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Merger Control

Mexico

Aziz & Kaye Abogados, S.C.

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MEXICO

LAW AND PRACTICE:

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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MEXICO LAW AND PRACTICE

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Aziz & Kaye Business Law is a highly specialised firm in Economic Competition and Antitrust, Mergers and Acquisitions and Corporate Law. The foundation of the success of

Aziz & Kaye is the advice offered to their clients, proposing solutions based on solid legal knowledge, added to the experience and vision in the field of business.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant merger control legislation in Mexico comprises;

- The Federal Economic Competition Law (*Ley Federal de Competencia Económica* – “LFCE”);
- LCFE’s regulations (*Disposiciones Regulatorias de la Ley Federal de Competencia Económica* and *Disposiciones Regulatorias de la Ley Federal de Competencia Económica para los sectores de Telecomunicaciones y Radiodifusión* – jointly “Regulations”); also
- The Federal Telecommunications and Broadcast Law (*Ley Federal de Telecomunicaciones y Radiodifusión*).
- Mexican Competition Authorities, the Federal Competition Commission (*Comisión Federal de Competencia* – “COFECE”) and the Federal Institute of Telecommunications (*Instituto Federal de Telecomunicaciones* – “IFT”)

published the guidelines for merger control, based on the provisions of the LFCE and its Regulations. These guidelines are not a binding document and merely serve as a tool for merging entities within competition authorities.

1.2 Legislation Relating to Particular Sectors

The relevant legislation, the Foreign Investment Law (*Ley de Inversión Extranjera*), governs foreign investments and states the sectors that are reserved to the state, as well as setting limits to foreign investment in additional sectors.

1.3 Enforcement Authorities

The Foreign Investments Commission (*Comisión Nacional de Inversiones Extranjeras*) enforces foreign investment laws in Mexico.

There is a constitutional appeal (amparo lawsuit) – before administrative district, federal judges specialised in competition, telecommunications and broadcasting – in the event that COFECE or IFT blocks or enforces remedies in a transaction reviewed under merger control procedure. The decisions of these judges can be appealed before administrative circuit tribunals specialised in competition, telecommunications and broadcasting.

2. Jurisdiction

2.1 Notification

Regarding whether the notification is compulsory or voluntary, it is necessary to mention that the LFCE requires compulsory notification if the transaction between the merging entities exceed any of the three thresholds set forth in Section 86 of the LFCE:

- if the consideration of the transaction in Mexico (ie, only the entities or assets located in Mexico that are to be acquired) exceeds approximately USD76 million*;
- if the purchaser will acquire at least 35% of the assets or shares in Mexico of an entity with assets located in Mexico or annual sales in Mexico exceeding approximately USD76 million; and/or;
- if the transaction involves the acquisition of assets or capital in Mexico, greater than approximately USD35 million, provided that the assets located in Mexico or annual sales in Mexico of the merging entities, jointly or separately, exceed approximately USD200 million.

However, even if merging entities do not exceed the aforementioned thresholds, according to the LFCE they are entitled voluntarily to file for clearance (ie, compliance matters).

Please find the list of exceptions to the notification in **2.3 Types of Transaction**, below.

(*Note: all amounts in dollars in this article are considered on a MXN/USD exchange rate of 19 pesos per dollar.)

2.2 Failure to Notify

There are penalties for those entities that do not notify a transaction that exceed any of the three thresholds set forth in the LFCE and receive clearance before closing; penalties range from approximately USD21.2 million up to 5% of the parties' annual incomes.

In 2015, COFECE sanctioned Alsea, a Mexican multi-brand restaurant operator, and Grupo Axo, a clothing distributor for luxury brands, for a total of USD1.35 million for a transaction that exceeded the aforementioned thresholds and required the consequent approval of COFECE.

In 2016, COFECE started two investigations into the production of raw milk and the production, distribution and commercialisation of pasteurised milk and its derivatives. These two dockets are confidential, so it is impossible to determine if these transactions should have or should not been notified to COFECE.

