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Practical cross-border insights into merger control issues

Merger Control 2023

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

As a result of the amendments made in 2013 to Article 28 of the Mexican Constitution, two administrative agencies, independent from the Mexican Ministry of Economy and with technical and operational autonomy to issue resolutions, have been created to enforce competition law and the merger control notification process in Mexico: (i) the Federal Telecommunications Institute (the "IFT"); and (ii) the Federal Economic Competition Commission (the "Commission"). The IFT is the agency in charge of regulating and supervising the telecommunications, radio and TV industries, and the Commission is the agency responsible for all competition matters except for those sectors reserved for the IFT. The Commission is integrated to exercise merger authority by public officials, divisions and administrative units, of which the main authority is the Commission in Plenary session, comprising seven commissioners, including the Commission President. Resolutions are issued by majority votes of its members and, exceptionally, by a qualified majority in accordance with the law.

1.2 What is the merger legislation?

Listed in order of hierarchy, the merger legislation is as follows: (i) Article 28 of the Mexican Constitution, which establishes the antitrust prohibition, concentrations and the monopoly exception regime in the case of intellectual property (patents, trademarks and copyrights) and certain state monopolies (oil, electricity and the postal service, among others); (ii) international treaties to which Mexico is a party, containing antitrust provisions, including, among others, USMCA and EUFTA; (iii) the Federal Economic Competition Law (the "Law") and its regulations; (iv) the Industrial Property Law; (v) the Copyright Law; (vi) the Foreign Investment Law; (vii) the Federal Consumer Protection Law; (viii) the Federal Criminal Code; (ix) the Federal Tax Code; and (x) the General Law of Business Companies.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation for foreign mergers in terms of economic competition and free commercial practices; however, requirements and limitations apply with respect to foreign investment for certain industry sectors.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Yes, the Federal Telecommunication and Broadcasting Law, which regulates the telecommunications, radio and TV industries. Apart from this, there is no other relevant legislation for mergers in terms of economic competition and free commercial practices; however, requirements and limitations apply with respect to foreign investment for certain industry sectors.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

Apart from the aforementioned legislation in questions 1.2 and 1.4 above, there is no other relevant legislation for mergers in terms of economic competition and free commercial practices. However, foreign investment requirements and limitations apply to investments by foreigners in certain industry sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The types of transactions caught under merger control provisions are subject to threshold tests related to the underlying value of each transaction or successive transactions. The Law defines a concentration as any merger, control acquisition or any act resulting in the concentration of legal entities (whether commercial or civil), including trust or assets in general among and between competitors, suppliers, customers, or any economic agents.

The Commission is able to challenge, suspend and sanction, subject to express criteria, any concentration with the purpose of diminishing, damaging or not allowing competition or free access, with respect to identical, similar or substantially similar goods and services.

Although control is not a defined term in the Law, if the underlying transaction falls within any of the thresholds set forth in the Law, regulation provides that a merger control notice shall be filed with the Commission prior to: (i) perfection of the underlying agreement or as condition precedent; (ii) acquiring or exercising direct or indirect control, *de facto* or *de jure*, of another economic agent, through purchase of assets, shares, units of trust certificates; (iii) execution of a merger agreement; or (iv) perfection of any combination of actions, the last of which would result in exceeding the thresholds.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of a minority shareholding does not amount to a merger as a general rule; however, if such acquisition is within the scenarios and thresholds specified under question 2.4, it would be subject to notice and prior approval from the Commission.

2.3 Are joint ventures subject to merger control?

Yes, please refer to questions 2.1 and 2.4.

2.4 What are the jurisdictional thresholds for application of merger control?

Based on the foregoing, and in accordance with Article 86 of the Law, the following transactions are subject to prior notice:

(1) When the transaction, irrespective of the place of execution, results in the direct or indirect amount in Mexico being equivalent to more than 18 million times the minimum general daily wage applicable in Mexico City ("MGDW"): approximately $3,111,660,000 pesos.

(2) When the transaction or a series of transactions implies an aggregate of 35% or more of the assets or shares of an economic agent, whose annual assets in Mexico or annual sales that originated in Mexico are equal to more than 18 million times the MGDW: approximately $3,111,660,000 pesos.

