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The International Comparative Legal Guide to:

Merger Control 2018

14th Edition

A practical cross-border insight into merger control issues

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Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 44 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Mexico

Gustavo A. Alcocer

José Miguel Lecumberri Blanco

OLIVARES

1 Relevant Authorities and Legislation

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

The Federal Telecommunications Institute ("IFT" for its initials in Spanish); and the Federal Economic Competition Commission (the "Commission"). The IFT is the agency in charge of regulating and supervising the telecommunications, radio and TV industries, and the Commission is the agency responsible for all competition matters except for those sectors reserved for the IFT. The Commission is integrated to exercise merger authority by public officials, divisions and administrative units, of which the main authority is the Commission in Plenary session, comprising seven commissioners, including the Commission President. Resolutions are issued by majority votes of its members and, exceptionally, by a qualified majority in accordance with the law.

1.2 What is the merger legislation?

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

1.3 Is there any other relevant legislation for foreign mergers?

There is no relevant legislation for foreign mergers in terms of economic competition and free commercial practices, but requirements and limitations apply with respect to foreign investment for certain industry sectors.

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

There is no relevant legislation for mergers in terms of economic competition and free commercial practices, but requirements and limitations apply with respect to foreign investment for certain industry sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

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

The Commission is able to challenge, suspend and sanction, subject to express criteria, any concentration with the purpose of diminishing, damaging or not allowing competition or free access, with respect to identical, similar or substantially similar goods and services.

Although control is not a defined term in the Law, if the underlying transaction falls within any of the thresholds set forth in the Law, regulation provides that a merger control notice shall be filed with the Commission prior to: (i) perfection of the underlying agreement or as condition precedent; (ii) acquiring or exercising direct or indirect control, *de facto* or *de jure*, of another economic agent, either through purchase of assets, shares, units of trust certificates; (iii) execution of a merger agreement; or (iv) perfection of any combination of actions, the last of which would result in exceeding the thresholds.

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

The acquisition of a minority shareholding does not amount to a merger as a general rule; however, if such acquisition is within the scenarios and thresholds specified under question 2.4, it would be subject to notice and prior approval from the Commission.

2.3 Are joint ventures subject to merger control?

Yes, please refer to questions 2.1 and 2.4.

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

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

1. When the transaction, irrespective of the place of execution, results in the direct or indirect amount in Mexico equivalent to more than 18 million times the minimum general daily wage applicable in Mexico City ("MGDW"); approximately $1,440,720,000 pesos.
2. When the transaction or a series of transactions imply an aggregate of 35% or more of the assets or shares of an economic agent, whose annual assets in Mexico or annual sales which originated in Mexico, are equal to more than 18 million times the MGDW; approximately $1,440,720,000 pesos.
3. When the transaction or a series of transactions imply an aggregation in Mexico of assets or paid-in capital which amount to more than the equivalent of 8.4 million times the MGDW; approximately $672,336,000 pesos, and two or more economic agents participate, whose assets or annual sales volume in Mexico on an individual or aggregate basis are equal to more than 48 million times the MGDW; approximately $3,841,920,000 pesos.

For reference purposes, as of 1 September 2017, the foreign exchange rate is $17.81 pesos per US dollar, as quoted by Mexico's Central Bank in the Official Gazette of the Federation (*Diario Oficial de la Federación*), and the MGDW is $80.04 pesos.

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

Merger control applies in the scenarios and thresholds described above, regardless of whether monopolistic conduct has occurred. This, in turn, may result in antitrust conduct, subject to investigation by the Commission on its own discretionary authority, upon request by the Federal Executive Branch, the Ministry of Economy, the Consumer Protection Agency or upon a third party claim.

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

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

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

There are no such mechanisms.

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

The principles that apply are: the relevant market; free competition; economic competition; identification of the economic agents; effects as a result of the concentration with respect to other competitors; and the commercial relationship between the relevant economic agents.

Additionally, and as a general rule, even if a merger takes place in stages, the Commission will consider the thresholds referred to in question 2.4 for each stage.