In June 2017, COFECE fined Mexico Multifamily Fund VIII (MMF), Invex, Cibanco, HSBC and Monex MXN365,000 each, but what is more significant is that it was the first time that COFECE sanctioned a notary public with a MXN8.5 million fine for formalising a merger without COFECE's approval.

In addition, in 2019, IFT started an investigation in provision of Pay TV and audio-restricted services, fixed and mobile telephone, and broadband internet in national territory. This docket is also confidential, so it is impossible to determine if the investigated transaction should have or should not been notified to IFT.

It is important to point out that another consequence of not notifying a transaction is that the competition authorities could investigate and fine if the transaction is considered illegal. The fine will be around 8% of the incomes of the parties, regardless of civil liability.

Acts carried out without notification shall be null and void, without prejudice of the economic agent's administrative, civil or criminal liability and that of the persons who ordered or contributed to the execution thereof, as well as the notary public (who may receive a maximum fine of MXN14.5 million) or attesting official who may have intervened.

The resolution, entity and the amount of the sanctions are public and available on the competition authority's website; the authority also issue press releases in order to report the highlights of the cases.

2.3 Types of Transactions

The following types of transactions are caught:

- when the transaction involves a corporate restructure, in which the economic agents belong to the same economic interest group and no third entity participates in the concentration;
- when the holder of stock, partnership interest or units of participation increases its relative participation in a company's capital stock which it has controlled since its incorporation or commencement of operations, or, when the Board of Commissioners had previously authorised the acquisition of such control and the former then increased its relative participation in the capital stock of the referred company;

- when the transaction concerns the incorporation of a management, guaranty or any other sort of trust, whereby the economic agent transfers its assets, stock, partnership interest or participation units without the purpose or necessary consequence of transferring said assets, stock, partnership interest or participation units to a company other than both the trustor and the corresponding fiduciary institution; however, if the guaranty trust is executed, this shall be notified in case the thresholds referred to in Section 86 of the LFCE are surpassed;
- when the transaction concerns legal acts of foreign companies, over stock, partnership interest or participation units, or under trust agreements entered into abroad and related to companies not residing in Mexico for tax purposes, insofar as the companies involved do not acquire control over Mexican companies, nor accumulate stock, partnership interest, participation units or participation in trusts or assets in general within the Mexican territory in addition to those which they directly or indirectly owned prior to the transaction;
- when the acquiring party is a variable income investment company and the transaction has as its purpose the acquisition of stock, obligations, assets, securities or documents with resources resulting from the placement of the investment company's shares among the investing public, except if as a result or because of the transactions, the investment company may have significant influence over the decisions of the economic agent involved in the concentration;
- in the acquisition of stock, assets, titles or the representative documents of the capital stock of companies or whose underlying assets represent equity of legal entities, and which are traded on stock exchanges in Mexico or abroad, when the act or sequence of acts does not entitle the purchaser to own 10% or more of such capital stock, obligations convertible into stock, assets, securities or documents, and the acquirer does not have the powers for:
 - (a) appointing or removing members of the board, directors or managers of the issuing company;
 - (b) imposing, directly or indirectly, decisions on the general meetings of stockholders, partners or equivalent bodies;
 - (c) holding ownership rights that allow, directly or indirectly, to exercise voting regarding 10% or more of a legal entity's capital stock; or
 - (d) directing or influencing, directly or indirectly, the management, operation, strategy or the main policies of a legal entity, by means of equity holdings, contractually or otherwise; and
- when the acquisition of stock, partnership interest, participation units or trusts is performed by one or more investment 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 a concentration.

2.4 Definition of 'Control'

The LFCE does not define control. The Supreme Court has defined that an entity can exercise "decisive influence" or "control" on others to act in the markets, either by the law, in the following cases: (i) ownership of the majority of an entity's stock; (ii) power to name the majority of the members of the board of directors or any administrative or managing body or official within an entity, administration of the economic activities of an entity through a long-term agreement, or by (a) the capacity of a minority shareholder to obtain majority approval considering attendance, or (b) the position of other shareholders or financial interests.

