The Fundamentals of North America Merger Control (US, Canada & Mexico)

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On January 15, 2025, the International Committee of the American Bar Association's Section of Antitrust Law hosted a webinar on the mechanics of the merger control process in the United States, Canada, and Mexico. This was the second of a seven-session "Crash Course in Global Merger Control" organized by the International Committee and co-sponsored by the section's Mergers and Acquisitions Committee. The series, which will run through February 2025, is designed for junior lawyers and economists interested in international merger control and tackles the basics of merger control and review process in general, as well as outlines information specific to various jurisdictions around the globe.

This session explored the details of the merger control regime in each jurisdiction, including the conditions under which it is required to file and the subsequent timeline.

Moderated by Mélanie Perez of Covington & Burling in Brussels, the panel featured three speakers: Clotilde Le Roy of Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C.; Gideon Kwinter of McCarthy Tetrault LLP in Toronto; and Ernesto Alvarez Castillo of SAI Derecho & Economia SC in Mexico City.

United States

In a review of merger control in the United States, Ms. Le Roy stressed that it is critical to determine if a filing under the Hart-Scott-Rodino Antitrust Improvements Act (HSR) is required. Such a filing is required for certain acquisition of assets, voting securities, and non-corporate interests (e.g., LCCs, LPs, and LLPs in the case that "control" is conferred) when either the "Size of Transaction" test or "Size of Person" test (if applicable) are met, and no exemption applies (e.g., lack of a U.S. Nexus, or the Investment-only Exemption). In 2024, the "Size of Transaction" test had a threshold of $119.5 million, although this value is adjusted annually and the FTC increased the threshold to $126.4 million for 2025. In general, the size of the transaction is equivalent to the total consideration to be paid. However, the HSR rules sometimes require adjustments. Notably, Ms. Le Roy noted that, in certain cases, it is necessary to aggregate prior asset acquisitions from the same parties, whereas in other cases, certain assets to be acquired may be exempt. In cases where the "Size of Transaction" exceeds the threshold value but is less than four times the threshold, the "Size of Person" test must also be met to trigger a filing requirement. The "Size of Person" test applies additional thresholds to the annual net sales or total assets of both parties. In 2024, one party must have sales or assets of at least $239 million and the other of at least $23.9 million to meet the "Size of Person" test. In addition to covering the conditions under which an HSR filing is required, Ms. Le Roy also highlighted the FTC's "To File or Not to File" guide as an invaluable resource for making such determinations.

Ms. Le Roy went on to outline an HSR filing timeline. For a standard transaction, the post-filing waiting period is 30 calendar days; however, for cash tender offers that waiting period is only 15 calendar days. Parties can also "pull and refile" their HSR filing, providing the agencies with more time to conduct their initial review. Ms. Le Roy explained that at the end of the waiting period, the agencies can issue a Second Request for additional information, documents, and data. Ms. Le Roy closed her discussion by noting an

upcoming change to the process: beginning February 10, 2025, a new HSR form and instructions will go into effect, expanding on the existing set of information and documents that would need to be included in an HSR form.

Canada

Mr. Kwinter addressed the merger control process in Canada, which requires a mandatory pre-closing filing where prescribed criteria are satisfied, and no exemption applies.

The pre-merger notification regime under Canada's Competition Act applies only to the following types of mergers: acquisitions of assets, voting shares of a corporation or interests in a combination (e.g., partnership units), amalgamations (including Delaware mergers); and formations of combinations. For each of these transaction types, in order for a filing to be required, the subject of the merger must involve an "operating business", which, under the Competition Act, means "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work", and two financial thresholds ("Size of Transaction" and "Size of Parties") must both be met.

The precise application of the "Size of Transaction" threshold varies by transaction type, but, broadly, it is met if the target has assets in Canada (book value) or gross revenue from sales in, from, or into Canada exceeding C$93 million (this value is subject to annual review and potential adjustment). The "Size of Parties" threshold is met if the parties to the transaction (together with affiliates) have combined assets in Canada (book value) or gross revenue from sales in, from, or into Canada exceeding C$400 million.

Additional thresholds apply to specific transaction types. For both the acquisition of shares in a corporation and interests in a combination, the "Size of Equity" threshold must be met. For a share acquisition, this requires that the acquisition would result in the purchaser (together with affiliates) holding more than 20% of the voting shares of a public corporation, more than 35% of the voting shares of a private corporation, or, if the preceding thresholds are already satisfied, more than 50% of the voting shares of either a public or private corporation. For the acquisition of interests in a combination, the "Size of Equity" threshold is met where the purchaser (together with affiliates) will come to hold the right to more than 35% of either the combination's profits or its assets upon dissolution, or, if the preceding threshold is already met, more than 50% of the combination's profits or its assets upon dissolution. In the case of an amalgamation, the "Parties to Amalgamation" threshold requires that at least two of the amalgamating entities have assets in Canada (book value) or gross revenue from sales in, from, or into Canada exceeding the "Size of Transaction" threshold.

