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SOME BRIEF COMMENTS ABOUT THE PRE-MERGER NOTIFICATION PROCESSES IN MEXICO AND THE UNITED STATES

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Mergers of large corporations in the global market place invariably invoke scrutiny from regulators in multiple companies. With the passage of the North American Free Trade Agreement (NAFTA), more merger transactions are occurring that are subject to regulation in Mexico and the United States. These transactions must clear pre-merger notification processes in both countries. In general, mergers of large corporate entities must notify regulators in advance of the merger and may not consummate it until approval by the regulators. The American process is prescribed by the Hart-Scott-Rodino Antitrust Improvement Act of 1976[1] and the Mexican process is set forth in Articles 20 and 21 of Federal Law of Economic Competition (LFCE).[2] This essay will give you some impressions about these pre-merger notification processes.

The first impression deals with the perspectives that surface in the discourse about the pre-merger notification process. The views of regulators, lawyers who represent clients in the mergers and acquisitions process, and academics dominate the discourse. The voices of lawyers who represent competitors and challenge transactions, consumers, and the general public are not as loud. The discourse over the process is different from the debate over specific transactions. These perspectives are loudly heard voicing objections then. The difference in perspectives is not inconsequential. The regulators and the lawyers who represent clients in the mergers and acquisitions process want to reduce the transaction costs generated by regulation. Regulators seem to be interested in working with them to accomplish that goal. Consumers and the general public, on the other hand, are concerned with low prices and not necessarily the transaction costs of the merger. Regulators may address those concerns in making the substantive evaluation of the anticompetitive effect of mergers when and if consumer welfare is a goal of the process.

Indeed, most of the current global discussion pertains to the transaction costs of competition law enforcement and compliance. There is considerable discussion about the added costs imposed by compliance with diverse pre-merger notification requirements to which a large global transaction may be subject. The approval processes for these large transactions generate substantial transaction costs due to separate sets of rules for each country involved, different time frames for the steps in the approval process, and standards for evaluating the appropriateness of mergers. These processes take time and increase the costs of companies trying to

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1. 15 U.S.C. § 18a (2000).
2. Federal Law of Economic Competition, Diario Oficial, Dec. 14, 1992.

obtain approval. There is an ongoing dialogue about the need to reduce the transaction costs of the pre-merger notification process in the United States. A similar dialogue has begun about the Mexican system. In fact, other members of the panel have raised some of the criticisms.

The second impression relates to the allocation of resources spent to ensure compliance with antitrust laws. Within the United States, most antitrust enforcement resources are allocated to the regulation of mergers, particularly the pre-merger notification process. Seventy percent of the antitrust resources at the FTC and the DOJ are placed in the pre-merger notification process.[3] That is, more resources are allocated to the pre-merger notification process than in detecting, enforcing, and punishing antitrust violations. Accordingly, the level of competition or monopoly in the marketplace is a function of the allocation of resources to the pre-merger notification process, the detection of antitrust violations, enforcement, and sanctions. Analyzing this formula may show how the decision to put more resources into the pre-merger notification process affects the level of competition in the marketplace. Presumably, the level of competition in the marketplace with the current allocation is higher than it would be with some other allocation.

Mexico appears to allocate resources differently than the United States. In Mexico, investigation of monopolistic practices and pre-merger notification seem to be given equal weight in the regulations, suggesting that the resources are allocated equally between the functions. This inference may be empirically tested by an examination of the actual allocations. It is possible that Mexico allocates resources to the regulation of competition in the same manner as the United States.

Regardless of the amount of the particular allocation resources, the pre-merger notification process and the associated transaction costs are a worldwide reality. Efforts to reduce transaction costs focus on ways to streamline and coordinate all aspects of mergers regulation, including the pre-merger notification process. Completion of a merger involving both countries requires the companies to navigate both processes. Some of the transaction costs may be reduced by coordination between the regulatory agencies in both countries. Officials at the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) spend a lot of time interfacing each day with their counterparts in other countries around the world, including the Federal Competition Commission (CFC) in Mexico. The most common formal tool of coordination currently used is a bi-level agreement between the regulators of different countries. Such an agreement currently exists between the United States and Mexico.[4]

Efforts continue in the United States to find ways to reduce transaction costs. These efforts include proposed legislation introduced in Congress to raise the threshold amount in the United States to almost $50 million.[5] The threshold amount in Mexico is calculated in multiples of the minimum wage and may, in fact, be

3. Enforcement: FTC Has Record Year in Enforcement in Both Merger and Non-Merger Cases, 79 ATRR 390 (2000).

4. 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 (July 11, 2000).

