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**COMPETITION LAW AND STATE-OWNED ENTERPRISES – Contribution
from Mexico (IFT)**

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Competition Law and State-Owned Enterprises

- Contribution from Mexico (IFT) -

1. Introduction

1. In this contribution, the Federal Telecommunications Institute (IFT) presents recent cases of the application of competition law and policy, acting as both competition and regulatory authority, regarding State-Owned Enterprises (SOE) in telecommunications and broadcasting sectors in Mexico. This document focuses on the granting of concessions to use radio electric spectrum and the entry of SOE to the provision of OTT services, after a competition assessment is issued.

2. Legal and administrative framework

2. According to the constitutional¹ and legal² framework in Mexico for telecommunications and broadcasting, competition and sectoral laws pursue the protection and the promotion of competition conditions.

3. SOE actively apply for spectrum concessions. Under the competition law (the Federal Economic Competition Law, LFCE), they can be acting as: (i) public entities when acting in compliance of their public duties and powers, thus not subject to this law, or (ii) economic agents subject to competition assessment. Under the sectoral law (the Federal Telecommunications and Broadcasting Law, LFTR), they can apply for: (i) public concessions, legally designed to be granted to public entities for the development of its legal attributions, faculties and public purposes, or (ii) commercial concessions, but subject to a competition neutrality legal regime and restricted to provide wholesale services.

4. Regarding the policy for spectrum management, the sectoral law provides that the IFT must pursue effective competition in convergent markets as well as effective use of this resource, among other objectives.³ The Mexican Constitution also prohibits *accumulation phenomena against the public interest* in any market or activity within national territory.

5. In exercising those mandates, when assessing SOE applications for concessions — and following the principles of administrative simplification and regulatory improvement— the IFT carries out only one integral assessment on each case that includes an independent competition opinion, which is provided by the Economic Competition Unit (UCE). Thus, all SOE's applications, either for public or commercial uses, analysed by the

¹ Articles 27 and 28 of the Mexican Constitution. The Constitution is available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/1_270818.pdf

² Articles 67, 76 and 140 to 144 of the Federal Telecommunications and Broadcasting Law (LFTR), available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTR_150618.pdf

³ Article 54 sections III and IV of the LFTR.

IFT include a competition assessment, which is provided as a competition advocacy action.⁴

3. Public Concessions

6. The sectoral law⁵ considers that public concessions are exclusively granted to governmental institutions and agencies to exercise their public duties. This figure includes SOE not acting in commercial activities. This type of concessions pursues strict public objectives and contains a ban to obtain commercial gains or speculative profits.

7. Considering spectrum as a scarce resource and the increasing demand on alternative uses (other than public concessions and several services), the IFT analyses the granting of public concessions through different assessments, which include spectrum administration, spectrum efficiency and competition.

8. The IFT assesses —on a case-by-case basis— the possible effects of granting a public concession on the availability for alternative uses within the geographical market involved and the accumulation of spectrum already in concession to the public applicant. The sectoral law provides a statutory prioritization for public applicants. If the IFT —based on its competition opinion— identifies that under the existent conditions of available and allocated frequencies, the granting of a public concession may create a barrier to entry (or efficient expansion) for alternative uses, therefore it triggers a request to include additional frequencies to the Annual Frequency Bands Program, in order to timely expand the offer on that geographic market. SOE common examples occurs in radio broadcasting services, as described below.

3.1. Radio FM broadcasting service cases

9. In radio FM broadcasting services, the IFT avoids granting public concessions that could represent an unnecessary reduction to commercial spectrum or a barrier to entry in radio broadcasting commercial services, or other alternative uses, especially considering these circumstances:

- A particular public entity or SOE has previously one or more public concessions.
- There is few spectrum availability in the geographical area evaluated.
- Other public entities upheld public concessions.
- There is high potential demand for alternative uses (commercial, social, private and indigenous) in the same bandwidth and geographical area.