(3) When the transaction or a series of transactions implies an aggregate in Mexico of assets or paid-in capital that amount to more than the equivalent of 8.4 million times the MGDW: approximately $1,452,108,000 pesos; and two or more economic agents participate, in which assets or annual sales volume in Mexico on an individual or aggregate basis are equal to more than 48 million times the MGDW: approximately $8,297,760,000 pesos.

For reference purposes, as at August 19, 2022, the foreign exchange rate is $20.21 pesos per US dollar, as quoted by Mexico's Central Bank in the Official Gazette of the Federation (*Diario Oficial de la Federación*), and the MGDW is $172.87 pesos.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control applies in the scenarios and thresholds described above, regardless of whether monopolistic conduct has occurred. This, in turn, may result in antitrust conduct, subject to investigation by the Commission on its own discretionary authority, upon request by the Federal Executive Branch, the Ministry of Economy or the Consumer Protection Agency, or upon a third-party claim.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Merger control applies when the transaction, irrespective of the place of execution, results in the direct or indirect amount in Mexico (either as paid-in capital, assets or sales, respectively) being equivalent to the threshold referred to in question 2.4 above.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are no such mechanisms.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The principles that apply include: the relevant market; free competition; economic competition; identification of the economic agents; effects as a result of the concentration with respect to other competitors; and the commercial relationship between the relevant economic agents. Additionally, and as a general rule, even if a merger takes place in stages, the Commission will consider the thresholds referred to in question 2.4 for each stage.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes, notification is compulsory when the thresholds are met, and approval must be granted prior to the implementation of the underlying transaction (for a more detailed deadline schedule, please see our response to question 3.5).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Transactions are exempt from clearance even if they exceed the monetary thresholds (please refer to question 2.4) when:

(i) the transaction implies a corporate reorganisation in which the underlying parties belong to the same group of control and no third party is involved in such reorganisation;

(ii) a stockholder increases its participation in the capital stock of a corporation in which it has held control since its incorporation or when the Commission has previously authorised the acquisition of such control prior to the capital stock increase;

(iii) a trust is involved (for management or guarantee) based on which an economic agent contributes its assets, provided such contribution is not made for the benefit of any person other than such economic agent or the trustee; however, upon enforcing a guarantee trust, notice applies, taking into account the thresholds mentioned in our response to question 2.4;

(iv) transactions related to stocks, shares or trust certificates related to foreign companies that are considered non-residents (for Mexican tax purposes), provided the underlying companies do not acquire control in Mexican companies or accumulate in Mexico stocks, shares or trust certificates, or any other asset in addition to those held, directly or indirectly, before the transaction;

(v) the acquirer is an equity investment company and the purpose of the transaction is to acquire shares, debentures, securities, credit instruments or equity participations with proceeds obtained from a public offering of the investment

company's stock, except if as a result of the transaction such investment company has a meaningful influence on the decision-making of the relevant economic agent;

(vi) in the acquisition of shares, securities, credit instruments or equity participations of any company or in the acquisition of instruments, the underlying assets of which are stocks of a publicly traded company, when the transaction does not allow the purchaser to acquire 10% or more of such assets, and additionally, the purchaser does not have authority to: (a) appoint or revoke board members of the issuing company; (b) directly or indirectly impose decisions at the shareholders' or partners' meetings or equivalent management bodies; (c) maintain ownership of rights that allow them to, directly or indirectly, vote with the shares of 10% or more of a company's capital stock; or (d) manage, or directly or indirectly influence, the management, operation, strategy or main policies of a company, either through ownership of securities, by contract or otherwise;

(vii) they acquire stock, shares or trust certificates or equity participations in one or more investment funds with speculation purposes (portfolio investment) where such funds do not have any investments in companies or assets in which they participate or invest, or where they are employed in the same relevant market with the relevant economic agent; and

(viii) in those cases established by legislation.

3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

Transactions not requiring prior notice to the merger authority may be investigated during the first year after their execution. For clarity purposes, mergers that met the jurisdictional thresholds may also be investigated if the resolution was reached under the assertion of false information or when it has been subject to ulterior conditions that were not fulfilled in the legal timeframe provided for such purpose.

The referred investigation may be initiated *ex officio* or per the request of any third party through a complaint containing the description of the facts that motivate the complaint and the correspondent evidence, among other requirements.

The merger authority shall analyse the complaints filed, and within the following 15 days shall issue a decision: (i) ordering the initiation of the investigation; (ii) dismissing the complaint, partially or totally, for being notoriously inadmissible; or (iii) requiring more elements from the petitioner.

