

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Non-price Effects of Mergers - Note by Mexico (IFT)**

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This document reproduces a written contribution from Mexico (IFT) submitted for Item 4 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/non-price-effects-of-mergers.htm](http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm).

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## Mexico (IFT)

### Introduction

1. The Federal Telecommunications Institute (IFT) identifies in concentration authorization procedures to what extent concentrations in the telecommunications and broadcasting sectors could have anticompetitive effects according to the Federal Economic Competition Law (LFCE).
2. The telecommunications and broadcasting markets show an accelerated process of development and technological convergence, as they evolve towards the digital economy. In this context, the IFT analyzes the potential effects of concentrations, either in the price dimension or in other dimensions<sup>1</sup> such as quality, variety, availability and innovation.<sup>2</sup>
3. This document describes IFT's practice when considering the various effects in the analysis of concentrations.

### 1. Criteria applied by the IFT to assess the effects of concentrations

4. Articles 58, 59, 63, 64 of the LFCE and the Regulatory Provisions<sup>3</sup> of the LFCE establish the criteria used by the IFT to evaluate concentrations subject to the procedures outlined in the LFCE. In practice, the IFT also uses these criteria to evaluate concentrations complying with the Federal Telecommunications and Broadcasting Law.
5. The IFT has the obligation to evaluate the effects of concentration in the relevant market, with respect to other competitors and other claimants of the good or service, as well as in other markets and with related economic agents. With this very broad mandate, the IFT must identify whether the concentration:
  - confers or can confer substantial power or increase the power of the parties involved;

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<sup>1</sup> This document adopts the reference provided by the OECD, in the sense that concentrations can have effects on numerous dimensions of competition other than price, including quality, variety and innovation.

<sup>2</sup> Recently, the Mexican judiciary issued criteria which states that the authorization of mergers analysis, in terms of the abrogated Federal Law of Economic Competition (issued in 1992), requires an economic component with a methodology based on an *ex ante* analysis. This analysis considers the dynamic consequences that current decisions will generate in the future activity of economic agents in the market in question. For further reference see: *Tesis: I.Io.A.E.83 A (10a.), Época: Décima Época. Registro: 2010173. Instancia: Tribunales Colegiados de Circuito. Tipo de Tesis: Aislada. Fuente: Semanario Judicial de la Federación. Publicación: viernes 09 de octubre de 2015 11:00 h. Materia(s): (Administrativa)*, available in Spanish at: <http://sjf.scjn.gob.mx/sjfsist/paginas/DetalleGeneralV2.aspx?ID=2010173&Clase=DetalleTesisBL&Semanario=0>

<sup>3</sup> Regulatory Provisions of the LFCE for the telecommunications and broadcasting sectors (Regulatory Provisions), available in Spanish at: [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5378340&fecha=12/01/2015](http://www.dof.gob.mx/nota_detalle.php?codigo=5378340&fecha=12/01/2015).

- has or may have as purpose or as effect the establishment of barriers to entry, the prevention of third parties from accessing the relevant market, related markets, essential inputs or the prevention of competition;
- has the purpose or the effect of substantially facilitating the exercise of anticompetitive behaviors of the parties involved in such concentration.

6. In addition, the IFT must take into account the elements submitted by the parties to determine if the concentration would generate gains in efficiency that, if applicable, would outweigh the identified risks. In general, article 14 of the Regulatory Provisions sets out what can be considered as gains in efficiency derived from the concentration, including elements other than prices, like quality, variety, availability and innovations. On those basis, the IFT may consider different effects (other than effects on prices) to determine if there are anticompetitive effects, which may even lead to the non-authorization of mergers, or to the imposition of measures to counteract them.

## 2. Cases in which the non-price effects have greater relevance

7. A non-exhaustive review of the IFT's cases allows the identification of some elements on the analysis of the non-price effects that have been relevant for the analysis of concentrations.

### 2.1. Characteristics of the markets

8. In the IFT's experience, non-price variables are more relevant in markets where there is competition in differentiated products or services, a significant use of technology, major investments in advertising and development, convergence processes between markets, and an involvement of assets in which concentration can generate barriers to entry and to the expansion of competitors.

