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Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Mexico

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Mexico --

1. General points: Merger control regime

1.1 Please provide a brief overview of your merger control regime

1.1.1 Legal powers

1. The Federal Law of Economic Competition (FLEC) was enacted in 1993. Since then, there has been a fully-functioning merger control regime.

2. The FLEC defines concentrations as the merger, acquisition of control, or any other action whereby an economic agent acquires assets, stock holding, equity interests, trusts, or assets in general from other economic agent.

3. The Mexican Federal Competition Commission (hereinafter Commission or CFC for its acronym in Spanish) has the power to challenge and impose fines on any transaction whose aim or effect is to reduce, lessen or prevent competition and free market access of products and services that are equal, similar or substantially related.

1.1.2 Substantive test used

4. Article 17 of the FLEC states that the CFC may consider the following criteria for challenging a concentration: i) that the transaction grants or may grant to the merging parties unilateral power to set prices or restraint supply in the relevant market and competitors are not able to counteract this power; ii) that the transaction has the purpose of unduly displace competitors or impede entry to the relevant market; and iii) that the new agent obtains or strengthens its power to incur in monopolistic practices.

5. Article 18 of the FLEC defines the elements that are necessary to decide if the merger may be challenged or sanctioned. First, the article establishes the basis of an analysis following the principles of a dominance test. The analysis begins with the definition of the relevant market, according to a procedure that is defined in the FLEC and its Regulations. Second, the Commission identifies the economic agents that participate in the market, defines their market shares, analyzes their market power and estimates the degree of concentration. To do this, the Commission uses the Herfindahl-Hirschman Index (HHI), and the Dominance Index (DI). The use of concentration indexes is regulated by a ruling by the Commission's Plenum.¹

¹ The ruling is called "Resolución por la que se da a conocer el método para el cálculo de los índices para determinar el grado de concentración que exista en el mercado relevante y los criterios para su aplicación" and was published in the Official Gazette (Diario Oficial de la Federación) on July 24th, 1998. The dominance index, used as a complement of the HHI, has the characteristic that it diminishes when the

6. In addition, article 18 defines other elements that open the possibility of an analysis similar to the Substantial Lessening of Competition Test (SLC). Particularly, this article considers the examination of the effects of the concentration on other related markets, as well as efficiency arguments presented by the parties that are involved in the transaction.

7. In the evaluation of efficiencies, article 16 of the FLEC's Regulations considers that a concentration can improve efficiency in the market and can have a positive impact in the process of competition and free market access if the parties show that there are permanent benefits for consumers that exceed the anti-competitive effects of the concentration. The kind of efficiencies that could be accepted in an efficiency defense is related to permanent cost reductions, technology transfers, improvement of infrastructure and distribution networks.

8. In addition to article 18, the Plenum's ruling that defines the methodology to estimate concentration indexes stipulates that even in the case that indexes are below the risk thresholds, the Commission may conclude that a transaction could reduce, damage or impede competition and free market access, when: i) the involved parties have participated in previous transactions in the same relevant market; ii) the parties are related with another agent and from this relationship the parties can obtain a privileged access to any essential input or advantages in distribution, marketing or advertising in the relevant market; iii) the parties can obtain market power in related markets; or iv) any other element that could represent or lead the parties to obtain market power that is not reflected in the market shares before the transaction occurs.

1.1.3 Mandatory regime

9. When the monetary thresholds established in the FLEC are met, it is compulsory to notify mergers and acquisitions prior to their completion.

10. Since January 1st 2011, the notification fee will be eliminated.

11. There are not special requirements for merger notification. The parties have to submit information on the parties involved in the concentration; documents which certify the representative's legal capacity; the companies' constitutional documents; financial statements; description of capital stock structure of the economic agents participating, both before and after the concentration; description of the transaction, its objectives, kind of transaction and non-compete clauses; mention if the economic agents involved in the transaction participate in other firms that produce or sell similar or substantially related goods to those supplied by the parties; description of the goods and services supplied by the parties, and information about their use in the relevant market; information about market shares of the parties and their competitors in the relevant markets; information about placement of factories and distribution centers owned by the parties; and another elements that could be helpful for the analysis of the transaction.

merging parties are minor competitors in the market so that presumably competition is enhanced by a "new stronger" agent. An increase in the ID does not imply the achievement of dominant position by the merging parties; in any case, the level and its change are taken as a presumption of the "new" agent to achieve or strengthen market power. The concentration indexes only use market share information and for this reason, are at most considered auxiliary elements for the analysis of market power. To determine if an economic agent has market power or could obtain market power as a result of a merger or acquisition, the Commission has to take into consideration barriers to entry, the power and presence of competitors, access to inputs, the recent behavior of economic agents involved in the transaction, access to imports, the capacity to fix prices unilaterally without the competitors being able to actually or potentially counteract that capacity, the cost for the consumers to access to another suppliers, and other elements.

