

Unclassified

English - Or. English

13 June 2022

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

**Cancels & replaces the same document of 3 June 2022**

**Disentangling Consummated Mergers – Experiences and Challenges – Note by Mexico  
(COFECE & IFT)**

23 June 2022

This document reproduces a written contribution from Mexico (COFECE & IFT) submitted for Item 6 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm>

Antonio CAPOBIANCO  
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

**JT03497550**

## *Federal Economic Competition Commission (COFECE or the Commission)*

### **1. Introduction**

1. The Federal Economic Competition Law (LFCE, per its initials in Spanish) provides the Federal Economic Competition Commission (COFECE or Commission) with the necessary tools to analyze the possible anticompetitive effects of consummated mergers. In this regard, this contribution presents the Mexican legal framework that sets forth the infringements to the LFCE regarding mergers that can be investigated by COFECE, which can be classified as (i) consummated mergers with no competition concerns and (ii) mergers that can lessen competition. The following sections will explain the procedural analysis for these two categories, and in the case of unlawful mergers, commitments imposed and challenges to restore competition in the markets. Finally, a summary of two unlawful mergers is presented at the end of the contribution.

### **2. Legal framework related to the review of consummated mergers**

2. The LFCE establishes, in its article 86, the mandatory notification of a merger prior its implementation when legal thresholds are met, and the transaction has effects in Mexico.<sup>1</sup> Below the legal thresholds, economic agents may voluntarily notify the merger to COFECE.<sup>2</sup>

3. The LFCE also provides, in article 87, a stand-still obligation which is that economic agents must obtain COFECE's authorization before they execute any legal transaction, acquire, or wield control (de facto or the jure) over another economic agent, acquire assets or shares of another economic agent, sign any merger agreement without a suspensory clause, or when the merger is international before it has effects in Mexico. Also, if there are several legal transactions that consummate the merger, economic agents must obtain COFECE's approval before the legal transaction that exceeds the legal thresholds is consummated.

4. COFECE will not authorize and, where applicable, will investigate and sanction those mergers whose object or effect is to diminish, harm, or prevent competition and free market access, in terms of article 62 and 63 of LFCE.

5. According to article 64, indications of an unlawful merger are: i) the operation confers, may confer or increase the substantial market power of an economic agent; ii) it has the object or effect of establishing barriers to entry, preventing access to markets or essential inputs or foreclosing other economic agents; and iii) it facilitates any of the conducts prohibited by the LFCE.<sup>3</sup>

---

<sup>1</sup> In this contribution, the term "merger" will be used to refer to a concentration as it is defined under article 61 of the LFCE. This article provides that a concentration is a merger, acquisition of control or any act by which companies, associations, shares, social shares, trusts, or assets in general are united; that is carried out between competitors, suppliers, clients or any other economic agents.

<sup>2</sup> In this case, if the Commission objects or conditions the operation, the notifiers will be obliged to the compliance and observance of the resolution.

<sup>3</sup> Article 65 also provides that COFECE can investigate mergers that were notified and approved based on misleading or false information or when they were conditionally approved, and the fulfilment of such conditions

6. In this sense, taking into account the restrictions and requirements briefly explained in the previous paragraphs, violations to the LFCE regarding consummated mergers that may be investigated by COFECE can be broadly classified as consummated mergers:

- i. **with no competition concerns** – this category includes: i) consummated transactions that exceed legal thresholds and parties failed to comply with the mandatory notification requirement; ii) closing a different merger than the one notified; and iii) extemporaneous notification of a consummated merger. These are analyzed under a novel procedure called the *Notification Compliance Verification* (VCN for its initials in Spanish) that will be further explained in the following section.
- ii. **that can lessen competition (unlawful mergers)** – defined as those that have as their purpose or effect to obstruct, diminish, harm or impede free market access and economic competition.

### 3. Investigation and analysis of consummated mergers

#### 3.1. Consummated mergers with no competition concerns

7. The body responsible for analyzing consummated mergers with no competition concerns is the Commission's Technical Secretariat. Likewise, in accordance with the provisions of the Organic Statute of COFECE, the merger notification procedure, carried out prior to its completion, is also processed before the Technical Secretariat.

8. Article 133 of the Regulatory Provisions of the LFCE determines the procedure to be followed by the Technical Secretariat known as VCN, to verify the omission to comply with the obligation to notify a merger when legally it should be done. Accordingly, the procedure could be initiated based on the objective knowledge of a probable omission to comply with the obligation to notify a merger or on any indication of non-compliance with this obligation.<sup>4</sup> In this regard, the Technical Secretariat will integrate a file and may order the required measures to gather information and necessary documents to determine whether or not the obligation to notify a merger was complied. The Technical Secretariat has a period of 120 working days, renewable once for justified reasons, to carry out the corresponding proceedings and once said period is expired (or before), it will issue a notice that concludes the stage for gathering information.

9. Within the 20 days following the issuance of the notice, the Technical Secretariat must issue a notice in which it: i) orders the closure of the file due to the non-existence of objective elements that allow to assume the existence of a probable omission to notify a merger, or ii) initiates a procedure in accordance with the terms and deadlines provided in articles 118 and 119 of the Regulatory Provisions, for considering that there are objective elements on the existence of a probable omission to the obligation to notify a merger.

10. Regardless of the above, the Technical Secretariat may directly initiate the procedure indicated in subsection ii) of the previous paragraph when it has knowledge of objective elements about the existence of the omission to notify the merger, therefore, when

---

was not achieved during the established period. It also establishes that COFECE can investigate below the legal threshold mergers within a year of its consummation.

