Merger Control

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Contributing Editors:
Nigel Parr & Ross Mackenzie

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Octavio Olivo Villa, James E. Ritch & Marta Loubet
Ritch, Mueller, Heather y Nicolau, S.C.

Overview of merger control activity

In 2018, the Mexican Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*, "COFECE" or the "Authority") reviewed 183 merger notifications. Out of the transactions that required in-depth scrutiny, COFECE did not authorise three concentrations and imposed structural and behavioural conditions on one transaction. Although only three transactions were not authorised by COFECE in 2018, it is common practice when feasible for the parties to withdraw their case rather than wait for a negative decision and, therefore, the number of transactions rejected in 2018 is not necessarily indicative of the number of transactions that raised fundamental concerns from the perspective of COFECE in that year.

The number of merger control cases was higher in 2018 when compared with 2017, with the authority's level of scrutiny and analysis of cases becoming more rigorous. COFECE was also increasingly active in the areas of investigations for illegal mergers (four investigations for illegal concentrations were carried out by COFECE in 2018), gun-jumping in mergers and in the enforcement of the regulations via the imposition of fines. The decisions issued by COFECE can be challenged through indirect appeal (*amparo indirecto*) proceedings before specialised courts. In the period from 2014 to 2017, such courts ruled on 155 appeals, out of which 39 were dismissed, 90 were denied and 26 were granted. This means that in 83% of cases, COFECE's actions were upheld in court.

The trend of continuing professionalisation and effectiveness of COFECE continues. In 2018, COFECE implemented an electronic system for the notification of concentrations (SINEC, by its Spanish acronym), in an effort to streamline merger clearance proceedings.

Competition law and antitrust is an increasingly active and visible field in Mexico, and COFECE is establishing itself as a leading competition authority in Latin America. In 2018, COFECE rose to three-and-a-half stars (out of five) from three stars in the 18th edition of the Rating Enforcement, the annual survey conducted by the *Global Competition Review*, at the same level as the competition agencies in Canada, Spain, Norway, New Zealand and Italy, surpassing those of Austria, Chile, Columbia and the Netherlands.

Also in 2018, COFECE and the European Commission signed an administrative agreement on cooperation in the field of competition law and enforcement, committing to enhanced cooperation and coordination of enforcement activities by the two competition authorities when working together.

The consolidation and recognition of COFECE's strengthening over the past years (both in Mexico and internationally) comes as a result of ongoing tension between Mexico's legally autonomous regulators, like COFECE (an autonomous body with a high degree of

independence granted by the Mexican Constitution) and legislators belonging to the ruling MORENA party, with the support of the new presidential administration, who, for instance, have criticised some decisions made by COFECE, such as COFECE's unconditional clearance of the Disney/Fox deal (which was conditioned by the Federal Telecommunications Institute, a separate autonomous body responsible of the competition scrutiny of the telecommunications aspect of the transaction) or a newspaper article by COFECE's president questioning, on anticompetitive grounds, the procurement practices of social welfare programmes by the new administration.

Also, in the context of the austerity policy of the incoming presidential administration, budget cuts and other measures have been imposed on COFECE and other Mexican governmental agencies, such as those recently enacted pursuant to the new Federal Law of Remuneration for Public Servants, which seek to reduce the compensation of public sector employees. COFECE has initiated a judicial proceeding to challenge the constitutionality of such law seeking to reverse cuts in personnel and budgetary allocation of reduced resources in an attempt to defend its autonomy.

In terms of economic sectors, COFECE updated the 2008 landmark study by Carlos Urzúa, who is the current Minister of Finance and Public Credit, entitled "Evaluation of the Distributive and Special Effects of Companies with Market Power in Mexico",[1] whereby the author identified the regressive effects of market power among households and regions. The updated study was performed by Andrés Aradillas López, Associate Professor of the Department of Economics of Pennsylvania State University. The updated study, which was published in October 2018, finds that a lack of competition and market monopolies caused Mexican households to pay a premium of up to 98.23% when buying consumer goods, including corn tortillas, bread, eggs, fruits and vegetables, medicines, as well as services such as transportation. The relevance of this study lies partly in the fact that COFECE has stated that it will focus its actions in the years to come on the markets of such products, which will be the case in investigations and in merger control.

