Legal 500
Country Comparative Guides 2024

Mexico
Merger Control

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Mexico.

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Mexico: Merger Control

1. Overview

Mexico's competition law framework has undergone significant developments in recent years, with the Federal Economic Competition Commission ("**COFECE**") and the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*, "**IFT**" and together with COFECE the "**Mexican Antitrust Agencies**") maintaining a proactive stance in enforcing the Federal Economic Competition Law (*Ley Federal de Competencia Económica* "**FECL**"). As key regulators, both authorities have expanded their scope in areas such as digital markets, energy, telecommunications, and financial services, reflecting global trends such as the integration of sustainability concerns into competition analysis and the increasing complexity of the economic landscape.

2. Is notification compulsory or voluntary?

In Mexico, if a transaction surpasses any of the Mexican monetary thresholds, said transaction must be notified before any of the Mexican competition agencies: *(i)* COFECE and/or the *(ii)* IFT, as applicable; thus, in Mexico notification is compulsory. However, the FECL includes the possibility to submit a voluntary pre-merger filing, which is normally used in transactions in which it is not clear if the thresholds are triggered and also to ensure that the enforcers will not investigate the transaction later.

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

Yes, in Mexico, if the transaction closes before the authority grants its approval, it will be considered as gun-jumping and the Mexican Antitrust Agencies have the capacity to impose a fine. Also, it should be noted that the agencies have up to 10 years from the closing of a transaction to investigate any failure to notify obligation. The FECL sets forth a fine that goes from MXN $542,850 (approx. USD $27,320) and up to the 5% of the income generated in Mexico for the last fiscal year. This fine is applied to each of the economic agents involved in the transaction.

Mexico does provide for the option of a Hold separate/ Carve out where the Mexican part of the transaction is separated, and the transaction is allowed to close in other jurisdictions. However, in practice, the Mexican Antitrust Agencies are very formalistic and finds it difficult to accept this type of alternatives to close transactions.

4. What types of transaction are notifiable or reviewable and what is the test for control?

A transaction must trigger any of the three Mexican economic thresholds in order for any of the Mexican Antitrust Agencies to have authority to review said transaction.

In Mexico, a transaction would not be notifiable where there is no acquisition of Mexican assets or shares or no price allocation for the Mexican portion given that all the thresholds are monetary-based and not specifically related to control. However, Mexican Antitrust Agencies recommend adopting a conservative standpoint and notifying any transaction in which there are doubts concerning the thresholds, as well as other joint ventures (particularly among competitors).

Regarding control, it should be noted that in Mexico the obligation to notify a transaction is purely based on monetary thresholds, regardless of whether or not the acquirer gains control. The FECL and its regulatory provisions do not contemplate a definition of control. Nonetheless, the Supreme Court has defined control as the capacity to exert a decisive influence or control over other economic agents when it comes to acting in the markets, either as a result of legal acts or based on facts.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

Minority acquisitions can trigger a Mexican pre-merger control filing as long as one of the monetary thresholds is met. Mexico has three thresholds which are described in detail in question 6.

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

apply to particular sectors?

In Mexico, there are no specific thresholds applicable to a particular sector or related to control. In this respect, article 86 of the FECL set forth the following three Mexican thresholds:

- Price allocation if there is a specific price allocation for the Mexican portion (including for tax purposes), the amount of such price is equal to or higher than MXN $1,954,260,000.
- Size of the target a transaction must involve the acquisition of 35% or more of the assets or shares of an entity whose sales or assets in Mexico are valued at more than MXN $1,954,260,000. Both parts of the second threshold must be met in order for a transaction to be notifiable in Mexico.
- Size of the parties a transaction must involve the acquisition of assets or capital stock with a value greater than MXN $911,988,000 and the undertakings involved in the transaction must have assets or sales in Mexico that (jointly or separately) amount to more than MXN $5,211,360,000. Please note that both parts of the third threshold must be met in order for a transaction to be notifiable. As regards the first part of this threshold, if the transaction only implies the acquisition of a certain percentage of the target, this percentage must be applied to the total Mexican assets or capital stock.

Regarding particular sectors, there is no additional legislation specifically applicable to merger control in Mexico. However, in the oil and gas industry, there are certain additional regulatory requirements when an economic agent owns or acquires a shareholding interest in companies active in different portions of the downstream segments and the transportation or storage assets are subject to open access.