It is important to consider the provisions contained in the authorities' merger control guidelines, to determine if the transaction gives either one of them control, meaning the ability to decide on the activities performed by another entity.

2.5 Jurisdictional Thresholds

There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The guidelines for merger control states that the jurisdictional thresholds should be calculated taking into consideration the financial statements. The financial statements, mainly the balance sheet and the income statement, contain most of the information necessary to determine the value of the assets, sales or income and the capital of the companies involved in a concentration.

In case the sales or assets are booked in a foreign currency, the Regulations state that authorities must consider the smallest exchange rate published by the Bank of Mexico from the five days before the parties file the notification.

Regarding the value of the assets, the competition authorities state, in their merger control guidelines, that the highest figure that results from the following possibilities must be considered: (i) total value of the assets stated in the balance sheet in Mexico, which is part of the companies' financial statements, without making exceptions among the items that make up the assets; and (ii) the commercial value of the assets in Mexico, which may differ from the value assigned in books. In this case, the commercial value of the assets is equivalent to the price paid in the transaction.

2.7 Relevant Businesses/Corporate Entities for the Purpose of Calculation

Please refer to 2.1 Notification, above.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if there are any effects in Mexico, and the competition

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authorities will run a local effects test considering only the assets and/or sales in Mexico of the entities involved in the transaction.

2.9 Market Share Jurisdictional Threshold

No market share jurisdictional threshold is provided by the LFCE.

2.10 Joint Ventures

The joint ventures are subject to merger control whenever they exceed the thresholds established by the LFCE.

Notwithstanding, in Mexico, there is no legal figure that allows granting exemption from the application of the LFCE to collaboration agreements (joint ventures) between competitors.

The criteria of the competition authorities states that the definition of “merger” includes acts that do not necessarily mean obtaining control via shares or that do not derive from an act of transfer of assets or shares, but that have analogous effects, as is the case of some collaboration agreements between competitors.

In this regard, COFECE’s guidelines for collaboration among competitors states that the competitors participating in a collaboration agreement, with the characteristics of a merger, may opt to notify it voluntarily to the competition authorities for analysis, in terms of the provisions of the last paragraph of Section 86 of the LFCE. If the collaboration agreement has already been made, the Commission may investigate it as an illegal concentration or as an absolute monopolistic practice, the latter when the entities remain competitors.

2.11 Power of Authorities to Investigate a Transaction

The power that the competition authorities have to investigate a transaction that does not meet the jurisdictional thresholds is limited to reviewing the transaction for one year after its execution.

Nonetheless, authorities have no power to review transactions that have already received clearance, unless they were cleared based on false information or subject to remedies after their execution.

On the other hand, for those transactions that were not notified when they should have been, the authorities have ten years to investigate, since said investigation may consider that the transaction was illegal as its purpose or effect was blocking, reducing, damaging or impeding free enterprise and competition.

2.12 Requirement for Clearance Before Closing

The implementation or execution of a transaction must be suspended until there is clearance from the authorities.

2.13 Penalties for Implementation of a Transaction Before Clearance

There are penalties in case the parties close the transaction before the clearance. These penalties imply that the transaction did not produce any legal effects. Additionally, there are sanctions to the public notary and the officials that participated in its execution.

The authorities might also consider it an unlawful transaction subject to penalties of up to 8% of the parties’ assets and/or ordering the partial or total divestiture of the transaction.

As of yet, there is no record of any penalties to parties for executing a transaction before the authorities’ clearance.

2.14 Exceptions to the Suspensive Effect

There are no general exceptions to the suspensive effect provided by the LFCE or the applicable legislation. Since it is not possible to avoid the suspensive effect, it is important to convey to the authorities the urgency of closing transactions and to provide all necessary information to the authorities in order to speed up the process as much as possible and obtain the clearance.