1.1.4 Monetary thresholds

12. The FLEC establishes that the following concentrations have to be notified to the CFC:

- When the transaction or series of transactions giving rise to the concentration, regardless of the place where they take place, have a value in Mexico, directly or indirectly, exceeding the equivalent of 18 million times the general minimum wage (MW) for the Federal District;
- When the transaction or series of transactions giving rise to the concentration involve the accumulation of 35 per cent or more of the assets or shares of stock of an economic agent, whose assets or annual sales in Mexico exceed the equivalent to 18 million times the MW; or
- When the transaction or series of transactions giving rise to the concentration involve the accumulation in Mexico of assets or capital stock in excess of the equivalent to 8.4 million times the MW and two or more economic agents take part in the concentration whose assets or volume of annual sales, jointly or individually, exceed an amount equivalent to 48 million times the MW.

13. It is not necessary that control is acquired over the Mexican economic agent. A notification could be triggered if the thresholds are met even if the transaction involves only the acquisition of non-voting shares.

1.1.5 Exemptions or special provisions for cross-border mergers

14. The FLEC states that whenever the acquired party in a merger has interests (assets, stock or sales) in Mexico, the transaction has to be notified – this obligation stands even if the acquirer has no prior interests in Mexico.

15. The analysis carried out by the Commission in the case of cross-border mergers is not different from that when the parties are national companies.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

16. No, there has not been such a case in México. Most instances related to cross-border mergers focused on: i) the exchange of information; and ii) the request by other authorities to sign waivers from companies situated in México which may have interests in their jurisdictions.

2.1.2 Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

17. Yes, currently the Mexican Government and the CFC have signed agreements with other agencies and governments (jurisdictions) in the field of competition policy enforcement and advocacy. Particularly, in merger cases the agreements require the authorities to notify each other whenever there is a transaction in which the economic agents involved are established and/or located in the territories of the corresponding authorities.

18. The agreements which have been signed by the Mexican Government or the CFC are the following:

- Agreement between the government of the United States of America and the government of the United Mexican States regarding the application of their competition laws.
- Agreement between the government of the Canada and the government of the United Mexico States regarding the application of their competition laws.
- Arrangement between the Fair Trade commission of the Republic of Korea and the Federal Competition Commission of the United Mexican States regarding the application of their competition laws.
- Agreement between the Federal Competition Commission of the United Mexican States and the Federal Antimonopoly Service of the Russian Federation on Cooperation in the Field of Competition Policy.
- Implementing Agreement between the government of Japan and the Government of the United Mexican States Pursuant to article 132 of the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership.
- Annex XV of the Free Trade Agreement between the European Union and Mexico.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

19. Most of the agreements signed by the Mexican government and the CFC relating to the enforcement of competition law are non-binding in nature; however, the Commission has always been willing to comply with the commitments contemplated in the agreements regarding cross-border mergers and acquisitions

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organizations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organizations?*

20. The CFC has been a very active participant in the OECD and ICN in the area of merger control. As a member of the OECD, the Commission has taken part in a number of roundtables where merger control has been addressed. As part of the Global Forum on Competition in January 22, 2009, the CFC answered a Questionnaire on the Challenges Facing Young Competition Authorities and participated in the related discussion. During this Forum the CFC explained merger control rules in Mexico, as stated in the Federal Law of Economic Competition. The CFC also wrote about the challenges it faces while implementing the merger control regime, such as streamlining the analysis so that human resources can concentrate on the handling of complicated cases.

21. Regarding its participation in the ICN, the CFC has been actively involved in the development of the Merger Working Group products (such as Recommended Practices; Guidelines Workbook; Handbooks; Reports and Templates). In addition to this, these products have served as useful guidance and international benchmark to reform the FLEC. For example, in 2006 the FLEC was amended to allow the CFC to impose structural remedies and to strength and simplify procedures related to the presentation of

efficiency gains arguments. Currently, the Mexican Congress analyzes a second generation of reforms to ease the enforcement of the merger control regime. Among other things, the reform proposal contemplates exempting from the obligation to notify certain type of mergers that clearly pose no risk to competition.

2.1.5 *Does your regime belong to a regional organization in the field of competition law? Does this organization have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?*

22. The provisions included in the FLEC and its regulations do not belong or are subordinated in any way to a regional regime or an international organization.

