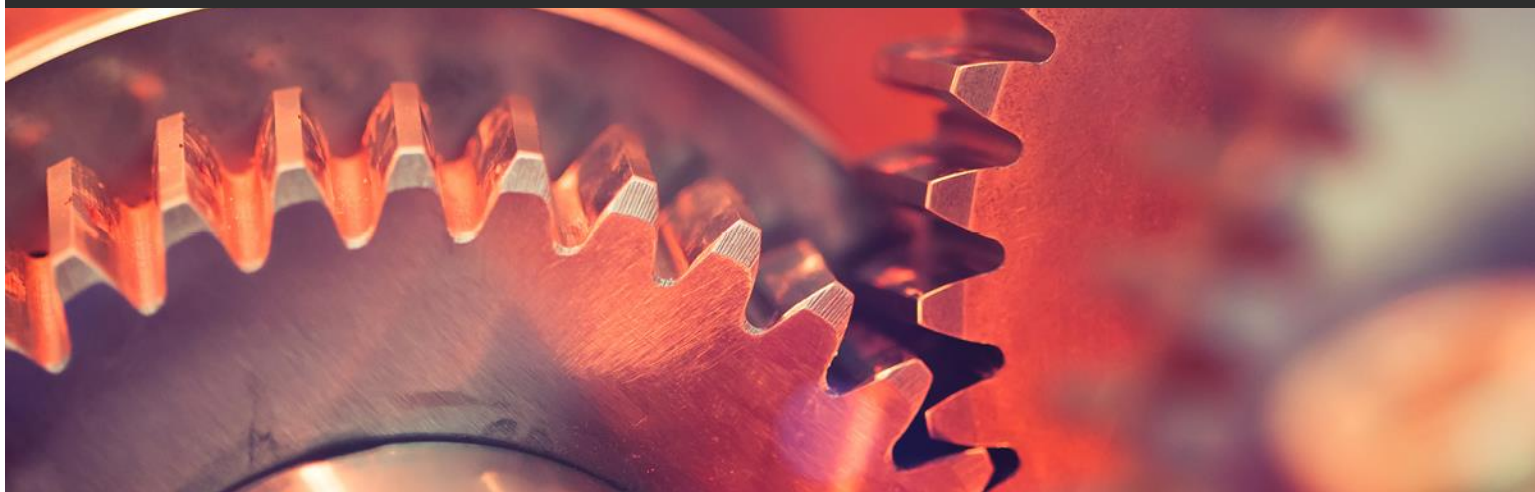


**Alert | Antitrust Litigation & Competition Regulation**



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## **Mexico’s Competition Commission Updates Merger Control Guidelines**

The Federal Economic Competition Commission (COFECE, or the Commission) has published an update to the Merger Control Guidelines. Although there are no significant changes from the prior version, the Commission did strengthen its view to carry out a “substance-over-form” analysis when it comes to transactions requiring prior antitrust clearance in Mexico.<sup>1</sup> Some of the key aspects include:

**1. Not only acquisitions are reportable “concentrations.”**

As with competition law in other jurisdictions, Mexico’s Competition Law uses the term “concentration” to refer to those transactions that could be reportable to the Commission when meeting certain thresholds. Definition of the term “concentration” has always been an issue. The Guidelines list as examples of reportable transactions not only mergers and acquisitions but also trusts (*fideicomisos*), donations, joint ventures and collaboration agreements, assignment of rights, and even lease agreements meeting certain requirements. Irrespective of the form, the Commission clarifies that a reportable transaction could include any form of agreement between economic agents to jointly participate in economic activities, whether or not through a new company, when there is a

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<sup>1</sup> The Guidelines are not binding. Nevertheless, in the Commission’s own words, they “reflect the operating practices of the Commission and are a tool for transparency and certainty [...]”

legal or de facto transfer of assets or contributions of any kind to the new venture, and an arrangement to distribute profits and losses.

**2. The treatment of joint ventures and other collaboration agreements between companies.**

The Guidelines provide more information to enable economic agents to determine whether a joint venture or any other sort of collaboration agreement should be considered a “concentration” and thus reportable if it exceeds the notification thresholds.

The Commission points to three key elements: duration (long-term vs. short-term), operating independence, and reach or potential reduction of incentives to compete. According to the Guidelines, a joint analysis of these three elements should allow the parties to determine if, from a competition standpoint, a given transaction could have the same impact as a “merger” or an “acquisition” and thus should be reported as a “concentration.”<sup>2</sup>

**3. Calculation of notification thresholds.**

The Guidelines provide clarification on how to calculate the three reportability thresholds set forth in article 86 of the Competition Law, which include:

- a. The different tools that could be used to calculate the “value of the transaction” threshold when there is no specific value assigned to the Mexican part of the business,
- b. The entities or companies that should be considered in determining the “value of the transaction” threshold, and
- c. The Commission’s understanding of the term “succession of acts” for reportability thresholds.

**4. Investment funds as buyers in a transaction.** When investment funds participate as buyers in a transaction, the limited partners’ information will not be required unless they:

- a. have the right to intervene in the decision-making process related to:
  - i) the business plan, policies, and objectives of the investment fund or the target company,
  - ii) the fund’s annual budget or target companies,
  - iii) the appointment of the fund manager, or the companies where the fund invests, or
  - iv) any other operational activities of the fund.
- b. have rights or hold 20% or more of the assets, contributions, capital, or voting shares of the fund.

**5. Information that should be filed to raise a “failing firm defense” argument.**

The Guidelines recommend, among other things, filing documentation demonstrating the imminent

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<sup>2</sup> Examples of collaboration agreements that according to the Guidelines are typically considered “concentrations” include: collaboration to consolidate activities, to develop a network, to consolidate production, for joint commercialization, to consolidate procurement or “buying clubs,” and even research and development.

risk to companies that could potentially go out of market in the immediate future, or showing the risk to companies with no other solution to mitigate a financial crisis, other than an acquisition.

*\* This GT Alert is limited to non-U.S. matters and law.*

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