Upon conclusion of the investigation, the merger authority may: (i) initiate a trial procedure, due to objective elements that indicate a probable responsibility of the investigated economic agents; or (ii) close the case file if there are no elements to initiate the trial procedure.

After the trial, sanctions may be applied if the economic agents resulted liable.

The implication, transaction-wise, is that the closing may be subject to further delays or conditions.

3.4 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

In cases of infringement, the Commission is entitled to: (i) order the rectification or cancellation of the underlying merger; (ii) order partial or total divestiture of what has been improperly concentrated, regardless of the fine that may be applicable in such cases; and (iii) impose penalties of up to 10% of the relevant economic agent's income, among others.

3.5 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Yes, it is possible to carve out local completion through the establishment of conditions precedent applicable to the perfection of mergers in Mexico, such as the issuance of a favourable resolution by the Commission.

3.6 At what stage in the transaction timetable can the notification be filed?

Notification must be filed at any time before any of the following events occur:

(i) the underlying act is perfected in accordance with the applicable legislation or, should it be the case, the condition precedent to which such act is subject, is fulfilled;

(ii) control is acquired *de facto* or *de jure*, or exercised directly or indirectly over another entity, or before assets, participation in trusts, partners' capital contributions or shares of another party are acquired *de facto* or *de jure*;

(iii) a merger agreement is signed between the parties without the condition that a clearance of merger notice must be obtained prior to it becoming effective; or

(iv) in the case of a succession of acts, before the last act becomes effective that would result in exceeding the applicable threshold amounts.

With respect to mergers resulting from acts executed abroad, these must be notified before they have legal or material effect within Mexican territory.

3.7 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Within the 15 days following the notification filing date, the Commission is entitled to request additional information or documentation, which must be delivered by the interested parties within 15 days following the request. This timeframe may be extended on a case-by-case basis based on the complexity of the case, or the volume of information requested. After the documentation delivery process is completed, the Commission has a 35-day term to issue its resolution; if such resolution is not issued within such a term, it shall be interpreted as if the Commission has no objection to the merger; however, the Commission is entitled to extend the term for its resolution for up to 40 days but only in extraordinarily complex transactions and which is decided on a case-by-case basis.

It is worth pointing out that if a merger falls within the jurisdictional thresholds outlined under our response to question 2.4, the resulting acts of a merger will not be able to be filed at the Public Registry of Commerce (*Registro Público de Comercio*), executed in public deed, or registered in the company's corporate books, until a favourable resolution of the Commission is obtained, or the term extension described in the foregoing paragraph lapses without the issuance of a favourable resolution by the Commission.

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

Yes, economic agents must obtain clearance prior to completing the transaction if jurisdictional thresholds are met; otherwise, the acts carried out are null and void, without prejudice of the economic agents' administrative, civil or criminal liability and that of the persons who ordered or contributed to the execution thereof, as well as the notary public who may have intervened. Furthermore, legal acts concerning the merger shall not be registered in the corporate ledgers, formalised under a public deed nor registered in the Public Registry of Commerce (*Registro Público de Comercio*).

As to penalties imposed in practice, these are very common. For example, during the past few months, the merger authority imposed a total fine of $9.7 million pesos on four economic agents for the omission of notifying two mergers that required prior clearance. It is customary to include the merger control clearance as a condition precedent for closing.

3.9 Is a transaction which is completed before clearance deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

Yes, please refer to question 3.8 above. As to the validity, it can be restored based on due process; however, sanctions will still be applied.

3.10 Where notification is required, is there a prescribed format?

The notice shall be made in writing through a free form writ, in which a copy of the underlying agreements shall be enclosed. Such writ must include, among others, the names of the relevant parties, their financial statements of the last fiscal year, their market share and any additional information through which the merger is documented.

3.11 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The law does not provide for an accelerated procedure *per se*; however, if at the time of filing the notice the parties provide as much information as available, such as analyses, reports, evidence, etc., to support the fact that such a merger will notably not result in diminishing, damaging or preventing competition, the Commission may expedite the issuance of the resolution.

In order to speed up the clearance timetable, close contact and lobbying with the staff at the Commission is highly recommended; this frequently results in a more expedited process and is a good way of anticipating additional information requests.

