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Cross-border Mergers – Contribution from Mexico

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Cross-border Mergers

- Contribution from Mexico -

1. Introduction

1. In the last decade, forty one percent (41%) of the notified mergers to the Federal Telecommunications Institute (IFT) have been cross-border mergers, which means that the notified transactions merged companies from multiple jurisdictions or produced effects in Mexico and other jurisdictions simultaneously. In fifteen percent (15%) of those cross-border cases, the IFT imposed either structural or behavioral remedies. Hence, cross-border transactions absorb a considerable amount of work, attention and analysis of this competition authority.

2. This contribution presents, from the IFT´s perspective and experience, the main challenges in cross-border transactions, such as uneven timing in notification filings, lack of expertise from the merging parties to determine the reportability of a merger transaction in different jurisdictions, issues related to mergers involving private equity and financial enterprises, and the need for broader international cooperation between competition authorities, i.e., not limited to issues related to the handling of parallel cases.

3. In addition, it proposes some tools to address these challenges and to reinforce international cooperation, such as mandatory simultaneous notification filings, to expand pre-merger communications between competition authorities and parties involved in cross-border transactions, to enhance the information requests -especially in the case of mergers involving private equity and financial enterprises- and to implement staff exchange programs and joint collaborations between competition authorities from different jurisdictions.

2. Main Challenges Faced in Cross-Border Merger Cases

2.1. Uneven Timing in Notification Filings

4. An area of concern in international merger cases is the late filing of merger notifications (ex-ante proceedings)[1] for the same transaction in different jurisdictions. While some competition authorities receive a merger notification early on, others receive a late notification filing of the same merger transaction.

5. The parties involved in an international transaction prioritize differently between jurisdictions when it comes to the timing for filing a merger notification. For example, some market participants decide to notify first in those jurisdictions where their market presence is larger or where they anticipate facing long waiting statutory periods. Other market participants begin filing notifications in jurisdictions where they assume that risks to competition are unlikely to arise, or in legal regimes that provide fast-track proceedings. There are also those that file notifications first in jurisdictions for which they possess the most information and notify other jurisdictions later as information is gathered.

[1] Additional issues would arise in ex-post proceedings, but this is not the subject of this contribution.

6. However, this uneven timing in notification filings presents legal risks in merger notification proceedings. First, it encourages the parties involved in a cross-border merger to engage in gun-jumping behavior, as the acquirer may begin to take control over the target before receiving an authorization from the late-notified jurisdictions. Second, it impedes a timely and open international collaboration between the agencies involved, as the late-notified jurisdictions may face the burden of mirroring the market definition and competitive assessment or even accepting the remedies or flat authorization as imposed by the authorities that had previously reviewed the merger transaction. Third, it puts an extra burden on the late-notified competition authorities, as they must speed up the competition analysis for those merger transactions that were already cleared by foreign competition authorities. Fourth, it creates an impossibility for competition agencies to timely coordinate for the imposition of remedies. Fifth, it increases the risk of bringing different market definitions and even imposing contradictory remedies. Hence, the uneven timing of merger notification across different jurisdictions poses significant risks to the competition assessment and to a timely international collaboration and efficiency in determining adequate remedies.

2.2. Lack of Expertise from the Merging Parties to Determine the Reportability of a Merger Transaction across Jurisdictions

7. It is not uncommon to find that the parties involved in a transaction are not experts on antitrust matters and lack the expertise to determine whether the merger must be reviewed by the competition authority in a certain jurisdiction, especially when it comes to calculating notification thresholds. In Mexico, the Federal Economic Competition Law (LFCE) provides multiple criteria to determine the reportability of a merger, including the size of the transaction and the size of the parties involved. However, calculating those thresholds is not a minor nor a superficial task, especially if no prior contact is made with the authority. In the case of cross-border mergers this is particularly problematic, since in such cases it is necessary to correctly identify the relevant agents for the analysis of the thresholds, even if they are not located or registered in the country, as described below.