5. *See* H.R. 4194, 106th Cong., 2d Sess. (2000). *See also* S. 1854, 106th Cong., 2d Sess. (2000) for even higher but more complex thresholds.

higher than it is in the United States.[6] One of the issues raised in Mexico about the threshold amount is how it is determined, and the cost involved in determining it. In an effort to save time, and therefore reduce transaction costs, lawyers representing mergers and acquisitions clients prefer not only high threshold amounts but clearly stated threshold amounts that can be easily ascertained.

Other efforts to reduce transaction costs involve the stages of review. In a simplified process, the merging companies would give the advance notification containing the requisite information, and a final decision would be rendered expeditiously. In many cases, however, a second stage is required because the regulatory agency has questions or is unable to ascertain the anti-competitive effect of the proposed transaction. In the second stage, the merging companies must submit additional information. There is much discussion regarding the need to bring greater clarity and definition to that second stage process. One solution may be a maximum time frame period for the entire process. Although a maximum time period has been advocated in the United States and Mexico, it has not been adopted.

The ambiguity of the second stage raises the issue of transparency. Transparency is the extent to which the pre-merger notification process, the standards for evaluating the appropriateness of the transaction, the factors influencing the decision, are known and clear to those who must comply. In the United States, some professionals advocate a process that requires the DOJ and FTC to provide a detailed explanation of the reason for a second request. That is, the regulators should not only ask for the additional information required by the second stage review, but they should also explain why they are subjecting the transaction to the second stage of review. Such an explanation would allow the inquiry to become more focused. The more focused the regulatory review becomes, the less time it will take to accomplish a transaction, and transaction costs will be reduced. Moreover, the explanations will provide guidance to lawyers for structuring future transactions.

Transparency in the pre-merger notification process in Mexico is a substantial issue for American companies desiring to directly or indirectly acquire Mexican companies. One of the major criticisms of the pre-merger notification process is the lack of transparency for the time period for completion of the pre-merger notification process. Article 21 of the LFCE provides a lengthy time frame for approval by the CFC that may be extended. The length of time it takes to make a decision in Mexico could be longer or shorter than the time frame in the United States. The uncertainty about the time frame increases transaction costs. The lack of transparency concerning the threshold amount triggering the pre-merger notification process in Mexico and the time frame for its completion, make it essential that American counsel work with knowledgeable and experienced Mexican counsel.

In the United States, companies have a waiting period they must observe after notification of federal regulatory agencies completing a transaction. If the FTC or DOJ does not object within the specified period, the companies may proceed to complete the transaction. Notwithstanding the waiting period, 97% of all merger

6. Art. 21, Federal Law of Economic Competition.

requests that go to DOJ and the FTC are approved within 30 days.[7] Last year, there were almost 5,000 such requests, up from 2,000 requests ten years ago.[8] There is some fluctuation from year to year, and the number of requests has declined recently, but there has always been a very high level of approval regardless of how many requests have been received.

The high approval rate for mergers in the United States occurs in part because the threshold amount for the size of a merger triggering the pre-notification process is relatively low.[9] Accordingly, filing is required for transactions that do not, even on their face, involve anti-competitive problems. On the other hand, in Mexico, more information must be filed from the inception of the process. Assembling the information, preparing the request, and presenting it to the regulatory agency results in significant transaction costs. Those costs must be borne even for transactions that present no anti-competitive problems.