9. Currently, in most markets, there are degrees of differentiation in products or services, which compel us to consider elements other than price to determine the net effects that a concentration may have in them. When production and consumption processes are also associated with dynamic technological processes and convergence, non-price elements become more relevant, as they serve to identify competitive pressures in a dynamic way (e.g. innovations) and between types of services (e.g. quality, availability, variety), all of which should be analyzed in the relevant and related markets.

10. In markets that exhibit these characteristics, the effects on investments in advertising (real or commercial variety) or on development (innovations) are also relevant to identify their importance in competition processes and to identify the changes that derive from the concentration.

11. Likewise, the tangible and intangible elements of the acquired assets, other than price, with the capacity to generate barriers in the markets must be identified. Concentrations involving radio spectrum are a good example of this, as it is a resource with limited availability, with use rights assigned to specific persons for exclusive use. The concentration assessment should prevent that the possession of significant amounts of this resource by an economic agent does not bar the entry of new participants or the expansion of others at sufficient scales to compete effectively.

12. Other effects to consider are possible displacement (e.g. market closure) or coordination effects. In the first case, there are, for example, concentrations that involve relations or vertical integrations that, due to its effects, can generate incentives and the ability to foreclose the relevant market or related markets or to displace competitors (e.g. denial of treatment or discriminatory treatment based on prices and not based on prices). In the second case, the coordination effects may arise in concentrated markets and in those with a small number of significantly asymmetric participants, in which the parties can form a link through the concentration to coordinate their activities in other markets, instead of operating independently.

## 2.2. Characteristics of concentrations

13. The concentrations in which the identification and evaluation of non-price effects have been relevant for the IFT are those in which:

- the parties agree on the products or services they provide, because in light of increased concentration levels, the risks of price and non-price effects rise (quality, availability, variety or innovations);
- vertical integrations are created or vertically integrated economic agents are involved, because non-price-based restrictions (e.g. denial of treatment or discriminatory treatment) that the resulting economic agent may impose on competitors in related markets (either upstream or downstream) should be considered in the value chain;
- the economic agents involved participate in different markets, but that are related, and in which possible effects of portfolio, crossed directories and coordination are evaluated; and
- a high accumulation of spectrum or other scarce inputs can be created by the resulting economic agent, which will constitute a barrier to entry or to expansion that limit the ability of others to compete under comparable conditions.<sup>4</sup>

## 3. Stages in which the Non-Price Effects are Analyzed

14. The IFT uses non-price elements in the analysis of concentrations in the following stages:

1. when defining the relevant markets, the IFT identifies the products and services that, according to their attributes (e.g. price and non-price characteristics) meet the needs of the demand and can be substitutes on the supply side, and their geographical and temporal availability;
2. in the evaluation of the purpose or the effect of a concentration, the IFT should consider whether, in the relevant or related markets, the concentration:

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<sup>4</sup> Page 30 of the Guidelines on Concentration Control Proceedings in the sectors of Telecommunications and Broadcasting (Concentration Guidelines) by the IFT, available in Spanish at:

<http://www.ift.org.mx/sites/default/files/industria/temasrelevantes/9195/documentos/pift280617368.pdf>.

- confers, can confer or increases substantial power to the resulting economic agent;
- has or may have the purpose or the effect of establishing barriers to entry, preventing access or displacing other economic agents; and
- by its purpose or its effect, substantially facilitates the exercise of anticompetitive behavior.

If none of those elements are identified, the IFT may determine that the concentration does not have the purpose or the effect of hindering, diminishing, damaging or preventing economic competition. Therefore, it would deem appropriate to authorize it.

At this stage in the analysis, it becomes more complex to distinguish the effects that correspond to prices from those that do not. For example, if the concentration results or may result in an economic agent obtaining or strengthening its substantial market power, this effect may generate high prices, but also detriments in variety, quality, availability or innovations of the goods or services involved. Although, if the concentration allows an economic agent to control an input that determines competition in a related downstream market, then it can generate discriminatory treatment based on prices and one not based on prices (e.g. denying treatment, delaying delivery or reducing the quality or quantity to be supplied);

3. in the evaluation of possible efficiencies (from the elements submitted by the parties) that could result from the concentration and that could favorably influence the process of competition.<sup>5</sup> This analysis focuses on determining if the gains in efficiency outweigh the anticompetitive purpose or effect of the concentration.