COFECE is actively putting the digital revolution at the core of its agenda. In February of 2018, it published "Rethinking Competition in the Digital Economy", an advocacy paper to raise attention on the importance of the digital economy and its impact on competition policy.

The legal framework also continues to be strengthened through the updating of guidelines and technical criteria. In February of 2018, COFECE modified the regulatory provisions to the Mexican Federal Law of Economic Competition (*Ley Federal de Competencia Económica*, the "Competition Law"), that were published in the *Official Daily* of the Federation on February 14, 2018, in order to further refine and clarify the legal framework and strengthen the authority of COFECE. A few weeks earlier, on January 31, 2018, COFECE published its report on the public consultation of the Draft Guide on Collaboration Agreements between Competitors, which included the comments received during the public consultation carried out from the end of 2017 to the beginning of 2018. The Guide is intended to provide economic agents with more clarity as to the elements that determine COFECE's assessment of joint ventures and other agreements among competitors, and it is expected to be published in 2019. COFECE has also continued to promote competition and comply with its transparency and accountability obligations by means of constantly publishing high-quality statistical and other information of its activities, as well as in-depth analysis and opinions on current competition topics and new legal developments, such as the opinion COFECE published in respect of the drafted new Mexican Law for the Transparency and Ordering of Financial Services and the Law on Credit Institutions regarding banking fees. The website of COFECE is increasingly robust in terms of information and functionality,

and COFECE is an active participant in social media and in Mexican and international specialised conferences, having participated in panels in the American Bar Association Section of Antitrust Law's Spring Meeting, among others.

In 2018, COFECE carried out a total of 183 merger control notification analysis; an average of approximately 15 merger control notifications per month. In 2017, the annual number was 155 and the average monthly notifications were approximately 13. Based upon the number of cases so far in 2019, it seems that 2019 is a year where the number of transactions subject to prior merger clearance in Mexico will show a decline (as of March 2019, a total of 19 cases have been submitted to COFECE).

In our experience, in the majority of cases, COFECE requests additional basic information and therefore the formal admission of each case by COFECE takes more time. We have seen a growing trend of COFECE requesting more information from the parties, the transaction and the markets involved, depending upon the complexity of each transaction. For instance, there is a tendency to request official translations into Spanish of more sections of the non-Mexican law agreements governing the transaction, and of the constitutive documents of the non-Mexican economic agents involved in each transaction (and not only of material provisions thereof), and COFECE increasingly analyses in more detail the direct and indirect ownership structures of the parties involved in notified transactions (which can be complex and burdensome for the notifying parties, for example, in the case of investment funds). In general, parties to concentrations notified to COFECE in Mexico should be prepared to disclose detailed direct and indirect ownership structures.

In terms of fines, COFECE continues to be active in imposing fines on the parties to transactions which it considers were required to be notified to COFECE and were not so notified thereto. In such cases, COFECE has the right to impose fines of up to 5% of the income of the economic agents who participate in the transaction (as income is defined in the Competition Law and in the regulations thereunder). The obligation to notify a transaction is applicable to all direct participants thereof, so fines and other penalties are applicable to all parties of a transaction and not only to the purchaser.

In this respect, in January 2019 COFECE imposed a fine, for the equivalent of approximately US$39,400 to Banco Ve por Más (BX +) and Bankaool as it considered that both financial institutions had implemented a concentration without first notifying the authorities. In this gun jumping case, BX + acquired Bankaool's credit rights. COFECE cleared the concentration considering that the sale would have little chance of affecting free competition. The transaction, completed on December 1, 2017, had to be notified and authorised previously as it triggered the statutory thresholds. However, it was not until September 7, 2018 when the financial institutions notified the regulator.