Also, the Mexican Foreign Investments Law requires that transactions related to certain restricted sectors or that meet the monetary thresholds must initiate an authorization process. The law is very lax, and only a few sectors are restricted, and the monetary thresholds are high.

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

As stated in question 6, Mexico has three monetary-based thresholds. None of the thresholds include the market share value, however, regarding the assets the Law provides two ways to determine the value of the assets, the Economic Agents must consider the highest figure which results among the following:

a. Total value of the assets recorded in the balance sheet, that is part of the financial statements of the companies.
b. Commercial value of the assets, the Commission has considered that the commercial value of the assets is equal to the price agreed by them in the transaction.

Only in cases where this value cannot be obtained, the amount of the assets may be calculated as the proportional amount of the assets of the acquired object.

Regarding the value of the sales, the Law refers to annual sales. And the value must be analyzed depending on the following:

a. If the company object of acquisition is located in national territory, the Economic Agents may consider the total net sales.
b. If the acquired company is located in a different country and does not have assets in Mexico but has sales originated in national territory, the Economic Agents must analyze the following:

i) Whether the sales in national territory are carried out directly by the company or through third parties. If a third party imports and distributes the product in national territory and is not part of the distribution system established by the company located abroad and partaking in the operation, it is not possible to attribute these sales to the latter and, therefore, they are not taken into consideration when assessing the existence of an obligation to notify.

ii) If there are any sales invoiced in Mexico.

iii) If there are any sales to Mexican customers or customers located in Mexico.

iv) Sales from a Mexican entity to foreign customers.

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

For the conversion of US dollars to Mexican pesos, the exchange rate that should be used is the lowest exchange rate published by the Mexican Central Bank in the preceding five days. The exchange rate can be reviewed

here under the column titled “Para pagos”. Where the sales or assets are shown a currency other than US dollars, any exchange rate indicator that reflects the value of the Mexican currency with regard to the foreign currency in question can be used.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Joint ventures are subject to merger control and the general thresholds apply. Joint ventures can qualify as a transaction subject to merger control as long as they involve the union of two or more economic agents to jointly carry out economic activities either contractually or through a vehicle with legal personality in the latter case, through which said agents will make contributions and participate jointly in the profits and losses.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

Yes, this under Mexican law is known as succession of acts, which states that the obligation to notify occurs before the sum of the succeeding acts meets any of the thresholds. It is hereby clarified that the cases in which there are several acquisitions over time but where sellers and objects are not identical, are not considered as a succession of acts, without prejudice that any of these acquisitions should be notified individually when it exceeds the thresholds.

The main reason for this disposition is to prevent an Economic Agent from acquiring little by little participation in the share capital of another one, through acts that do not require to be notified individually, until obtaining de jure or de facto control

11. How do the thresholds apply to “foreign-to-foreign” mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

In Mexico, there is no explicit local effects test for foreign-to-foreign transactions. However, the Mexican thresholds imply the necessity of certain local presence through either the acquisition of Mexican assets/capital stock or the existence of Mexican sales. Hence, a foreign-to-foreign transaction could trigger a Mexican filing if it implies the acquisition of Mexican capital stock/assets or where the parties' Mexican sales exceed the threshold.

Based on the aforementioned and the Mexican thresholds, a filing would not be triggered if the target has neither Mexican sales nor assets/capital stock.

Regarding the transactions where the target/joint venture has no nexus to Mexico (*i.e.*, the Target/Joint venture has no subsidiaries in Mexico, no assets, no direct or indirect sales, the target/joint venture has no presence in national territory) these operations are exempt from being notified.

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

As stated above, in Mexico has a mandatory filing regime; thus, this question is not applicable.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

The Mexican Antitrust Agencies does not have any specific tests for any particular sector. The initial test employed by the agency to analyze a transaction is the Herfindahl-Hirschman Index (HHI). Pursuant to the authority's technical criteria, the transaction has a low probability of harming competition and markets if:

- the post-transaction HHI is below 2,000 points; and/or
- delta is below 100 points as a consequence of the transaction.

Additionally, when the transaction requires a more complex analysis, the authority is able to use other tools such as the SSNIP (Small but Significant Non-transitory Increase in Price) test.

14. Are factors unrelated to competition relevant?

No, the Mexican Antitrust Agencies are highly technical agencies and are not influenced by political or other kind of factors.

