The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Mexico: Merger control

This country-specific Q&A provides an overview of the legal framework and key issues surrounding merger control law in **Mexico**.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control

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1. Overview

Mexican merger control regimen was recently changed as a result of recent amendments to article 28 of the Mexican Constitution published on 11 June 2013, which, among other many changes, created two new constitutionally autonomous enforcement agencies and provoked the enactment of a new competition act.

Currently, merger control in Mexico is mainly governed by recently enacted July 2014 the Federal Economic Competition Law (FECL). However, merger control legislation has been in effect since 1993.

In addition, the following statutes and regulations are also applicable in concordance with the FECL:

1. The Federal Telecommunications and Broadcasting Law (Telecom Law);
2. Regulatory Provisions of the FECL and the Regulatory Dispositions to the Telecom Law;
3. Federal Telecommunications and Broadcasting Law (Telecom Law);
4. Organic Statutes of both competition agencies;
5. Federal Civil Proceedings Code; and additionally
6. non-binding merger control guidelines (with certain recent amendments pending of approval).

The competition agencies in charge of enforcing current merger control policy, which are constitutionally autonomous bodies, are (i) the Federal Economic Competition Commission (generally known as Cofece) and the (ii) the Federal Telecommunications Institute (commonly known as the IFT). The IFT is the agency in charge of merger control exclusively in the telecom and broadcasting (including TV) arena and Cofece manages the rest of the industries, markets and sectors.

These new competition enforcers took office on 10 September 2013 and are composed of seven commissioners each, who need to be approved by the Senate and the Executive branch.

Cofece and the IFT have federal jurisdiction over all potential cases and merger control is exclusively limited to their authority. Consequently, although specific sectors such as financial and insurance might require other types of regulatory approvals and certain types of transactions might require authorization from foreign investment authorities, specific merger control review is exclusively under the jurisdiction of Cofece and the IFT.

As consequence of the aforementioned amendments, Mexican merger control system aimed to adapt world-wide best practices by reinforcing local experience. Therefore, local merger control regimen is mandatory when specific thresholds are reached with very limited exception cases, clearance is a compulsory requirement for closing and filing fees have been reinstated since 2016.

Similarly, merger control procedure in Mexico has acquired certain level of complexity as both authorities have increased scrutiny and analysis for local or transnational transactions and communication with other competition agencies around the world (especially in the US) is now a common standard practice as it will be addressed further on.

2. Is mandatory notification compulsory or voluntary?

Merger control notifications can either be voluntary or compulsory. Voluntary notifications are the exception, so the core of the merger control regimen in Mexico relies on certain statutory thresholds which has made it mandatory if any of these thresholds are reached.

The FECL contemplates specific thresholds, which on practice, can be interpreted or analysed based on several factors such as calculations of turnover, assets, and exchange rates, among many others as explained below.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Mexico became a suspensory jurisdiction as a result of the new FECL. Therefore, transactions that reach any of the statutory thresholds are legally forbidden to close without previously obtaining clearance. Actions from the parties without clearance shall have no legal effects until approval, so potential carve outs, derogations or other strategies that could imply the combination or de facto execution of the transaction could potentially constitute a violation of the FECL.

4. What are the conditions of the test for control?

The FLEC defines “concentrations” very broadly by including reference to any merger, acquisition of control or any other act whereby corporations, associations, shares, equity parts, trusts or assets in general are joined by and among competitors, suppliers, clients or any other economic agents. Therefore, this definition includes joint ventures and acquisition of non-controlling interests, or similar commercial arrangements. Yet, acquisition of non-controlling shareholder may be exempted from filing obligations in

very specific cases.

Likewise, when performing a very strict interpretation of the FECL, other specific cases such as the licensing of intellectual property rights or long-term supply agreements where one party acquires control over another could also follow under the scope of the FECL. Yet, these are very complex cases which should be analysed case by case.