Another example is the fine imposed to Consorcio Villacero for the equivalent of approximately US$3.1 million for failure to comply with two of the conditions agreed upon in 2010 with COFECE for the clearance of the acquisition of Grupo Collado, a competitor in the markets for manufacturing of steel plates, steel pipe, and steel mesh, as well as commercialisation of steel products. COFECE determined that Consorcio Villacero did not comply with the conditions and consequently imposed such fine.

Some of COFECE's fines are currently being contested in court. The activity of specialised competition courts is also increasing in tandem with the increasingly vigorous enforcement stance of COFECE. It is important to note that COFECE is allowed to publicise the imposition of fines, even though the fined parties are legally entitled to challenge the legality of such fines in competent courts.

In respect of judicial activity, an important development is that in 2018, COFECE suffered a setback with a decision that complicates the agency's investigation of an alleged illegal concentration in the medicine distribution sector. The country's Supreme Court of Justice granted an *amparo* appeal to Marina Matarazzo, wife of the owner of drug distributor Nadro, against an order that would force her to reveal information that may determine whether she was behind the acquisition of a competitor, Marzam Commercial and Industrial Group. The purchase of Marzam from previous owner Genomma Labs was carried out by the Dutch investment fund Moench Coöperatief, with the endorsement of COFECE, almost three years ago. However, the competition assessment was reviewed again by the agency via an investigation after revelations that suggested a possible (and undisclosed by the parties in the context of the merger notification) link between the Dutch fund and members of the family that controls Nadro. The case was closed without COFECE deciding on the merits due to a settlement with the parties that was announced by COFECE on October 16, 2018.

Another case worth mentioning is the Grupo Bio Pappel-Scribe merger, which involved the importation of bond paper. COFECE cleared the transaction subject to the condition that neither of the parties could promote antidumping investigations within the relevant market and the parties appealed such commitments before the competition specialised courts, that concluded earlier in 2018 that COFECE's conditions were illegal since the right of an economic agent to request the initiation of antidumping proceedings cannot be waived in advance.

Also, in 2018 three transactions were not approved by COFECE. Publicly available information related to the merger between water heater manufacturers Rheem and Calorex mentions that COFECE considered that the company resulting from the concentration would have an important market share in terms of sales which would facilitate possible price increases without other participants being able to counter such market power. Another merger that was blocked by COFECE was the purchase of certain self-service stores of the retail company Soriana by Walmart, on the basis that the transaction would jeopardise the competition process. The transaction (consisting in an undisclosed number of stores in five states of the country, Campeche, State of Mexico, Guanajuato, Guerrero and Jalisco) was planned in the context of the divestment plan imposed by COFECE to Soriana during its acquisition of stores of its rival, Comercial Mexicana, in 2015. In 2017, Soriana proposed Chedraui (another retailer with ample national coverage) as a buyer in order to comply with the commitments derived from the Comercial Mexicana transaction. Such transaction was not approved by COFECE either.

COFECE was also active in imposing conditions on transactions that it approved. For instance, it conditioned the cooperation agreement between Monsanto and Bayer, due to concerns over its impact on the Mexican seed market. The company must divest its business in genetically modified cotton seeds, crop seeds, and certain herbicides, as COFECE concluded that, as a result of the transaction, Bayer would become the sole supplier of genetically modified cotton seeds in Mexico and would obtain a significant share in the seed market for a large number of crops.

In general, the field of merger control continues to be particularly active and COFECE is increasingly thorough in its analysis and vigorous in the exercise of its authority. COFECE and practitioners are quickly learning and working constructively to build practices, arguments and precedents which will contribute to clarify the legal framework and create a more predictable path for transactions that are reviewed by COFECE. As is the case in other jurisdictions, COFECE and international regulators, as well as the Mexican and international

bar, continue to be increasingly active in international competition forums and conferences. This has helped the development of the Mexican legal framework and practice, and international experience is relevant in Mexican cases, as COFECE is mindful of international legal developments and has good working relationships with the antitrust authorities of the world's most active jurisdictions.