Following his discussion of the requirements for filing, Mr. Kwinter reviewed the Canadian merger control process and timeline. The Canadian merger control filing consists of up to two components: technical notification filings, which are made separately by each party, and a joint substantive submission (referred to as a request for an advance ruling certificate of an "ARC Request"). While an ARC Request is filed in effectively every case, parties may choose not to file (or not to initially file) technical notification forms.

The filing of complete notification forms by both parties triggers a statutory 30-day waiting period. The Canadian Competition Bureau can waive the waiting period, terminate it early or extend it through the issuance of a Supplementary Information Request (SIR). Upon the expiry of the waiting period, the parties are in a legal position to close under the Competition Act, unless the Competition Bureau has obtained an injunction from the Competition Tribunal (or an injunction application is pending with the Tribunal).

Separate from the statutory waiting period, a non-binding service standard also applies to the Competition Bureau's substantive review, irrespective of whether the parties file notification forms. Depending on the Competition Bureau's complexity designation for the transaction, the service standard is either 14 calendar days (non-complex) or 45 calendar days (complex; for complex transaction where an SIR is issued, the service standard is extended to 30 calendar days following SIR compliance). In the case of outstanding information requests, the service standards can be paused.

Mexico

Turning to Mexico, Mr. Alvarez Castillo covered his country's merger control regime, outlining the conditions under which a filing is mandatory. He noted that the filing requirements cover a wide definition of "concentration" ("Any act by which economic agents consolidate assets in general") that meets the filing thresholds. The Mexican legislation foresees three thresholds and, in the event any of them is met, the transaction must be notified to the Mexican Federal Economic Competition Commission (COFCE). He explained that the first or "High-Value Transaction" threshold is met if the value of the transaction in Mexico exceeds M$1.95 billion. The second threshold covers the "Partial Acquisition of Target with Significant Sales" and applies when it involves the acquisition of at least 35% of the assets or shares of an economic agent with annual sales in Mexico exceeding M$1.95 billion. For cross-border transactions, the most commonly met threshold is the third one, covering the "Acquisition of Medium Sized Assets by Companies with Significant sales in Mexico," which is met if the acquisition of assets or capital stock in Mexico exceeds M$911.9 million and the annual sales in Mexico of all economic agents' party to the transaction exceeds M$5.2 billion. Each threshold is based on the "UMA" index, which is updated annually. Like in the U.S. and Canada, a number of potential narrow exemptions can apply, including for corporate reorganizations in which no third

parties are involved, an increase in a shareholding stake by an entity with an existing controlling stake, acquisitions of stakes less than 10% in public companies, and non-controlling acquisitions made by investment funds when there is no overlap in Mexico. Each exemption should be carefully assessed on a case-by-case basis. Voluntary filings can be made even if a transaction does not meet the specified thresholds. Mr. Alvarez Castillo presented key factors to consider when determining if it is advisable to file in these cases, particularly in collaborations between competitors considering the stringent treatment of horizontal agreements and exchanges of information between competitors. He listed key factors to consider: the length of the agreement, potential loss of independence over market strategies, and potential loss of rivalry.

In addition to filing requirements, Mr. Alvarez Castillo provided an overview of post-filing procedural highlights. Unlike in the U.S. and Canada, the merger control process in Mexico is characterized by long statutory terms, which can result in reviews that can last anywhere from three to over six months depending on complexity. The waiting period is governed by a "deemed approved" clause that designates a 60-business day waiting period from the last submission of information, extendable up to an additional 40-business day term. Nonetheless, in practice, every case receives an explicit resolution, hence the "deemed approved" clause is not used in practice. Post-filing, the first step by COFECE is to issue an initial request for information (RFI) to the parties. For simpler mergers, often characterized by a combined market share of less than 30%, the review typically ends at this stage and takes up to three months. More complex mergers generate additional RFIs, including to third parties, and take up to six months. Finally, Mr. Alvarez Castillo explained that if COFCE deems the merger to pose potential risks to competition, a "Notice of Risks" may be issued, which opens a window to engage in remedy negotiations, further extending the timeline. In general, the merger control process can take over six months when remedy negotiations are required.

Along with his description of the current process, Mr. Alvarez Castillo provided context for an upcoming change to the merger control regime in Mexico. In 2025, Mexico will transition from COFCE to a new Competition Agency following the approval of a constitutional amendment to modify the existing authority. During the transition period to the new Competition Agency, if merger procedures stall or the authority lacks the resources to handle COFECE's current workload, the parties may rely on the "deemed approved" clause to close their transactions.

The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

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