Pre-Merger Notification Survey

MEXICO
Basham, Ringe y Correa S.C.

CONTACT INFORMATION
Amilcar Peredo
Basham, Ringe y Correa S.C.
Mexico
Telephone: 52.55.5261.0400
Email: aperedo@basham.com.mx

1. Is there a regulatory regime applicable to mergers and similar transactions?

Yes. Article 28 of the Mexican Federal Constitution, as well as Chapter III of the Federal Economic Competition Law (the “Law”) prohibit mergers and other concentrations that may affect the proper operation of Mexican markets and set forth a notification mechanism for certain transactions that, due to their size or importance, may have an effect on the markets.

2. Identify Applicable National Regulatory Agency/Agencies.

The national regulatory agency regulating mergers and similar transactions, from an economic competition perspective, is the Federal Competition Commission (the “Commission”). It is made up of five commissioners (among them the president), supported by an executive officer, as well as various technical and administrative departments (Economic Studies, Investigations, Legal, etc.)

3. Is there a supranational regulatory agency (e.g., the European Commission) that has, or may have exclusive competence? If so, indicate.

No.

4. Are there pre-merger filing requirements; if so, where are they published?
Notice of any transaction exceeding the thresholds set forth in the Law must be given, in writing, to the Commission before being carried out. The rules for proceeding with the filing and required information is described in the Law and its Regulations; however, for information purposes only, the Commission has published brochures, guidelines and questionnaires related to the information that is needed or requested for analysis of any specific transaction.

As a result of the above referred to proceedings, the Commission may authorize, object to or subject to conditions, the transaction whose notice is being dealt with.

5. **What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions)**

As a general rule, any transaction that may have an impact on the Mexican market (or on its participants), may be analyzed by the Commission in order to determine whether the process of free and open competition is being affected; however, only transactions exceeding certain thresholds set forth in the Law, require previous notification to be given to the Commission. Most corporate restructurings are excluded from the notification requirement, while transactions which will clearly not affect the process of free and open competition may only require compliance with a fast track process.

Transactions under the thresholds may only be challenged as unlawful within the first year of being carried out. To avoid this risk, it is possible to voluntarily submit to the notification process in order to obtain explicit approval from the Commission.

6. **Is there a "size of transaction" threshold?**

Yes. Article 20 subparagraph I of the Law sets forth that notice of any transaction whose value in Mexico exceeds the approximate amount of US$73,060,000 must be given to the Commission, prior to completion.

7. **Is there a "size or turnover of the parties" test; if so, what is it and how are size and turnover to be calculated?**

Yes. According to the Law, the size and/or turnover of the target company, buyer and seller must be calculated in order to determine if notice of a transaction must be given.

Regarding the target company, in accordance with Article 20, subparagraph II of the Law, notice of a transaction must be given prior to completion whenever a company acquires 35% or more of the target company assets or shares, whenever or turnover within Mexico exceeds the approximate sum of US$73,060,000.

8. **Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.**
Yes. Only transactions that will affect the Mexican market or the economic agents participating on it, will be subject to notification.

9. **Is the filing voluntary or mandatory? What are the penalties for non-compliance?**

The filing is mandatory for those transactions exceeding the thresholds set forth in the Law (except for most corporate restructurings), and voluntary for other transactions which do not meet the thresholds.

A failure to give the required notice of a transaction may result in the imposition of a fine of up to approximately US$1,620,000. The same will apply for filing a notice beyond the time limits set out in the Law.

10. **Time in which a filing must be made.**

   The filing must be made:
   i) before the transaction is completed;
   ii) before one of the parties directly or indirectly acquires shares, assets or corporate control of the other;
   iii) before the execution of a merger agreement; or
   iv) with respect to a series of transactions, before the thresholds mentioned above are exceeded.

11. **Form and Content of Initial Filing.**

   The filing must contain the information and documentation set out in Article 21 of the Regulations to the Federal Economic Competition Law. The Commission has published a questionnaire of information to be provided in complex cases.

12. **Are filing fees required?**

   Yes. The filing fee is set annually and is currently about US$10,200.

13. **Is There An Automatic Waiting Period? If so, specify.**

   Yes, there is an automatic waiting period of 10 working days, calculated from the date of the filing, during which the Commission may issue an order prohibiting the parties from carrying out the transaction in question. If such an order is issued, the parties must wait until the Commission reaches its final decision prior to closing the transaction. If such an order is not issued during the 10 day period, the parties may close the transaction, although they assume the risk of a possible objection by the Commission to the transaction or an order giving conditional approval.