3.12 Who is responsible for making the notification?

The parties participating in the underlying merger are jointly responsible for filing the notification and appointing a sole representative. In addition, when the parties cannot for any reason provide the notice, the merging entity, the party acquiring control of the corporation, or the entity intending to enter into the transactions or to aggregate the shares, equity interest, trust interests or assets, is responsible for filing the notice.

3.13 Are there any fees in relation to merger control?

There are no filing fees.

3.14 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

There is no impact; however, listed companies have a detailed and broad disclosure standard, facilitating the determination of notice thresholds.

3.15 Will the notification be published?

No, the law does not require such notification to be published.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The parties are subject to scrutiny in order to determine whether, as a result of the concentration, the parties are able to fix prices, restrict in a material way competitors' access to the relevant market, or engage in illicit monopolistic practices.

4.2 To what extent are efficiency considerations taken into account?

Efficiency considerations shall be taken into account by the Commission when reviewing proposals that result in efficiency gains in connection with barriers to competition, or aspects that have a favourable effect on economic competition.

4.3 Are non-competition issues taken into account in assessing the merger?

Non-competition issues are taken into account on a case-by-case basis, e.g., the scope of the non-competition provision, term of the obligation not to compete, size of the relevant market, among others. We have also found that the criteria at the Commission change from time to time.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

As a general rule, the law allows for third-party written complaints related to mergers and alleged monopolistic practices. Once the claim is filed, and during the investigation process, the Commission will not allow access to the claim file, and, during the process, only those entities with legal standing will have access to such information.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

When exercising its powers, the Commission may request from the relevant parties information deemed material (including documentation, books and records, information generated in electronic, optic or in any other media or technology), as well as summon those involved in the corresponding cases for the purposes of merger scrutiny, and request and verify information from third parties, including competitors and clients, among others. Additionally, the Commission has the power to conduct verification visits at its discretion, with the assistance of the public force and federal, state or municipal authority.

Notwithstanding the foregoing, if a merger is approved, the Commission is not authorised to initiate an investigation procedure, with the exception of those cases when such resolution was obtained based on false information.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Any information filed before the Commission or obtained by it during an investigation process will be classified as reserved, confidential or public. Reserved information is that which is available only to those entities with legal standing in the investigation process; confidential information refers to information that, if disclosed to any entity with legal standing in the investigation process, such disclosure will result in damages to the disclosing party. Confidential information will only be treated as such if the disclosing party requests so. The Commission, each of its commissioners on an individual basis, its Executive Secretary and any public officer of the Commission must refrain from revealing reserved or confidential information relating to the files or administrative procedures that are part of a legal proceeding, as this may cause damage to the underlying parties, until the investigated party has been notified of a resolution, on the understanding that the information will continue to be classified or confidential.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process concludes with a resolution by the Commission, or the expiration of the applicable term to issue their resolution.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes, provided that such remedies are agreed upon, parties are notified by the Commission prior to the issuance of the resolution. The Commission may notify the parties, either formally or informally, of the criteria that must be met, e.g., excessive terms for non-compete provisions, and which parties need to comply with the set criteria to allow for the favourable resolution to be issued.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Conditions have been imposed by the Commission in both foreign-to-foreign mergers and cross-border mergers, relating to non-compete provisions in scope and term, divestiture of certain assets and/or business units, among others. In such cases, remedies may be proposed and implemented by the parties as necessary to comply with the conditions and ensure that no antitrust conduct is present.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

During the assessment period and before the resolution is issued, the negotiation of remedies can be commenced. There is no particular procedure to negotiate remedies which shall be agreed upon before the resolution is issued.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

No. The divestment remedy is customarily resolved as a condition precedent to clearing the merger notice.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may execute the underlying transaction, assuming any liability resulting from non-compliance with the law. In the case of transactions that require filing before the Public Registry of Commerce (*Registro Público de Comercio*), filing is conditional upon a favourable resolution of the Commission.

5.7 How are any negotiated remedies enforced?

Negotiated remedies must be complied with in order to avoid a resolution by the Commission by means of which its authorisation is revoked and an order to cancel the merger is issued.

5.8 Will a clearance decision cover ancillary restrictions?

On a case-by-case basis, there can be orders for ancillary restrictions to be resolved prior to a clearance decision or to be set as conditions precedent to the clearance decision becoming effective.

5.9 Can a decision on merger clearance be appealed?

The decisions of the Commission can be appealed through administrative recourse and amparo trial (*Juicio de Amparo*).