New developments in jurisdictional assessment or procedure

In accordance with the Competition Law, concentrations (which are broadly defined and include mergers and acquisitions) that trigger any of the three statutory thresholds contemplated in Article 86 thereof, are required to be notified to COFECE and are not allowed to close without the prior written approval of COFECE (i.e. our jurisdiction does contemplate a bar on closing). The obligation to notify a transaction that triggers the thresholds is not only applicable to the purchaser but to all the direct parties of a transaction, which sometimes, in practice, creates tension between parties in cases when there is disagreement between the parties as to whether the transaction triggers the obligation to notify COFECE.

Failure to comply with the obligation to notify a transaction that is required to be notified to COFECE entails various serious consequences: (i) the transaction will not produce any legal effect (the implications of this in practice are sometimes very complex and difficult to implement, such as when, for instance, a sale of an asset has been fully consummated and the asset has been re-sold to a good faith third party); (ii) the imposition of fines on the parties to the transaction (which can amount to 5% of the income of the economic agents who participate in the transaction (as income is defined in the Competition Law and the regulations thereof)); and (iii) the imposition of criminal liability in cases where fraud is proven.

The risk of imposition of liability refers not only to the economic agents who participate in the transaction but to directors, managers, officers, executives, agents or representatives of economic agents who participate in illicit concentrations, as well as to any person who assists, propitiates or induces illicit concentrations, including public notaries. For instance, COFECE imposed a fine on a Mexican public notary in 2017, which was successfully challenged by the notary public before Mexico's Supreme Court in appeal but does evidence the commitment of COFECE to deter breaches by agents that participate in concentrations by vigorously exercising its enforcement authority. COFECE publishes on its website when it imposes a fine – which immediately produces a reputational consequence on the fined parties despite their ability to challenge the legality of any such fines in competent courts.

In practice, it is possible to discuss questions around the notificability of a transaction with officers of COFECE but often, a verbal opinion of an officer of COFECE does not suffice and the alternative of a formal consultation or other request for a written opinion of COFECE is impracticable, since such consultation processes are regulated and also involve a substantial amount of time to obtain such opinion. This context often leads to the decision to notify, and parties who are of the opinion that the transaction is not legally required to notify often request that the filing be made on a voluntary basis. This situation is limited to those cases that are controversial as to whether they trigger the obligation to be notified to COFECE, and are not the general rule.

So-called "greenfield" projects, or transactions that imply a succession of acts executed over a period of time in the future, often raise questions as to whether and when they trigger the thresholds, depending upon the terms and conditions of each particular transaction; the

Competition Law establishes that in the case of transactions that imply a succession of acts, the transaction is required to be notified before the consummation of the act that triggers the threshold. In cases that involve a succession of acts in the future and where the threshold to notify will be triggered by one of such acts in the future, we have encountered cases where the parties decide to notify the transaction at the outset in order to avoid delays in the execution of the transaction in the future, but the possibility and advisability of such a strategy would depend upon the facts of each specific transaction.

A prominent case in 2018 was the imposition of a fine on the parties to a transaction among Nestlé México (Nestlé), Société des Produits Nestlé (SdeP), Nestec and Innovación de Alimentos (Innovación), a subsidiary of the Mexican dairy conglomerate Grupo Lala, for the equivalent of approximately USD 400,000 for failing to notify a concentration while legally being compelled to do so.