2.15 Circumstances Where Closing Before Clearance Is Permitted

There is no circumstance that allows the closing of a transaction before the clearance. On the contrary, if the parties involved in a global transaction lack the clearance of the Mexican competition authorities, it is possible to separate the businesses or assets in the Mexican jurisdiction and implement global closing. These proceedings may implicate additional information to ensure that it will not have effects in Mexico until they receive the clearance.

Lastly, the parties should inform the competition authorities of their intention to do so, before closing the global transaction.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

According to the LFCE and the applicable legislation, all notifiable transactions must be filed before their execution.

The penalties for not notifying a transaction that exceeds the thresholds provided by the LFCE are the same as the ones for closing the transaction before clearance, which is up to 5% of the parties’ annual income; if the authorities consider the transaction as unlawful, they may also fine the parties up

to 8% of their assets and/or order partial or total divestiture of the transaction.

3.2 Type of Agreement Required

It is not required to submit a binding agreement prior to the notification, but parties may submit a letter of intent, a memorandum of understanding or a similar document that evidences the details of the transaction in the understanding that, after the execution of the transaction, the parties must submit the final documents evidencing the transaction.

3.3 Filing Fees

Before COFECE, the filing fees required for the notification of a transaction in 2018 are approximately USD8,700, as determined by the Federal Law of Rights and the Fiscal Miscellaneous Resolution for 2018.

Parties must attach proof of payment of the filing fees at the filing moment. COFECE will not accept any merger notifications that do not comply with this requirement.

3.4 Parties Responsible for Filing

The parties responsible for the filing are those who directly participate in the transaction (ie, seller and buyer). The agreement or document on which the transaction is based should determine who are the entities that directly participate in the transaction. Competition authorities considers the signing entities to be the ones that directly participate in the transaction.

3.5 Information Required in a Filing

The information required to be included in a filing is the following:

- the names of the notifying parties and of those participating directly or indirectly in the transaction;
- the names of the legal representatives of the notifying parties with the notarised document with sufficient powers of attorney, the name of the joint representative and the address to receive notifications;
- a description of the transaction, as well as a draft of any non-compete clauses;
- documents and information that explain the purpose of the transaction;
- the articles of incorporation and bylaws of the involved parties, as well as any amendments;
- financial statements for the previous year of the involved parties;
- a description of the involved parties' capital structure;
- an indication of the parties directly or indirectly involved in the capital structure of the involved parties or in any competitors;
- the market share of the involved parties and their competitors;
- the location of the facilities of the involved parties;

- a description of the main goods or services produced or offered by the involved parties, specifying their use, and a list of similar goods or services and who produces them; and
- any other document or information deemed necessary by the parties in order to analyse the transaction.

All documents must be submitted in Spanish or, if the documents were produced in a different language, must be filed attached with a certified translation of their main provisions.

3.6 Penalties/Consequences if Notification Is Deemed Incomplete

The authorities will require the parties to submit all pending information in case the notification is deemed incomplete.

The parties shall submit missing information within ten business days after the authorities notified the request. If such term expires and the parties did not submit all the necessary information in accordance with the LFCE or with the authorities' requirement, the authorities will consider the notification as not filed. This implies that the parties shall file a new notification.

We are not aware of precedents that confirm if the authorities apply these provisions.

We are aware that there is at least one case where COFECE considered the notification as not filed.

3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information

The penalties provided by the LFCE in case that the parties submit inaccurate or misleading information in the filing is a fine of approximately USD742,369, regardless of the criminal liability incurred.

We are not aware of precedents that confirm if the authorities apply these provisions.

3.8 Phases of the Review Process

Section 90 of the LFCE sets out the filing procedures as stated below.

