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SANCTIONS IN ANTITRUST CASES

Contribution by Mexico (IFT)

-- Session IV --

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SANCTIONS FOR THE FAILURE TO COMPLY WITH MERGER REMEDIES

-- MEXICO (IFT) --

1. Introduction

1. The Federal Economic Competition Law (FECL) empowers the Federal Telecommunications Institute as the national competition authority in telecommunication and broadcasting sectors to impose remedies to mergers in order to preserve benefits and prevent harmful effects, to monitor their effective compliance, and to sanction non-compliances.

2. Remedies on mergers might range from behavioral to structural. However, behavioral remedies entail a risk to competition because the merged entity might have incentives to behave strategically and allege that it has complied with the letter of the remedy, but avoiding the compliance of its purpose. Thus, it is necessary to monitor the compliance of merger remedies, which increases enforcement costs.

3. In 2015, Mexican Specialized Courts for Economic Competition, Broadcasting and Telecommunications adopted a criterion that strengthened the powers of the authority to enforce merger remedies. They resolved that remedies are not only a list of specific acts or conducts mandatory to the merged party, but also they seek a specific outcome in the market, thus the behavior of the merged entity has to comply with the purpose defined by the authority. This resolution improves the accountability on the remedies and makes its enforcement more flexible and less costly for the authority.

2. Conditions that may hinder the compliance of remedies

4. When drafting remedies, it is not possible to foresee all the possible future situations and to write a contract that considers all of them.[1] Remedies, seen as incomplete contracts between the authority and the merged entity, create potential moral hazard and incentives for the merged entity to behave strategically to avoid or undermine compliance with the remedies. Moral hazard might amount from underperformance to the ineffectiveness of contractual obligations. These circumstances increase the risks of imposing remedies on a merger and impose the competition authority additional with tasks and costs to monitor their effective compliance.

3. Sanctions for the failure to comply with merger remedies

5. The FECL sanctions the failure to comply with merger remedies[2] up to the amount equivalent to nine hundred thousand times the daily minimum wage set for that year. If there is recidivism, that sanction

1 *V.* Oliver E. Williamson, "The Economics of Antitrust: Transaction Costs Considerations", *University of Pennsylvania Law Review. 1439, 1443 (1974),* p. 122.

2 The current applicable law to mergers subject to the compliance of remedies is the FECL, amended in 2006. The 2014 FECL sanctions non-compliance of merger remedies up to the amount equivalent to the 10 percent of the offender's revenue during the previous year. If there is recidivism, that amount may rise up to the 20 percent of the offender's revenue. The aforementioned sanctions do not preclude the possibility to cancel the merger authorization, which will eventually lead to the divestiture of the merged entity. The

could rise up to twice the aforementioned amount or the amount equivalent to 10 percent the offender's revenue or assets. The amount applicable is the one that results the highest of the three options. It is also an option for the competition authority to revoke the merger's authorization.

6. The highest pecuniary sanction may not be dissuasive. The value of mergers exceeded eighteen million times the daily minimum wage each,[3] thus the sanction is not deterrent enough because it is not proportional to the value of the operation.

7. However, in a recidivism scenario, the sanction could become proportional not only to the revenue of the merged entity, but also to the value of the merged entity. If the value of the ten percent of the merged entity's assets result the highest of the three recidivism values, the sanction becomes proportional to the merger. The sanction also may include the revocation of the merger authorization. Hence, the deterrent effect is higher in recidivism cases.

4. Remedies on Telecommunications mergers and its enforcement

8. During 2006 and 2007 Grupo Televisa (GTV), a broadcasting company, acquired two independent pay TV companies.[4] The broadcasting firm produced four of the five highest rating TV channels nationwide. Those channels were free broadcasting channels. At the same time, GTV also produced pay TV channels and provided them to other pay TV operators.[5] Since the mergers involved two pay TV operators, the main concern was that an incentive would be created for the broadcaster to provide its channels on an exclusionary basis.

9. The assessment of this proposed merged revealed a trade-off between efficiency gains and the risk to prevent or lessen competition substantially in one or more relevant markets. On one hand, the benefits consisted on higher quality and coverage of pay TV services, through digital networks with the capacity to provide other telecommunication services. On the other hand, as result of the vertical merger, GTV may acquire or increase its capacity and incentives to deny access to other pay TV or broadcasting competitors, or to provide access on a discriminatory basis.