Article 65 of the Competition Law establishes that transactions that have obtained the prior approval of COFECE may not be investigated thereby except if the approval was granted based on false information or if the conditions imposed by COFECE were not complied with; such provision also establishes that transactions that are not legally required to be notified to COFECE may be investigated by COFECE, but only within one year after the consummation thereof. However, transactions that have not been notified to COFECE when they were legally required to be notified, may be investigated by COFECE for a period of 10 years after the date of consummation thereof. COFECE has the authority to impose fines as a result of the failure to obtain its approval when it was legally required, and also has the authority to impose fines and other remedies if, in addition, it determines that the concentration was illegal; such fines and remedies include the correction or suppression of the illicit concentration, total or partial divestiture, and fines of up to 5% of the income of the parties that were party to the illicit concentration (as income is defined in the Competition Law and its regulatory provisions). In the *Nestlé/Lala* case mentioned above, COFECE imposed the aforementioned fines for the failure to notify the transaction but, after reviewing the substance of the transaction, it found that it did not constitute an illicit transaction and therefore it did not impose any additional penalties or remedies applicable to illicit concentrations.

In general, COFECE is increasingly thorough in its review of transactions, even if the merits do not raise any anticompetitive issue. COFECE has a period of 60 business days, counted as of the date a filing is admitted to issue its approval, the terms of which can be extended by COFECE for 40 additional business days in cases it considers are justified in light of the complexity of the case. COFECE has worked to improve the time it takes to approve mergers and it has consistently improved on average, although, as mentioned above, the key to minimise the risk of delays is a complete initial filing. As mentioned above, the clock to review a transaction begins when COFECE admits the filing because it is considered complete, and therefore it is key for parties to present a very complete filing at the outset. Also, the time for review depends on the complexity of the case and the workload of COFECE. Our Competition Law does not allow for an expedited review in the case of urgent cases, such as, for instance, impending bankruptcy or government intervention; in our experience, however, COFECE endeavours to assist the parties to the extent practicable with a timely review when the parties prove that there is an objective, justified reason to merit such a review (for instance, in the case of extreme financial distress of a party). The Competition Law does contemplate an expedited process for cases where it is "notorious" that the transaction will not have an adverse effect on competition; however, such expedited

process continues not to be an alternative in practice, since the time and work it takes for the board of commissioners of COFECE to confirm such "notoriety" (plus the fact that COFECE is very strict in acknowledging such "notoriety") makes pursuing this option impracticable.

The Competition Law requires the parties to explain the objective and motive of the transaction, and to provide evidence in support of such explanation. The recent amendments to the regulatory provisions of the Competition Law elaborated on the kinds of documents that COFECE can consider as evidence of such objective and motive, and includes documents such as board resolutions, press releases, prospectuses and other information. The parties to notified transactions in Mexico should include in the filing such justifying documents, which are required by the Competition Law and the regulatory provisions thereof, and this information is an item that COFECE is increasingly focusing on, as reflected in the latest legal amendments. In connection with confidentiality, our legal regime allows the parties to request the confidential treatment of information, but such request has to be duly justified by the requesting party.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

In general, the current administration of COFECE continues to consolidate its operating and investigative practices and its administrative policies, as well as to put into practice its stated objectives – which are to sanction any illegal conduct, prevent the creation of illicit concentrations, and to be observant of the markets that most matter to Mexican consumers and impact the growth of Mexico. COFECE has also stated that it is committed to the promotion of competition and to the correct application of the law. COFECE's board of commissioners, composed by seven commissioners including the chairperson (each for a nine-year period), is its governing body in charge of deciding cases and resolving matters in a collegial manner, requiring a majority vote. Each commissioner is selected and appointed by the President on the basis of an evaluation of capabilities by a technical committee; the resulting candidates are then submitted to the Senate for ratification. In 2018, the Senate appointed José Eduardo Mendoza Contreras as a new commissioner, as nominated by former Mexican president Enrique Peña Nieto. Earlier this year, in February 2019, the Senate ratified Gustavo Rodrigo Pérez Valdespín, as a new commissioner nominated by Andrés Manuel López Obrador, who took office on 1 March 2019. Under the term in office of the new President, López Obrador, no further commissioners are expected to be replaced, so no major changes are expected in terms of the board of commissioners' direction.

