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Industrial Policy and the Promotion of Domestic Industry**

– Contribution from Mexico –

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Mr. Chris Pike, Competition Expert - Chris.Pike@oecd.org.

Ms. Lynn Robertson, Manager GFC, LACCF ; Competition Expert - Lynn.Robertson@oecd.org.

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Session III: Industrial Policy and the Promotion of Domestic Industry

- Contribution from Mexico (IFT)* -

1. Introduction

1. In 2013, the Federal Telecommunications Institute (IFT) was created as an independent competition authority and sectoral regulator in order to enhance the stability and credibility of economic regulation in the telecommunications and broadcasting sectors. This action was part of a far-reaching constitutional amendment to improve competition law and policy implementation as a tool for development. On this topic, the 2017 OECD Telecommunications and Broadcasting Review of Mexico¹ concluded, among other things, that:

“Since 2013, this unprecedented structural reform has allowed the Mexican authorities to introduce important changes to modernize the telecommunication and broadcasting sectors, challenging a highly concentrated status quo and moving into a more competitive future. The results have been remarkable and demonstrate what can be achieved with evidence-based policy making.”

2. In general, Mexico’s competition policy is a supporting feature and a part of industrial policies. Federal public policies –including those industrially oriented– take into consideration competition rules, principles and criteria, but opportunity areas persist. Industrial policies cannot set exceptions to laws of general application, such as competition and sectorial laws. Nevertheless, industrial policy considerations can permeate –thought legislative and executive initiatives– the design of the regulatory frameworks. In addition, there is not a national champion policy in place.

3. In this contribution, the IFT presents a perspective on the most relevant aspects of the interaction between industrial and competition policies in telecommunications and broadcasting in Mexico.

2. Background of competition and industrial policies

4. Mexico’s competition policy was introduced as part of a decade-long reform initiative, that begun in the mid-1980s in order to end central government control and protection of domestic economic activity, to develop instead a market-based economy. The government ended most of the domestic price controls and reduced entry constraints. To open the economy to foreign trade and investment, Mexico eliminated most of the compulsory import licenses, abolished official import prices, reduced tariffs, and adhered to the GATT.

* Contribution of the Federal Telecommunications Institute (Instituto Federal de Telecomunicaciones, IFT).

¹ OECD (2017), *OECD Telecommunication and Broadcasting Review of Mexico 2017*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264278011-en>.

5. The first competition law was issued in 1992, in preparation for the signing of the North American Free Trade Agreement (NAFTA), and was enforced by the Federal Competition Commission (CFC). According to the 2004 OECD's peer review,² at that time there was no clear base of support for competition policy, and it stated that the vigor of the competition authority's enforcement record to that point could be questioned.

3. Current industrial and competition policy relation

6. In 2013, the amendment of article 28 of the Mexican Constitution strengthen the role of competition authorities and the regulator in telecommunications and broadcasting to protect the society's right to competition and the benefits it can provide. This reform also embodied a transitory regime, specific for telecommunications and broadcasting sectors, which established specific tasks and granted specific powers to the IFT in order to improve competition conditions.

7. In 2014, following the constitutional reform, the executive power proposed to the legislative body the enactment of new competition (Federal Economic Competition Law or LFCE) and telecommunications and broadcasting laws (Federal Telecommunications and Broadcasting Law or LFTR) that entered into force, abrogating the previous laws. This new legal and institutional framework:

- granted to the IFT, an autonomous collegiate body, the powers to be a competition authority and sectorial regulator, in order to build up the expertise and technical capacity for regulatory improvement that integrates competition criteria and principles;
- strengthened the separation between regulation and policymaking in the telecommunications and broadcasting sectors, and called for a collaboration between authorities. This framework is based upon the consensus on the need to safeguard IFT's independence to maintain a clear, objective and neutral decision-making process, and it grants the appropriate powers and mechanisms to fulfill the roles and interact with other authorities, policymakers and stakeholders;
- gave the IFT a triple mandate, being the competition authority, the sectorial regulator and a key contributor to the efficient development of telecommunications and broadcasting in Mexico;
- included specific regulatory provisions to influence sectors' structures and controls of undertakings with significant power at sectorial level (i.e. multi-market approach). These measures were included by the executive and legislative powers with the purpose to correct some market failures and as part of the Constitution and the LFTR, they must be enforced by the IFT.