8. First, the calculation of the notification thresholds requires gathering information not only from the acquiring and the acquired entities, but also from their respective economic interest groups (considering their ultimate parent entities and all their subsidiaries). Second, the calculation includes revenues, sales or assets from all entities that provide services in Mexican territory and that contract with clients located in Mexico, even if those contracting entities are not physically located in Mexico. As a result, the merging parties may present limited information (or calculate the merger thresholds using incomplete information) that only considers the business segment that they "assumed" is involved in the merger transaction.

9. In addition, to determine the reportability of a merger transaction, there is a general misconception that leads certain enterprises to consider only the financial information (income, sales or assets) of the entities or subsidiaries "located" or "duly registered" in the national jurisdiction, and they omit submitting the financial information of all their entities that render or provide services in Mexico even in they are located or duly registered abroad. Precisely, foreign companies that are not necessarily registered or located in Mexico could also provide services in Mexico and contract with local clients, so in those cases the income and turnover of such foreign companies also count for the purposes of calculating the notification thresholds.

10. Furthermore, all these misconceptions by the notifying parties could lead them to refrain from providing the IFT with information of all the activities or services they provide

in different jurisdictions, even when there could be coincidences in other Mexican markets that they inadvertently omit, but which must be considered for the purposes of determining the notification thresholds.

11. In particular, the IFT has seen problems arising from cross-border mergers in which the parties decide not to contact the competition authority beforehand to determine the reportability of the transaction or to confirm that the transaction will not eventually pose a competition risk. At the international level, this problem has been aggravated in cases of serial acquisitions and industry roll-ups, where the partes involved shield themselves from antitrust scrutiny using legal technicalities to avoid reporting the merger transactions.

2.3. Mergers Involving Private Equity and Financial Enterprises

12. Over the last five years, the IFT has observed an increase in merger transactions that involve non-industry players, most typically private equity funds and financial acquirers. New regulations in capital markets, the influence of the Covid-19 pandemic and new digital ecosystems may be factors contributing to the increase in this type of cross-border merger transactions. In particular, the IFT has faced a couple of challenges related to them: 1) gathering information from limited parties and their corporate control structures, as well as information related to cross-directorships and 2) handling confidential information from the acquirer or acquired enterprises, particularly in the public version of the IFT decisions.

13. In general, acquirers that are private equity funds and some financial entities are structured through a general partner (who controls the fund and is considered part of the acquirer's enterprise) and limited partners (who do not control the fund and are third parties not related to the acquirer's enterprise). To conduct a competition assessment, the IFT requests information on economic activities in Mexican markets from all the enterprises related to the acquirer, meaning from any enterprise that may have control or significant influence[2] over the acquirer, including its limited partners when they hold a stake of 15% or more.

14. In the case of private equity funds, the IFT has considered that an enterprise (including a limited partner) may have significant influence over investment funds if they hold 15% or more of the shares or investments in the fund. Hence, in mergers in which the corporate structure of the buyer includes investment funds as direct and/or indirect acquirers, in addition to all the information related to the general partners, the investment fund and any other enterprise belonging to the buyer's enterprise, the IFT also requests information from the limited partners that hold a stake of 15% or more of the investment fund to identify whether such limited partners participate directly or indirectly in the Mexican markets. However, in the IFT's experience, financial enterprises involved in cross-border mergers are particularly reluctant to provide information concerning limited partners, and even information related to cross-directorships.

15. Also, a parallel issue of concern is the handling of confidential information, particularly due to the lack of uniform criteria across jurisdictions to determine what information relating to a merger transaction of this type and the parties involved in it is public or confidential and, therefore, should or should not be published in a public version

[2] The IFT has considered as indicia of control: having the majority of voting shares or voting rights to appoint the majority of the board members and or to appoint key directors or equivalent situations, while we have considered as indicia of significant influence: having a minority of voting shares (less than 50%) or voting rights to appoint at least one member of the board or equivalent situations. Those who have control are part of the buyer´s interest group (GIE), and those who have significant influence are not part of the buyer´s GIE, but they are linked to it to the point that, under certain circumstances in the market like high concentration, it may lead to collusion.

of a merger decision, as this is a source of continuous discussion between the IFT and the notifying parties, even in cases that not involve personal data.