The FECL also provides a narrow closed-list with exception cases that even if statutory thresholds are reached, filing is exempted. The cases are the following:

1. Corporate reorganisations, where the economic agents belong to the same controlled economic group of interest and no third party participates in the concentrations;
2. In the event the holder of shares or equity units or equity parts increases its relative participation in the capital stock of a company already controlled by such holder since incorporation or since approved by the competition authority;
3. When creating administration or guarantee trusts or any other where the contribution of assets or shares has no purpose or consequence of transferring such assets or shares to a different company. However, the execution of a guarantee trust must be notified if the filing thresholds are met;
4. Acts on shares performed abroad, related with non-residents in Mexico for tax purposes, as long as the companies involved do not acquire the control of Mexican companies, nor accumulate in Mexico shares, equity or assets in general, in addition to those already possessed, directly or indirectly, before the transaction;
5. When the acquirer is a variable income investment firm and the transaction has, as its purpose, the acquisition of shares or other instruments with resources from the placement with the public of shares representing the capital stock of the investment firm, except when, as a result of the operations of the investment firm, it may have a significant influence in the decisions of the concentrated economic agent;
6. In the acquisition of shares, equity or other documents representing (directly or indirectly) the capital stock of companies listed on a stock exchange in Mexico or abroad, when the acts or successive acts do not allow the purchaser to hold 10 per cent or more of such shares, equity or other instruments, and, in addition, the purchaser has no authority to:

- Appoint or revoke members of the board of directors, or managers of the issuer;
- Impose, directly or indirectly, decisions in stockholders meetings or similar bodies;
- Maintain the holding of rights allowing it to, directly or indirectly, exercise the vote of 10 per cent or more of the company in question; or
- Directly or indirectly instruct or influence the management, operation, strategy or the main policies of a company, whether through ownership, through contract or in any other manner; and

7. When the acquisition of shares or equity or participation in trusts is performed by one or more investment funds with speculative purposes only, and has no other investments in companies or assets that participate or are employed in the same relevant market of the concentrated agent.

In addition to the foregoing and only for the telecom and broadcasting sectors, the Telecom Law also provides that as long as there is a preponderant agent in such sectors, concentrations with the following characteristics shall not require the prior authorisation from the IFT:

1. They generate a sectorial reduction of the Dominance index, provided the HHI does not increase by more than 200 points;
2. It results in an economic agent having a sectorial market shares lower than 20 per cent;
3. A preponderant economic agent in the sector does not participate in the concentration; and
4. The effects of the transaction do not reduce, diminish or impede the free competition processes in the corresponding sector.

The IFT has declared one preponderant agent in the telecommunications sector, and one preponderant agent in the radio/TV sector.

5. What are the conditions on minority interest in your

jurisdiction?

As stated before, all concentrations or transactions that reach statutory thresholds require mandatory filing. However, there are specific cases where even if statutory thresholds are reached, mandatory filing could be exempted. Therefore, acquisition of minority interests become of no relevance if statutory thresholds are surpassed and the specific transaction does not falls into one of the afore-mentioned exception cases.

For this specific scenario, it is important to highlight that the change of control falls under the scope of what the FECL considers to be a concentration. Yet, considering the wide definition provided in the local competition statute and that a “concentration” includes any acquisition of assets or shares even when not granting control, the Mexican Supreme Court of Justice rendered a decision in the past addressing a the notion of control upon analysing the term “economic agent” and “economic group of companies” for purposes of competition law, considering both legal and de facto control.

In this case, the Supreme Court (head of the Mexican judiciary) made reference to different circumstances to define whether or not a company or individual has or exercises a decisive influence over others. The Supreme Court recognized that decisive influence can be found when a company or individual acquires the majority of the shares of a company (de iure), or if it has the authority to manage a company or to appoint the majority of the members of the board, among others (de facto).

The precedent rendered by the Supreme Court serves as guidance as to under which scenarios, certain transactions should be analysed in regard to merger control regulations.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

Applicable statutory thresholds are provided in the FECL, which contemplates three specific scenarios as follows:

1. Those transactions involving an act or a series of acts, regardless of the place of execution, amounting in Mexico the equivalent of 18 million times the Units of Measure or more (equivalent to approx. MEX $1.3 billion pesos / US $60 million

dollars);

2. Transactions involving an act or a series of acts with an accumulation of at least 35 per cent of the assets or capital stock of an economic agent, whose assets in Mexico or annual sales originated in Mexico involve more than the equivalent to 18 million times the Units of Measure (equivalent to approx. MEX $1.3 billion pesos / US $60 million dollars); or
3. Transactions involving an act or series of acts with an accumulation in Mexico of assets or capital stock higher than 8.4 million times the Units of Measure (equivalent to approx. MEX $600 million pesos / US $29 million dollars), and the transaction involves the participation of two or more economic agents with assets in Mexico or annual sales originated in Mexico, jointly or separately, of 48 million times the Units of Measure (equivalent to approx. MEX $3.6 billion pesos / US $168 million dollars).