- When the written notification fails to comply with the requirements established in subsections I to XII of Section 89, the competition authority, within ten days after the written notification has been filed, shall inform the notifying parties that their notification fails to meet the requirements established by the LFCE and will grant an additional ten-day period for the parties to submit the missing information. This period may be extended per request of the notifying party in duly justified cases;
- In case the additional submission of information is not filed in the terms established above, the competition authority, within ten days following the expiration of the period, shall

issue and notify the decision considering the notification as not filed;

- The competition authority may request additional data or documents within the following 15 days after receiving the filing, which shall be provided by the notifying parties within an equal period that may be extended under duly justified cases. The competition authority may require additional information considered necessary for the merger analysis. When the additional information is not filed within the period provided for, the filing merger shall be considered as not filed, thus, the competition authority shall issue and notify the notifying party the corresponding decision within ten days following the expiration of said period. The competition authority may require additional information from other entities related to the concentration, as well as the reports and documents considered relevant to conduct the analysis of the concentration as set forth under Title III of the LFCE to any individual or undertaking, including the notifying parties and any public authority, without these being considered as parties under the procedure. The requirements established above shall not suspend the legal timeframes to resolve the notification. The required parties shall file the information within ten days after the requirement is notified, and this period may be extended for an equal term upon a duly justified request;
- If the competition authority has not issued and notified the decision whereby the concentration notification is considered as not filed and the legal timeframes referred to in the first and third bullet points above have expired, the procedure shall continue;
- To issue its resolution, the competition authority shall have a 60-day period that will commence upon submission or, as the case may be, upon reception of the additional documents requested. Upon conclusion of such period without the issuance of a resolution, it may be understood that the competition authority has no objection to the filing merger. Regarding mergers considered to pose possible risks for the competition process and free market access, the competition authority shall inform the notifying parties within at least a ten-day period prior to the case being scheduled for a Board of Commissioners session, in order to allow the parties to propose remedies that may correct the aforementioned risks. The competition authority resolution may authorise, object or subject the authorisation to certain remedies that are intended to prevent the possible effects to free market access and economic competition which could result from the notified concentration;
- Under exceptionally complex cases, the competition authority may extend the legal timeframes established under the third and fourth bullet points above, for an additional 45-day period;
- For the effects established in the third and fourth bullet points above, the filing shall be considered as received and the decision to receive for processing considered issued on:
 - (a) the day the written notification is filed, when the

competition authority has not issued a decision informing the notifying parties that their notification lacks the requirements established by the LFCE, thereby granting an additional period for the parties to submit the missing information, as provided for in the first bullet point above, or

- (b) the day the additionally required information is filed, when the competition authority has not issued and notified the decision whereby the notification is considered as not filed in terms of the second bullet point above.
- The competition authority's favourable resolution shall not prejudice on the execution of monopolistic or other anti-competitive practices which, in terms of this LFCE, hinder, damage or impede free market access or economic competition. Hence, a favourable resolution does not excuse involved entities from further liabilities. The competition authority's favourable resolution shall have a validity period of six months, and may only be extended for one additional period under duly justified causes. The notifying parties may submit, from the filing moment and until one day after the concentration is scheduled for a Board of Commissioners session, proposed remedies to avoid hindering, damaging or impeding the process of economic competition and free market access as a result of the merger. In case the proposed remedies are not submitted together with the written notification, the timeframe for issuing a resolution shall be stayed and shall be computed from the initial stage. To issue its resolution, COFECE has a term of 60 days, counted from the reception of the notification or, if applicable, from the reception of the additional documentation requested. In exceptionally complex cases, COFECE may extend this period up to an additional 40 days. COFECE's favourable resolution will have a term of six months, extendable for a single occasion for justified reasons.

3.9 Parties Engaging in Pre-Notification Discussions with the Authorities

In Mexico, the parties are able to engage in informal pre-notification discussions with the competition authority and this process is treated as confidential.

3.10 Requests for Information During the Review Process

Requests for information are very common, and are becoming generally very burdensome. For stop-the-clock matters, see 3.8 Phases of the Review Process, above.

3.11 Accelerated Procedure

Parties may request an accelerated procedure for reviewing the transaction as provided for in Section 92 of the LFCE, for which the notifying parties shall bring to the Commission information and the corresponding elements of conviction that clearly demonstrate that the transaction will not hin-

der, damage or impede free market access and economic competition.