16. In this regard, as in many jurisdictions, once the IFT decides on a merger case (either blocking, conditioning or approving it), it must release a public version of its decision, in which the reasoning and the outcome of the decision must be available to the public. However, it is not always straightforward to determine whether certain information should be treated as confidential, especially since the Mexican Constitution and the General Law of Transparency and Access to Public Information establish a principle of maximum disclosure in government decisions.

17. During the merger notification procedure, the acquirer and the acquired enterprises may argue in favor of excising certain information from the public version if such an information qualifies as confidential. Then, the IFT evaluates the enterprises' allegations and decides whether such information should be removed from the public versions. The enterprises may also challenge in Court the IFT's denial of excising certain information from its public versions.

18. In cross-border cases, the problems arise when the criteria for classifying or protecting certain information from the public domain differ among competition authorities. For the same transaction, it may occur that one jurisdiction publishes as many details as possible about the transaction and the enterprises involved under the concept of maximum publicity, while another jurisdiction is more protective or conservative.

19. Furthermore, the jurisdictions that come up with an early decision on a merger transaction may set the tone for how other competition agencies will treat the information and the public version of a decision for the same merger transaction, frequently providing arguments for the enterprises involved to argue in favor of removing specific information from the public domain using the prior competition authority's public version of the decision as a reference. Thus, in the process of classifying or selecting which information should remain confidential in a public version, it matters what other competition agencies across the globe have done recently for the same transaction or in previous cases involving the same notifying enterprises.

20. At a domestic level, the IFT prevents disclosure of confidential information using either law or case law. There are some well-established criteria for identifying confidential information, such as personal data, patrimonial data, privileges (legal, medical, religious and others), legal secrets (such as trade, bank, or industrial), contractual provisions, among others. There are also case-based and open criteria that the competition authority must interpret and fill with content to determine whether the information is confidential, such as "any useful information to a competitor that may affect negotiations, agreements of the decision bodies and dividend policies."

21. However, specific disclosures are a frequent source of disagreements between the competition authority and the parties involved in the transaction, for instance: 1) the full list of parent, intermediates and subsidiaries enterprises linked to the acquirer and the acquired companies, 2) the corporate structures of the limited partners in investment funds and/or financial acquirers involved in a transaction and 3) the enterprises that may exert significant influence (and not precisely control) over others.

2.4. Necessity of Increasing International Collaboration beyond the Merger Notification Process

22. A substantial amount of international collaboration occurs when authorities in different jurisdictions are conducting parallel cases, i.e. the same merger and/or the same

antitrust enforcement investigation. This international collaboration is mainly justified under the existence of cooperation agreements between the agencies, or the filing of waivers of confidentiality by the enterprises involved in the case. In addition, collaboration occurs at international settings such as the International Competition Network, the OECD, and academic activities organized by any competition agency. However, these efforts still lag the current antitrust challenges posed by digital markets, artificial intelligence (AI) and well-known regulated sectors (such as oil, gas or telecom), especially when we consider recent phenomena like industry roll-ups, serial acquisitions and entrenchment strategies that have been the focus of previous OECD competition roundtables.

23. Based on the IFT experience, inter-agency cooperation needs to go beyond handling parallel cases and contributing to the academic activities of neighboring jurisdictions. Currently, we could identify room for improvement in at least three areas: 1) warning peer competition authorities on potential competition violations in pre-merger cases and/or antitrust investigations in absence of a parallel case between them. For instance, cases such as gun jumping, failure to notify a merger and anticompetitive practices[3] could be addressed more effectively considering a fluent international collaboration. 2) Bringing back staff-exchange programs between competition agencies, as many of those were suspended during the pandemic. In the last two years, the IFT has launched an exchange program with peer competition and regulatory agencies in the LATAM and Caribbean region, and it has proven to be effective in strengthening mutual collaboration, learning new investigative and analytical tools and bridging the cultural, political and social gap between jurisdictions. 3) Creating joint working documents, proposals and/or collaboration to address new common multijurisdictional challenges, such as those posed by AI and international markets that have been experiencing speed-up growth (such as data centers, submarine cable, and satellite infrastructure).