The first two thresholds are referred to the target's assets located in Mexico, where target's companies with direct operation in Mexico (mainly Mexican subsidiaries or branches) or target's sales originated in Mexico. The third threshold considers a combination of sales or assets of the parties in Mexico, and an additional accumulation of assets or capital stock in Mexico of the target company only.

In addition, there are no filing obligations if the target or seller company has no presence (assets or sales or both) in (or into) Mexico. However, there is no de minimis doctrine, so in case that any of the thresholds are met, then the transaction must be filed, even if one of the parties has insignificant presence or sales in (or into) the country. Likewise, one or both parties will be taken into account and thresholds can be satisfied by one or both parties.

Finally, considering the wide range of volatility that the Mexican peso has affronted over the last couple of months, statutory thresholds for transactions agreed on foreign currencies have vary daily.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

Calculation of statutory thresholds is based on Units of Measure (Unidad de Medida y

Actualización), which, for 2017, is equivalent to MEX $75.49 pesos. The Units of Measure replaced calculations which in the past were based on the minimum wage for the Federal District and are aimed to be an economic reference applicable in all Mexican territory. Also, Units of Measure are calculated on year by year basis and will be a fix reference through the whole applicable year.

In addition, according with the Regulatory Dispositions of the FECL, for the calculation of the afore-mentioned thresholds, parties should also consider the higher value between the assets specified in the general balance and the commercial value of the assets.

8. **Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

The Regulatory Dispositions of the FECL provide that transactions which are agreed on foreign currency such US dollars, shall be calculated upon the lower exchange rate published by the Bank of Mexico (Banco de México) over a 5 previous day period upon the date of filing.

Likewise, transactions agreed on other foreign currencies that are not US dollars, the Regulatory Dispositions of the FECL provide that any exchange rate indicator that reflects the value of the national currency (Mexican pesos) with respect to the foreign currency can be applied.

9. **Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?**

As explained before, the FECL defines “concentrations” very broadly. Such definition includes, without exemptions, joint ventures and acquisition of non-controlling interests, or similar commercial arrangements. Therefore, merger control over joint ventures does not vary or is treated differently and thresholds are the same.

Likewise, merger control review in Mexico has become very complex so joint venture transactions will not just be analysed in regard of the specific transaction but rather the enforcement agencies will also review the corporate groups to which the parties belong

(all the way to ultimate parent companies) and the group's activities and business. Therefore, in cases where parent companies trigger statutory thresholds and the joint venture transaction will have a direct or indirect impact in Mexican markets the obligation to notify the transaction is undisputable.

In addition, failing to notify a JV operation when statutory thresholds are reached could constitute a violation of the FECL as the enforcement agencies could consider it either as an unlawful concentration or potential collusive behaviour depending on the merits of each case specially by considering the precedent rendered by the Supreme Court regarding Groups of Economic Interest. Similarly, for those cases where there is related to an existing JV, parties might be exempted of merger control if the particular case falls within one of the exemption cases described before but a deep assessment would be required for such matter.

10. In relation to "foreign-to-foreign" mergers, do the jurisdictional thresholds vary?

For transactions carried out abroad, the filing must be made before the concentration has legal or material effects in Mexico if any. This means that any transaction that has either a direct or an indirect impact in Mexico will require filing only if, once again, the transaction reached statuary thresholds and is not exempted by the FECL.

Therefore, if the transaction implies, for example, the indirect acquisition of assets located in Mexico or will have an effect on a Mexican market in regard of sales of a certain product or maybe indirect acquisition is deemed to exist if, for instance, a company abroad is acquired and the acquired company has subsidiaries in Mexico and any thresholds in Mexico are reached, then the parties will have to submit to local merger control. However, if the transaction does not have any impact in regard to Mexico, even if statutory conditions are met, parties do not require a filing in Mexico.

11. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Mexico is a jurisdiction where transactions that do not meet with statutory requirements for merger control, can be notified on a voluntary basis. However, when making a

voluntary notification, scrutiny from the competition agencies could be expected to be lighter considering that the transaction will not have a substantial impact, but the procedure and applicable rules will remain the same.

