement.

Any remedies imposed by the COFECE and the IFT must be directly related to the correction of the adverse competition effects identified by the authority and they must be proportional to the intended correction; otherwise, the parties may contest them before the Mexican courts.

5.5 Negotiating Remedies with Authorities

The parties to a transaction that raises competition concerns are able to include a remedy proposal to the reviewing authority right in their initial filing, and offer one before the Board of Commissioners' of the COFECE or the IFT convenes to vote on the transaction.

As indicated in **5.1 Authorities' Ability to Prohibit or Interfere with Transactions** and **5.2 Parties' Ability to Negotiate Remedies**, if competition concerns are identified by COFECE or the IFT, they shall inform this situation to the parties in a meeting convened by the Technical Secretary of the reviewing authority, at least ten business days before the transaction is listed for its discussion and by the corresponding Board of Commissioners.

The parties are served with an official communication containing the concerns identified by COFECE or the IFT, the parties then have until one business day after the transaction is listed for discussion to submit their remedies proposal. In practise, remedies are negotiated with the case team and the Technical Secretary and remedy proposals usually tend to reflect the results of these negotiations.

Multi-jurisdictional Transactions

In multi-jurisdictional transactions potentially involving remedies in other jurisdictions, the COFECE analyses if the remedies offered abroad address the competition concerns found in Mexico and generally accepts to rely on them if they are already binding on the parties from decisions adopted by the EC and the US antitrust authorities. If divestments and other remedies are needed in Mexico, they then impose their own set of conditions to ensure that the adverse competition effects found in Mexico are fully addressed and corrected, and proper follow-up on their compliance may be carried out in Mexico.

Once the remedies are submitted or amended, the review clock to analyse the transaction is stopped and restarts, with the COFECE or the IFT having a fresh set of 60 business days to adopt their decision (although they rarely use the whole period to do so). Because of limits set forth in the FLEC, the parties are able to amend their remedy proposal only once, thus once a remedy proposal is submitted, negotiation between the authority and the parties takes place, which usually ends in an agreed amendment being submitted.

When a case file is presented for review and discussion to the Boards of Commissioners of COFECE and the IFT, it includes a recommendation from the Technical Secretary and the case team on the transaction and the offered remedies. It is then up to the Board to accept the remedy proposal and convert them into the set of conditions to be imposed in the decision. In such determination, the Board may amend the remedy proposal and the recommendation from the case team and Technical Secretary and impose no remedies, modify some material or non-material element, or even impose additional conditions to the once offered by the parties.

Likewise, if the Board deems the remedies insufficient, they can decide to prohibit and block the transaction.

Conditioning Transactions

When conditioning transactions, the reviewing authority effectively blocks them and condition a reversal of such blockage to the unconditional acceptance of the conditions imposed in the conditional clearance decision.

This unconditional acceptance does not negate the parties' right to file an amparo claim against the reviewing authority for breach of their constitutional rights.

5.6 Conditions and Timing for Divestitures

The standard approach regarding condition and timing of remedies depends entirely on a case-by-case basis, but ex-ante remedies are preferred to ex-post remedies.

Non-compliance of the conditions imposed through a resolution may lead to a fine equivalent up to ten percent of the parties' income, and the COFECE and the IFT may also be entitled to issue an order for divestiture to unwind the transaction in case an ex-post remedy was not complied with.

5.7 Issuance of Decisions

The process of notification ends with the issuance of decision by the COFECE or the IFT, which is served to the parties after the Board of Commissioners Meeting in which the resolution was adopted. Likewise, in case that at the end of the review period there is no decision issued, it is deemed that the transaction is approved (*afirmativa ficta*).

All resolutions are served to the parties and non-confidential versions are publicly available on the COFECE's and the IFT's websites.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The COFECE and the IFT's analysis of transactions is based only on their competition effects in Mexico.

Foreign-to-foreign transactions conditioned abroad have been unconditionally cleared in Mexico due to absence of anticompetitive effects in Mexico and, conversely, foreign-to-foreign transactions cleared elsewhere have been conditioned or blocked in Mexico due to adverse competition effects being found in Mexico.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Ancillary restraints, specifically non-compete restrictions, are analysed carefully by the COFECE and the IFT in the context of the type of transaction and the relevant markets involved. Non-solicitation agreements are usually not reviewed by the COFECE; however, they have started investigations on the subject on non-merger cases, which may indicate an interest to review it in the future in merger cases.

