

Market
Intelligence

MERGER CONTROL 2020

Global interview panel led by White & Case LLP

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Mexico

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1 | What are the key developments in the past year in merger control in your jurisdiction? Are the authorities focusing on particular sectors more than others?

One of the aspects that our firm has insisted on for years is that in mergers that could generate risks to economic competition, the Federal Commission for Economic Competition (COFECE) should inform what the identified risks consist of. Finally, in August 2018, the obligation for the Technical Secretary to notify the parties of such risks was included in the Regulatory Provisions (DR) of the Mexican Federal Economic Competition Act (FECA). Without a doubt, this is a crucial development, that allows the parties to analyse and propose remedies. Before this inclusion, the parties had to 'guess' what COFECE was thinking.

On the other hand, one of the most important developments in recent years is COFECE's increasing interest in digital markets. COFECE amended its Organic Statute to create a Digital Markets Authority, which among other functions, will collaborate with the merger team in the review of transactions taking place in digital markets.

What were the authorities' most significant decisions over the year, and why were they important? To what extent and how have public interest issues been dealt with?

From our point of view, one of the most significant decisions in 2019–2020 was the denying of the merger between Cornershop and Walmart, as COFECE considered that the transaction would give Walmart the ability to gain access to sensitive information about its competitors in the retail market. COFECE stated that Walmart could unduly displace its competitors through the unlawful use of information on each of its users collected by the e-commerce platform.

This transaction is also relevant from the perspective of the protection of the public interest, due to the potential unlawful use of information (data) by Walmart.

Also, in early 2019, COFECE and the Federal Telecommunications Institute (IFT) cleared the transaction between Disney and Fox for film distribution, licensing of books and video games, among other markets. This transaction is one of the largest mergers ever in the global entertainment industry.

2 | Have there been any developments that impact how you advise clients about merger clearance? Are the authorities in your jurisdiction cooperating more with other jurisdictions?

In our experience, in all transborder transactions COFECE is cooperating with other jurisdictions' authorities.



Ismael Henestrosa Pérez



Mauricio Marín Valdez

Has covid-19 changed the clearance process?

In March of this year, COFECE issued a public statement announcing an immediate review of all transactions, especially those related to products or services designed to help combat the pandemic.

Is there more of an emphasis on economic evidence?

Yes. In our experience, the Mexican competition authorities carry out their merger control analysis increasingly on the basis of economic evidence. They require the largest possible quantities of economic information through several RFIs. In the past, if the transaction wasn't considered a 'problem for markets', one would typically obtain clearance with fewer requests and analyses of economic data.

Are local governments or member states conducting more investigations?

On merger control matters COFECE is continually active in investigating the avoidance of filing transactions. In 2019-2020, COFECE fined 26 companies for this infringement of the law.

“One of the most significant decisions in 2019–2020 was the denying of the merger between Cornershop and Walmart.”

How predictable is the outcome of merger review?

In general, the outcome is very predictable. For instance, if there are several overlaps, you know that the competition authority will impose remedies. But we have experience in some 'easy' transactions that took very long to obtain clearance. From our point of view, that kind of situation happens when the competition authority undermines market dynamics but, when issuing its resolution, no remedies, provisions or any concerns are mentioned in the resolution.

Are there aspects of your merger control regime that tend to make it easier or harder to obtain clearance, or to make the process shorter or longer than in other jurisdictions?

To make it easier to obtain clearance, in article 92 of the FECA, there is a provision for a 'fast-track' procedure, which can apply if it 'is clear that a merger does not have as its purpose or effect to hinder, damage or impede free market access and economic competition', among other conditions.

Despite the absence of any special requirements that would make it harder to obtain clearance in Mexico, the Mexican competition authorities do tend to take more

time in some multi-jurisdictional transactions than agencies in other jurisdictions, even when reviewing the same transaction with the same antitrust concerns.

Do the authorities keep to their deadlines?

