Chapter 20

MEXICO

Fernando Carreño and Paloma Alcántara[1]

I OVERVIEW

In Mexico, antitrust practice has become a highly relevant area due to the significant number of recent changes in our country, in both legislation and practice, most of them related to the increasing powers of antitrust authorities and higher penalties against those who breach antitrust law in Mexico. This has resulted in it being an important concern for many companies, both local and international, which have implemented antitrust compliance policies and programmes to avoid investigation and possible sanctions. Consumers have also become more aware of the need to have strong antitrust institutions, and the media closely watches any relevant antitrust cases and quickly communicates them to the general public.

With regard to antitrust, the integral reform, established principally in the reform of the Constitution and a new Mexican Antitrust Act (MAA), has resulted in the Mexican Antitrust Commission (MAC) pursuing a greater number of investigations and exercising its authority more vigorously, including the exercise of powers that were not used by the previous Federal Antitrust Commission. In addition, this new MAC has given much greater scrutiny to mergers and has initiated several procedures with the new concepts established in the MAA in key industries for the Mexican economy, as in the case of the airlines and the food and agriculture sector.

i Prioritisation and resource allocation of enforcement authorities

Currently, the government is prioritising the investigation of cartels and monopolistic practices in markets that have been identified as prone to such conditions in the Mexican market, such as telecommunications and broadcasting. This has led to the creation of the Federal Telecommunications Institute (FTI), which is in charge of all antitrust activities and mergers related to the telecommunications and broadcasting sectors. All other markets are investigated and reviewed by the Mexican Antitrust Commission (MAC).

1 Fernando Carreño is a partner and Paloma Alcántara is an associate at Von Wobeser y Sierra, SC.

ii Enforcement agenda

During the last few years the regulatory framework of antitrust policy in Mexico has changed significantly. In 2014, the legislation resulting from the reform of Article 28 of the Constitution in telecommunications and antitrust was approved: the new Mexican Antitrust Act was issued, its Regulatory Provisions and the Organisational By-laws of the MAC. In 2015, the MAC undertook the task of issuing certain guidelines and criteria for carrying out procedures in relation to mergers and investigations of absolute and relative monopolistic practices. The development of these instruments involved consultations with the public. In this regard, MAC reported to the national Congress that it fulfilled 92.2 per cent of its annual work programme for 2015.

For 2016, its recently published annual work programme sets forth approximately 28 actions, among which are the conclusion of the process for electronically giving notice of mergers, the drafting of an instrument for the analysis of the non-compete clause in merger proceedings, and the publication of a guide for foreign lawyers on the immunity programme, which they consider will facilitate the detection of international cartels that impact Mexican markets.

II CARTELS

i Overview

The MAA, along with its Regulatory Provisions and the new Technical Criteria for the Initiation of Investigations for *Per Se* Illegal Practices contain the provisions regarding cartels.

Among the prohibited activities in terms of the MAA are monopolistic practices and prohibited mergers. In turn, the MAA divides monopolistic practices into two groups: absolute (*per se* illegal practices) and relative (rule of reason or vertical practices).

Absolute monopolistic practices

Absolute monopolistic practices are defined as contracts, agreements, arrangements or combinations among competitors, which have as their purpose or effect any of the following:

a to fix, raise, coordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets (price fixing);

b establish an obligation not to produce, process, distribute, market or acquire but only a restricted or limited amount of goods, or the provision or transaction of a limited or restricted number, volume or frequency of services (output restriction);

c to divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services, by a determined or determinable group of customers, suppliers, time spans or spaces (market segmentation);

d to establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls (bid rigging); and

e to exchange information with any of the purposes or effects referred to in the previous subsections.

Price fixing occurs when one or more competitors in a given market control supply creating the shortage of a product. In this sense, a group of competitors establishes the market's supply, increasing the profits of such competitors.

The purpose of the restriction of a product is to control supply or demand of a product or service in order for prices to increase. In many markets, the restriction of a product can

simply be achieved by determining the amount of goods or services competitors will provide or sell, allowing for the market to decide the pricing on such product. Indirect evidence of this type of practice may require additional research on the product considering distribution and sales of competitors.