Ancillary restrains, by themselves, are not required to be notified to the COFECE or the IFT outside the context of a notifiable transaction.

7. Third-Party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-Party Rights

Third parties have no standing in a merger review process.

Any third party may file a complaint and evidence against a merger, and the reviewing authority will include such information in the case file and decide by its own the weight it will give such complaints.

Third parties that are served requests for information under a merger review process are bound to answer them, but they are also not granted standing in the process.

7.2 Contacting Third Parties

Reviewing authorities usually contact clients and competitors when reviewing transactions involving relevant overlaps or vertical integrations through the issuance of written requests of information.

Market testing of remedies is possible but not commonly used by the reviewing authorities in Mexico.

7.3 Confidentiality

The notification process content is confidential, only authorised persons may access the notification files, commercial information and business secrets shall be kept confidential even after the decision is served and made public.

The identity of the parties to a transaction is usually made public in the authorities' websites; under certain circumstances these abstracts may be kept confidential as well.

The COFECE and the IFT publish non-confidential versions of their decisions in their websites after they have been served to the parties. In the case of relevant transactions involving conditions or that are blocked, the authorities usually issue press releases on the subject.

7.4 Co-operation with Other Jurisdictions

The COFECE and the IFT often co-operate with other agencies around the globe for all kinds of purposes. The most contacted agencies are the EC, the DOJ and the FTC, with which they have a relationship not only in the context of merger review, but on competition policy matters.

In order to contact other agencies for the purpose of exchanging information of a specific transaction, they request waivers from the parties to submit for each jurisdiction they desire to contact.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

As indicated in **3.1 Deadlines for Notification**, there is no appeal procedure in the FLEC for the decisions issued by COFECE or the IFT.

However, parties may contest the COFECE and IFT decisions through "amparo" proceedings that focus on the protection of the parties' constitutional rights, which include due process.

8.2 Typical Timeline for Appeals

The constitutional term for the amparo proceeding is of 15 business days counted since the serving of any governmental resolution. There have been many successful appeals related to imposition and amount of fines.

A recent precedent of successful appeal of a remedy occurred in the BioPappel-Scribe transaction, where a remedy was unconditionally accepted by BioPappel, waiving its right to request the start of anti-dumping procedures was deemed unconstitutional as it was not directly related to the transaction itself.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties can appeal a clearance decision, however, this has never been done successfully. In the context of the Disney-Fox merger, subsidiaries of the largest Mexican television network, Televisa, have contested such transaction and public information on such cases indicate the amparo procedures are still ongoing.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

There are no recent significant changes to the FLEC or its Regulatory Provisions, nor significant proposal to amend them, besides the now mandatory pre-merger electronic filing process. Transitory provisions related to the COVID-19 health emergency were adopted by the COFECE allowing for electronic service of process in specific circumstances and are discussed in **9.4 COVID-19**.

The COFECE recently adopted regulations to protect legal privilege of information that is obtained during its proceedings. While they are mostly focused on information gathered during dawn raids, the protections could also apply when privileged documents and information may be requested by the COFECE in a merger review process.

There is also a recent precedent in connection with the transaction of Uber/Cornershop; this transaction raised a debate between the COFECE and the IFT, basically, both authorities claimed to be competent to review this transaction. Finally, the competent courts in Mexico issued a decision in which they indicated that, although businesses like Uber and Cornershop use telecommunications as an essential tool for its function, they cannot be labelled as telecommunications closely related businesses, such as: paid television or the provision of internet services.

9.2 Recent Enforcement Record

There have been several cases in which the COFECE fined economic agents for failing to file a notification of concentration. During the past five years, the COFECE has imposed the following fines:

- On 2 November 2015, the COFECE imposed sanctions of approximately USD1.3 million to Alsea, S.A.B. de C.V. (Alsea) and approximately USD157,112 to Grupo Axo, S.A.P.I. de C.V. (Axo).
- On 14 May 2017, the COFECE fined Panasonic Corporation, Panasonic Europe, Ficosa Inversión and Pindro Holding for the amount of approximately USD748,155 each,

and Pertacol was fined for the amount of approximately USD9,641.