12. Additional information: Jurisdictional Test

In 2015, Cofece released non-binding guidelines for merger control review in Mexico. The Guidelines published by Cofece aim to provide further explanations for analysing specific cases, as well as detailed advice over substantive and procedural rules applicable for these kinds of procedures. Cofece's guidelines are similar to those published by leading competition enforcers such as the US antitrust authorities (DOJ Antitrust Division and the FTC) and the European Commission.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?

Applicable substantive test on Mexican merger control review has been improved considerably on the last years. Mexican enforcement agencies have been trying to adopt best international practices and experience from major antitrust jurisdictions.

Nowadays, competition agencies focus on several aspects regarding the impact the transaction might have over the competition process including both, unilateral and coordinated effects, including horizontal and vertical overlaps and portfolio effects.

For such purposes, the authority first focuses on combined market shares and whether the acquirer, as a result of the transaction, may result in market power or increase such power with which it may diminish or damage the competition process. Likewise, competition agencies also analyse whether the transaction may have an exclusionary purpose or effect, establish barriers to entry or to the competition, impede access to related markets or to essential facilities. To this end, the authority also analyses the relevant and related markets, the market power other players might have and the level of concentration.

In addition, the authority would also analyse whether the transaction may have as its

purpose or effect to substantially facilitate the commission of a monopolistic practice (i.e. horizontal cartels or vertical restraints) and whether there is the need to impose certain conditions that will contrast the power in case the transaction was approved.

The authority´s review also includes other aspects such as potential efficiencies and rationale behind the transaction, potential entrants to the market or other conditions that could be considered as pro-competitive. Likewise, in regard of cross border transactions, Mexican competition authorities will also relay on the review of other relevant jurisdictions and will aim for consistency if the merits if the case permits it.

14. Are non-competitive factors relevant?

Not necessarily given that the authority's review and task is to focus on the impact certain transaction might have over Mexican markets and consumers from a competition perspective. However, specific circumstances of a particular case like for example a failing firm defence could somehow be taken into consideration but it will not be the authority's first interest.

15. Are there different tests that apply to particular sectors?

Substantive test applicable on merger review procedures will not vary depending on the sector but will vary depending on the complexity of the transaction. However, it is standard practice that local enforcement agencies could rely on specific sector regulators to have a better understanding of the market, impact of the transaction and technical information.

16. Are ancillary restraints covered by the authority's clearance decision?

Ancillary restraints such as non-compete or non-competition covenants or agreements have been subject to heavy scrutiny by the Mexican competition authorities. Current criteria from Cofece indicates that non-compete covenants could be approved when such agreements are limited in regard of (i) specific territories, (ii) specific coverage of products and/or services, (iii) specific individuals or companies and (iv) limited 3 years maximum duration, and only of the parties justify their need.

Likewise, in some cases where other ancillary restrains such as shareholders agreements, or non-solicitation clauses are present, competition authority would also analysed them and review that they are justified and comply with similar parameters.

In fact, Cofece is aiming to complement its non-binding merger control guidelines to provide further guidance in regard not just of non-competition covenants, but also regarding to shareholders agreements and non-solicitation clauses. Such portion of Cofece's guidelines is still however under a public consultation period.

17. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

According to statutory provisions, filing must be made before the concentration has legal or material effects in Mexico. This means, filing must be made before closing and, as explained, closing cannot occur without clearance on mandatory filing cases. Therefore, there is no formal statutory deadline for filing the notification form other than the limitation to file before legal or material effects have occurred. It is important to address that different from other jurisdictions Mexico does not contemplate pre-notification requirements, so formal merger procedure begins with filing. Consequently, informal meetings with the authority to review filing form or other aspects of the transaction, although might help, do not trigger any clock.

18. What is the earliest time or stage in the transaction at which a notification can be made?

As mentioned, filing must be made prior to closing or prior to acquiring control (including de facto control). Regarding mergers, according to the FLEC, the filing must be made prior to executing the merger agreement. In practice, the enforcer has raised no concerns on filings made after the merger agreement is executed, provided closing is subject to clearance as statutory provisions contemplate such possibility. In addition when there is a succession of acts, the filing must be made prior to perfecting the last act triggering the threshold.