15. In the IFT's practice, the evaluation of non-price aspects is made in various stages and it gives consistency and comprehensiveness to the analysis of concentrations. To sum up, the analysis of concentrations must identify the value or importance that markets (on the supply and demand sides) attribute to price and to different elements; which can be identified and evaluated by the role those elements play in competition processes. Thus, for example, attributes other than price that have served to define the relevant market will allow the identification of a concentration with the purpose or the effect of reducing or favoring competitive pressure in the markets, or with the purpose of generating efficiency gains.

#### 4. Assessment of the Price and Non-Price Effects

16. The LFCE grants the IFT flexibility to identify, analyze and evaluate non-price effects and does not distinguish between them; therefore, the IFT evaluates them according to the specific case in question.

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<sup>5</sup> The efficiency gains analysis is carried out in terms of the article 63, sections III, V y VI of the LFCE and article 14 of the Regulatory Provisions. See page 35 of the Concentration Guidelines.

17. When evaluating the effects of a concentration, the IFT focuses on identifying how the price and non-price elements interact in the competition processes of the markets involved; and how it can change them if the concentration is carried out. It is not necessary to quantify all the possible effects, but it is necessary to have elements that identify what they consist of, to prove that they will be generated because of the concentration, and to provide qualitative elements that support their relative importance against other identified effects.

## 5. Relevant Cases

18. In recent concentration cases involving the media (usually multi-sided markets), the non-price effects that the IFT has most frequently considered are related to variety or diversity and the availability of products or services in the markets. Diversity considerations<sup>6</sup> in the IFT's practice, although related to plurality,<sup>7</sup> constitute a different element of analysis regarding the variety of products and services provided by the media on all sides of the markets. In turn, the element of availability is related to the possibilities of access to goods or services.

19. A summary of relevant decisions in which the IFT has included non-price effects in the evaluation of concentrations, follows.

### 5.1. Licenses for non-commercial free-to-air radio<sup>8</sup>

20. In 2014 and 2015, the IFT denied two applications for licenses to provide social radio services in localities of the states of Sinaloa and Coahuila, because the analysis of the effects showed that:

- there were high barriers to entry into the provision of commercial radio services (related market), such as the need to have a concession and the necessary investments to start operations and to generate content for transmission; and
- the applicants were already involved in the provision of commercial radio services in those areas, consequently the authorization could result in the accumulation of frequencies and create barriers to entry.

21. In this case, the non-price effects considered were:

- that, given the scarcity of available frequencies, granting some frequencies for social use would reduce the available amount for other uses, including the commercial use. In this structural situation, the existence of an opportunity cost was recognized for the variety or diversity in the provision of radio services (commercial and non-

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<sup>6</sup> In particular, the Constitution establishes that in Mexico, telecommunications and broadcasting services are public, therefore the State will guarantee their provision under conditions that include, among others, competition, quality and plurality.

<sup>7</sup> See, as a reference, OECD (2003), *Media Mergers*, pages 42 to 45.

<sup>8</sup> The redacted versions of the resolutions are available in Spanish at: [http://apps.ift.org.mx/publicdata/P\\_IFT\\_011014\\_352\\_Version\\_Publica.pdf](http://apps.ift.org.mx/publicdata/P_IFT_011014_352_Version_Publica.pdf) and <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/versionpublicapift18031592.pdf>

- commercial) by allowing an entity to concentrate spectrum in one use, as opposed to the possibility of assigning that spectrum to another applicant or to another use;
- that the applicants had already accumulated frequencies in the same geographical area, hence, it was considered that the concentration would cause, quantitatively and qualitatively, a further accumulation of frequencies; and
  - that granting the frequencies to the applicants would create barriers to entry as:
    - it would strengthen the applicant's transmission capacity and its positioning before the audiences;
    - the new entrants would face a greater scarcity of spectrum and the significant presence of the applicant in the markets; and
    - it would restrict the ability of already established participants to compete in the variety of programming.
22. All the previous elements mentioned in this case would ultimately restrict the availability of frequencies for other uses and the variety of radio services in the localities involved.