Yes, they are legally bound to keep their deadlines. In the past, COFECE's predecessor cleared at least two transactions because they did not meet the deadlines. The FECL establishes that a merger resolution must be issued before the deadline. Failing to do so will clear the transaction automatically.

How can the impact on the timing of deals best be dealt with?

We always suggest to our clients that they should meet at least once with the authority and provide certain information for analysis. In this way we get to know what the concerns are, if any.

What kind of communication is there during the review between the authorities and the parties and their advisers?

On the one hand, there is the official communication between the authorities and the parties and their advisers through the request for information. On the other hand, there is ample room for 'off the record' conversations. The Mexican authorities are very open to listening to all parties.

How frequent is it, and is it formal or informal?

In our practice, it's always both .

How accessible are authority staff at different levels?)

The Mexican authorities are very accessible on any level.

3 | Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

The recent turf war between the IFT and COFECE, analysing the transaction between Cornershop and Uber, suggests such change. COFECE obtained a favourable ruling and with this, an uncertainty that generated delays for transactions was eliminated. We consider that from this experience, as we have already pointed out, COFECE created its Digital Markets Authority.

What kinds of deals are the hardest to get approval for?

In theory, those that generate a high level of concentration or those that create barriers to entry. Also, in markets in which there have been investigations on anti-competitive practices.

Are there industry sectors in which it is more difficult than others to get clearance?

Probably those involving new technology or innovation, such as digital platforms.

Have the authorities expressed particular concerns about increased consolidation in some industries (endgame mergers)?

Yes, in the processed milk industry; medicine distribution (COFECE); and in any transaction involving the radioelectric spectrum (IFT).

Do political considerations influence enforcement policy or the outcome of the review process?

No, in Mexico the competition authorities are autonomous.

Are public interest issues taking on increased importance?

Yes, in the public procurement sector, especially on public health.

4 | Are there any trends in merger challenges, settlements or remedies that have emerged over the past year?

Are there any notable deals that have been blocked or cleared subject to conditions?

Between 2019 and 2020, COFECE blocked the merger between Cornershop and Walmart.

Regarding the *Disney/Fox* transaction, in 2019 the IFT imposed behavioural and structural conditions.

In 2018, the *Monsanto/Bayer* concentration was only accepted by COFECE after imposing the divestment of Bayer's genetically modified cotton seeds, crop seeds, and certain herbicide businesses.

Why were they blocked?

They were blocked because COFECE considered that the transactions would give Walmart the ability to ascertain information pertaining to its competitors in the retail market. COFECE stated that Walmart would displace its competitors through the unlawful use of the information collected by each of the users' platforms.

Regarding the *Disney/Fox* transaction, behavioural conditions were imposed to avoid coordination between the two remaining competitors, which counteract the



risks detected in the factual channel market and structural conditions in the sports channel market, through the divestment of the Fox Sports business.

Could the prohibition be overturned quickly enough for deals to be saved?

Possibly, in relation to *Walmart/Corner Shop*, and it is perhaps worth considering the possibility that Walmart may have employed an information barrier or used an alternative vehicle for the Cornershop acquisition.

In hindsight what could have been done differently to gain clearance?

It may have helped to know, prior to the submission of the transaction, the concerns of COFECE. This would have allowed the parties to better assess their chances of success throughout the transaction. This might have prevented whetting Cornershop's sales appetite. Cornershop is now on its way to being acquired by Uber.



How demanding have the authorities been in terms of the divestments and other remedies they require and has this changed recently?

COFECE is extremely demanding when it imposes remedies that involve divestment. To ensure compliance with the order to divest, the closing of transactions has even been conditioned on divestment. Between 2019 and 2020 only one transaction was cleared subject to conditions, and the only remedies imposed were related to the amendment of the non-compete clause.

Regarding the *Disney/Fox* transaction, in 2019 the IFT imposed behavioural conditions, to avoid coordination between the two remaining competitors, which counteract the risks detected in the factual channel market and structural conditions in the sports channel market, through the divestment of the Fox Sports business.