3. Tools to Improve International Collaboration

3.1. Mandatory Simultaneous Notification Filings

24. One proposal to address uneven timing in notification filings is setting a domestic or international rule requiring notifications to be filed in all jurisdictions involved “at the same time”. Imposing fines or extending the time of the notification process while the parties fail to notify peer competition authorities could be effective tools to enforce this rule. In addition, competition authorities should commit to notify their peers if they have indicia that a merger transaction has not been timely notified under the simultaneous notification rule. This would improve timely and efficient international collaboration in open cases (especially for the design of remedies) and reduce gun-jumping behavior and failure to notify multi-jurisdictional mergers. This rule will also incentivize parallel information requests from different competition authorities to the same notifying parties across jurisdictions, which need to be enhanced regarding what was observed in recent cases, particularly in those involving private equity and financial enterprises.

3.2. Expand Pre-Merger Notification Communications between Potential Notifying Enterprises and Competition Authorities

25. To reduce the bypassing of notification thresholds, the proposal for competition authorities is to increase advocacy efforts for bringing interested parties before them and

[3] Maintaining the confidentiality of the information in cases where it is required.

conduct pre-merger notification communications (in addition to redesigning notification thresholds, as some jurisdictions have already proposed in previous OECD competition roundtables). These pre-merger notification communications between notifying enterprises and competition authorities (legally allowed in many jurisdictions) are meant to dissipate common concerns in potential merger transactions notifications and to accurately determine reportability, especially in complex and novel markets like digital services and AI.

26. So far, the existence of merger guidelines and the implementation of best practices across different jurisdictions has not been entirely effective in compelling the notification of merger transactions that do not meet the thresholds but may pose risks to competition. As mentioned above, the flashpoint of this problem has been serial acquisitions and industry roll-ups across jurisdictions, as they pass unnoticed through legal technicalities, and they still cannot be captured effectively.

27. Although creating new criteria for notification thresholds may reduce failure to notify and prevent notification bypasses, advocacy efforts around the world should encourage enterprises to contact competition authorities to determine in advance whether a merger transaction should be notified, rather than making that decision unilaterally. An advance dialogue before starting a merger notification process would significantly reduce the costs that the competition authority must bear to conduct an ex-post investigation and could prevent negative effects on competition and reduce potential violations of domestic legal frameworks.

3.3. Enhanced and More Exhaustive Information Requests for International Merger Transactions Involving Private Equity and Financial Enterprises

28. Due to the increase in merger transactions involving international private equity and financial enterprises, more enhanced and exhaustive information requests from competition authorities are required to properly identify controlling groups, players with significant influence over the businesses involved, cross-directorships and adjacent markets. Recognizing these demands at a domestic level or setting out rules in guidelines and best-practice manuals can facilitate access to information by competition authorities and conformity of the parties involved when gathering and evaluating such information. Similarly, establishing uniform criteria to determine what information relating to a merger transaction and the parties involved in it must be published in a public version can provide certainty on gray areas of disclosure, such as the publishing of corporate structures of limited partners in investment funds and the disclosure of enterprises that may exert significant influence (and not precisely control) over the parties involved in a merger transaction.

3.4. Staff Exchanges Programs and Joint Collaborations between Competition Authorities

29. Finally, international cooperation between competition authorities is essential, beyond simultaneously processing an ongoing case. Running staff-exchanges programs and creating joint collaborations, such as papers or guidelines, paves the way for a robust and meaningful relationship among peers. Although several staff exchanges between competition authorities were suspended by the pandemic, and were never reestablished, it is about time to bring back what has been proven to be beneficial. As an example, in the last two years, staff-exchanges programs between the IFT and other competition agencies and regulators in the LATAM region have brought together public officials at all levels to share common knowledge, learn and compare antitrust analytical tools, and bridge the

cultural, political and social gaps between jurisdictions. This is a unique and permanent toolkit to build open dialogues among technicians, and to share and develop knowledge for the benefit of the global community.