Market segmentation occurs when competitors distribute, assign or impose segments of a current or potential market of goods and services, using available customers, suppliers, schedules or locations. Such type of practice takes place when competitors divide the market using one or more of the following divisions: (1) by customers, when the involved companies agree not to seek or enter into similar agreements with any of the other companies' customers; (2) by territory, when competitors agree to restrict the availability of their products or services to certain areas, cities or territories; or (3) by products, when competitors agree not to engage in the production, sale or distribution of certain products sold or produced by their competitors.

Bid rigging occurs when competitors agree to participate in certain offers or refrain from participating in public bids that are likely to have the effect of guaranteeing the contract will be awarded to a specific competitor.

Finally, it is also considered an absolute monopolistic practice to exchange information among competitors for the purpose and effect of fixing prices, restricting supply, segmenting the market or rigging bids. In this respect, on 10 December 2015 the Commission resolved the issuance of the Guide for the Exchange of Information among Economic Agents, in order to clearly establish the elements the Commission will consider to determine if the exchange of information generates risks for competition or not.

The issuance of this Guide for the Exchange of Information among Economic Agents represents the express recognition of the Commission that, notwithstanding that the exchange of information among competitors can have the purpose or effect of engaging in absolute monopolistic practices, it can also generate efficiencies and favour competition.

Thus, the Guide for the Exchange of Information among Economic Agents contains recommendations for economic agents that find themselves in situations of contact with others, such as in the following cases: (1) the process prior to a merger; (2) collaboration agreements between competitors; (3) unilateral communiqués; (4) common directories (crossed); or (5) discussions within professional associations and business chambers, etc.

In general terms, since these are *per se* illegal practices, the MAC only has to prove their existence to investigate and sanction them, meaning that it is not necessary for such practices to produce effects in order to be sanctioned.

However, proving the execution of absolute monopolistic practices is difficult. The MAC and the plaintiffs are required to obtain the necessary evidence in order for it to be deemed relevant and start an investigation.

In view of the above, the MAC issued a Guide for Processing the Investigation Procedure for Absolute Monopolistic Practices which establishes primarily: (1) the nature of the investigation procedure of a possible absolute monopolistic practice; (2) the formal elements that result in the initiation of an investigation; (3) the benefit of the reduction of the sanctions that may be available to the Economic Agents; and (4) a detailed description of the principal stages of the investigation.

Relative monopolistic practices

According to the MAA, relative monopolistic practices, which are rule of reason practices, are acts, contracts, agreements, procedures or combinations with the purpose or effect

of improperly displacing competitors, blocking their access to the market or establishing exclusive advantages in favour of one or more economic agents. Unlike absolute monopolistic practices, these practices are usually performed through a vertical relationship (i.e., between a producer and a distributor). However, relative monopolistic practices are subject to verification that those who execute them have individual or joint market power and correspond to the applicable relevant market.

In this regard is important to note that the Regulatory Provisions state that the elements that must be taken into consideration by the Commission in order to determine the existence of substantial power of two or more economic agents in the same relevant market (joint market power) are, among others, the following:

a if two or more independent economic agents distinguish themselves from the rest of the economic agents that participate in the relevant market; and

b that such economic agents show similar and sustained behaviour.

From our point of view such criteria are vague and unclear, allowing the Commission to freely declare the existence of joint market power. This facilitates the attribution of responsibility for the probable committing of relative monopolistic practices without need of a thorough study of market conditions for each case.

Likewise the elements to determine the relevant market are now defined in the MAA, stating that in order to define the relevant market, it is necessary to take into consideration the possibility of substituting the good or services being analysed with other products available to consumers in such area.

In determining the relevant market, the MAC shall consider, among other things, the following:

a the possibilities of substituting the good or service in question for others, whether of domestic or foreign origin, considering the technological possibilities, the availability of substitutes for consumers and the time required for such substitution;

b the good's distribution costs; its relevant inputs; its complementary goods and substitutes from other regions or abroad, taking into account freights, insurance, tariffs and non-tariff restrictions, the restrictions imposed by economic agents or their associations and the time required to supply the market from these regions;

c the costs and probabilities that users or consumers have to access other markets;

d the federal, local or international regulatory restrictions that limit the users' or consumers' access to alternative supply sources, or the access of suppliers to alternative clients; and

e other factors provided by the Regulatory Provisions, and the technical criteria issued by the Commission to that effect.