In some cases, factors pertaining to shareholders structure and control over entities could be relevant for the analysis of the Mexican Antitrust Agencies. Nevertheless, this is not a standard review test.

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

The Mexican Antitrust Agencies may take into account ancillary restraints as long as they are significant for the analysis of the transaction. This usually takes place when the relevant market of the goods or services related to a transaction have a global, cross-border (e.g., North American) scope.

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

Pursuant to the FECL, where a mandatory filing is required, a transaction must be notified and cleared by the authority before any of the following takes place:

i. The legal act by which the transaction is carried out is perfected in accordance with the applicable legislation or, if the case may be, fulfills the condition precedent to which said act is subject;
ii. The direct or indirect acquisition or exercise of factual or legal control of another entity (or the factual or legal acquisition of another entity's assets, trust participation, partnership interest, or stock);
iii. The execution of a concentration agreement among the involved economic agents (unless it is conditional upon clearance by the authority); or
iv. The culmination of the last in a sequence of acts, owning to which any of the Mexican thresholds are met.

If the parties to a transaction carry out any of the above-mentioned acts before notifying and obtaining clearance, they will be subject to a fine ranging from MXN $542,850 (approx. USD $27,320) up to 5% of their income. These penalties are actually applied in practice and, in the past three years (2020 23), 12 fines have been imposed – with the average fine being USD 500,000. However, it is important to emphasize that the amount of these fines has increased lately.

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

The parties can file a notification as soon as they confirm a notification is mandatory. There is no, mandatory time or stage imposed by law; however, it advisable to submit the concentration notice only after the main terms of the transaction are agreed and no substantial changes are expected (*i.e.*, transaction structure, involved entities, non-compete and non-solicitation provisions).

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

In complex cases parties could engage the authority in pre-notification discussions. This usually happens when complex corporate structures are in place, or market concerns are identified.

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

The authority has, in principle, 60 business days to review the transaction and issue its decision. This term is counted from the date on which the authority receives all the information that was requested for the analysis. However, it should be noted that only in complex cases the Mexican Antitrust Agencies use all the 60 business days. In simple cases clearance can be obtain between 2 and 3 months from filing.

If the authority does not issue a decision within this term, the transaction will be considered authorized. The merger review process is suspensive in all cases; therefore, the parties cannot close a transaction prior to receiving clearance by the authority.

The authority is empowered to request additional information (to complete the filing) within the following terms.

a. The authority has ten business days following the date of filing to request basic information that should have been included in the initial filing. The notifying parties will have a period of ten business days to satisfy the request and this term can be extended in justified cases.
b. The authority has 15 business days from either the date of filing (or the date on which the request for the above-mentioned information is satisfied) to request additional information that it considers necessary for the analysis of

the transaction. The notifying parties will have a term of 15 business days to answer the request and this term can be extended by another 15 business days in justified cases.

Additionally, the authority may further request additional information that they deem relevant for their analysis from any person – including the notifying parties, agencies or economic agents – that is related to the concentration. Whoever receives such requests for information will have a period of ten business days to satisfy such request and this term can be extended in justified cases. Such requests will not restart the clock in terms of the time period in which the authority must issue their resolution.

If the authority issues a request for additional information pursuant to the above-mentioned terms, the 60 business days for review and resolution will start running from the date on which the authority has received all the requested information.

It should be noted that, pursuant to the FECL, the clock will be restarted, and the Mexican Antitrust Agencies will have 60 business days to analyze the remedies and to issue a decision if following the submission of the pre-merger filing – the parties offer remedies or conditions in order to dissipate any possible concerns.

The decision issued by the agencies will be valid for a term of six months. Upon request from the parties involved in the transaction, the term can be extended only once for six additional months. If a transaction is not closed within the above-mentioned time frame, the parties will need to re-submit a pre-merger filing in order to obtain a new authorization to close the transaction.

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

In complex cases, the authority can extend the review period for up to 40 additional business days in order to request additional information and/or issue a decision.

Furthermore, as previously mentioned in point (19) the 60-business day review period is counted from the date on which the authority receives all the information that was requested for the analysis. Therefore, if the authority issues a request for information (RFI) when the authority deems as completed the RFI, the 60 business days clock will restart.

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

Usually, the agencies take 15 to 30 business days to issue a resolution after all the information is provided, and the 60 business days is rarely met, only in exceptional complex cases.