² OECD (2004), *OECD – IADB Competition Law and Policy in Mexico: an OECD peer review*, OECD Publishing, Paris, <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/31430869.pdf>.

4. Regulatory measures closely related with industrial policy

4.1. Advocacy

8. The 2014 LFCE explicitly bestows the IFT with the authority to advocate for competition. The IFT is empowered to issue non-binding opinions and assessments on competitive effects of existent and proposed programs, policies, laws, regulations, agreements, and other governmental acts. In this case, the IFT reports a favorable experience in the receptivity of other authorities and policy makers of its opinions and recommendations on competition.

9. In 2017, the IFT issued an opinion for the Energy Regulatory Commission (CRE) regarding the “Preliminary draft for the issuance of administrative provisions to allow access to telecommunication services providers to infrastructure and rights of way pertaining to the National Energy System”. The draft had the purpose to establish technical, administrative and economic conditions to allow access to the poles of said system. These conditions will be of mandatory observance for the Access Providers who are responsible for the physical control of the infrastructure. It aligns with the shared objectives of both energy and communications policies to improve the access to existing passive infrastructure of the electricity industry to host telecommunications networks in order to enhance them. The electricity sector policy was enhancing efficient and non-discriminatory use of the State-owned entities’ assets in electricity industry and the communication policy was looking for the reduction of deployment and expansion of infrastructure for telecommunication networks, in order to incentivize investments. Both objectives were perfectly compatible and consistent with competition policy’s objectives in telecommunications; therefore, in order to strengthen the draft, the IFT recommended:

1. to keep records of the activities carried out by access providers that assess compliance;
2. to standardize the criteria for conducting auctions to award the last available access point;
3. to allow access providers to request to the IFT consultations on competition issues;
4. to adopt a transparent policy on discounts in order to avoid providing advantages to large providers with respect to smaller ones.

4.2. Competition Neutrality

10. The LFCE empowers competition authorities to advocate for competition neutrality. For the first time in Mexico, a sectorial law (i.e. the LFTR) establishes a specific regime for State-owned entities (SOE). It legally defines *competition neutrality* as the obligation of the State consisting in not distorting markets, when participating as owner of entities.³ In telecommunications, SOE with commercial licenses:⁴

- (i) are subject to competition neutrality principles;

³ LFTR, article 3, section XXXVIII.

⁴ LFTR, articles 140 to 144 applicable to Public Telecommunication Networks with Public Participation.

- (ii) shall operate as wholesalers, subjected to the principles of total infrastructure sharing, complete disaggregation of their services and capacities, competitive pricing and non-unduly discrimination;
- (iii) must carry separate accountancy for telecommunications and broadcasting; and
- (iv) must submit to previous authorization all the agreements with *preponderant* economic agents.

4.3. Specific Investment Projects to fulfill telecommunications coverage and accessibility objectives

11. The transitory regime of the constitutional reform mandated the development of two large-scale projects aiming at increasing investment to fulfill coverage objectives:

- (i) *Red Compartida* to roll out a wholesale national shared network using all (90 MHz) the digital dividend gained in the 800 MHz band to increase facility-based competition in telecommunications; and
- (ii) *Red Troncal* or Backbone Network plan to design and execute the construction and expansion of a national fiber network to provide high capacity data traffic to promote competition in locations served by one or very few operators and cover unserved or underserved locations.

12. Both projects were designed as private public partnerships (PPP). In the *Red Compartida* project, the State provided the rights to use the spectrum, and in the *Red Troncal* plan, it provided the rights to use existent dark fiber. In both cases, private consortiums had to provide investment for deployment.

13. PPP contracts have been allocated through public international auctions. In these processes, the IFT –as competition authority– assessed and issued recommendations for the call and bidding rules, and –as sectoral regulator– it coordinated with the auctions’ responsible authorities to fulfill regulatory requirements so winners could obtain proper authorizations to operate. In addition, the IFT assessed the interested bidders in order to prevent the creation or strengthening of agents with substantial market power.

14. Both projects were sponsored by the Ministry of Communications and Transports (SCT), which is responsible for the industrial policy in telecommunications, enacted as a tool to contribute to the development and modernization of infrastructure and the attraction of investments, so that users have access to a greater diversity of services at accessible prices.

