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June 5, 2015

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Comisión Federal de Competencia Económica (COFECE)

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RE: Joint Comments on the Draft Merger Notification Guidelines of the Mexican Comisión Federal de Competencia Económica

Dear Commissioners:

On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments on the Draft Merger Notification Guidelines of the Mexican Comisión Federal de Competencia Económica.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



Howard Feller
Chair, Section of Antitrust Law



Marcelo E. Bombau
Chair, Section of International Law

Attachment

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL
LAW ON THE DRAFT MERGER NOTIFICATION
GUIDELINES OF THE MEXICAN COMISIÓN FEDERAL
DE COMPETENCIA ECONÓMICA**

[June 5, 2015]

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the Mexican Comisión Federal de Competencia Económica (“COFECE”). The Sections appreciate the opportunity to present our views regarding COFECE’s Draft Merger Notification Guidelines (“Draft Guidelines”)¹ applicable to transactions covered by Mexico’s federal competition statute, the Ley Federal de Competencia Económica (“LFCE”). The Sections appreciate the substantial thought and effort reflected in the Draft Guidelines and offer these comments in the hope that they may assist in completing the final version. The Sections’ comments reflect our expertise and experience with competition law in the United States as well as in many other jurisdictions worldwide.

The Sections commend COFECE’s focus on continuing to improve the transparency, efficiency, and effectiveness of its merger notification process, consistent with the guiding principles and recommended practices of the International Competition Network (“ICN”).² These comments focus on five aspects of the Draft Guidelines: Reportability of Joint Ventures; Exceptions to Mandatory Filing; Filing Parties; Review Periods; and Simplified Procedure.

1. Reportability of Joint Ventures

The Draft Guidelines indicate (see p. 6, ¶ II) that certain joint ventures (“*acuerdos de colaboración entre competidores*”) constitute reportable transactions. The Draft Guidelines state: “unlike in the legal frameworks existing in other jurisdictions, in Mexico there is no legal institution allowing the exemption [of certain joint ventures] from the LFCE. When an agreement of such nature is notified, COFECE verifies whether there is any element which allows including the act in question within the scope of Article 61 LFCE.” Indeed, the concept of reportable transaction (“*concentración*”) is put in very broad terms under Article 61 of the LFCE and the Draft Guidelines (p. 4), and encompasses “any act by virtue of which corporations, associations, shares, stakeholders, trusts and assets in general are put together and which takes place between competitors, suppliers, clients or other economic players.”

We welcome the Draft Guidelines’ statement that COFECE will evaluate whether any particular joint venture has “*aspects analogous to those which would take place in a merger or in an acquisition of shares or assets*” (p. 6, ¶ III) and therefore is properly subject to merger review. The Draft Guidelines apparently intend to exclude from reporting obligations purely associative joint ventures, *i.e.*, joint ventures that do not involve a lasting

¹ Guía para la notificación de concentraciones, available at http://www.cofece.mx/images/Consulta/Guia_concentraciones_consultaP.pdf.

² ICN Guiding Principles, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>; ICN Recommended Practices available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

change in the structure of the relevant market(s) (see p. 6, ¶ III). The Sections urge that the Draft Guidelines should also more precisely specify in other ways what types of joint ventures must be reported and what types need not be.

Particularly given the broad scope and applicability of Article 61 of the LFCE, it would be helpful for the Draft Guidelines to provide more specific guidance beyond the current list of “non-exhaustive” criteria to be taken into consideration for these purposes.³ Providing clearer guidance would enable parties to comply with the law while at the same time relieving COFECE of the burden of reviewing potentially massive numbers of filings raising no serious plausible competitive issue. Providing this sort of clear guidance is consistent with international norms and there are several models to use as a reference. For example, both the U.S. Federal Trade Commission and the European Commission have provided detailed guidance on this issue.⁴

2. Exceptions to Mandatory Filing

The Draft Guidelines essentially reproduce Article 25 of the Regulations to the Competition Act (Disposiciones Regulatorias) (“Regulations”),⁵ specifying that to qualify for an exemption from filing based on the fact that the acquirer already controls the relevant undertaking involved in the transaction, the acquirer must already own at least 95% of the shares of the undertaking.