10. Under those characteristics, granting a new public concession to a SOE might reduce the frequencies' availability for other kind of spectrum uses in a certain location, especially commercial uses in high concentration ratios. The IFT is also aware of the opportunity costs involved in granting a frequency to one specific use and, throughout that act, reducing the availability for other uses, commercial and no commercial, since all of

⁴ Article 12 section XIX of the Federal Law of Economic Competition (LFCE).

⁵ Articles 67 and 76 of the LFTR.

them have social value in terms of diversity and plurality and indirect competition for audiences.

11. In order to protect spectrum efficiency, plurality, diversity and competition issues, the IFT applies *distribution and eligibility criteria* when granting radiobroadcasting services, as a way to eliminate barriers to entry and to prevent from future antitrust concerns.

12. Bearing in mind an equilibrium in alternative spectrum uses for FM broadcasting services, the IFT protects the inclusion and efficient distribution of every type of them. For example, in a same coverage location, public concessions (SOE) may uphold up to 10% to 15% of the frequency concessions where other kinds of concessions are requested and there is not enough spectrum available. This distribution sometimes would function as an *ex ante* mechanism to reduce future competition distortions. This quantitative criterion, but especially the competition and opportunity costs rationale that supports it, have guided the IFT's decisions.

13. At the same time, when different SOE are interested in a same location and the availability of spectrum is limited, the IFT uses *eligibility* criteria to choose the best positioned one. For example, a SOE with no previous concessions in a location might be considered differently over those who, directly or indirectly, have already one or more concessions. Such information is provided by the UCE thorough an internal opinion that includes a report on the structure of participants and their close related parties on the analysed geographical area, their participation as frequency holders, as well as concentration, accumulation and scarcity.

4. Commercial concessions

14. This type of concessions are granted to public entities or to Public Private Associations when performing commercial activities. The sectoral law establishes a specific regime for SOE that obtains a concession for telecommunications network. It legally defines competition neutrality as the obligation of the State consisting in not distorting markets, when participating as owner of entities.⁶ In telecommunications, SOE with commercial licenses in which they:⁷

- Are subject to competition neutrality principles,
- Shall operate as wholesalers subject to the principles of total infrastructure sharing, complete disaggregation of their services and capacities, competitive pricing and non-unduly discrimination,
- Must issue public referential offers of its services,
- Must carry separate accountancy for telecommunications and broadcasting,
- Must submit to authorization all the agreements with *preponderant* economic agents previously, and

⁶ LFTR, article 3, section XXXVIII.

⁷ LFTR, articles 140 to 144 applicable to Public Telecommunication Networks with Public Participation.

- Are authorized to provide wholesale services only and explicitly banned to provide final users services.

15. These measures constitute an initial mechanism to prevent from discrimination conduct, predatory prices, exclusivities and other kind of antitrust concerns regarding SOE. At this time, the IFT have not explored the possibility for commercial concessions different from these wholesale services.

5. Wholesale broadband network case

16. Article 16 Transitory of the 2013 Mexican Constitutional Telecommunications Amendment contained the obligation to adjudicate by auction the *Red Compartida* project, which comprehends the setting and operation of a wholesale public network to provide broadband services (Wholesale broadband public network) with a compromise coverage of 92% of the Mexican territory for 2024.

17. According to the Constitution, the project was to be adjudicated to a public or public/private entity (APP), considering private applicants that previously competed in an auction. This guarantees that any telecommunication service provider or operator could be involved in the operation of the project.

18. In 2016, two private agents competed in the auction to be a part of the project's APP, where the company: Altán Redes (a consortium) was the winner applicant.

19. According to the legal framework, before the auction in late 2016, the IFT issued a competition assessment to the interested companies in order to determine if they complied with the obligation of avoiding that any telecommunications operator got influence in the project operation.

20. One of the evaluated companies (Rivada Networks)⁸ was subject to conditions because one of his shareholders (EchoStar) was a telecommunication operator and its identified participation in the company could potentially get influence in the operation of the project (49% of the total share amount, according to the proposal of that consortium). Because of this reason, the shareholding of EchoStar in the consortium was limited to no more than 10%, with limitation in voting rights and restrictions to access information about the operation of the project.