Additions to the Guide for the Notification of Concentrations (*Guía para la Notificación de Concentraciones*, the "Guide") were published in 2017 to express COFECE's posture on non-compete obligations. Such additions are generally regarded as reflecting a long-standing practice of COFECE and its predecessor under the Competition Law and its predecessor statute in connection with non-compete obligations (a paragraph in the annual report of the predecessor to COFECE described some of the basic elements of the posture in respect of such obligations). In our experience, COFECE is increasingly strict in the analysis of non-compete provisions and rarely allows departures from the views stated in the Guide, even though it is, by its terms, a non-binding document and it explicitly states that in some duly and strongly justified cases, COFECE can consider departure from the parameters set forth therein.

The Competition Law and its regulatory provisions do not establish the requirements that such non-compete obligations are required to comply with. However, the Guide, which is

not binding, does set forth the criteria that guide the behaviour of COFECE in concentration proceedings which, as mentioned above, was amended recently to incorporate the criteria applicable to such non-compete obligations.

Section 7.9 of the Guide establishes that the first action that COFECE will take is to evaluate if the obligation falls within any of the following definitions:

> *"1. **Non-competition clause**: agreement whereby any of the participants of a contract or agreement (generally the selling party) assumes the obligation not to compete, directly or indirectly, with the acquiring party. This is, not to sell, distribute or produce certain merchandise or property, develop certain commercial activity or provide certain services within certain time, in a limited geographic zone.*
>
> *2. **Shareholders' agreement**: agreement whereby the shareholders or partners of a joint venture agree not to participate, for their own account, in activities that are the same or directly related to those developed by the joint venture. Its rationality is found in generating incentives for the participants in the joint venture to make their best effort in the development of the business.*
>
> *3. **Agreements not to hire or not to solicit**: agreement whereby one of the notifying parties (generally the seller or both) agrees not to hire those persons that already work or provide professional services to the company that is the subject matter of the transaction or that will work in the company resulting from a joint venture. These agreements have as a purpose to protect the knowledge, human capital and value of the transferred business or of the subject matter of the joint venture."*

Thereafter COFECE will evaluate on a case-by-case basis the justification presented by the parties, and confirm that the corresponding non-compete provision has a small probability of affecting competition and free concurrence considering four dimensions: (1) persons subject to the obligation; (2) coverage of the products or services involved; (3) duration; and (4) geographic coverage.

In respect of non-compete obligations, the Guide "explains the manner in which COFECE has performed the analysis of this type of agreements, in light of the principles of economic competition and free concurrence", as follows:

As a general matter, the first element involved in the analysis as to whether a non-compete obligation is justified is to verify that the transaction effectively involves the transfer of assets that do not have ownership rights or legal protection and that, therefore, need the protection afforded by means of a non-compete clause. After the parties justify the need to contemplate a non-compete provision in the transaction documents, COFECE evaluates whether it will have a small probability of affecting competition and free concurrence in the aforementioned four dimensions, and establishes the following parameters within which any such provisions generally are considered acceptable:

- Persons subject to the obligation. When the persons subject to the restriction are the seller and the companies of the economic group to which the seller belongs, as well as their successors and assignees in the case of companies. They may additionally include an economic agent that shall have been created as a vehicle to affect the notified transaction and that remains part of the economic group of the seller.
- Coverage of the products or services involved. The provision: (a) shall be limited to products and/or services offered by the business that is the subject matter of the transaction; (b) may include products or services that are at an advanced phase of development by the acquired business at the time of the notification; and (c) may

include products or services that have been fully developed but are yet to be commercialised by the acquired business at the time of the notification. In global transactions, the provision may cover all of the products or services offered worldwide by the acquired business even if not all of them are offered in Mexico. The Guide mentions that generally, it is not considered justified to include products and services that are not produced, distributed or sold by the transferred business.