3 Notification and its Impact on the Transaction Timetable

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

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

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

Transactions are exempt from clearance even if they exceed the monetary thresholds (please refer to question 2.4) when:

(i) the transaction implies a corporate reorganisation in which the underlying parties belong to the same group of control and no third party is involved in such reorganisation;

(ii) a stockholder increases its participation in the capital stock of a corporation in which it has held control since its incorporation or when the Commission has previously authorised the acquisition of such control prior to the capital stock increase;

(iii) a trust is involved (for management or guaranty) based on which an economic agent contributes its assets, as long as such contribution is not made for the benefit of any person other than such economic agent or the trustee; however, upon enforcing a guaranty trust, notice applies, taking into account the thresholds mentioned in our response to question 2.4;

(iv) transactions related to stocks, shares or trust certificates related to foreign companies which are considered non-residents (for Mexican tax purposes), as long as the underlying companies do not acquire control in Mexican companies or accumulate in Mexico stocks, shares or trusts certificates, or any other asset in addition to those held, directly or indirectly, before the transaction;

(v) the acquirer is an equity investment company and the purpose of the transaction is to acquire shares, debentures, securities, credit instruments or equity participations with proceeds obtained from a public offering of the investment company's stock, except if as a result of the transaction such investment company has a meaningful influence on the decision-making of the relevant economic agent;

(vi) the acquisition of shares, securities, credit instruments or equity participations of any company or in the acquisition of instruments, the underlying assets of which are stocks of a public traded company, when the transaction does not allow the purchaser to acquire 10% or more of such assets, and additionally, the purchaser does not have authority to: a) appoint or revoke board members of the issuing company; b) directly or indirectly impose decisions at the shareholders' or partners' meetings or equivalent management bodies; c) maintain ownership of rights that allow them to, directly or indirectly, vote the shares of 10% or more of a company's capital stock; or d) manage, or directly or indirectly influence, the management, operation, strategy or main policies of a company, either through ownership of securities, by contract or otherwise;

(vii) they acquire stock, shares or trust certificates or equity participations in one or more investment funds with speculation purposes (portfolio investment) where such funds do not have any investments in companies or assets in which they participate or invest, or where they are employed in the same relevant market with the relevant economic agent; and

(viii) those cases are established by legislation.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

In cases of infringement, the Commission is entitled to: (i) order the rectification or cancellation of the underlying merger; (ii) order partial or total divestiture of what has been improperly concentrated, regardless of the fine that may be applicable in such cases; and (iii) impose penalties of up to 10% of the relevant economic agent income, among others.

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

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

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

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

i. the underlying act is perfected in accordance with the applicable legislation or, should it be the case, the condition precedent to which such act is subject, is fulfilled;

ii. control is acquired *de facto* or *de jure*, or exercised directly or indirectly over another entity; or before assets, participation in trusts, partners' capital contributions or shares of another party are acquired *de facto* or *de jure*;

iii. a merger agreement is signed between the parties to it without the condition that a clearance of merger notice must be obtained prior to effectiveness; or

iv. in the case of a succession of acts, before the last one becoming effective that would result in exceeding the applicable threshold amounts.

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

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

Within the fifteen (15) days following the notification filing date, the Commission is entitled to request additional information or documentation, which must be delivered by the interested parties within fifteen (15) days following the request. This timeframe may be extended on a case-by-case basis, for forty (40) days, based on the complexity of the case, or the volume of information requested. After the documentation delivery process is completed, the Commission has a sixty (60)-day term to issue its resolution; if such resolution is not issued within such a term, it shall be interpreted as if the Commission has no objection to the merger; however, the Commission is entitled to extend the term for its resolution for up to forty (40) days, only in extraordinarily complex transactions, decided on a case-by-case basis.

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

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

If a merger control notice has been approved or the request for additional information has not been issued by the Commission, the procedure shall continue; provided, however, that it shall not be interpreted as an implied authorisation for the execution of the underlying merger, unless the term granted to the Commission for issuance of its resolution expires, in which case it shall be interpreted as if the Commission has no objection to the merger.

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

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

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

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

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

In order to speed up the clearance timetable, close contact and lobbying with the staff at the Commission is highly recommended; this frequently results in a more expedited process and a good way of anticipating additional information requests.

3.10 Who is responsible for making the notification?

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

3.11 Are there any fees in relation to merger control?

There are no filing fees.

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

There is no impact; however, listed companies have a detailed and broad disclosure standard, facilitating the determination of notice thresholds.