Coordination among different antitrust regulators around the world raises issues involving the exchange of information and confidentiality. When information is submitted to a regulatory agency, it will be shared with other regulators involved in the review process. This sharing also occurs between regulators of different countries, often pursuant to bi-lateral agreements. Because the information submitted may include trade secrets and other proprietary information, rules are needed to ensure confidentiality. If the rules governing confidentiality are not clear and safeguards are not in place, many problems may arise that will drive up transaction costs and draw pressure from regulators and lawyers in the mergers and acquisition process to reduce these costs. Agreements between countries must resolve policy differences in the domestic rules of each country with respect to the confidentiality of submitted information. Under Article X of the Cooperation Agreement, the United States and Mexico agree to maintain the confidentiality of information exchanged pursuant to the agreement. However, there is a gray area because the regulators of each country need only observe that obligation to the extent such confidentiality is consistent with their respective laws.

The evolution of competition law in Mexico has been and will continue to be different than in the United States. In the United States, the Sherman Act[10] has had a long history of developing domestic antitrust law. International regulation has become more important to the American companies but it has played only a minor role in the development of American antitrust law. In Mexico, however, international regulation is playing a far more important role in the development of its competition law. Mexican competition law, still in its infancy, is being developed in an age in which globalization is a watchword and there is substantial pressure for the harmonization of enforcement policies among the different regulatory agencies around the world. In many instances in which a Mexican entity will be acquired as a part of a larger transaction, multinational companies may proceed to close deals even though the Mexican piece may not yet be resolved. Mexican competition law necessarily will be affected. The provisions of the LFCE

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7. Enforcement: ICPAC Advises DOJ on Merger Review, Antitrust/Traditional Interface Directions, 78 ATRR 199 (2000).

8. *See* note 1 *supra*.

9. The threshold amount is only $15,000,000.

10. Ch. 647, 26 Stat. 209 (1890).

will be interpreted in light of international and local concerns, and occasionally there will be tensions between the goal of protecting Mexican consumers and facilitating efficient mergers between companies outside of Mexico. Nevertheless, transactions occurring outside of Mexico may have much to do with the manner in which competition law develops in Mexico.

In the United States, for example, one of the things that occurred as a part of the evolution of antitrust law is that the business of baseball in the United States has been exempt from the antitrust laws. This result would appear to be unlikely to occur in Mexico, but if Major League Baseball were to add an expansion team in Mexico, the question would surely arise. Interestingly, the District Federal Court decision in Mexico holding that notaries are not economic agents[11] under Article 28 of the Mexican Constitution and therefore not covered by Article 3 of the LFCE is very similar to an example used by Justice Holmes in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* in which the court held that baseball was exempt from the Sherman Antitrust Act.[12] Justice Holmes said he could see no difference between a lawyer practicing law and a professional baseball player playing baseball. Furthermore, notaries in Mexico are comparable to lawyers. However, Articles 8, 9 and 10 of the LFCE specifically includes services, so Mexico would not necessarily be expected to follow the same line of reasoning. If the question does arise in Mexico, it would evolve differently and be resolved differently

Finally, Mexican competition law is coming of an age during when there is not only the pressure for harmonization at the international level to coordinate competition law enforcement in the pre-merger notification process among regulators, but there is also pressure for a supra-national antitrust law. Responsibility for enforcement of a supra-national antitrust law could be lodged in the World Trade Organization. While the coordination of enforcement is a reality, a supra-national competition law has not yet arrived. There is considerable vocal opposition from many people who believe and argue that individualized regulation, country by country, would be better than having one supra-national competition law with one worldwide enforcer. Furthermore, there is resistance within countries because the subordination of local law to a worldwide law is a big domestic political issue. Nevertheless, scholars and academics continue to push very hard for a supra-national law. Notwithstanding the absence of such a law, worldwide competition law enforcement is moving towards such a model. This occurrence may cause some of those other perspectives, i.e., lawyers who represent competitors, lawyers who mostly litigate the transaction side of the law, consumers, or even the general public, to become more visible in competition law enforcement discourse. This trend may cause more people on the street, more ordinary people, to be concerned about the allocation of resources in the pre-merger notification process and the substantive framework in which these transactions are evaluated. This result may not occur in Mexico, but it is already occurring in the United States.

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11. Omar Guerrero Rodriguez, *Recent Decisions of the Mexican Supreme Court of Justice*, 9 U.S.-MEXICO L. J. 47, 49 (2001).

12. Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).