- Duration. When the duration of the provision is for up to 3 (three) years after the closing of the transaction and such duration is justified.
- Geographic coverage. COFECE will only analyse the effects of the provision in Mexican territory. It has been considered that a provision has a small possibility of affecting competition and free concurrence when: (a) it covers the territory served by the business, or assets that are the subject matter of the transaction before it is consummated; and (b) when it includes regions in which the acquired business is at an advanced phase of expansion, investments shall have been made or any other action related to the expansion of territory shall have been executed.

The Guide establishes that a non-compete obligation approved by COFECE may not be modified by the parties and if they do, they shall be required to obtain a new approval from COFECE. The approval of a non-compete provision does not affect the authority of COFECE to investigate collusion or any other anti-competitive behaviour under applicable law.

The parties should bear the aforementioned criteria in mind since, as mentioned above, any departure from any of them has to be strongly argued and supported, and COFECE rarely departs from such criteria. In addition, the parties should be aware that in case the parties and COFECE engage in a discussion of any element of a non-compete provision, the process for review may be delayed. From a formal perspective, if COFECE identifies a risk in the non-compete provision, COFECE can notify the parties formally that it has identified such a risk, calling them to a meeting where it explains the risk, allowing the parties a period to provide a remedy which can be proposed until the day after the transaction is listed for approval of the board of commissioners of COFECE. The parties always have the right to ask COFECE for a meeting with the commissioners of COFECE to present their arguments in defence of their position or their proposal for remedies, which meeting with the commissioners has to occur before the meeting of the board of commissioners that will formally review the case.

At these meetings with the commissioners, parties usually present their arguments to commissioners, and the director of concentrations and the technical secretary of COFECE are usually present at these meetings. This process has raised due process concerns for some practitioners since often, the parties do not have access to the full position and arguments presented by the concentrations department to the board of commissioners, so parties have to present their arguments without having full access to the opposing view. Also, when the board of commissioners of COFECE approves a transaction but conditions the non-compete or imposes another condition, the only remedy available to the parties is to challenge the resolution of the board of commissioners in competent courts, which is a burdensome and time-consuming procedure that is often impracticable for mergers and acquisitions.

Reform proposals

In addition to the previously discussed amendments and proposals, an important development in terms of competition law in Mexico in the past few months has been the initiative by

COFECE to seek legal clarity on the meaning and implications of the attorney-client privilege in the context of Mexican competition law. The reasons for such initiative include the fact that there were no legal guidelines in that respect which has affected the ability of COFECE to successfully gather evidence in the context of investigations. COFECE published draft guidelines for consultation until January of 2019 and has held conversations with practitioners in that respect. This topic and initiative has raised great interest from the Mexican legal community since there is concern of excessive governmental intervention in such an important right. COFECE is currently reviewing the guidelines on the basis of the comments, which revolved around the need to guarantee due process, the relevance of an adequate custody chain and the functioning of COFECE's committee for the assessment of confidential information. COFECE is expected to be publishing these guidelines by July 2019.

A case that gave rise to such COFECE initiative is a ruling by the competition specialised courts in November of 2018, whereby the court nullified privileged information gathered and used by COFECE to build its case. Even though such ruling and related judicial resolutions only applies to that particular case, they constitute an important first non-binding precedent and shed light on the scope of the attorney-client privilege in antitrust proceedings.

In order to characterise the attorney-client legal privilege, the First Collegiate Tribunal specialised in Competition Law referred to the criteria established by the European Union Court of Justice in *Akzo Nobel Chemicals Ltd v European Commission* and identified the following requirements for the recognition of the attorney-client privilege: (i) the communications (understood as all written materials) between attorney and client must be related to the exercise of the right of defence of the client (i.e. the documents must have been generated in the context of the lawyer's advice during the exercise of the client's right to an adequate defence in proceedings before the public authority) and obtained by Cofece in breach of the undertaking's procedural rights; and (ii) the communication must be between the client and an external legal counsel (i.e. exchanges with the company's in-house lawyers do not benefit from the attorney-client privilege).