10. The mergers were authorized subject to the permanent compliance of specific remedies, which included:

- the obligation to provide its TV channels to anyone who requested them at a fixed per user rate (must offer). This measure sought to prevent the exclusion of other pay TV firms from the access of channels produced by the merged entity;
- the obligation to carry every broadcaster on the merged entity's pay TV platforms (must carry). This measure sought to prevent broadcasters from being excluded from the Pay TV platforms they had available;
- the prohibition to acquire an equity interest in other network operators besides their own subsidiaries;

2014 FECL has a stronger deterrent effect because it imposes a sanction based on the offender's revenue. However, in the case of recidivism, the sanction could not be proportional to the value of the merged entity because the 2014 FECL does not take into account the asset value.

3 Threshold that triggers the obligation to notify a merger.

4 *V.* http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf p. 153.

5 *Loc. cit.*

- the prohibition to form an interlocked directorate with any other network operator, which was aimed to prevent the coordination with other network operators; and
- the prohibition to be a member of a TV programming buying club.

11. Nevertheless, the set of rules could not foresee every possible outcome that may avoid compliance. In December 2013, a procedure was started to verify the compliance of the remedy referred in the subsection iv. The authority obtained evidence that some board members and executives of one of the merged parties participated in the board and administration of other network operator's, which was not a subsidiary and had not previous relation with the merged party.

12. Based in this evidence, the merged entity was responsible for violating the remedy preventing an interlocked directorate, and was sanctioned with the maximum fine established in the 2006 FECL. The offenders filed a judicial review (*juicio de amparo*) against this decision.

5. Judicial Review

13. Antitrust and Economic Competition sanctions follow the principle *nulla poena sine lege* which means, that sanctions apply only if there is a previous rule forbidding that specific conduct.

14. The merged party requested the judicial review of the authority's decision, alleging that the competition authority had violated the *nulla poena sine lege* principle, because (among other arguments):

- the interlocked directorate took place in a relevant market different from the one analyzed for the merger purposes; and
- literally, the remedy did not explicitly forbid executives from the merged parties to hold any particular offices (*e.g.* an office amounting to the functions of a CFO).

15. In 2015, one Specialized Court ruled that the competition authority's decision was legal and valid. It recognized that the rules dealing with mergers were of a different nature than those dealing with or other competition law violations. The Court concluded that merger remedies:

- were adopted in an *ex ante* procedure analyzing a merger;
- are not drafted to reach short-term goals but are thought for long-term effects in the market;
- are subject to economic forces and incentives in a business environment.

16. The Specialized Court ruled that remedies seek a purpose, not just the prohibition of specific conducts.[6] In the case of the GTV merger, one of the purposes was to prevent interlocked directorates, not just to reform bylaws or to prevent executives to hold certain offices.

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6 *V.* complete resolution in Spanish at: http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=COMPETENCIA%2520ECON%25C3%2593MICA.%2520NATURALEZA%2520JUR%25C3%258DDICA%2520DE%2520LAS%2520CONDICIONES%2520A%2520LAS%2520QUE%2520SE%2520SUJETA%2520LA%2520AUTORIZACI%25C3%2593N%2520DE%2520LAS%2520CONCENTRACIONES%2C%2520EN%2520T%25C3%2589RMINOS%2520DE%2520LA%2520LEY%2520FEDERAL%2520RELATIVA%2520ABROGADA&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2010175&Hit=1&IDs=2010175&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

17. The Court also held that it did not matter that the interlocked directorate involved firms that operated in a different relevant market. The remedy, more generally, sought to avoid interlocked directorates between the merged entity and any other network operator.

18. The criterion given by the Court has likely made behavioral remedies more enforceable by linking them to the fulfillment of their objectives. Remedies will satisfy the principle *nulla poena sine lege*, as long as the rules and the objectives are clearly stated.

19. Additionally, the criteria will likely prevent anticompetitive conducts that contradict the purpose of the remedies. Transgressors will be subject to a “non-compliance procedure”, which is faster than an investigation procedure.

6. Conclusions

20. Behavioral remedies for vertical mergers are not easily enforceable, given the high levels of sunk investments and the impossibility of foreseeing every possible outcome or conduct involving the regulator and the merged entity (e.g. moral hazard).

21. The recent criterion adopted by the Specialized Courts might increase the efficacy and reduce the cost of enforcing a remedy by requiring compliance not only with the letter of the remedy but also with its purpose.