We recommend that the 95% threshold be eliminated, so that no transactions where a controlling stakeholder increases its stake in an undertaking it already controls would be subject to the mandatory merger control process. We recognize that adopting this recommendation would also require modifying the Regulations, but this change would conform the Regulations to international norms, which do not require notifications of share acquisitions where the acquirer already controls the relevant undertaking and is merely increasing its ownership stake.⁶

3. Filing Parties

³ The Draft Guidelines (p. 6, ¶ III) point to the following non-exhaustive list of elements that may lead to a transaction being reportable: “the participation of two or more economic actors in an economic activity, the establishment of a long-term relationship [between two companies] that goes beyond a commercial relationship, the possible inference of an economic actor in the strategic management or in the appointment of the directors or board members [of another company] and the de facto transfer of physical control over the assets [of another company].”

⁴ See, e.g., 16 C.F.R. § 801.40 (formation of joint ventures or other corporations), available at http://www.ecfr.gov/cgi-bin/text-idx?SID=76f160cb0b5126c6be0124702a67f77b&mc=true&node=se16.1.801_140&rgn=div8; 16 C.F.R. § 801.50 (formation of unincorporated entities), available at http://www.ecfr.gov/cgi-bin/text-idx?SID=76f160cb0b5126c6be0124702a67f77b&mc=true&node=se16.1.801_150&rgn=div8. See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, pp. 1-22, at Article 3(4), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:en>; and Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, pp. 1-48, at Section B.IV (Joint Ventures – The Concept of Full-Functionality), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>. Under these standards, joint ventures are subject to notification obligations if they perform on a lasting basis all the functions of an autonomous economic entity (full-function joint ventures).

⁵ See Acuerdo mediante el cual el Pleno de la Comisión Federal de Competencia Económica emite las Disposiciones Regulatorias de la Ley Federal de Competencia Económica from Mexican Official Gazette (Nov. 10, 2014).

⁶ See ICN Recommended Practices for Merger Notification Procedures, *supra* note 2, § IV.B; see also, e.g., 15 U.S.C. § 18(a)(c)(3), available at <https://www.law.cornell.edu/uscode/text/15/18a> (exempting from Hart-Scott-Rodino notification requirement asset acquisitions where the acquirer already own at least 50% of the voting securities of the target issuer).

The Draft Guidelines refer to COFECE's general practice of requiring all parties signing a concentration agreement to join in the notification of the concentration. The Draft Guidelines also recognize, however, that there are transactions where multiple undertakings sign the agreement, but it is appropriate for only those undertakings that control the acquiring and selling parties to submit the notification if the parties show that it is legally or factually "impossible" for all the undertakings involved to do so. This criterion is also incorporated in Articles 19 and 20 of the Regulations. (The same criterion applies for those transactions where the acquiring parties are all members of the same economic group, and the question is whether all of them must join in the filing.)

In most cases it is not literally impossible for all the undertakings involved in a transaction to submit the filing. It is, however, almost invariably burdensome for all the parties to join the filing. For example, each of the parties is required to execute a power of attorney, and corporate and financial information for all companies might need to be submitted. To reduce the regulatory burden for the notifying parties, we recommend that COFECE eliminate the requirement that undertakings signing the relevant agreement other than those that control the acquiring and selling parties show that it is impossible for them to join the filing and otherwise leave the general exceptions as currently drafted (which, except for the required showing, are consistent with international norms).⁷

Absent this modification, the efficiencies that the exceptions to joining the notification are intended to promote would rarely, if ever, be realized in practice. We recognize that implementing this suggestion would require modifying the Regulations as well.