As per such court's ruling, when such two requirements are met, the attorney and the client have the right for their communications not to be used or copied by COFECE and the IFT. If such right is violated, the actions of such authorities' officials can be challenged by the affected person directly through an *amparo* trial identifying the information protected by the legal privilege. Such ruling constitutes a relevant precedent for challenging through *amparo* breaches of the confidentiality of communications between a lawyer and her or his client in the field of competition law.

Indeed, this decision is especially relevant as it is the first time Mexican courts have admitted the challenge of a dawn raid since the constitutional amendment overhauling competition enforcement was adopted in 2013. In the context of this reform, any legal claim against COFECE and/or the IFT during an investigation is deemed inadmissible, which has led Mexican courts to reject any challenges against COFECE and IFT, including breaches of the attorney-client privilege in the context of antitrust investigations.

On November 7, 2018, COFECE announced the initiation of an investigation of a cartel investigation in the market for the recruitment of soccer players, aligning itself with other antitrust authorities worldwide that have increasingly focused their efforts in competition issues in labour markets. On the basis of recent developments, we expect COFECE to pay particular attention to provisions such as no-poaching and no-hire clauses in merger agreements in the future.

The field of competition and antitrust in Mexico continues to develop consistently, in line

with international trends. COFECE is a modern independent regulator supported by a sophisticated and experienced team, a strong legal framework and specialised courts, as well as a by an increasingly sophisticated and specialised Mexican bar.

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Endnote

1. Available at https://www.oecd.org/daf/competition/45047597.pdf.

Octavio Olivo Villa
Tel: +52 55 9178 7040 / Email: oolivo@ritch.com.mx

Octavio Olivo is a recognised leader in the field of competition and antitrust law. His work focuses on merger control and competition law enforcement, having advised clients in a wide range of complex merger control matters, antitrust investigations and competition enforcement actions, most recently advising Time Warner Inc. in connection with AT&T's US$85.4 billion acquisition of TW.

Octavio joined Ritch Mueller in 1992 and has been partner since 1998. He was a foreign associate at Clearly, Gottlieb, Steen & Hamilton, New York (1994–1995). He has a law degree from Universidad Nacional Autonoma de Mexico (1991), and a Masters in Law from London School of Economics and Political Science (1992).

James E. Ritch
Tel: +52 55 9178 7000 / Email: jritch@ritch.com.mx

James has extensive experience in the field of competition and antitrust in Mexico. He regularly advises clients in the area of merger control and investigations, and is also part of the firm's private equity practice. In 2017, James advised clients active in the energy, banking, education, oil & gas, real estate and telecommunications markets in competition and antitrust issues.

James joined Ritch Mueller in 1992 and was a partner of the firm until 2012, when he became a visiting scholar at Duke University School of Law, rejoining the firm in 2016 as senior counsel. James was a foreign associate at Debevoise & Plimpton. James has a law degree with Honours from the Escuela Libre de Derecho in Mexico City, and an LL.M. from Duke University School of Law.

Marta Loubet
Tel: +52 55 9178 7000 / Email: mloubet@ritch.com.mx

Marta is an associate in the Competition Law area of Ritch Mueller. Prior to joining the firm, she was part of the competition teams in Mexico City, Brussels and Paris of leading firms in the sector for more than six years, after having served as a stagiaire in the DG COMP of the European Commission and the French Council of State.

Marta graduated in 2010 from the Law School of the Universidad Complutense de Madrid and later obtained a master's degree in European and international business law at the Université Paris-Dauphine (Double Diploma with the Universidad Autónoma de Madrid) and an LL.M. from Queen Mary University of London. Marta is admitted to practise in Mexico and Spain and is a member of the Association des Juristes Européens, ANADE and Abogadas MX.

Ritch, Mueller, Heather y Nicolau, S.C.

Av Pedregal 24, Piso 10, Molino del Rey, 11040 Ciudad de México, Mexico
Tel: +52 55 9178 7000 / URL: www.ritch.com.mx

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