The MAA states that the following are relative monopolistic practices:

a exclusive distribution or marketing rights;

b imposition of conditions for the marketing of goods or services;

c tied sales;

d refusal to sell or market goods or services to third parties;

e boycotts;

f granting of discounts or incentives to not acquire or sell goods or services from a third party;

g cost incentives or discounts;

h price discrimination;
i setting different conditions for different clients or distributors in similar circumstances;
j actions to increase costs, impede the production process or reduce the demand of competitors;
k the denial of, restriction of access to, or access under discriminatory terms and conditions to an essential input; and
l the narrowing of margins between the price of access to an essential input provided by one or more economic agents and the price of a good or service offered to the final consumer by those economic agents, in which the same input is used for its production.

Those last two are also novel types of conduct included in the MAA, and for greater regulatory precision, such Act establishes the criteria for determining the existence of this innovative legal concept called 'essential inputs', the main purpose of which is the avoidance of the abusive exploitation of those inputs that might be essential for entering or participate in a market. Therefore, the criteria the Commission must follow in order to determine the existence of essential inputs is the following:

a if the essential input is controlled by one or more economic agents with substantial power, or which have been determined as preponderant agents by the Federal Telecommunications Institute;
b whether or not the reproduction of the input by another economic agent is possible, from a technical, legal or economic point of view;
c if the input is indispensable for the provision of the goods or services in one or more markets, and if it has close substitutes; and
d the circumstances under which the economic agent gained control of the input.

In addition, the Regulatory Provisions state that it shall also be considered whether allowing the use of an 'essential input' by a third party will generate efficiency in the market.

Since the reform of the MAA in 2006, and until today the MAC has had a leniency programme in place for companies or individuals involved in absolute monopolistic practices to voluntarily report their activities. Under the MAA, companies or individuals that have participated in absolute monopolistic practices may reduce or avoid sanctions (which can include criminal sanctions) provided they denounce the illegal acts in question and take the necessary steps to terminate their participation. The leniency programme grants full immunity and confidentiality to the company or individual that was the whistle-blower, in order to continue promoting the option for such company or individual to apply for the immunity programme in current or future investigations.

New regulation

Recently, the MAC issued a Guide for Processing the Procedure of Investigation of Relative Monopolistic Practices or Prohibited Mergers in order to disseminate among the Economic Agents, practitioners, authorities and the public in general, the form in which the Investigating Authority of the MAC carries out an investigation procedure of a possible relative monopolistic practice or prohibited merger and to inform them of the stages of the investigation procedure in this case.

ii Significant cases

The MAC and the FTI are working very aggressively against entities that hold a significant presence in their respective markets. There are several investigations initiated by the FTI for the telecommunications and broadcasting sectors and it has already imposed substantial fines on economic agents and declared the predominance of several economic agents in their respective markets. As a result of this declaration of dominance, it has implemented an asymmetrical regulation on such preponderant economic agents.

The MAC has also already issued an important number of resolutions and has initiated a significant number of investigations in key markets for the Mexican economy.

The MAC has also initiated investigations in the sugar, corn and automobile components markets, among others.

Additionally, at the beginning of 2016 the Commission published a report of its study on the conditions of competition in the food and agriculture sector, which consisted of a review of certain regulatory aspects and of the functioning of the food and agriculture sector in Mexico and with which the Commission sought to gather information on the characteristics of those markets and, if appropriate, make recommendations to the sectorial regulators and the agencies responsible for ensuring they perform more efficiently.

As a result of this study, the MAC issued 27 recommendations regarding the improvement and dissemination of information; production; regulation; commercialisation; transversal relations, etc. Many of these recommendations involve the direct intervention of the state in the functioning and regulation of the markets.

iii Trends, developments and strategies

The MAC publicises its investigations, resolutions and criteria through mass media with the clear intention of making all entities, as well as consumers, aware that the newly formed antitrust authorities intend to actively investigate and sanction any activities prohibited by law.

The MAC has also begun making full use of its rights to investigate on a larger scale. Since the Constitutional Reform, during the past two years, the MAC has made more visits to investigated entities than it had in previous years. This strategy strengthens the impression that the antitrust authorities will work to ensure free trade in all markets.

The leniency programme has had great success in investigations and the determination of sanctions. This, in addition to the strengthening of the antitrust authorities' powers and sanctions, provides those companies involved in absolute monopolistic practices with more reasons to consider applying for leniency. The confidential nature of the proceeding and non-disclosure of the applicant has been taken into consideration by the entities that applied to the programme, as it ensures they will not be negatively affected in relation to their competitors or suppliers as a consequence of giving such help to the authorities.

iv Outlook

As a result of the Constitutional Reform, and the issuance of the MAA and its Regulatory Provisions, the MAC has been working hard to properly handle the powers that have been granted to it and to fulfil the mandate it has been charged with.