19. What is the basic timetable for the authority's review?

According to statutory provisions, local competition agencies must render and serve

their resolution within 60-business days period counted from the date of receipt of the notification form or the submission of the additional information requested by the enforcer. If the enforcer has not issued a resolution at the end of this term, then the FECL provides that the transaction shall be understood as tacitly approved.

However, it is common and standard practice for the enforcer to issue written requests of information, which interrupt the 60-day term. According to the FECL, formal written requests of information are made in two different stages:

1. Within the 10 business days after the filing has been made, the enforcer may issue a request of basic information, granting the parties a 10-business days to respond; and
2. Within the 15 business days following filing (if no basic information request has been made), or following the date the parties submit the basic information requested by the enforcer, the enforcer may request additional information, where the parties would need to address such request on a 10 business day term.

The second request of information normally involves data required for substantive analysis and tends to be long and very detailed requests so extensions of the legal term to respond them are very common.

In practice regarding notifiable transactions that do not raise obvious competition concerns, procedures tend to take a range between four to six weeks. However, complex transactions and especially cross border operations tend to take longer and will generally wait for other major jurisdictions to resolve first.

20. Under what circumstances the basic timetable may be extended, reset or frozen?

The 60 business day period mentioned above may be extended once in exceptional cases for another 40 business-days. However, the authority in charge of the review process will have to justify the need for the extension and in practice, is generally used in complex transactions where other major competition agencies have not cleared.

Likewise, as explained before, the authority has two opportunities to issue written formal requests for information which stop the clock and given that these requests in some

cases tend to be very detailed, the parties generally have the need to extend the legal term to respond. Equally, when responses to these requests are incomplete or incorrect, the authority will reiterate the pending information and until the parties provide full and complete information, the legal term to resolve will not start counting.

In regard of remedies or potential competition risks, the new FECL contemplates a completely new process. Currently, as the 60-business day term is undergoing and before the matter is submitted before the Plenary for voting, the authority in charge of the merger review process will have to notify the parties that it has identified certain competition concerns and that potential remedies proposal might be required. In case this happens and parties want to address the competition concerns, the clock will restart and a new 60-business day will commence with a potential extension of additional 40-business day period.

21. Are there any circumstances in which the review timetable can be shortened?

The FLEC provides for a fast-track process if the parties prove to the enforcer that it is notorious that a concentration does not have as its purpose or its consequences to have the effect of diminishing, damaging or impeding competition.

In these cases, the enforcer must resolve the filing within a term of 15 business days from the date the enforcer formally acknowledges receipt of the filing through a resolution (which must be made within five business days following the date of the filing). The cases eligible for the fast-track process are the following, provided that the acquirer does not participate in any related market and it is not an actual or potential competitor of the target:

1. If the transaction implies the first participation of the purchaser in the relevant market. To this end, the structure of the relevant market should not be modified and should only involve the substitution of the economic agent;
2. If, before the transaction, the purchaser holds no control of the acquired agent, and with the transaction it increases its relative participation in such agent, without having additional power to influence the operation, management, strategy and main policies of the company, including the appointment of members of the board and managers; or

3. If the purchaser has the control of a company and increases in relative participation in the capital stock of such company.

22. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

Mexican merger control regulations require a joint filing. Specifically, the FLEC provides that all economic agents directly participating in the transaction shall make the filing. However, the FLEC will allow for the acquirer to make the filing independently if it can demonstrate that (i) the other parties are unable to do so (legally or de facto), and this is evidenced and justified before the enforcer; or (ii) a simplified filing is made.

23. What information is required in the filing form?

Mexican merger control system does not contemplate a standard filing form but the FECL and its Regulatory Dispositions provide what type of information will be required in the filing. Likewise, Cofece has published non-binding documents that contains list of other relevant information that is suggested to be included in the filing.

Obviously, filings in regard of transaction that don't raise obvious competition concerns, a simple filing will suffice including basic corporate information, description of business and activities (generally world-wide and Mexico specific), detailed information about products and services, information about locations in Mexico (including plants, offices, sales points, etc.) and market share data of target and competitors in all cases. Yet, for transactions that involve horizontal or considerable vertical overlaps, filing would also need to include economic analysis in relation to market definition, market share data, and barriers to entry, among other more substantial information.