4.4. Spectrum policy

15. Access to radio electric spectrum is one of the most relevant basis for the development of telecommunications to cope with the increasing demand for data traffic capacity. In this regard, the IFT, as the authority responsible for the spectrum management policy, decided to reduce unnecessary barriers to access this input and launched a liberalization process to offer as much spectrum as possible for all alternative uses – commercial, social and communitarian. This policy is aimed at increasing competition in markets, but also to enhance plurality and diversity in electronic media. Up to 2018, Mexico has allocated 243 MHz for mobile telecommunications and plans to keep going further. According to 5G Americas, since 2015 Mexico has passed from the 15th to the 2nd position in

the allocation of spectrum for these services,⁵ which puts Mexico on the right path towards providing a platform for digitalization and coverage in unserved and underserved areas.

16. Spectrum for commercial uses is always allocated through public auctions. Specifically, the bidding rules' design and the assessment of interested bidders are carried out adopting competition criteria and principles. General competition rules establish that competition authorities shall issue an assessment and opinion to the responsible authority regarding bidding rules and participants.⁶ Being a convergent authority in competition and the caller for spectrum auctions, the IFT has cut the red tape to simplify procedures, which are designed, from the beginning, adopting competition criteria and principles.

17. Up to now, the IFT has carried out six auctions that include the first in its kind for over-the-air national broadcasting television networks and local radio stations. In these auctions, the most relevant tools have been the imposition of spectrum caps and incentives for new participants in the markets to create a level playing field.

18. Observing OECD's recommendations on the importance of evidence-based policies, the IFT is currently conducting a study about spectrum valuation and price setting, since the IFT is the authority in charge of setting the reserve price for auctions, and the Ministry of Finance and Public Credit (SHCP) is responsible of setting the annual fees for spectrum use. Given this two-part pricing of spectrum there is an opportunity area for both authorities to review the effects on markets, considering competition in facilities and services, investment and coverage. Based on the evidence gathered through specific studies, the IFT will be able to evaluate alternatives with the SHCP.⁷

4.5. Preponderance: control measures for economic agents with power at sectorial level

19. The 2013 Constitutional reform established a transitional regime that strengthens the IFT's powers to protect and promote effective competition in the telecommunication and broadcasting sectors. These powers are additional to those granted by the LFCE, and include the novel figure of *sector preponderant*, which corresponds to an economic agent with more than 50% share of the sector (i.e. a multi-market approach).

20. In addition, as a consequence of being the sole public entity in charge of exercising *ex ante* and *ex post* competition intervention, the IFT is empowered to declare that certain economic agent(s) enjoy substantial market power (SMP) in any of the relevant markets in the telecommunication and broadcasting sectors, following the rules established in the LFCE. In the telecommunications and broadcasting sectors, *preponderancy* is defined at the sectorial level and it may coexist with the figure of substantial market power or dominance as defined by the LFCE.

⁵ See 5G Americas, press release "*México muestra el mayor avance en espectro radioeléctrico en América Latina desde 2015*", available at <https://mailchi.mp/bda88d77f710/mxico-muestra-el-mayor-avance-en-espectro-radioelctrico-en-amrica-latina-desde-2015?e=%5bUNIQID%5d>.

⁶ Articles 98 and 99 of the LFCE.

⁷ See, for example, the study announced in the 2018 IFT's Annual Work Plan about the analysis of the payments for spectrum use, available at <http://cgpe.ift.org.mx/PAT2018/detalle.php?id=71&st=espectro>; and the 2015 IFT's study on spectrum valuation, available at: <http://www.ift.org.mx/sites/default/files/contenidogeneral/espectro-radioelectrico/plumvaluationstudy-executivesummarya.pdf>.

21. According to the 2017 OECD Review, empowering the IFT to impose asymmetric regulations on preponderant firms as on those with SMP was crucial in an environment that was characterized by the presence of substantial market failures, such as high levels of concentration in most markets, high prices, deficient quality of service, and insufficient investment and penetration levels. Furthermore, the fact that both the preponderance declaration and the imposition of specific remedies are carried out within the same administrative proceeding, by a single public institution, overall reflects administrative efficiency.

