

## **1 Relevant Authorities and Legislation**

### **1.1 Who is/are the relevant merger authority(ies)?**

The Federal Competition Commission, which is an administrative agency independent from the Mexican Ministry of Economy, has technical and operational autonomy to issue its resolutions. The Commission is integrated to exercise merger authority by public officials, divisions and administrative units, of which the main authority is the Commission in Plenary session, comprised of 5 commissioners, including the Commission President. Resolutions are issued by majority votes of its members and exceptionally by a qualified majority in accordance with the law.

### **1.2 What is the merger legislation?**

Listed in order of hierarchy: (i) Article 28<sup>th</sup> of the Mexican Constitution, which establishes the antitrust prohibition, concentrations and the monopoly exception regime in the case of intellectual property (patents, trademarks and copyrights) and certain state monopolies (oil, electricity, postal service, among others); (ii) international treaties to which Mexico is a party, containing antitrust provisions, including, among others, NAFTA and EUFTA; (iii) the Federal Economic Competition Law (the “Law”) and its regulations (iv) the Industrial Property Law; (v) the Copyright Law; (vi) the Foreign Investment Law; (vii) the Federal Consumer Protection Law; (viii) the Federal Criminal Code and (ix) the Federal Tax Code.

### **1.3 Is there any other relevant legislation for foreign mergers?**

Not in terms of economic competition and free commercial practices, but requirements and limitations apply with respect to foreign investment for certain industry sectors.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Not in terms of economic competition and free commercial practices, but requirements and limitations apply with respect to foreign investment for certain industry sectors.

## **2 Transactions Caught by Merger Control Legislation**

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

The types of transactions caught under merger control provisions are subject to threshold tests related to the underlying value of each transaction. The Law defines a concentration as any merger, control acquisition or any act resulting in the concentration of legal entities (whether commercial or civil), including trust or assets in general among and between competitors, suppliers, customers or any economic agents.

The Commission is able to challenge, suspend and sanction, subject to express criteria, any concentration with the purpose of diminishing, damaging or impeding competition, with respect to identical, similar or substantially similar goods and services.

The Commission may issue a restrictive order not to execute the underlying transaction, until a favourable resolution is issued, during a term of 10 days following the filing of the concentration notice.

Although control is not a defined term, if the underlying transaction falls within

any of the thresholds set forth in the Law, regulation provides that a merger control notice shall be filed with the Commission prior to (i) perfection of the underlying agreement or condition precedent; (ii) acquiring or exercising direct or indirect control, *de facto* or *de jure*, of another economic agent, either through purchase of assets, shares, units of trust certificates; (iii) execution of a merger agreement; or (iv) perfection of any combination of actions, the last of which would result in exceeding the thresholds.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of a minority shareholding does not amount to a merger, as a general rule; however, if such acquisition is within the scenarios and thresholds specified under question 2.5, it would be subject to notice to the Commission.

2.3 Are joint ventures subject to merger control?

Yes, please refer to questions 2.1 and 2.4.

2.4 What are the jurisdictional thresholds for application of merger control?

Based on the foregoing, the following transactions are subject to prior notice:

1. When the transaction, irrespective of the place of execution, results in the direct or indirect amount in Mexico equivalent to more than 18M times the minimum general daily wage applicable in Mexico City (MGDW), \$1,121,940,000.00 M.N., Pesos.

2. When the origins of the transaction imply an aggregate of 35% or more of the assets or shares of an economic agent, whose annual assets in Mexico or annual sales which originated in Mexico, are equal to more than 18M times the MGDW, \$1,121,940,000.00M.N., Pesos.

3. When the origins of the transaction imply an aggregation in Mexico of assets or capital stock which amount to more than the equivalent of 8.4M times the MGDW \$523,572,000.00 M.N., Pesos and two or more economic agents participate, which assets or annual sales volume on an individual or aggregate basis are equal to more than 48M times MGDW, \$2,991,840,000.00 M.N., Pesos.

For reference purposes, as of 31 August 2011 the foreign exchange rate is \$12.[\*] Pesos per Dollar, as quoted by Mexico's Central Bank on the Official Gazette of the Federation (*Diario Oficial de la Federación*) and the MGDW is \$62.33 Pesos.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control applies in the scenarios and thresholds described above, regardless of whether monopolistic conduct has occurred, which in turn may result in an antitrust investigation by the Commission's discretionary authority, or upon a third party claim.