5.10 What is the time limit for any appeal?

Pursuant to the dispositions set forth in Article 17 of the Amparo Law, a 15-day term is granted to the parties in order to appeal against any act during the procedure or within the resolution issued by the Commission.

5.11 Is there a time limit for enforcement of merger control legislation?

The authority of the Commission to initiate investigations that may result in the application of sanctions expires after a term of 10 years following the date on which the underlying conduct was performed. The authority of the Commission to initiate a criminal action expires 10 years after issuance by the Commission of the resolution concluding that a party is liable for conducting monopolistic practices. In the case of merger control, transactions that are not subject to notice cannot be investigated after a one-year term, following the date of completion of the transaction.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

Mexico is a party to international treaties and arrangements to cooperate in competition enforcement matters, among which are USMCA, EUFTA, and treaties with the European Free Trade Association, Japan, Korea and USA. Such treaties and arrangements include commitments related to international coordination and cooperation matters.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

Mergers, acquisitions or alliances between companies of a certain size and/or value of sales can affect consumers if the result is a considerable concentration of power in the market and, therefore, they must be reviewed and approved in advance by the Commission. Pursuant to the official information of the Commission, fines for illegal conduct were imposed for a total amount of $9.7 million pesos on four economic agents in 2022.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The reform of the merger control regime in Mexico was approved by the National Congress on July 7, 2014, with several reforms and extensions to various provisions of the Law. The last reform of the Law was on May 20, 2021.

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as at August 19, 2022.

7 Is Merger Control Fit for Digital Services & Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

As the digital economy grows and the globalisation of digital business expands, we are challenged to rethink competition occurring in the digital space, as it relates to overall antitrust conduct and practices including merger control tools. One of the challenges is the geographic expansion of markets based on users' consumption preference in the digital world. Collaboration between competitors is necessary as well as the use of big data, cloud hosting services and algorithms, resulting in greater volumes of data and easier ways to buy and sell products and services. An example across jurisdictions is the coexistence and combination of the different platforms and social networks that are consolidating and creating activity in the space of mergers and acquisitions. Finally, innovation, as the most important piece of the puzzle in the new era of digital competition, offers open markets to consumers and users around the world in only a few clicks.

In Mexico, as in other jurisdictions, there is increasing debate in this area, as the demographic potential of Mexico's population is huge in the digital space. We are seeing more and more disruptive players and industries changing the landscape of competition, such as 360-degree e-commerce, including financial services. In Mexico, there are a range of concerns which draw the regulator's eye and which we are currently observing closely, for example: consumers' privacy; competition; and suppliers and owners of digital content interaction.

We can anticipate future regulations that will allow these challenges to be managed more effectively and will result in the application of more efficient competition policy for the digital economy. As in many other jurisdictions, the conduct of competitors, suppliers, distributors and consumers in the digital space brings up similar types of issues to those we have faced in the competition arena, such as mergers and acquisitions, pricing and antitrust conduct. Future developments in these areas will lead to a better understanding of whether we need more regulation. As the debate continues, we need to define what a digital merger is. We believe that the nature of the "digital asset" in a transaction and its effects on the market are the key stepping-stones that must be analysed to define digital mergers.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

As stated above, there have been debates regarding digital mergers in Mexico; however, none of them have resulted in any change to Mexican legislation.

As the digital market continues to expand, it will be necessary to make such changes, but always bearing in mind the inherent characteristics of a "digital" environment, in order to guarantee the effectiveness of the Law.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

No, there are no particular cases as at the date of August 19, 2022; however, some difficulties may arise from dealing with digital markets, such as new regulatory requirements, as well as the possibility that at any time an innovation and its dominance in the market could be superseded. The main topics under consideration also include privacy, data ownership, portability and interconnection regulation, among others.

Gustavo Alcocer manages the Corporate and Commercial Law Group at OLIVARES, advising domestic and foreign businesses and the owners of those businesses on Mexico and cross-border corporate and commercial transactions. He serves as outside general counsel in Mexico to many of his domestic and foreign clients and has significant experience in domestic and cross-border transactions. With more than 30 years of law firm and in-house practice experience, Mr. Alcocer possesses a wealth of transactional knowledge in M&A, finance, and business law and advises clients across IP-intensive industry sectors such as life sciences, information technology, food and beverage, transportation, and retail. Clients routinely turn to him for sophisticated strategic advice regarding structuring, maintaining and expanding operations in Mexico, as well as on valuation and monetisation.

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