22. In March 2014, enforcing the transitory constitutional regime, the IFT declared the existence of preponderant economic agents (AEP) in the telecommunications and broadcasting sectors and imposed specific regulations (measures) for each of them, in order to prevent them from restricting competition and free market access. The measures imposed are subject to bi-annual reviews in order to either suppress or modify them or to impose new ones, based on an assessment of their impact in competition conditions.

23. In 2017, the IFT carried out the first bi-annual review of the 2014 measures based on a competition assessment, and it issued the decisions that amended some measures and imposed new ones. The following table summarizes the most relevant changes, including an order of functional separation for the PEA in telecommunications that constitutes the first case in which a Mexican authority enforces the powers to order the separation of an entity, pursuing competition objectives.

AEP in Telecommunications	AEP in Broadcasting
Functional separation: the IFT ordered Telmex/Telnor to create a legally separated company to exclusively provide wholesale services related to local access. The two companies will have to be governed by independent bodies.	Relevant content: the AEP is not allowed to obtain, directly or indirectly, exclusive rights to retransmit relevant audiovisual content in broadcasted television, unless it also obtains the rights to sub-license them to other broadcasters.
Non-discriminatory treatment: measures were issued relating to equivalence of inputs, and to technical and economical replicability with respect to the provision of wholesale fixed and mobile services.	Accounting separation: rules for accounting separation were strengthened.
Economic replicability: the AEP's retail rates must be replicable by other carriers that use regulated wholesale services, applying the equally-efficient carrier standard and a methodology of long-run incremental costs.	

24. The 2017 measures will be subject to bi-annual assessments of their effects on competition conditions in the regulated services after two years.

4.6. Merger control

25. The control of concentrations in telecommunications and broadcasting is executed by the IFT through proceedings established both, in the LFCE and the LFTR. Differences are limited to procedural aspects, because the evaluation of the effects of concentrations is consistent regardless the procedure it follows.

26. The LFCE, in general, establishes three types of proceedings. First, there is the standard notification subject to full-length assessment. Second, the simplified notification that may create an exemption from a full assessment if the actors fulfil some legal criteria based on the notoriousness that the concentration's effects would not hamper competition. Third, already executed mergers –totally or partially– may be subject to a formal investigation proceeding if there is an objective cause to consider that they may hamper competition. On the other hand, the LFTR explicitly identifies the cases that constitute a merger and, therefore, are subject to one of these proceedings: (i) a procedure established in the LFCE; (ii) a different administrative procedure established in the LFTR and subject to a competition assessment based on the LFCE's criteria; or (iii) an exception to obtain authorization.

27. Also, the decree that issued the 2014 LFTR established additional transitional provisions that are enforceable as long as a PEA exists in the telecommunications and/or broadcasting sectors. In particular, the ninth transitory article grants economic agents the right to benefit from an exception regime, which consists in exempting the concentration from requiring previous approval to the IFT, as long as the merger complies with the following criteria: (i) the involved parties are concessionaires; (ii) the sectorial PEA does not participate in the concentration; and (iii) the transaction complies with four specific requirements, aimed at preventing a significant increase in concentration indexes and adverse effects on competition at the sectorial level. According with the explanatory memorandum of the legislature, this provision was introduced in order to promote competition and develop viable competitors in the long term through concentrations, when they do not involve a PEA.

28. According to the 2017 OECD Review, because of the way the sectors have been defined, those conditions have proven to be inadequate to protect competition, at least in the pay TV market. Nevertheless, this article strips the IFT of its *ex ante* merger review powers based on the premise that in doing so, it will not only lead to greater competition, but would expedite it. Given that concentration has actually increased in the pay TV market and that the competition law already sets out an *ex ante* merger review process, transitory article ninth is an unnecessary and indeed anticompetitive measure that seems to codify a lack of confidence in the IFT. A change in the legal framework would allow the IFT to exercise its authority in all cases, which would include clearing transactions quickly when they pose no obvious threat to competition, but also thoroughly reviewing and, when appropriate, blocking proposed concentrations before they have anticompetitive effects. In summary, the exception provided by transitory article ninth is not consistent with the overall goal of the Constitution and the law to promote competition in the telecommunication and broadcasting sectors; on the contrary, it facilitates concentration. Therefore, the OECD recommended that transitory article ninth of the LFTR, which provides a fast track for non-PEA agents to concentrate, should be eliminated.