The evolution of antitrust law in Mexico has been quick and complex, and the following years will greatly affect how antitrust authorities will coexist and the extent of the government's regulation in preventing monopolistic activities.

Without denying that these recent activities are evidence that the new MAC is working harder to ensure that monopolistic activities are being investigated and sanctioned, and that Mexico has made consistent efforts regarding investigation, prevention and enforcement of antitrust and competition matters, it is important to bear in mind that guidelines and criteria yet to be drafted will be key to determining a number of concerns regarding the execution and enforceability of antitrust legislation.

III SANCTIONS AND FINES

Pursuant MAA, both the company and its employees directly participating or involved in any activities in breach of the antitrust law can be held jointly responsible for any such breach of the MAA. Penalties imposed on companies and individuals are different, both in amounts and in nature.

The sanctions for breaching the MAA or engaging in any monopolistic practices or prohibited mergers can be administrative and criminal in nature, with the possibility of doubling any sanction in case of recidivism. Regarding companies that breach antitrust law, the MAA may order the correction or suppression of the monopolistic activity or prohibited merger and the imposition of fines that may go up to 10 per cent of the company's income, depending on the action in breach of antitrust regulations, as follows:

a up to 5 per cent of the company's income if the merger is carried out without giving prior notice to the Commission, in the event such notification is legally required;

b up to 8 per cent of the company's income if the company engages in any relative monopolistic activities;

c up to 10 per cent of the company's income if the company engages in absolute monopolistic activities, breaches any preventive measures or breaches any conditions imposed regarding mergers;

d up to 8 per cent of the company's income if engaging in an illegal concentration; and

e up to 10 per cent for failing to comply with the conditions imposed by the Commission in the concentration resolution.

With regard to individuals or employees involved in the defendant company's execution of monopolistic activities, the applicable fines, as stated in the MAA, are as follows:

a up to approximately US$940,000 for anyone who helps, induces or participates in any monopolistic activities, prohibited mergers or other market restrictions stated in the MAA;

b up to approximately US$1.035 million for anyone who directly participates in any monopolistic activities or prohibited mergers while representing the defendant company;

c up to approximately US$915,000 for misstating or delivering false information to the Commission; and

d up to approximately US$940,000 for the government officials who have participated in any act related to a concentration which had to be authorised by the Commission.

Moreover, according to the Federal Criminal Code, the conducts referred to as monopolistic practices (cartel activities) contemplated in the MAA are considered federal crimes, as well as destroy or disrupt entirely or partially information or documents during a dawn raid.

IV ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The MAA includes a special procedure by means of which the Commission shall resolve regarding market conditions, such as effective competition, market power existence or any other analogous concept. This special procedure may be initiated *ex officio*, at the request of the federal executive branch or at the request of an affected party.

In accordance with the MAA an entity has market power when it can increase prices, reduce or control the supply or otherwise restrict free trade, and its competitors do not have the ability to counter such actions. For the MAC to prove the existence of substantial power in the market, it must consider:

a the participation of the company in the market and the inability of competitors to counteract this participation;
b the existence of entry barriers;
c the existence and market power of its competitors;
d the possibilities for new competitors to enter the market; and
e the behaviour of all competitors in the market.

In addition, it is important that the MAA has divided the different types of restrictive agreements into absolute monopolistic practices and relative monopolistic practices, as explained above. The consequences of executing such agreements differ, and the fines imposed on those involved are more elevated when they involve absolute monopolistic practices.

One important change that has taken place since the Constitutional Reform is that companies or individuals affected by the activities of antitrust authorities investigating any monopolistic activity cannot challenge such activities through a constitutional appeal before the authorities' final resolution; in the past, such appeals had been used to slow down or stop investigations and weaken the authority's resolution. This has been criticised by many as a breach of the constitutional rights of the affected parties, since it is possible that the antitrust authorities can violate such rights during an investigation without the possibility of the parties lodging an appeal or proceeding to protect them prior to the final resolution. Finally, constitutional appeals against a final resolution can only be filed through Mexican courts that specialise in antitrust and telecommunications matters.