2.6 In what circumstances is it likely that transactions between parties outside Mexico ("foreign to foreign" transactions) would be caught by your merger control legislation?

Merger control applies when the transaction, irrespective of the place of execution, results in the direct or indirect amount in Mexico (either as capital stock, assets or sales, respectively) being the equivalent to the threshold referred to in question 2.4 above.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are none.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The principles that apply are the relevant market, economic competition, free commercial practices, commercial relation between the relevant economic agents, the term between the stages and type of transaction. Additionally, and as a general rule, if a merger takes place in stages, the Commission will apply to each stage the thresholds referred to in response 2.4 above.

### **3 Notification and its Impact on the Transaction Timetable**

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes, notification is compulsory when the thresholds are met, and must be made prior to the implementation of the underlying transaction (for a more detailed deadline schedule, see our response to question 3.5).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Transactions are exempt from clearance even if they exceed the monetary thresholds (please refer to question 2.4) when: (i) the transaction implies a corporate reorganisation in which the underlying parties belong to the same group of control and no third party is involved in such reorganisation; (ii) a stockholder increases its participation in the capital stock of a corporation in which it has held control since its incorporation or when the Commission has

previously authorised the acquisition of such control prior to the capital stock increase; (iii) at inception of any type of trust (for management or guaranty) based on which an economic agent contributes its assets, as long as such contribution is not made for the benefit of any person other than such economic agent or the trustee; however, prior to enforcing a guaranty trust, notice of enforcement must be filed, taking into account the thresholds mentioned in our response to question 2.4; (iv) transactions related to stocks, shares or trust certificates related to foreign companies which are considered non-residents (for Mexican tax purposes), as long as the underlying companies do not acquire control in Mexican companies or accumulate in Mexico stocks, shares or trusts certificates, or any other asset in addition to those held, directly or indirectly, before the transaction; (v) the acquirer is an investment company of variable income and the purpose of the transaction is to acquire shares, debentures, securities, credit instruments or equity participations with proceeds obtained from a public offering of the investment company's stock, except if as a result of the transaction such investment company has a meaningful influence in the decision-making of the relevant economic agent; (vi) in the acquisition of shares, securities, credit instruments or equity participations of any company, or in instruments which underlying assets are stocks of a public traded company, when the transaction does not allow the purchaser to acquire 10% or more of such assets, and additionally, the purchaser does not have authority to: a) appoint or revoke board members of the issuing company; b) directly or indirectly impose decisions at the shareholders' or partners' meetings or equivalent management bodies; c) maintain ownership of rights that allows them to, directly or indirectly, vote the shares of 10% or more of a company's capital stock; or d) manage or directly or indirectly influence the management, operation, strategy or main policies of a company, either through ownership of securities, by contract or otherwise; and (vii) they acquire stock, shares or trust certificates or equity participations in one or more investment funds with speculation purposes (portfolio investment) where such funds do not have any investments in companies or assets in which they participate or invest, or where they are employed in the same relevant market with the relevant economic agent.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

The Commission is entitled to: (i) order the correction or cancellation of the underlying merger; (ii) and impose penalties of up to 5% of the relevant economic agent income.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Yes, it is possible to carve out local completion through the establishment of conditions based on precedents applicable to the perfection of mergers in Mexico, such as the issuance of a favourable resolution by the Commission.

3.5 At what stage in the transaction timetable can the notification be filed?

Notification must be filed at any time before any of the following events occur:

- i. the underlying act is perfected in accordance with the applicable legislation or, should it be the case, the condition precedent to which such act is subject, is fulfilled;
- ii. control is acquired *de facto* or *de jure*, or exercised directly or indirectly over another entity; or before assets, participation in trusts, partners' capital contributions or shares of another party are acquired *de facto* or *de jure*;
- iii. a merger agreement is signed between the parties to it, without the condition that clearance of merger notice must be obtained prior to effectiveness; or
- iv. in the case of a succession of acts, before executing the last one that would result in exceeding the applicable threshold amounts.