21. After the IFT completed the competition evaluation, the auction was issued and the winner contestant was Altán Redes,⁹ which is currently designing, setting and operating the wholesale public network. Its concession title contains provisions of competition neutrality, and a public reference offer of its services was authorized by the IFT.

22. In the APP, Altán Redes is now the developer of the project, subject to the terms of the private public contract agreement and to the Mexican Private Public Association Law. The other part in the contract is the Telecommunications Investment Promotion Organism (PROMTEL), who leased 90 MHz of spectrum to Altán, and *Telecomm de México* (a public

⁸ The competition assessment is available in Spanish at: <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/versionpublicauepifttext13101625.pdf>

⁹ The competition assessment is available in Spanish at: <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/versionpublicauepifttext13101626.pdf>

organism dependent from the Mexican Communications and Transportation Ministry), transferring two pairs of optic fiber to the public network project.

23. As the same time, another APP scheme has been chosen for a national project known as *Red Troncal*, which consist in a trunking public national network to provide trunking services around the country.

24. The IFT has already issued a competition assessment of the interested companies in the project, in order to attend actual or potential competition concerns (to this date, IFT resolutions are confidential until the companies present its economic proposals at the auction). The auction will be carried out until 2019. Meanwhile, this SOE project has already been analysed by the competition authority.

25. Relevant recommendations issued by the IFT to the public bidders were aimed at:

- Increasing competition within the bidding process. Given that they were capital-intensive projects, the IFT recommended allowing the participation of consortia with flexible structures, in order to incentivize the participation of private investors and to support the viability of the APP.
- Removing operative and contractual conditions or requirements designed to guarantee the compliance of the project's objectives, but that may create unnecessary barriers to deployment and to their capacity to compete.

26. As mentioned before, a mechanism consisting in a previous competition assessment of the SOE has been used in *Red Compartida* and *Red Troncal* projects, in order to prevent future competition concerns. Besides, in the two cases described, the SOE have the obligation to notify to the IFT any future transaction that modifies its corporative structure (any transaction where control or influence is compromised).

6. Entry of a SOE to audio-visual OTT

27. In 2016, the Mexican Institute of Cinematography (IMCINE) consulted to the IFT¹⁰ if the commercial offer of its content catalogue through an OTT could have anticompetitive effects or could lead to a declaration of substantial market power.

28. The UCE assessed the case and provided a non-binding response in the following terms:

- The commercial offer and the discounts scheme proposed did not posed a competition risk on the correspondent market, especially due to the existence and participation of larger and stronger economic agents;
- Because of the same reason, there were no indications of possible anticompetitive effects or the acquiring of substantial market power; and
- Recognizing that IMCINE has the legal duty to provide public finance to carry out their statutory activities, which includes the promotion and provision of access to the audio-visual catalogue it preserves, the IFT highlighted the fact that it is compelled to observe the neutrality competition principle established in the sectoral

¹⁰ Throughout the request of a General Orientation provided in article 110 of the LFCE.

law, when using the OTT platform for commercial purposes.¹¹ Particularly, the IFT recommended that IMCINE observed a clear and transparent separation between its public duties and its commercial activities; and to allocate the cost, based on the use of the platform, in order to prevent cross subsidization between both activities.

7. Conclusion

29. The IFT employs the tools provided in both the competition and sectoral laws, in order to have a timely and more effective intervention preventing and remedying historical market conditions, especially in the spectrum management for telecommunications and broadcasting sectors. In this regard, the assessment of SOE applications for public and commercial concessions includes its competition opinion on their potential effects on the availability of this scarce resource for alternative uses and alternative users.

30. Based on the competition assessment, the IFT instructs the inclusion of additional frequencies for further allocation, in order to reduce or remove entry and expansion barriers. In other cases, it provides transparent and objective eligibility criteria to select the applicant that best complies with the objectives of competition, diversity and plurality.

31. Additionally, the IFT performs the external advocacy powers granted by the LFCE in order to orient SOE in adopting competition criteria and principles—including competition neutrality— when performing their public duties and commercial activities.

¹¹ Also referred in footnote 7 of this document.