Additionally, the FECL also contemplates a simplified pre-merger review process if the parties demonstrate to the authority that it is evident that the transaction does not have the aim or effect of diminishing, damaging or impeding competition.

When the parties request this simplified review, which must be within five business days following the date of the filing, the authority has 15 business days from the date on which the filing was received to issue a resolution on the transaction. Pursuant to the law, it is considered evident that – provided the purchaser does not participate in any related market and it is not an actual or potential competitor of the target – a transaction does not have the aim or effect of diminishing, damaging or impeding competition if:

i. the transaction implies the first participation of the purchaser in the relevant market (the structure of the relevant market should not be modified as a consequence of the transaction and should only involve the substitution of the undertaking);
ii. the purchaser holds no control of the acquired agent before the transaction and, through the transaction, it increases its relative participation in the acquired agent without having additional power to influence the operation, management (including the appointment of managers and board members), strategy and main policies of the company; or
iii. the purchaser has the control of a company and increases its relative participation in the capital stock of the company.

If the authority determines that a transaction submitted via this process does not meet the legal requirements or if the filing is not submitted together with all the information legally required, then the authority will issue an official communication denying the expedited review process and initiating a standard review process.

It should be noted that this simplified procedure is not commonly used because, in many cases, it is more complicated to prove that the transaction does not have the aim or effect of diminishing, damaging or impeding

competition and the authority is highly likely to consider that the legally required documents and information are incomplete. Thus, the undertakings are reluctant to follow this procedure and instead prefer to file their transactions through the standard process.

22. Which party is responsible for submitting the filing?

The notification process is a joint responsibility process. Therefore, every individual or entity directly involved in the transaction must file the notification, or in any case, adhere to the filing. In certain cases, such as hostile takeovers or public offers, the acquire can appear before the Commission as the only notifying party; however, the Commission will request to demonstrate the legal or factual impossibility for the other parties to appear as notifying parties.

23. What information is required in the filing form?

Simple copies of the following information/documents pertaining to the involved parties must be submitted along with the concentration notice in Mexico:

- Documents that describe the rationale of the transaction, such as, business plans, press release related to the transaction;
- Detailed description and structure of the transaction;
- Transaction agreements and all the related exhibits and disclosure schedules or letters;
- Incorporation documents and bylaws in force;
- Audited financial statements for the preceding fiscal year;
- Detailed direct and indirect capital structures;
- Confirmation of direct and/or indirect participation in the capital structure and/or management of entities with activities in Mexico in the same markets and/or related markets by the parties (as well as their shareholders and subsidiaries
- Competitive assessment and market shares in the national territory and any other relevant geographic market;
- List of facilities and plants in Mexico;
- Filing fee receipt; and
- List of jurisdictions in which the transaction will be notified.

In addition to the above, the notifying parties must provide the relevant powers of attorney of their legal representatives. In this regard, for Mexican entities, original or certified copies of the powers of attorney for each of the notifying parties, which should be granted in favor of their legal representatives. When a notifying party is a foreign entity, it must grant a power of attorney which must be notarize and apostilled/legalized, as the case may be.

All the information/documents must be submitted in Spanish. If the documents are in another language, a certified Spanish translation of the main terms of the document must be submitted along with the original document.

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

There are no additional mandatory documents to be filed before the authority, besides the ones described in answer to question (23); nevertheless, when needed, the parties can submit any additional document, expert witness report, study that the parties deem necessary to push forward their economic arguments/posture or rational behind the transaction.

25. Is there a filing fee?

Yes. The Law contemplates a filing fee that is annually updated. For 2024, the filing fee is MXN $237,058.00 (approx. USD $11,853, considering an exchange rate of MXN $20.00).

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

Please note that there are no public announcements when a notification has been filed; however, when a transaction is going to be analyzed by the board of Commissioners of any of the Mexican Antitrust Agencies a list with the names of the notifying parties is made public.

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

When the authority considers that the transaction requires an in-depth analysis or raises potential competition concerns, RFIs are notified to third parties (*e.g.*, competitors, clients, etc.) to obtain relevant information for the analysis and know their views. In case the transaction does not require an in-depth analysis, the authority does not reach out to third parties.

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

Before the decision is issued by any of the Mexican Antitrust Agencies, there is practically no disclosure of information to any third parties.