- On mid-2017, Santander acquired Banco Popular Español and did not inform the COFECE in time about their purchase agreement, as a result the COFECE imposed fines to Santander and Banco Popular Español for the total amount of approximately USD39,773.
- On 1 December 2017, Bankaool assigned to BX+ its existing and/or expired credit rights. For the amounts involved, this transaction had to be notified to before the COFECE prior to its execution. However, it was not until 7 September 2018 that these operators notified the transaction to this Commission. As a result, the COFECE decided to impose a fine of approximately USD39,773 on each of the above-mentioned financial institutions.
- On 6 March 2019, the COFECE fined Nestlé México (Nestlé), and other affiliates for the total amount of approximately USD417,416, the transaction between Nestlé, and Innovación, the latter a subsidiary of Lala Group, took place between July and August 2013 and exceeded the thresholds.
- On 21 April 2020, the COFECE approved the concentration between SoftBank Group Corp (SoftBank), SB WW Holdings (Cayman) Limited (SB WW) and The We Company (WW), the Board fined the companies for failing to notify the concentration ex ante, for the total amount of approximately USD141,000.

The most recent conditions imposed were the following:

27 June 2017

COFECE conditionally approved the concentration between The Dow Chemical Company (Dow) and DuPont de Nemours and Company (DuPont). Among said conditions are the divestiture of the acid copolymers and ionomers business as well as the foliar insect control against chewing insects for diverse crops, property of Dow and DuPont, respectively. The COFECE determined that if had the transaction taken place as it was notified, the process of competition and free market access would have been put at risk, so the COFECE imposed certain divestments and reporting obligations to the parties, we were directly involved in this transaction.

4 June 2018

The COFECE conditioned the concentration between Monsanto and Bayer to the divestment of the genetically modified cotton seed business, the vegetable seed business in its totality and certain non-selective herbicides that belong to Bayer. As the COFECE determined that the transaction would result in Bayer becoming the sole supplier of genetically modified cotton seeds in Mexico and would gain significant market shares in the market for multiple crops, such as onion, cucumber, tomato, watermelon, melon and lettuce as well as non-selective herbicides.

9.3 Current Competition Concerns

Authorities are focusing on monitoring Mexican markets and perform the necessary actions to be aware of any concentrations that may be unlawful and also those failed to file in time.

In addition, revisions to the COFECE's Merger Guidelines and technical guidelines on the assessment of market concentration are expected to take place this year according to their 2020 annual work plan.

Mergers are now exclusively filed through the SITEC e-filing system.

9.4 COVID-19

On March 27th, the COFECE published its position related to the COVID-19 pandemic in terms of the application of the competition law in Mexico, indicating that:

- they would not pursue agreements between competitors that aim to maintain or increase the supply in order to avoid shortage of goods and as long as they do not have as an object to displace competitors;
- reminded the public that any price increase must be individual and not a result of a concerted practice or by recommendation of a trade association;
- where indiscriminate price increases are identified, they will investigate the existence of cartels or barriers to entry; and
- that the COFECE will expedite its analysis in mergers that arise to make synergies and add production capacities to satisfy the needs arising from the crisis.

The COFECE and the IFT suspended certain terms and deadlines from March 23rd and until 12 (COFECE) and 30 (IFT) June 2020.

It is important to note that in the COFECE's case, merger review terms and deadlines were not suspended and such procedures will continue to be handled electronically. However, the terms and deadlines for the procedures related to compliance of conditions were also suspended.

In the IFT's case, the merger review terms were initially suspended, later on mid-May, the IFT, issued an official communication informing economic agents that, for as long as the interim COVID-19 measures are in place, they could restart the clock of their review of their merger transactions by requesting so, and also allowed the review of new notifications electronically using email as the communication means for the submission of documents by the parties and service of process of requests and notices by the authorities, which is relevant given that the IFT currently has no formal electronic filing system; it is unknown if they will continue to offer this option once the pandemic ends.

MEXICO LAW AND PRACTICE

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Creel Abogados, SC was established in 1950 in Mexico City. The firm has ten partners, nine associates and seven legal trainees who specialise in, among others, corporate and commercial, financial, tax, real estate, labour and employment, antitrust and competition, mining and litigation and dispute resolution. Creel Abogados has collaborated with numerous

leading international law firms, enabling the provision of an international network for clients. Recent clients include Parker-Hannifin Corporation, Exterran Corporation, Whirlpool Corporation, The Dow Chemical Company, Danone, Dentsu Aegis, Invekra, Shandong Ruyi, among others.

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