It is clear that a transaction does not have as its purpose or effect to hinder, damage or impede free market access and economic competition when the acquiring party has no participation in markets related to the relevant market in which the transaction takes place, or is not an existing or potential competitor of the acquired party and, in addition, any of the following circumstances occur:

- the transaction implies the participation of the acquiring party in the relevant market for the first time – consequently, the relevant market’s structure shall not be modified and will only involve the total or partial substitution of the acquired party by the acquiring party;
- prior to the transaction, the acquiring party does not hold control over the acquired party, and as a consequence of the transaction, the former increases its relative participation in relation to the latter, without attaining more power to influence the company’s operation, administration, strategy and main policies, including appointing board members, directors or managers;
- the party acquiring stock, partnership interest or participation units has the control of a company and increases its relative participation in the company’s capital structure; or
- in the cases provided for by the Regulations.

Within the five-day period following submission, COFECE shall issue its decision on its admissibility, or, pursuant to the last paragraph of Section 92 of the LFCE, order its inadmissibility and for the case to be processed under Section 90 of the LFCE.

The Board of Commissioners shall resolve whether the transaction complies with the criteria of clearly not hindering, damaging or impeding free market access and economic competition, as foreseen under Section 92 of the LFCE, within a period no greater than 15 days following the admissibility decision.

Upon conclusion of said timeframe without the Board of Commissioners issuing a resolution, it shall be understood that there is no objection to the transaction.

When the Commission considers that the concentration does not fall under the criteria of one of the bullet points above, or the information provided by the parties is incomplete, COFECE shall issue a decision for processing the case under article 90 of the LFCE.

4. Substance of the Review

4.1 Substantive Test

The substantive test employed by the authorities in order to review a transaction is whether the transaction may reduce, inhibit or prevent the process of competition and the free market.

This is applicable if the merged entity may acquire sufficient market power that will allow it to raise prices or restrict output in the relevant market, if the merged entity may displace or block competitors from entering the relevant market and/or if it increases its possibility to engage in relative monopolistic practices, abusing its market share or position.

In accordance with competition authorities criteria for analysing horizontal mergers, using the Herfindahl-Hirschman Index (HHI), by which it considers that a merger is unlikely to raise competition concerns in the relevant market when (i) the HHI increase value is fewer than 100 points, (ii) the HHI value of the merged entity is below 2,000 points, or (iii) the HHI value of the merged entity is between 2,000 and 2,500 points, the HHI increase value is between 100 and 150 points, and the merged entity is not one of the four biggest participants in the relevant market

4.2 Markets Affected by a Transaction

In order to determine which markets may be affected by the transaction, the competition authorities analyse the products or services where the parties overlap – for example, it confers or may confer substantial market power.

In addition, and in accordance with the competition authorities criteria for analysing horizontal mergers, using the Herfindahl-Hirschman Index (HHI), by which it considers that a merger is unlikely to raise competition concerns in the relevant market when (i) the HHI increase value is fewer than 100 points, (ii) the HHI value of the merged entity is below 2,000 points, or (iii) the HHI value of the merged entity is between 2,000 and 2,500 points, the HHI increase value is between 100 and 150 points, and the merged entity is not one of the four biggest participants in the relevant market.

4.3 Reliance on Case Law

Usually, competition authorities do not use definitions from other jurisdictions but, in our experience, may sometimes do so in global transactions or in transactions that involve advanced technology.

4.4 Competition Concerns

Competition authorities will analyse any actual or potential unilateral, co-ordinated and conglomerate effects, as well as vertical concerns or elimination of potential competition.

4.5 Economic Efficiencies

LFCE states that authorities shall consider gains in efficiency that favourably impact upon the process of competition and free market, to overcome possible anticompetitive effects in a merger, such as:

- introduction of new goods or services;
- cost reductions from creating new techniques and production;
- introduction of technological advances that produce new or improved goods or services; and/or
- a combination of productive assets or investments, which increase the amount or quality of the goods or services, among others.