2.2 *Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)*

2.2.1 *If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?*

23. To determine if a merger needs to be notified, the FLEC considers the use of monetary thresholds. These were updated in 2006, when the FLEC was reformed. At that time the thresholds were increased more than 50% on average, in order to improve the agency's capability to analyze mergers that have a significant impact in Mexico. In the reform package currently under discussion, changes to the notification thresholds are not contemplated.

2.2.2 *Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?*

24. The FLEC considers that the merger has to be notified by the different parties involved in the transaction (buyer, seller and the target). The parties are obligated to provide the information that is considered necessary by the CFC to carry out the analysis, even if one of the parties is placed in other country. If the parties do not provide the requested information, the Commission can close the file, without issuing a decision. Normally, the CFC does not have major difficulties in obtaining the information and so far it has not asked official help from other competition authorities.

2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

25. In cross-border mergers it is important for the Commission to take into consideration the analysis of other agencies, particularly those of Canada and the USA - Mexico's commercial partners in NAFTA -. The CFC verifies if conditions imposed in other jurisdictions could affect the degree of concentration in Mexican markets or affect supply conditions.

26. In some merger cases that are cleared with remedies in other jurisdictions, it is often not necessary to impose remedies in Mexico, because the action taken by other agencies is normally enough to solve the competition concerns in Mexico.

2.2.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

27. The Law employs technical elements to define relevant markets and to assess the competitive effects of mergers. The decisions are made by a collegiate body and it is not necessary to obtain the approval of other agencies or ministries. The executive power is not allowed to modify or to block a Commission's decision, in any kind of merger.

2.2.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

28. The objective of the FLEC is the protection of competition and free entry into the markets as a means to improve efficiency and to create better conditions for consumers. The FLEC does not consider public interest objectives, such as the protection of employment or protection of national companies.

2.2.6 *Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?*

29. The Commission has not identified any particular aspect in which it is necessary to work in order to improve enforcement actions in the case of cross-border mergers.

30. The Commission has a good relationship with agencies of Canada and USA, Mexico's main trade partners.

31. For the CFC, it is important to maintain cooperation with these countries because many of cross-border mergers that affect Mexico's economy involve companies placed in Canada or USA.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 *Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.*

32. The CFC has imposed remedies on cross-border mergers only in cases in which the markets have a national dimension, so the remedies have only affected Mexican markets.

33. Typical cases are those involving pharmaceuticals, in which is possible to divest assets on a national basis.

2.3.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioral remedies be applied? Please provide examples where appropriate.*

34. According to the FLEC, it is possible to impose remedies that may alleviate competitive effects of mergers, when remedies are justified in magnitude and are focused on concerns in the relevant markets that could be affected by the merger.

35. The FLEC does not limit the kind of remedies that could be imposed, so the Commission can adopt behavioral or structural remedies.

36. According to its experience, the Commission prefers the use of structural remedies, because they are more effective and simpler to enforce.

37. The Commission employs behavioral remedies only when it is not possible to impose structural remedies or as a complement of the latter. In the adoption of this kind of remedies, the Commission analyses their effectiveness to protect competition and the cost of implementation.

2.3.3 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

38. Once a merger is approved, the parties may have incentives to avoid the adoption of remedies. Thus, the CFC has decided not to approve certain mergers until the parties have fulfilled a program of remedies. If the parties demonstrate that they have satisfied the program, then the Commission approves the merger.

39. There are some cases in which it is not possible to proceed as mentioned above. For example, in cross-border mergers the Commission has considered that is not necessary to affect the closing of the merger in other jurisdictions. Because of that, sometimes the CFC approves the merger conditioned to a strict program to fulfill the remedies. The Commission is empowered to reverse an approval when the parties do not satisfy the program.

40. In Mexico, the rules of the game in place do not provide much flexibility for negotiating remedies. Particularly, the review period is relatively short and the procedure does not consider the possibility to stop it in order to open a period to discuss remedies with the parties.

2.3.4 *What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?*

41. In general, the parties have to accept the remedies imposed by the agency and have to present a program that considers actions, dates and reports.

42. Because the imposed remedies are normally focused on the attention of competition concerns that arise in Mexican markets, the Commission rarely informs others agencies or requests their assistance.

2.3.5 *To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?*

43. The Commission has discussed remedies with other national agencies within the framework of existing cooperation agreements. For this, it has been necessary to exchange information on the basis of confidentiality and the consent of the parties.

44. The discussions have focused on informing the other national authority about the possibility of a remedy that could have cross-border effects. There are no experiences of discussions to impose joint or coordinated remedies.