4. Review Periods

Under Article 90(V) of the LFCE, the ordinary review process in Mexico lasts for 60 business days. Under Article 90(VI) of the LFCE, however, COFECE can, "in exceptionally complex cases," extend this period by 40 days. Neither the LFCE nor the Draft Guidelines require COFECE to provide the parties with an explanation for extending the waiting period by 40 days, and no definition of "exceptionally complex cases" is provided. We recommend that the Draft Guidelines be modified to require that COFECE provide the parties with an explanation for extending the waiting period. This would increase transparency and conform with international norms.⁸

5. Simplified Procedure

Transactions benefitting from the simplified procedure provided for by Article 92 of the LFCE will be authorized in 15 business days. However, it appears that this "fast-track" procedure (procedimiento simplificado) is available only in very narrow circumstances. Under Article 92 of the LFCE, only those transactions where the acquiring entity "is not active in markets related to the relevant market where the concentration takes place, nor is an actual or potential competitor of the acquired entity" are eligible for this procedure. Moreover, Article 92 includes several additional requirements for a transaction to be eligible for the simplified procedure.

We believe that the provision for simplified procedure would better promote more efficient reviews if it were broadened to encompass transactions that plainly have no potential to result in anticompetitive

⁷ See ICN Recommended Practices for Merger Notification Procedures, *supra* note 2, Section V.B.

⁸ See, e.g., ICN Recommended Practices for Merger Notification Procedures, *supra* note 2, Section VI(C) ("Merging parties should be advised not later than the beginning of a second-stage inquiry why the competition agency did not clear the transaction within the initial review period.").

effects in Mexico, including transactions where there are minimal horizontal or vertical overlaps between the merging parties. Indeed, the European Union has recently established market share-based safe harbors of 20% for horizontal overlaps and 30% for vertical relationships, with transactions below those thresholds benefitting from the (simplified) European Union Form RS.⁹ We suggest that COFECE consider using the Draft Guidelines as a mechanism, in combination with any necessary changes to the LFCE, to broaden the simplified procedure to encompass transactions that have no potential to harm competition in Mexican markets yet are not currently eligible for the simplified procedure.

Finally, the Draft Guidelines provide that for parties to benefit from the fast-track procedure, they must not only meet the requirements of Article 92 of the LFCE, but also submit all the required information for merger review in their initial filing. It appears that if the parties fail to submit any necessary information, the transaction may no longer be eligible for the simplified procedure, and the parties will automatically be forced to follow the regular procedure.

We recommend that the Draft Guidelines be modified to provide that if COFECE finds the information provided by the parties in a simplified notification insufficient, it must (or at least should have discretion to) allow the parties an opportunity promptly to bring their notification into compliance without losing the benefit of the simplified procedure. This would lessen the possibility that the efficiencies from the simplified procedure would be lost based on minor deficiencies with the notification and would be consistent with international norms.¹⁰

Conclusion

The Sections very much appreciate the opportunity to comment on the Draft Guidelines and hope that COFECE finds these comments useful. We would be pleased to respond to any questions that the COFECE may have and to provide any further assistance that may be appropriate.

Respectfully submitted,

**Section of Antitrust Law
Section of International Law
American Bar Association**

⁹ See *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004*, OJ C 366, 14 12 2013, available at [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC1214\(02\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC1214(02)), at para. 5(c). Although, strictly speaking, the EU simplified procedure is not a “fast-track,” it does tend to result in transactions being cleared in an expedited manner after a cursory preliminary (Phase I) investigation.

¹⁰ For example, in Brazil parties making a deficient fast-track notification are given one chance to correct the notification without losing the benefit of the fast-track procedure. See Article 53, §1 of the Brazilian competition law (Law 12,529/2011), available at <http://www.cade.gov.br/Default.aspx?4de031f8081df33fcb79d36bc6> and Article 2 of CADE’s Resolution No. 2/2012, available at http://www.cade.gov.br/upload/Resolucao%202_2012%20-%20Analise%20Atos%20Concentracao.pdf; see also ICN Recommended Practices for Merger Notification Procedures, *supra* note 2, Section V.B. (advocating flexible processes to avoid unnecessary burdens on parties to transactions that do not raise material competition concerns).