4.6 Non-Competition Issues

Applicable legislation does not allow competition authorities to analyse non-competition issues when reviewing a merger. In addition, both authorities were created as constitutional government bodies, shielding them from political influences that the former antitrust authority suffered.

There are currently no precedents evidencing that competition authorities have considered non-competition issues in a merger review.

4.7 Special Consideration for Joint Ventures

Currently, joint ventures have no special consideration in the LFCE.

Co-ordination issues are usually analysed by the authorities between joint venture partners. Additionally, COFECE has issued recommendations to avoid illegal co-ordination, including guidelines for information exchange between entities. Furthermore, COFECE is about to publish its guidelines for co-operation among competitors.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with a Transaction

Competition authorities are empowered to prohibit or interfere with a transaction. The authorities' decision may block or condition the transaction to the compliance of certain remedies to prevent potentially damaging effects to the process of competition and the free market. If that is the case, when the competition authorities condition the transaction, they shall explain how such conditions prevent negative effects, therefore conditions must be proportionate to the needed correction of the effects of the merger.

5.2 Parties' Ability to Negotiate Remedies

The parties have the possibility to propose and negotiate remedies, including divestitures or behavioural remedies.

5.3 Legal Standard

Competition authorities may only impose or accept remedies that are directly related to the correction of the effects of the merger. The conditions that are imposed or accepted must keep proportion with the correction that is intended.

5.4 Typical Remedies

The legal standard that remedies must meet in order to be deemed acceptable are divestitures or behavioural remedies. Remedies are not required to address non-competition issues.

5.5 Negotiating Remedies with the Authorities

Parties may begin negotiating remedies with the authorities from the moment they file the merger and up to one day after the transaction is listed for the Board of Commissioners review. In case the remedy proposals are not filed with the transaction filing, the authorities' review term will restart. Authorities may propose remedies on their own, as explained in **5.1 Authorities' Ability to Prohibit or Interfere with a Transaction**, above.

5.6 Conditions and Timing for Divestitures

When the date of the potential ruling from the Board of Commissioners is imminent, the competition authorities usually inform the parties of any potential competition concerns, since at this moment it is more likely for the authorities to have detailed information on the transaction and the relevant market.

Competition authorities encourage the parties to file their own remedies proposals, since the parties have a greater and better knowledge of the market and how to correct any potential competition concerns effectively, even though competition authorities have the legal ability to impose remedies on their own.

In general, the parties are able to complete the transaction before remedies are complied with.

The penalty for those who do not comply with the conditions and remedies stated in the final ruling of the transaction are fines of up to 10% of the parties' annual income.

5.7 The Decision

A formal decision permitting, conditioning or prohibiting the transaction is issued to the parties.

A version of the decision is available on the official websites of the competition authorities; this is obliged to omit information determined as confidential by the authorities.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Some recent cases include:

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- in June 2018, COFECE conditioned the merger between Bayer and Monsanto to the divestiture of several business divisions;
- in March 2016, COFECE conditioned the joint venture between Delta and Aeroméxico to the divestiture of a number of airline slots in the Mexico City and New York JFK airports – the US Department of Transportation imposed similar measures before clearing this transaction;
- in late 2016, COFECE conditioned the merger between Sanofi and Boehringer Ingelheim in the healthcare market to the divestiture of several medication brands by Boehringer before execution of the transaction.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

A clearance decision may cover related arrangements in the competition analysis, particularly in the case that the competition authorities consider there may be potential spillover effects in other markets.

In the case that the execution of an ancillary restraint involves a transaction that exceeds the thresholds provided by the LFCE, the parties related to such transaction shall file a new and separate notification.

7. Third Party Rights, Confidentiality and Cross-Border Cooperation

7.1 Third Party Rights

Third parties may file a claim against a transaction if they consider it illegal. However, the authorities will deny any claim for a filed transaction that has not been cleared by the authorities, in which case the complaint will be filed under the merger file. The complainants may file information that will be taken into consideration by the authorities.