With respect to mergers resulting from acts executed abroad, these must be notified before they have legal or material effects within Mexican territory.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Within the 10 days following the filing date, the Commission is entitled to order the parties to refrain from perfecting the merger until it is approved. If no communication is issued by the Commission within such time frame, then the relevant parties, at their own responsibility, are entitled to proceed with the merger. Within the 15 days following filing date, the Commission is entitled to request additional information or documentation, which must be delivered by the interested parties within the 20 days following the request. This timeframe may only be extended once, decided on a case-by-case basis, for 20 days at the parties' request, if the complexity of the case or the volume of information requested justifies it. After the documentation delivery process is completed, the Commission has a 35-day term to issue its resolution; however, the President of the Commission is entitled to extend each Commission term for up to 40 days, but this only happens in extraordinarily complex transactions.

It is worth pointing out that if a merger falls within the jurisdictional thresholds outlined under our response 2.4, the resulting acts of a merger will not be able to be filed at the Public Registry of Commerce until, favourable resolution of the Commission is obtained, or the term extension described in the foregoing paragraph lapses without issuance of a favourable resolution by the Commission.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

If within the ten days of the filing date the Commission does not order the parties to refrain from executing the underlying merger until a favourable resolution is issued, then the parties, at their own responsibility, can execute

the merger. Provided, however, that such order is not issued within such a term, it shall not be interpreted as an implied authorisation for the execution of the underlying merger, unless the term granted to the Commission for issuance of its resolution expires, in which case it shall be interpreted as if the Commission has no objection against the merger.

As for the risks of executing the merger before clearance is received, the interested parties are subject to those sanctions specified in response to question 3.3.

3.8 Where notification is required, is there a prescribed format?

The notice shall be made in writing through a free form writ, to which a copy of the underlying agreements shall be enclosed. Such writ must include the name of the relevant parties, their financial statements of the last fiscal year, their market share and any additional information through which the merger is documented.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The Law does not provide for an accelerated procedure *per se*; however, if, at the time of filing the notice, the parties provide as much information as available, such as analysis, reports, evidence, etc. to support the fact that such a merger will notably not result in diminishing, damaging or preventing competition, then the Commission is granted a term of 15 days to issue its resolution. If such term is not extended by the President of the Commission and expires, it shall be interpreted as if the Commission has no objection against the merger.

In order to speed up the clearance timetable, a close contact and lobbying with the staff at the Commission is highly recommended; many times resulting in a

more expedited process and a good way of anticipating additional information requests.

3.10 Who is responsible for making the notification and are there any filing fees?

The parties participating in the underlying merger are jointly responsible for filing the notification and appointing a sole representative. In addition, when the parties cannot, for any reason, provide the notice, the merging entity, the party acquiring control of the corporation, the entity intending to enter into the transactions or to aggregate the shares, equity interest, trust interests or assets, is responsible for filing the notice.

(As of August 2012 there are no filing fees.)

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

No impact; however, listed companies have a detailed and broad disclosure standard, facilitating determination of notice thresholds.

3.12 Will the notification be published?

No, the Law does not provide such notification.

#### **4 Substantive Assessment of the Merger and Outcome of the Process**

4.1 What is the substantive test against which a merger will be assessed?

The parties are subject to scrutiny in order to determine if, as a result of the concentration, the parties are able to fix prices, restrict in a material way competitors' access to the relevant market, or engage in illicit monopolistic practices.

#### 4.2 To what extent are efficiency considerations taken into account?

There is no specific requirement directly related to efficiency considerations; however, efficiency and redundancy considerations are always used as an argument to strengthen the petition and notice.

#### 4.3 Are non-competition issues taken into account in assessing the merger?

Non-competition issues are taken into account on a case-by-case basis, i.e. scope of the non-competition provision, term of the obligation not to compete, size of the relevant market, among others; and we have found that criteria at the Commission changes from time-to-time.

#### 4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

As a general rule the Law allows for third party written complaints related to mergers and alleged monopolistic practices. Once the claim is filed, and during the investigation process, the Commission will not allow access to the claim file, and, during the process, only those entities with legal standing will have access to such information, except for the information identified as confidential.

However, (i) mergers that have obtained a favourable resolution from the Commission can't be further investigated, unless such resolution has been obtained by means of using false information or if effectiveness of such

resolution has been subject to further conditions, and they have not been complied with; and (ii) mergers which are not subject to notification, can't be further investigated after their first anniversary.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

When exercising its powers, the Commission may request from the relevant parties information deemed material (including documentation, books and records, information generated in electronic, optic or in any other media or technology), as well as summon those involved in the corresponding cases for purposes of merger scrutiny, request and verify information from third parties, including competitors and clients, among others. Additionally, the Commission has the power to conduct verification visits at its discretion, with the assistance of the public force and federal, state or municipal authority.