24. Which supporting documents, if any, must be filed with the authority?

The FECL sets the specific information that will be minimally required in the filing. For instance, given the obligation that all parties that directly intervene in the transaction have the obligation to file, each party shall be represented in means of a power of attorney dully legalized to have legal effects in Mexico (for example, granted before a

Public Notary and dully apostilled) by a legal representative who will have the obligation to sign the filing form. Other corporate information that is statutorily required includes incorporation documents (such as certificates of incorporation, articles of association or similar along with current bylaws), financial information of all parties (audited financial statements, annual reports or similar) and full and detailed description of all products and services that involve business in Mexico.

For complex transactions that might have raise competition concerns, recent practice from the authority is to request internal documents related to the transaction, business and market including board presentation and market surveys, among many others and documents that prove or evidence the rationale behind it (similar to Item 4 documents generally required under HRS filings).

Two additional aspects regarding support documentation is that documents prepared in foreign languages require an official translation into Spanish and privileged documents cannot necessarily be retained as attorney-client privilege doctrine in Mexico is still a hot under-discussion topic before federal courts.

25. Is there a filing fee? If so, please specify the amount in local currency.

As of 1 January 2016, filing fees have been restated and are updated on a yearly basis. Currently for 2017, filing fees are of MEX $165,280.00 Mexican pesos. In addition, Regulatory Disposition of the FECL provide that in order for the filing to be admitted, a physical copy of the payment receipt needs to be included in the filing and showed at exact moment of the filing or otherwise will not be admitted.

26. Is there a public announcement that a notification has been filed?

Generally, there are not public announcements about merger control filings. However, both competition agencies have the obligation to publish extracts of the issued procedural rulings in public notification lists so eventually names of the parties, docket numbers and other non-confidential information are disclosed.

In addition, once the filing process has concluded, third parties may have access to the file, except for confidential information and only if they submit a formal request through a regulated mechanism. Likewise, a public version of the final resolution is published and in some relevant cases (especially those blocked or subjected to remedies), the authority has issued press releases on the general aspects of a resolution.

27. Does the authority seek or invite the views of third parties?

Third parties have no recognized legal rights over merger control processes. However, the FECL provides that all economic agents may assist the enforcer by submitting data and documents that they consider relevant to the case. Common practice dictates that in complex transactions, the enforcer tends to request information from third parties, especially relevant competitors, important clients or other sector regulators, which will help the enforcer to have a better understanding of the specific markets and hear opinions from third parties about the potential impact of the transaction.

28. What information may be published by the authority or made available to third parties?

Parties have the right and the authority has the obligation to classify as confidential, information that meets certain parameters. Therefore, the parties' notification, supporting documents and other submissions made over the course of the proceeding will not be available for third parties. However, as stated before, third parties can request access to such information and the authority will have the obligation either to deny access or prepare a non-confidential version of the documents (which are also provided by the parties in every filing they make).

In addition, the final decision rendered by the authority will be made public once it has been served by to the parties at the authority's web resolution search site. Yet, only a non-confidential version will be published, which will be prepared by the authority.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The former and current competition authorities have executed cooperation agreements with authorities in other jurisdictions, including the US, Europe, South Korea, Canada and

others. Yet, in order to discuss or exchange information, the authority must seek waiver from the parties to disclose confidential information to foreign authorities, although the exchange remains confidential. However, in complex multi-jurisdiction transaction, the competition authorities in Mexico have been in close contact with foreign authorities, especially with the European Commission, the Federal Trade Commission and the US Department of Justice, Antitrust Division.

30. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?

Mexican enforcers have accepted in the past either behavioural remedies or structural remedies including divestment obligations. Depending on the impact certain transaction might generate, enforcers will generally aim to impose structural remedies given that behavioural remedies have only been imposed in some transactions that did not raise real competition concerns.

Considering that the current merger control regime obligates the enforcers to notify the parties when potential competition concerns have been found, remedies negotiation, specially structural remedies, have been addressed case by case. Therefore, relevant cases where structural remedies and divestiture obligations have been imposed (i.e. Pfizer-Nestle or Soriana-Comercial Mexicana) have not followed specific criteria to be resolved. This means that, for example, in the Pfizer-Nestle deal, the parties agreed the disincorporation of certain infant formula business to a third party before the closing of the transaction and on the Soriana-Comercial Mexicana deal, the parties were able to close months before actually finding third party buyers and actually selling certain stores.