14. **Are There Time Limits Within Which The Regulatory Agency Must Act? Can they be shortened by the parties or be extended by the regulatory agency?**

   The Law sets forth specific time limits for the review process:
i) fifteen working days for the Commission to request further information (when needed); and

ii) thirty-five days to issue its decision once the Commission considers that the information is complete. The Commission is entitled to extend the above periods for up to forty additional working days.

As an exception to the normal process, transactions which will clearly not affect the process of free and open competition in the relevant market must be approved within the fifteen working days following the order from the Commission accepting the filing of the notice for processing and no extensions to this period are allowed. If no decision is issued within the above referred-to periods, the transaction will be considered as approved.

The parties are not legally entitled to shorten the above-mentioned time periods; however, filing complete information or promptly attending to any requirements of the Commission contributes to an early decision.

15. What is the substantive test for clearance?

The Commission will first determine the relevant market and the concentration indexes (Herfindahl and Dominance) before and after the transaction in question. If these result in permissible levels of concentration in the relevant market, the transaction will be cleared without further analysis. Only if the concentration indexes result in a concentration beyond the permissible parameters further analysis will be required to determine whether the transaction will have a negative effect on the relevant market.

16. What are the common Post-Filing Procedures: Requests for further information, etc?

The only post-filing procedure is the request for additional information which must be made by the Commission within the first fifteen working days after the date on which the notice was filed.

17. Describe the sanctions for not filing or filing and incorrect/incomplete notification.

The Commission may impose a fine of up to approximately US$1,620,000 for out-of-time notifications or whenever notice of a transaction that meets the thresholds set forth in the Law is not given. The same will apply for incomplete notifications, since these last will be deemed as not filed and thus an out-of-time notification fine could be imposed.

Aside from the above, the transaction itself may be investigated by the Commission and challenged as an unlawful concentration, something which could result in an order to reverse the concentration and fines up to US$3,650,000.
Finally, the Commission may impose a fine of up to approximately US$124,000 for false statements or for delivering false information to the Commission, independently of any criminal liability which they may incur.

18. Describe the procedures if the agency wants to challenge the transaction?

With respect to transactions, notice of which has been given, during a notification proceeding, the Commission is entitled to approve, subject to conditions or object to the transaction in question, and thus, no other procedure is needed to challenge the same.

To challenge a transaction, as an unlawful concentration, for which notice was not given in spite of meeting the thresholds, or a transaction under the thresholds within the first year after being carried out, a “Probable Liability Proceeding” must be started, ex-officio or upon filing of a complaint by an interested party. This will lead to an investigation, followed by a proceeding in which the presumed violator (or violators) will be entitled to offer evidence and arguments, in order to prove that the transaction in question is not affecting the market.

Once the Probable Liability Proceeding has been carried out, the Commission will decide if the transaction is affecting the relevant market, and if so, may impose fines and order the parties to reverse the concentration.

If a complaint is made regarding a transaction that requires notice to be given (and which has not yet closed), and either notice has already been given or is given in time, then the complaint will not be processed but the information offered by the complainant will be taken into account as a basis for objecting to or approving the same during the notice review process.

19. Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger?

There is no explicit fine within the current legislation for implementing a merger before clearance by the Commission (although there is a risk of having to reverse an objected to transaction). Transactions deemed as unlawful or prohibited may be the subject of an order to reverse the concentration and of fines of up to about US$3,650,000. The same fine could be imposed if it is found that the merger did not comply with the conditions imposed by the Commission in order to allow it to close. Finally, any individual who has directly participated in carrying out an unlawful concentration may be fined up to the approximate amount of US$123,000, while any party who participated or collaborated in creating the concentration may be fined up to approximately US$113,000.

20. Describe, briefly, your assessment of the regulatory agency's current attitudes/activities.
The Commission has been actively trying to improve its economic analysis of transactions, as well as to work towards transparency in its methods and decision-taking procedures.

21. Other Important Information:

The Commission has issued Merger Guidelines in order to inform and orient the general public on the process that will be followed in analyzing, clearing or objecting to transactions filed with it. Although these Guidelines are not binding, they constitute.