3.13 Will the notification be published?

No, the law does not provide that such notification be published.

4 Substantive Assessment of the Merger and Outcome of the Process

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

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

4.2 To what extent are efficiency considerations taken into account?

Efficiency considerations shall be taken into account by the Commission when reviewing proposals that result in efficiency gains in connection with competition barriers, or aspects that have a favourable effect on economic competition.

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

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

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

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

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

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

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

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

Any information filed before the Commission or obtained by it during an investigation process will be classified as reserved, confidential or public. Reserved information is that available only to those entities with legal standing in the investigation process; confidential information means information that, if disclosed to any entity with legal standing in the investigation process, such disclosure will result in damages to the disclosing party. Confidential information will only be treated as such if the disclosing party requests so. The Commission, each of its commissioners on an individual basis, its Executive Secretary and any public officer of the Commission must refrain from revealing reserved or confidential information related to the files or administrative procedures which are part of a legal proceeding, and this may cause damage to the underlying parties until the investigated party has been notified of a resolution, on the understanding that the information will continue to be classified or confidential.

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

5.1 How does the regulatory process end?

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

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

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

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

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

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

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

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

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

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

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

5.7 How are any negotiated remedies enforced?

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

5.8 Will a clearance decision cover ancillary restrictions?

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

5.9 Can a decision on merger clearance be appealed?

The decisions of the Commission can be appealed through amparo trial (*juicio de amparo*).

5.10 What is the time limit for any appeal?

Pursuant to the dispositions of the Amparo Law, a fifteen (15)-day term is granted to the parties in order to appeal against any act during the procedure or within the resolution issued by the Commission.

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

The authority of the Commission to initiate investigations that may result in the application of sanctions expires after a term of ten (10) years following the date on which the underlying conduct was performed. The authority of the Commission to initiate a criminal action expires ten (10) years after issuance by the Commission of the resolution concluding that a party is liable for conducting monopolistic practices. In the case of merger control, the transactions not subject to notice cannot be investigated after a one-year term, following the date of completion of the transaction.

6 Miscellaneous

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

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

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

The reform of the merger control regime in Mexico was approved by the National Congress on 7 July 2014, with several reforms and extensions to various provisions of the Law; the last reform to the Federal Economic Competition Law was on 27 January 2017.

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

Our answers are up to date as of 1 September 2017.

Gustavo A. Alcocer
OLIVARES
Pedro Luis Ogazón 17
Col. San Angel
Mexico City, C.P. 01000
Mexico

Tel: +52 55 5322 3000
Email: gustavo.alcocer@olivares.mx
URL: www.olivares.com.mx

Gustavo A. Alcocer manages the Corporate and Commercial Law Group and is Co-Chair of the Life Sciences and Pharmaceuticals Group. Prior to joining OLIVARES as a partner in 1999, Mr. Alcocer acted as in-house counsel for Banamex for 11 years in various positions, including Vice President of International Legal Affairs in New York, Executive Vice President and Assistant General Counsel for Grupo Financiero Banamex. Mr. Alcocer holds J.D. degrees from the Universidad Intercontinental School of Law. He studied a graduate level course in the LL.M. Program of Banking and Securities Law at Fordham University's School of Law in New York City. Mr. Alcocer is a member of the Mexican Bar and the National Association of Corporate Counsel. He is a foreign associate of the ABA, and acted as past Co-Chair of the Intellectual Property and Entertainment Law Committee of the IBA. Mr. Alcocer has spoken at many educational sessions within national and international organisations, and possesses a wealth of transactional experience in M&A, Finance and Business Law in general.

José Miguel Lecumberri Blanco
OLIVARES
Pedro Luis Ogazón 17
Col. San Angel
Mexico City, C.P. 01000
Mexico

Tel: +52 55 5322 3000
Email: jose.lecumberri@olivares.mx
URL: www.olivares.com.mx

José is a Corporate lawyer specialised in M&A transactions. He has wide experience in foreign trade and customs law issues, especially in the oil & gas, mining and publishing industries. He also has experience in financing and fundraising projects as well as IPO transactions, private equity companies and structuring of financial dealings. He studied a graduate level course at the Universidad La Salle. Mr. Lecumberri holds a M.A. degrees from the Universidad de Oviedo, and a Master's Degree in Law History.

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