A couple of weeks after a decision is issued by the authority and notified to the parties, a redacted version of the decision is published in the authority's website (*i.e.*, confidential information of the parties is redacted). It is important to consider that when a transaction is cleared by COFECE, the decision barely contains a description of the transaction (which is mostly redacted) and does not include any assessment on how the authority analyzed the transaction and the involved markets. On the other hand, when a transaction is cleared subject to remedies or banned, the authority's decision will contain a detailed assessment on the transaction and the involved markets.

Regarding the IFT's decision, these are more extensive and contain greater analysis of the transaction and the relevant markets, even in simple cases; however, only redacted versions are made public.

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

Yes. Generally, the authority requests the parties to submit a waiver authorizing the exchange of information with other antitrust agencies that are analyzing the transaction. This kind of cooperation is usually done only when the transaction raises potential competition concerns and/or when the parties are negotiating remedies that might impact various jurisdictions. Waivers should be provided in order for these cooperations between jurisdictions.

30. What kind of remedies are acceptable to the authority?

Typically, the Mexican Antitrust Agencies prefer structural remedies, rather than behavioral, particularly in transactions with horizontal overlaps. The agencies are usually reluctant to accept behavioral remedies, since these require periodical review. In Mexico, the agencies consider behavioral remedies to be more effective for transactions involving vertical links, but even there, these are not usually accepted, since its surveillance takes more time, is more expensive and difficult.

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

The parties can offer remedies since the initial notification of the proposed transaction and until one day after the transaction is listed in the agenda for the Board of Commissioners to review the transaction. If the remedies are proposed after the initial notification of the transaction, the term for the authority to resolve the transaction is restarted.

The authority can propose the remedies on their own motion; however, it is standard practice for the authority to differ such offer to the parties, since these are knowledgeable of their business and can ultimately offer the remedies to address the competition concerns raised by the agencies.

The agencies issue a competition risk official communication identifying the possible concerns identified when the transaction raises potential competition concerns in order for the parties to be able to offer remedies.

If the transaction is cleared subject to remedies, the parties have to accept those, or the transaction will be blocked by the authority.

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

In Mexico there is a penalty for failing to notify when the transaction triggered any of the Mexican thresholds, late notification or closing in different terms from those authorized in the decision. The penalties for failing to notify range from approx. MXN $542,850 (approx. USD $27,320) up to 5% of the total income in Mexico for the last fiscal year. It is noteworthy to mention that the fines are imposed to each of the economic agents that carried out the transaction. Additionally, Mexican law contemplate recidivism, which can double any future sanctions within the following 10 years after the first sanction.

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

A fine up to $18,999,750 MXN (approx. USD $957,000) might be imposed for submitting false information to the authority and an investigation on the transaction could be

started. Additionally, such conduct might carry out criminal consequences.

34. Can the authority's decision be appealed to a court?

The decisions can only be appealed when these are final and this is done before judicial specialized courts on antitrust, telecommunications and broadcasting (Specialized Courts). The appeal is carried out by means of a constitutional appeal named *juicio de amparo indirecto*.

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

The initial test employed by the agencies to analyze a transaction is the Herfindahl-Hirschman Index (HHI). Pursuant to the technical criteria of the authority when the post-transaction HHI is below 2,000 points and/or delta as a consequence of the transaction is below 100 points, the transaction has low probabilities to harm the market. Additionally, when the transaction represents a more complex analysis, the authority is able to use other tools such as the SSNIP (Small but Significant Non-Transitory Increase in Price) test.

We have not identified any specific trends in the approach to the substantive assessment of transactions; however, we have noticed a trend in the enforcement and procedure consisting of detecting previous transactions that might have been subject to a premerger control filing within non related filings (*e.g.*, the authority uses a filing from a private equity firm to review its recent transactions related to Mexico and corroborate that none of those required a premerger filing in Mexico). While this might be an effective fashion to detect gun jumping cases, we consider that this mechanism should not delay the filing of the specific transaction being analyzed by the authority (as has previously occurred).

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

In Mexico, there is an ongoing legislative discussion about amending the Mexican Constitution to change the independent nature of the Mexican Antitrust Agencies. Instead of being autonomous bodies, they would become part of the executive branch, under the Ministry of Economy. This change would reduce the technical independence that currently characterizes the Agencies. However, nothing has been definitively decided yet.

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