It is important to clarify that unrelated third parties, including complainants, are not allowed to access the merger file, making it more difficult to address a complaint. For more information, please refer to **3.8 Phases of the Review Process**, above.

The rights of the third parties are protected by constitutional appeal (amparo lawsuit), before administrative district, federal judges specialised in competition, telecommunications and broadcasting.

7.2 Contacting Third Parties

It is common that the competition authorities require additional information from third parties as part of its review

process, including other public authorities, without these being considered as parties under the procedure.

Typically, the information will be required through official communications. The competition authorities will typically not “market test” any remedies offered by the parties.

7.3 Confidentiality

The transaction is made public, but not its detailed content. A competition authority publishes its rulings on its website in a period of 20 business days after the notifying parties are informed of the decision.

The parties may request that the information they submit be considered confidential or reserved, explaining the reasons behind such request and providing redacted versions of the documents, if possible.

Confidential information will only be available to the submitting party, while reserved information will only be available to the parties with a legal standing in the procedure.

The authorities shall not reveal or publish confidential information, which is kept in a separate file only available to the public officials reviewing the transaction. In addition, competition authorities’ officials are impeded from making public statements or revealing information regarding the transactions they are involved in.

7.4 Cooperation with Other Jurisdictions

Mexico has entered into several international agreements that include co-operation between competition authorities in countries such as the USA, Canada, Japan, Chile, Russia, South Korea and Israel, among other jurisdictions.

Mexican competition authorities cannot share confidential information with other authorities, unless the notifying parties explicitly allow sharing such information through specific waivers.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

In the event that COFECE or IFT blocks or enforces remedies in a transaction reviewed under merger control procedure, there is a constitutional appeal (amparo lawsuit), before administrative district, federal judges specialised in competition, telecommunications and broadcasting. The decisions of these judges can be appealed before federal administrative circuit tribunals specialised in competition, telecommunications and broadcasting.

8.2 Typical Timeline for an Appeal

Generally, the constitutional appeal (amparo lawsuit) has a duration of between six and 18 months, but it can take years to issue the final judgment.

It is extremely uncommon to have appeals on a merger procedure. One exception is Bio Pappel, who filed an amparo lawsuit against COFECE's resolution in 2015, since the company considered that the remedies imposed in the resolution were illegal.

8.3 Third Parties Appealing a Clearance Decision

Theoretically, a third party has the right to challenge a resolution through an amparo lawsuit.

We are aware that a civil association (AMEDI) filed an amparo lawsuit against the decision of the competition authority, in which the transaction between Televisa and Iusacell was authorised. This amparo lawsuit was not successful.

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9. Recent Developments

9.1 Recent Changes or Impending Legislation

Regarding the LFCE, there has not been any significant amendments to said legislation since its entry into force.

In February 2018, COFECE published the amendments of the Guidelines for Merger Control (*Guía para la Notificación de Concentraciones*).

Also, as stated above in **1.1 Merger Control Legislation**, in August 2017 the IFT published the Guidelines for the Control of Mergers in the Telecommunications and Broadcasting sectors (*Guía para el Control de Concentraciones en los Sectores de Telecomunicaciones y Radiodifusión*).

9.2 Recent Enforcement Record

In early 2017, COFECE fined Soriana, a Mexican supermarket and warehouse chain, for failing to comply with the authorised divestiture programme in order to purchase its competitor, Comercial Mexicana.

In June 2017, COFECE fined Mexico Multifamily Fund VIII (MMF), Invex, Cibanco, HSBC and Monex MXN365,000 each, but what is more significant is that it was the first time that COFECE sanctioned a notary public with a MXN8.5 million fine for formalising a merger without COFECE's approval.

9.3 Current Competition Concerns

In Mexico, the competition authorities are extremely exhaustive in their analysis of a notified transaction, even beyond the overlaps that exist between the parties. Moreover, COFECE is quite interested in government public bidding markets.