4.7. Support for industrial policy and sectorial regulations by providing data

29. Since its creation, the IFT has implemented a series of actions to get information needed to regulate efficiently all the different telecommunications and broadcasting markets, and to provide policymakers, industry and wider society with official information to enhance the decision-making processes, and thus reduce the information asymmetry that was widespread before 2013.

30. To this end, the IFT launched the Telecommunications and Information Databank (BIT)⁸ in May 2017, which is an interactive web tool designed to publish statistical information, following international best practices in terms of open data and transparency. The BIT has indicators about fixed and mobile services at the national, state and municipal levels, national macroeconomic indicators, and international benchmarks. This information: (i) supports telecom operators investment decisions in infrastructure since they can identify business opportunities throughout the Mexican territory; (ii) strengthens the decision making process for industry stakeholders, and enhances the development of sectorial public policy to improve Mexican society's welfare, especially to bridge the digital divide.

4.8. Policies at sub-national levels

31. Pending major competition issues persist in the collaboration with local authorities with whom not only the IFT, but also all federal agencies and policymakers, shall perform advocacy efforts to consolidate harmonized and evidence-base local policy and rulemaking, especially to reduce and eliminate barriers to entry and competition. In telecommunications and broadcasting, market studies have revealed that local authorities have raised economic and regulatory barriers that limit the deployment and expansion of active and passive infrastructure.

32. Market studies and competition advocacy has a big role to play in this arena, by informing citizens and local authorities about the costs of delaying the deployment and updating of telecommunications networks, and its impact on competition, digital gap, economic benefits but above all, in welfare for its inhabitants.

5. Current topics for future development

33. Developments on digital economy present significant areas of opportunity for policymakers, regulators and competition authorities to collaborate responding to technology and market trends in order to adopt or adapt regulatory frameworks that spread societal benefits.

34. Since communication technologies have impacts in the whole economy, ICT regulation has to deal with transversal issues and the best-fitted set of tools must be selected to attend or solve complex issues, based on evidence. In this context, the IFT actively collaborates –through formal and *ad hoc* means– with policymakers and regulators to discuss common concerns, such as:

⁸ Available at: <https://bit.ift.org.mx/BitWebApp/>.

- information, insights and opinions sharing to build common understandings about changing landscapes and to cope with issues in a timely, integral and appropriate manner;
 - suggestions to improve regulation, whether existing laws are adequate or specific regulation is required;
 - the core issue of connectivity provision to remote or underserved communities and investment attraction, aiming at increasing connectivity but also effective access to its benefits, for example, by promoting the use and appropriation of ICTs to foster productivity, through several coordinated authorities and transversal policies;
 - policy and regulatory sandboxes to allow innovators and entrepreneurs to test new ideas;
 - tools improvement to deal with existent and new challenges that globalization poses to national policies and regulations (for example, jurisdictional issues and information or evidence).
35. In practice, the exchange of experience among competition authorities, regulators, experts, policymakers and stakeholders is generating a collection of shared understanding to rely on when developing industrial policies, and policies in general.
36. However, the future of policies design cannot be viewed simply from an industrial, sectorial, national, regional or local perspective but it needs to consider the inter-relationships between all their dimensions. Collaboration, coordination and an evidence-based approach may be the response to alleviate tensions between policy areas, objectives and division of responsibilities.

6. Closing Remarks

37. Currently in Mexico, industrial policies incorporate competition policy criteria and principles. This status has been achieved after 25 years of existence of competition law and policy. In 2013, due to the general recognition of the contribution of competition policy to sustainable industrial and development policies, the competition institutional and legal frameworks were strengthened to provide competition authorities with greater enforcement and advocacy powers.
38. The coexistence, synergies and complementarities between competition and industrial or sectoral policies is desirable and attainable. Possible conflicts are avoidable or repairable, but it requires the review of objectives, focus, responsibilities and the relationship between policy instruments and regulatory frameworks.
39. The foreseeable changes, associated with the development of the digital economy, is demanding a closer collaboration between competition authorities, regulators, policymakers and stakeholders to develop the tools to take advantage of this economic transformation and generate benefits for our societies.
40. In this context, the IFT maintains its commitment to collaborate with policymakers to ensure that State actions –policies, programs, administrative acts, laws and rules– are in line with competition rules and principles, and to find solutions that suit their objectives and those of competition policy.