Lastly, we are not aware of the competition authority's behaviour having changed. But if a transaction implies that barriers to competition will be created, we are sure that divestment remedies will be imposed.

In 2018, the *Monsanto/Bayer* concentration was conditioned by COFECE to the divestment of Bayer's genetically modified crop and cotton seeds, as well as specific herbicide businesses.

Why were deals subject to in-depth analysis?

As soon as high levels of concentration are identified, the competition authorities conduct an in-depth analysis of barriers to entry, effects on related markets, and efficiency gains.

5 | Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

No studies or guidelines have been announced that impact merger control.

However, in 2019 some amendments were made to DR of the FECA, in order to establish a procedure for non-filed transactions. Now COFECE will resolve any issues relating to the avoidance of filing a transaction in a single procedure; fine the parties involved; and clear that transaction.

Also, the investigating authority would be able to run two investigations simultaneously, the first one regarding the existence of a possible unlawful concentration, and on the other hand investigate whether, in case no notification was filed, a particular transaction should have been notified.

COFECE has also modified the guidelines for the notification of concentrations by electronic means, to facilitate and encourage the use of electronic filings. COFECE is one of the most progressive Mexican public authorities regarding the use of electronic procedures. In this sense, since January 2020, concentration notifications shall be submitted only electronically, carried out through the Electronic Procedures System (SITEC).

What was the focus of these changes?

In general terms, we consider that COFECE sought to establish legal criteria to resolve non-filed transactions when there is an obligation to do so. In that case, the competition authorities could clear a transaction, while preventing that resolution from running counter to the resolution on unlawful concentration.

The foregoing is relevant, because last year, COFECE fined 26 companies for not notifying transactions, but also in the same procedure authorised the transactions.

Also, we consider that these modifications were driven from at least two cases in which we participated, where, on the one hand, the investigating authority initiated two investigations for unlawful concentration and, on the other hand, the Technical Secretary initiated two investigations, regarding the same unreported transactions, where in one of this cases, the Board of COFECE suspended the resolution for unlawful concentration until it could determine whether in fact there was an obligation to file the transaction.

What precipitated these studies or guidelines?

No studies or guidelines have been announced that impact merger control.

What is the likely impact of these changes?

No studies or guidelines have been announced that impact merger control.

6 | Do you expect any significant changes to merger control rules?

We do not expect any significant changes to merger control rules. Guidance for merger control analysis would be welcomed.

How could that change your client advocacy before the authorities?

It would create more certainty for the parties involved, since a guide to transaction analysis would reduce transaction costs.

It would also help to know the economic and legal reasons that led the competition authorities to make their decision. We are talking about the need to further increase transparency.

What changes would you like to see implemented in your jurisdiction?

We observe that COFECE and IFT have not issued the technical criteria or regulatory provisions – despite the the fact that FECA now made this mandatory – to define the relevant market and market power, as well as for the analysis of merger control.

We would also like to add a legal disposition that would provide the parties with a better understanding of what they discuss with the head of the merger control area and technical secretary, namely that concerns and possible remedies are consistent with what COFECE’s board could require to authorise the transactions.

Also, it will be very useful to publish guidelines for analysis, as well as rules on minimum content that must be included in the resolutions. This last suggestion would help to generate precedents that provide economic agents with certainty. Again, this is all about transparency.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

We always advise taking into account the time it takes to obtain authorisation in Mexico as this may be different from other jurisdictions. We also want to point out that foreign trade flows in Mexico and the barriers will be different than in other jurisdictions and that could impact the analysis of the transaction.

In your experience, what makes a difference in obtaining clearance quickly?

You need to be in permanent and close contact with the merger control authority, not only on a formal basis. For us it is very important to understand as early as possible the approach of the authority and any potential concerns regarding the transaction.

What merger control issues did you observe in the past year that surprised you?

Despite COFECE's resolution in the *Walmart/Cornershop* case, which was particularly important because as this was the first major case in which matchmakers' digital platforms were analysed, the resolution did not contain an analysis that supported the decision.

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