## 5.2. Concessions transfers <sup>9</sup>

23. In 2015, the IFT denied the authorization of two applications for the assignment of commercial radio concessions in localities of the state of Chiapas because, in addition to effects on prices, the following possible non-price effects were identified:
- the acquiring economic agent had incentives to accumulate radio stations and, thereby, create barriers to entry and to the expansion of smaller participants in the relevant market;
  - the accumulation of frequencies would give the acquirer a competitive advantage due to the potential exposure that advertisers with a greater number of stations could have; and
  - the substantial accumulation of frequencies in a single economic agent would restrict the variety and diversity of programming that other competitors could provide.
24. In this case, the evaluation of the non-price effects was consistent with the previous case.

## 5.3. AT&T/DirecTV<sup>10</sup>

25. In 2014, the IFT authorized the acquisition of DirecTV by AT&T, subject to the fulfillment of behavioral remedies. The merger was part of an international transaction with effects in the Mexican markets.

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<sup>9</sup> The redacted versions of the resolutions are available in Spanish at: [http://apps.ift.org.mx/publicdata/versionpublicapift18031590\\_1.pdf](http://apps.ift.org.mx/publicdata/versionpublicapift18031590_1.pdf) and [http://apps.ift.org.mx/publicdata/versionpublicapift18031591\\_2.pdf](http://apps.ift.org.mx/publicdata/versionpublicapift18031591_2.pdf)

<sup>10</sup> File UCE/CNC-003-2014, the redacted version of this decision is available at: [http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_131114\\_225\\_Version\\_Publica.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_131114_225_Version_Publica.pdf)

26. DirecTV has an indirect non-controlling stake in the capital stock of Innova, S. de R.L. de C.V. (Sky Mexico), a company owned by Grupo Televisa, which is a significant player in several markets of the telecommunications and broadcasting sectors in Mexico.

27. During the review of the case, AT&T agreed to divest its shareholding in América Móvil (AMX, the entity that controls Telcel and Telmex) and withdrew its representation of the AMX's Board of Directors. AMX is the major competitor in several markets in the telecommunications sector in Mexico.

28. Despite this divestiture, the IFT evaluated and found risks of coordinated effects (with price and non-price effects) in several markets arising from the transaction, because it would have established an informal communication channel between AMX, AT&T and Grupo Televisa, due to prior relations between AT&T and AMX.

29. In this case, non-price effects were the reduction in product development and variety of packages, and the availability and quality in the provision of mobile and fixed telecommunications services, including transmission and download speeds. The remedies imposed were implemented to prevent those effects.

#### 5.4. Grupo Televisa/TVI<sup>11</sup>

30. In 2016, the IFT authorized, subject to conditions, a transaction by which Grupo Televisa acquired the control of Televisión Internacional, S.A. de C.V. (TVI) from Grupo Multimedios. Grupo Televisa and Grupo Multimedios are the biggest commercial television broadcasters in the north of Mexico, and they compete in seven local broadcasting markets, and in six local commercial radio markets.

31. The participation of Grupo Multimedios in CVQ (a Grupo Televisa's subsidiary) could become a communication channel for Grupo Televisa and Grupo Multimedios to coordinate their activities in the markets where they compete. The competition analysis revealed several risks of price and non-price coordinated effects in broadcast TV and radio services derived from a structural link between Grupo Televisa and Grupo Multimedios. The non-price effects included the possible detriment of variety and diversity of programming in broadcast television and radio services, and the possible reduction in the offer of advertising times. As a result, the merger was approved subject to conditions aimed at avoiding potential harmful effects in the related markets.

32. In order to eliminate anticompetitive effects of the transaction, the merging parties proposed the whole acquisition of TVI by CVQ, and agreed that Grupo Multimedios will not have shares or any kind of participation in CVQ, remaining completely separated. The IFT's Board accepted the proposal of remedies.

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<sup>11</sup> File UCE/CNC-003-2015, the redacted version of this decision is available in Spanish at:

[http://apps.ift.org.mx/publicdata/Version\\_Publica\\_P\\_IFT\\_EXT\\_190216\\_7.pdf](http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_190216_7.pdf)

## 5.5. MVS / Telcel<sup>12</sup>

33. In 2017, the IFT authorized a concentration in which Telcel acquired 60 MHz of radio spectrum in the 2.5 GHz Band originally granted to a subsidiary of Grupo MVS, which constitutes a necessary input for mobile telecommunications services (mobile telephony, text messages, and access to mobile internet). In this transaction<sup>13</sup>, no final subscribers were acquired.