On other cases such as Alsea-Wal-Mart for the acquisition of certain food-chain restaurants, Cofece subjected its clearance not to a divestiture obligation but rather to eliminating certain exclusivity provisions and forced contracting provisions in shopping malls that Alsea had imposed in the past.

Another example where divesture obligations were imposed but the parties were able to close without actually implementing the obligations before closing refers to the case where Cofece, aligned with US authorities, subjected its clearance regarding the

Aeromexico-Delta transaction to the obligation of both airlines giving give up certain slots at local Mexican airport and at NY JFK airport and eliminate the duplication of designations on cross-border routes.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Considering the current dispositions of the new FECL and how it had worked in the past, commissioners and the staff of the enforcers would normally share their concerns during the review process. The process under the new FLEC requires that the enforcers notify to the parties the concerns they might have on the specific transaction. This communication must be made at least 10 business days prior to the date on which the matter is to be listed for discussion by the commissioners, to allow the parties to propose remedies. As exposed, the proposal of remedies interrupts the 60-day term for the authorities to resolve.

Remedies are commonly negotiated with the authority. The enforcer would normally advise the parties on concerns related with the transaction, and the parties would address those concerns by either clarifying information, or proposing remedies. Third parties, on the other hand, are not allowed to challenge remedies, as they are not part of the filing process.

In addition, remedies proposal have not been subject of market testing in the past and in regard to international transactions, in some cases, the authority aim to find consistency with other remedies obligations imposed in relevant obligations if they apply to Mexican circumstances.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Failing to file a transaction reaching the thresholds may result in significant fines for the parties. Therefore, if during the investigation process it is determined that the transaction is an illegal concentration (meaning it was notified after closing), additional fines may be imposed, as well as conditions (e.g. undoing of specific legal acts) or the order to divest or unwind the corresponding concentration. Penalties may be imposed to both parties under the transaction, as well as to those individuals ordering or executing

the transaction.

In addition, specific monetary sanctions for failing to notify include a fine that could be equivalent to 8% of each party annual income and the obligation to fully or partially divest what has been illegally concentrated.

Also, a transaction may be investigated and challenged after it has been approved only if:

1. When the approval was obtained based on false information; or
2. When approval was subject to conditions to be complied after closing, and those conditions are not complied with in terms of the corresponding resolution.

Finally, it is important to highlight the fact that parties are bound to act independently as long as clearance and closing does not occur. Therefore, exchange of sensitive information among the parties (i.e. gun-jumping), is also prohibited and would be investigated as a cartel violation.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

The consequences of providing incomplete information would not necessarily result in the imposition of sanctions, but rather that the enforcers might not have enough information for their analysis, which would affect a potential positive outcome.

However, as explained, providing misleading information would allow the enforcers to challenge approved transactions and potential sanctions include:

1. Fine that could be equivalent up to MEX $13 million pesos; and
2. Criminal charges that might include up to 8 years imprisonment sanctions.

34. Can the authority's decision be appealed to a court? In particular, can third parties who are not involved in the

transaction appeal the decision?

As a result of the Constitutional reforms, the internal appeal process has been repealed for resolutions issued by the new authority.

However, resolutions of the competition enforcers may only be challenged through an amparo proceeding before federal specialized courts on competition, broadcasting and telecom matters. In addition, if constitutionality issues are to be resolved, the Supreme Court may be competent. The term for a final and definitive decision varies from case to case, but it may it will take several months or years to be resolved.

In addition, amparo proceedings can be initiated by any of the parties in a 15 business day term after they have been served with the final decision rendered by the enforcer. Likewise, as exposed before, third parties could also challenge the final decision before federal courts.

35. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

Mexican merger control regime has considerably strengthened with the constitutional reform and issuance of new statutory legislation. Likewise, each day enforcers have more communication and contact with other major antitrust authorities worldwide so the level of scrutiny and review has become more sophisticated and complex.

In addition, enforcers, especially Cofece, have begun to include economic analysis of the cases and have used new investigative tools to perform a better task. In addition, analysis of vertical effects of concentrations is increasingly becoming more important and the authorities are focusing in ancillary restrictions more often.

36. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

Currently, there aren’t planned future reforms of the merger control regime.