While the antitrust law applies to most markets, the Constitution provides certain important exceptions. Mexico does not consider strategic activities (e.g., railroads) and activities that are exclusively reserved to the state (e.g., postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals and nuclear power generation, electricity) to be monopolies.

i Trends, developments and strategies

One of the modifications contemplated in the MAA, regarding antitrust investigations for absolute monopolistic practices, is the possibility for antitrust authorities to order the divestiture of assets, shares or rights of entities that are repeat offenders in violation of the antitrust law. Such resolution will be enforced by the antitrust authorities as a measure to eliminate anti-competitive effects.

In addition, it foresees penalties for any officials who have represented their companies or entities in the execution of monopolistic practices, consisting of up to five

years of disqualification and the removal of such persons as officers or representatives of the company or entity. This specific sanction seems to exceed the limits of the MAC and the FTI by engaging directly in the administrative sanctioning of the economic agents.

The above-mentioned sanctions are a clear indication that the antitrust authorities will punish anyone involved in restrictive agreements and dominance in breach of the antitrust law more severely.

ii Outlook

Since 2011, an area in which the government has increased its attention and resources is the prevention, investigation and enforcement of antitrust law, and 2015 will not be an exception to this. As part of the Constitutional Reform, the MAC and the FTI are now independent government agencies, which provides them with more power to enforce and sanction people and entities that are involved in monopolistic practices.

Also one of the most significant and radical changes reflected in the MAA is the split between the investigative authority and the enforcement authority, with which it seeks to equip the former with autonomy and the latter with impartiality in order to ensure the legality of the procedure and thus the legal security of the economic agents involved in such procedure.

Nevertheless, the enforcement authority still has several powers over the decisions of the investigative authority, so it will be interesting to analyse in practice how strictly this intention of providing autonomy to the investigating authority is respected.

V SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

As a result of the Constitutional Reform, the FTI was created. The FTI was appointed to review all antitrust activities specifically related to the telecommunications and broadcasting sectors, which have been identified as markets with companies that hold significant power and prevent the entry of new competitors into the market.

i Significant cases

In March 2014, the FTI issued an extremely important resolution in which it determined that America Movil (the biggest telephone company in Mexico) is a dominant agent in the telecommunications sector. In addition, the FTI issued a resolution regarding Grupo Televisa (the biggest broadcasting company in Mexico), determining it as a dominant agent in the broadcasting sector.

As such, the FTI imposed on these entities a significant number of prohibitions and measures to reduce such dominance and to allow the entry of new competitors into the markets. This is a very significant step towards ensuring fair conditions in such sectors, and it greatly affected América Móvil and Grupo Televisa (Grupo Televisa's share value on the Mexican Stock Exchange fell 3.7 per cent following the FTI's resolution).

ii Trends, developments and strategies

Following the FTI's resolutions affecting the dominant agents in the telecommunications and broadcasting sectors, and the proposed procedures related to essential inputs stated in the MAA, it is clear that the antitrust authorities have identified certain specific markets that are

prone to facilitating the execution of monopolistic practices, which is why the government is making considerable efforts to ensure that such markets have additional regulations and prohibitions, as well as higher sanctions in place for those who breach the antitrust law.

iii Outlook

The telecommunications and broadcasting sectors are expected to be the most scrutinised markets in Mexico in the next few years. The creation of a new authority designed specifically to ensure free trade and competition in those markets is a clear sign that the government wants to help not only the smaller competitors in the market, but also ultimately the consumer, since the entrance of new competitors who will invest in broadcasting and telecommunications will help improve the quality of the goods and services provided by the existing companies, and lower the prices for such goods and services.

VI STATE AID

The MAA includes several special procedures, among which are:

a investigation procedure to determine the existence of barriers to competition or essential inputs that could generate anti-competitive effects;

b procedure for resolution regarding market conditions such as effective competition, market power existence or any other analogous concept;

c procedure for the issuance of formal opinions or resolutions on licensing, concessions, permits and similar authorisations;

d all these specific procedures can be initiated by the MAC itself or by request of the President (either himself or through the Ministry of Economy). With the addition of this specific regulation, and where applicable, a resolution by the MAC, the MAC may order the entities involved in markets related to essential inputs to remove the existing barriers to new competitors, as well as the divestiture of assets or rights.

i Barriers to Competition

The concept 'Barriers to Competition' is a new concept – globally – that was included for the first time in our legislation through the recent MAA. This concept is defined in section IV of article 3 of the MAA, which reads as follows:

> *Article 3. For the purposes of this Law, the following definitions shall apply:*
> *[…]*
> *IV. Barriers to Competition and Free Market Access: Any structural market characteristic, act or deed performed by Economic Agents with the purpose or effect of impeding access to competitors or limiting their ability to compete in the markets; which impedes or distorts the process of competition and free market access, as well as any legal provision issued by any level of government that unduly impedes or distorts the process of competition and free market access.*

From this definition we can abstract that any of the following three premises that impedes or distorts the competition process and the free market may be considered a barrier to competition:

a structural characteristics of the market;

b acts or deeds of the economic agents; or

c legal provisions issued by any level of government.

Thus, in order to guarantee effective competitive conditions in the markets damaged or distorted by any of these three premises, the lawmaker decided to include a special procedure by virtue of which: the existence of this type of barrier to competition will be determined; and the corrective measures that are considered necessary to eliminate the restrictions on the efficient functioning of the market in question are established.

In contrast to the concept of barriers to competition, the MAA – since its beginning in 1992 – established the concept of barriers to entry, which according to Article 59 of the MAA is one of the elements that must be analysed to determine substantial power in the relevant market.

In comparison with barriers to competition, Article 7 of the Regulatory Provisions contains an illustrative list of those elements or acts that may be considered Barriers to Entry.

	Barrier to entry	*Barrier to competition*
Application	Element to be analysed to define a relevant market	Independent concept with a special procedure to guarantee the efficient functioning of the markets
Criteria for its determination	Articles 59 MAA and 7 of the Regulatory Provisions	Do not exist
When first regulated	Since the first MAA.	First regulated in the MAA of 2014
Comparative law	Concept established in various jurisdictions (United States, European Union)	Not established in other countries

i Significant cases

This special investigation procedure to determine the existence of barriers to competition or essential inputs that could generate anti-competitive effects was used for the first time by the Commission in a market that, without doubt, was the appropriate market to initiate an investigation of this nature. It is the market for providing air transport services used by the Mexico City International Airport for its landing and takeoff procedures, also known as the slots market.

Although the investigation stage has now been concluded, an important part of the procedure remains, and it undoubtedly will be very interesting to analyse the results of this first procedure in Mexico, which will establish a very important precedent.

VII MERGER REVIEW

Not all mergers must be filed before and cleared by the MAC prior to their execution. The MAA states that, to determine whether a merger notice must be filed before the MAC, the participating companies must verify if the merger will have effects in Mexico, and if the merger surpasses the thresholds set forth in the MAA. If the merger exceeds any of the following thresholds, the companies involved must file a merger clearance request before the MAC:

a If the price of the transaction in Mexico, that is considering only the companies, subsidiaries, affiliates or assets located in Mexico that will be indirectly acquired by the acquiring company, exceeds approximately US$83 million. This amount must be calculated based on the terms of the agreements, letters of intent, and memos of understanding or any other document which sets forth the price allocated to the Mexican shares or assets acquired.

b The Commission has recognised that often in international transactions no allocation of the price to be paid for the Mexican assets or shares is made and, therefore, it is not possible to determine if this threshold is surpassed.

c If the Acquiring Company, whether located in Mexico or not, will acquire at least 35 per cent of the assets or shares of a company or companies whose assets or annual sales in Mexico exceed approximately US$83 million. To calculate the value of the assets, the 'total assets value' stated in the audited financial statements for the previous fiscal year must be considered. If the Mexican companies to be indirectly acquired by the acquiring company do not have audited financial statements, the internal financial statements can be used.

d If the transaction involves the purchase in Mexico of assets or capital greater than approximately US$38.5 million, and the assets or annual sales volumes of the buyer or seller in Mexico, exceed approximately US$220 million.

e To calculate the asset value, as explained above, the 'total assets value' stated in the audited financial statements for the previous fiscal year must be considered. If the acquiring company does not acquire 100 per cent of the assets, the Commission will take into account only the portion that is actually acquired.

For the second segment of the threshold, the Commission assesses the figures reported by the acquiring company or the selling company, or both, regardless of the country in which they are located.