34. The competition analysis identified that:

- the concentration would not generate significant levels of accumulation that would limit the availability of this input for the entry of new competitors or for the expansion of the current ones;
- there was a sufficient availability of frequencies that could be tendered in the short term: 120 MHz in the 2.5 and 10 MHz band in the AWS band, that could allow the entry of new competitors of telecommunications services and/or the expansion of the networks of the current ones;
- Telcel's competitors had the capacity to expand their customer base at least to the point of reaching traffic ratios by MHz such as those exhibited by Telcel. Even after the concession, the ratio of subscribers and traffic per MHz would continue to be lower than Telcel's;
- Telcel is the operator with the highest intensity of radio spectrum use and there is a direct link between the spectrum used and the quality with which the services are offered, thus acquiring the spectrum through the concentration would allow Telcel to maintain or to increase the quality of its services, and it would solve congestion problems. Both aspects would eventually favor the quality of services;
- After the concentration, the spectrum would have a higher added value use, compared to the previous conditions, given that it was initially granted for concession to provide pay TV services via microwave, an obsolete technology that underutilizes the spectrum.

35. Therefore, it was concluded that the price and non-price effects attributable to the concentration were not contrary to economic competition. Among the non-price effects, it was considered that it did not affect the availability of radio spectrum as a relevant input for other competitors; that there would be a better (and more intensive) use of that resource; and, that it would have a favorable impact on the quality of intermediate and final telecommunications services.

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<sup>12</sup> File case number UCE/CNC-003-2016, the redacted version of this resolution is available in Spanish at: [http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones\\_pleno/acuerdo\\_liga/version\\_publica\\_uce\\_270417\\_221.pdf](http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones_pleno/acuerdo_liga/version_publica_uce_270417_221.pdf)

<sup>13</sup> This authorization is currently sub judice; the economic and technical elements of the analysis are detailed for information purposes only.

## 5.6. AT&T / Time Warner<sup>14</sup>

36. In 2017, the IFT authorized, subject to conditions, the international merger between AT&T and Time Warner.

37. AT&T provides mobile telecommunications services in Mexico and it is a shareholder (41.3%) of Sky Mexico, which is a pay TV company in Mexico and a subsidiary of Grupo Televisa. In turn, Grupo Televisa provides pay TV services and licenses channels and programs, operating the largest pay TV network, including cable.

38. Time Warner provides and licenses video programming content (channels and programs) in Mexico through different divisions (Turner, HBO and Warner). Its HBO division also provides and licenses channels from Time Warner and from third parties in Mexico and Latin America to pay TV providers.

39. The resulting entity (AT&T/Time Warner), through the participation of AT&T in Sky Mexico, would maintain a link with Grupo Televisa, the largest content provider and Pay TV operator. Due to this structural feature, the risk of strategic market foreclosure would arise in two markets:

- the provision and licensing of video programming content for providers of Pay TV (relevant market); and
- the retail provision of pay TV (related downstream market).

40. Market foreclosure could be based in price and non-price strategies, including the delay or denial of access or the decrease in quality and variety of programming content. It would also create risks of possible coordination (instead of an independent operation) among AT&T/Time Warner and Grupo Televisa in other markets, such as the provision and licensing of channels for pay TV competing suppliers, and in retail provision of pay TV (between Sky Mexico and other cable operators controlled by Grupo Televisa).

41. Consequently, the IFT imposed several conditions or remedies to the parties, grouped as follows:<sup>15</sup>

1. the separation of members of the Board of Sky Mexico from those persons that are involved in the activities of Time Warner;
2. maintaining the functional separation of the parties from the activities of HBO LAG, a group of companies in which Time Warner has a stockholder position; and
3. conditions for the commercial negotiation of contracts in order to make their commercial offers public and their obligation to attend all access requests in (price and non-price) non-discriminatory terms.

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<sup>14</sup> The full text of the resolution is available in Spanish at: [http://apps.ift.org.mx/publicdata/VP\\_P\\_IFT\\_150817\\_487.pdf](http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf)

<sup>15</sup> Pages 160 to 169 of the resolution –see footnote 14.