Notwithstanding the foregoing, if a merger is approved the Commission is not authorised to initiate an investigation procedure, with the exception of those cases when such resolution has been obtained based on false information.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Any information filed before the Commission or obtained by it during an investigation process will be classified as reserved, confidential or public. Reserved information is that available only to those entities with legal standing in the investigation process; confidential information means information that, if disclosed to any entity with legal standing in the investigation process, such disclosure will result in damages to the disclosing party. Confidential information will only be treated as such if the disclosing party requests so. The Commission, each of its commissioners on an individual basis, its Executive Secretary and any public officer of the Commission must refrain from revealing reserved or confidential information related to the files or

administrative procedures which are part of a legal proceeding and that may cause damage to the underlying parties until the investigated party has been notified with a resolution, on the understanding that the information will continue to be classified or confidential.

## **5 The End of the Process: Remedies, Appeals and Enforcement**

### **5.1 How does the regulatory process end?**

The regulatory process concludes with a resolution by the Commission, or the expiration of the applicable term to issue their resolution. This final resolution is subject to appeal.

### **5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?**

Yes, provided that such remedies are agreed upon, then parties are notified to the Commission, prior to the issuance of the resolution. The Commission may notify either formally or informally the criteria that needs to be met: i.e. excessive terms for non-compete provisions, which parties may reduce to comply with the set criteria and allow for the favourable resolution to be issued.

### **5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?**

Conditions have been imposed by the Commission in both foreign-to-foreign mergers and cross-border mergers, relating to non-compete provisions' scope and term, divestiture of certain assets and/or business unit, among others. In such cases remedies may be proposed and implemented by the parties as necessary to comply with the conditions and ensure no antitrust conduct is present.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

During the assessment period and before the resolution is issued, the negotiation of remedies can be commenced. There is no particular procedure to negotiate remedies which shall be agreed upon before the resolution is issued.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

No. The divestment remedy is customarily resolved as a condition precedent to the clearing of the merger notice.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may execute the underlying transaction, assuming any liability resulting from non-compliance of the Law. In the case of transactions that require filing before the public registry of commerce, filing is conditional upon a favourable resolution of the Commission.

5.7 How are any negotiated remedies enforced?

Negotiated remedies need to be complied with in order to avoid a resolution by the Commission by means of which its authorisation is revoked and an order to cancel the merger is issued.

5.8 Will a clearance decision cover ancillary restrictions?

On a case-by-case, basis ancillary restrictions can be ordered to be resolved prior to the clearance decision, or be set as conditions precedent to the effectiveness of a clearance decision.

5.9 Can a decision on merger clearance be appealed?

Yes, decisions can be appealed.

5.10 What is the time limit for any appeal?

Pursuant to Article 39 of the Law a thirty (30) day term, is granted to file an appeal against any of the resolutions issued by the Commission.

5.11 Is there a time limit for enforcement of merger control legislation?

The authority of the Commission to initiate investigations that may result in the application of sanctions expire in a term of 5 years following the date the underlying conduct was performed. The authority of the Commission to initiate a criminal action expires six-and-a-half years after issuance by the Commission of the resolution concluding that a party is liable for conducting monopolistic practices. In the case of merger control, the transactions not subject to notice cannot be investigated after a one-year term, following the date of completion of the transaction.

## **6 Miscellaneous**

6.1 To what extent does the merger authority in Mexico liaise with those in other jurisdictions?

Mexico is a party to international treaties and arrangements to cooperate in competition enforcement matters, among which are NAFTA, UEFTA, and treaties with the USA, Japan, Korea and the European Free Trade Association. Such treaties and arrangements include commitments related to international coordination and cooperation matters.

6.2 Are there any proposals for reform of the merger control regime in Mexico?

There is no Competition Law reform act currently being discussed before the National Congress with regard to a reform of merger regulation within Mexico, nor any relevant lobbying by the market actors in such regard.

6.3 Please identify the date as at which your answers are up to date.

August 31, 2012.