When a merger has effects in Mexico and any of the above-mentioned thresholds are surpassed, the participating companies are obliged to file a merger clearance request before the MAC.

i New regulation

In this respect, the Commission recently issued the Merger Notification Guide, the purpose of which is to provide information on and an explanation of the concepts, the law and the procedures associated with the notification of mergers, in order to facilitate this procedure for the economic agents.

Furthermore, in mid-2015 the Commission issued the Technical Criteria for the Calculation and Application of a Quantitative Index to Measure Market Concentration, which explain in detail the method the MAC uses to measure, through the Herfindahl-Hirschman Index – HHI the degree of concentration in the relevant markets, and to explain the considerations for applying it. This index permits the MAC to come to a first approximation of the structure of the markets and the effects the mergers may have on them.

Finally, at the end of 2015 the Federal Fees Act was amended to include that beginning on 1 January 2016, for the reception, study and processing of each merger notification, the economic agents initiating the process must pay a filing fee of approximately US$8,888.

ii Significant cases

In recent years, several important mergers (many with a global impact) have been analysed and resolved by the MAC in the beer, automobile, consumer goods, hotel and cinema industries.

Some of the most important recent mergers resolved by the Commission are the following:

a Soriana and Comercial Mexicana, which was authorised with certain conditions.

b Mylan and Perrigo, which was authorised in August 2015; and

c Alstom Energy and General Electric, which was authorised.

The Commission is also responsible for following up on the compliance with conditions established in the authorization of several mergers, such as Alsea and Wal Mart, Pfizer and Wyeth, and Continental AG and Carlyle CIM Agent.

iii Outlook

From recent resolutions that the MAC has issued, it seems that the antitrust authorities will now not only consider the markets related to a transaction, but also the related markets that may be affected by a merger. In addition, the MAC has begun to consider joint market power when analysing a merger to determine the possibility of smaller or new competitors participating in the market without any obstacles.

In addition, the increased penalties for executing mergers prohibited by law or for failing to request a merger clearance from the MAC before their execution have reduced the possibility of companies engaging in such mergers in an unlawful way, since the divestiture of assets will not only affect the merger itself, but will make the MAC analyse the later merger clearance request in much greater detail.

VII CONCLUSIONS

We shall follow up the resolutions of the MAC closely in this significant case, given that such resolutions will represent important precedents of this new authority, as well as reflecting the long-term results of the above-mentioned integral reform in Mexico.

However, independently of the above, it is a fact that nowadays we have seen a better and stronger MAC, which has decided to fearlessly but responsibly to exercise its faculties, with a growing level of expertise that allows it to solve increasingly complex cases.

PALOMA ALCÁNTARA

Von Wobeser y Sierra, SC

Paloma Alcántara is a junior associate at Von Wobeser y Sierra. She graduated from the Universidad Panamericana, where she obtained her law degree. Paloma also obtained a postgraduate degree in corporate and commercial law at the Universidad Panamericana. She has experience in competition and antitrust law, and also engages in mergers and acquisitions transactions. Paloma has advised clients in regards to competition investigations. Additionally, she has expertise in premerger filing cases. Her corporate practice advice focuses on complicated M&As that have a strong economic competition and antitrust component. Paloma is fluent in Spanish and English.

FERNANDO CARREÑO

Von Wobeser y Sierra, SC

Fernando Carreño has been a partner at Von Wobeser y Sierra since 2009. He graduated *cum laude* from the Escuela Libre de Derecho, where he obtained his law degree; he obtained his master's degree from the Northwestern University School of Law. Mr Carreño worked as visiting attorney at Arent Fox LLP in Washington, DC. He is head professor of antitrust and competition at the Escuela Libre de Derecho in Mexico City. Currently, Mr Carreño is the head of the antitrust practice at Von Wobeser y Sierra. He provides antitrust advice on both competition and antitrust aspects of corporate deals as well as litigation matters before

the Mexican Antitrust Commission and the Mexican courts. Mr Carreño regularly advises clients in many different industries, including the aerospace, telecommunications, energy, healthcare and technology sectors, as well as financial institutions in national and cross-border transactions. He also engages in mergers and acquisitions, and financial transactions. Mr Carreño is fluent in Spanish and English.

VON WOBESER Y SIERRA, SC
Guillermo González Camarena 1100
7th Floor
Santa Fe
01210 Mexico City
Mexico
Tel: +52 55 5258 1000
Fax: +52 55 5258 1099
fcarreno@vwys.com.mx
jpalomar@vwys.com.mx
www.vonwobeserysierra.com