<sup>4</sup> Information that may be considered includes that disclosed by any public media, including journalistic notes, statements, bulletins in the stock market, among others; or information in the Commission's records.

those elements are obtained, it is not necessary to follow the procedure established in paragraph 9.

11. Once there is a finding of an omission to notify a merger when there was the legal obligation, the Board will determine if the corresponding omission existed, and may authorize the merger (if it does not meet the provisions of article 62 of the LFCE) and impose the sanctions provided in the section VIII of article 127 of the LFCE,<sup>5</sup> without prejudice to the administrative, civil, and criminal liability of the economic agents and of the natural persons which ordered or contributed to the execution of said merger. If there are indications that the merger could meet the provisions of article 62 of the LFCE, meaning that could be unlawful, or if it is being investigated by the Investigative Authority, a notice will be issued ordering the termination of that procedure and the file will be sent to the Investigative Authority.

12. In accordance with article 29 of the Regulatory Provisions, the notification of a merger, in terms of articles 89 and 90 of the LFCE, after the merger has been consummated “will be inadmissible”. Therefore, it will be considered as “extemporaneous” and the Technical Secretariat will open a file in terms of article 133 of the Regulatory Provisions, as described above.

13. Finally, this category also includes consummated mergers that are different than those notified. This is the case when the documentation brought by the merging parties to verify the closing of the operation shows that the consummated transaction is different from the one that was originally notified. In such cases, the Commission considers it as a different merger whenever the consummated operation varies in economic agents involved, product or geographical dimension of non-compete clauses from the one notified originally. Therefore, it is considered a consummated merger that did not comply with the obligation to notify, a violation of the LFCE and is worthy of a fine.

### 3.2. Unlawful mergers

14. Investigations of unlawful mergers are conducted by the Investigative Authority. The powers of the Commission to initiate investigations that could lead to liability and imposition of sanctions, in accordance with article 137 of the LFCE, expire within a period of ten years, counted from the date in which the unlawful merger was consummated. For below the legal thresholds mergers, article 65 of the LFCE provides one year after the merger is consummated, and when COFECE has objective knowledge that it is an unlawful merger.

15. The LFCE establishes three mechanisms to open an investigation for possible unlawful mergers: (i) ex officio, (ii) for a complaint or (iii) at the request of the Federal Executive. The main selection criterion for initiating an investigation into a consummated merger is that there is "Objective Cause", that is, that there is any indication or certain circumstance from which a conclusion can be drawn about the existence (or non-existence) of a consummated merger that may be damaging to the competitive process.

16. In this regard, the LFCE empowers COFECE to intervene when the transaction poses risks to the competition process or constitutes an artificial instrument that promotes violations of the LFCE. In this way, the LFCE avoids the possible perverse effects that would lead individuals to choose artificial and inappropriate forms of association to develop legitimate purposes. By not restricting the protection of the LFCE to certain forms

---

<sup>5</sup> Respectively, “A fine ranging from the equivalent of five thousand times the minimum wage to five percent of the Economic Agent’s income for failing to notify a merger when it was legally required to do so;”.

of association or privileging some mechanisms over others, individuals have the possibility of finding the more efficient links (corporate, patrimonial or others) to develop legitimate business strategies – as long as these are compatible with the LFCE.

17. An example of this approach is the investigation of a possible unlawful merger carried out in the dairy market which will be further explained below in section 6, in which COFECE analyzed whether the operation could have had effects contrary to the process of economic competition, that is, the possible loss of competitive pressure that would result from the merger carried out between two of the main companies.

#### 4. Challenges for the investigation of consummated mergers

18. For any case of consummated mergers, the main difficulty is to have access to the necessary information to support the finding of the breaching of the LFCE.

##### 4.1. Consummated mergers with no competition concerns

19. For this type of consummated mergers, the challenge is to obtain information that clearly evaluates the value of the consummated transaction and, based on such information, determine if it met the legal thresholds. Also, it is necessary to collect information to disregard that the merger had anticompetitive effects. However, when the Commission becomes aware of a merger that should have been notified through, for example, its records, public information or related mergers, parties sometimes have the incentive to cooperate, and this may facilitate the collection of the information. In such cases, this has helped to obtain sufficient information to investigate and decide if a consummated merger can be unlawful or if it is just an omission to comply with the obligation to notify. For the parties involved, this process is more efficient, since if they cooperate, the sanction can be reduced, and the final decision can take place faster.

##### 4.2. Unlawful mergers

20. In the case of consummated mergers that can lessen competition, the difficulty in obtaining financial and accounting information from industry participants may affect the determination of the effects of the transaction on consumer welfare and whether it contributed to the substantial increase in market power of some of those involved. In this sense, determining the consequences of an operation that was possibly preceded or succeeded by other similar transactions can become more complicated as time goes by and as more additions or divestments accumulate among the participants of a certain industry.

#### 5. Sanctions and Commitments

21. Article 127 section VIII empowers COFECE to impose fines of approximately 24,645 USD<sup>6</sup> and up to 5% of the economic agent's income if there is an omission to notify a consummated merger, when there was a legal obligation to do so. Same article, section VII establishes a fine up of 10% of the economic agent's income for engaging in an unlawful merger. Also, sections I and II of this article, respectively, establish that COFECE may also order to correct or terminate an unlawful merger, and order the partial or total

---

<sup>6</sup> Equal to 5,000 Units of Measurement and Update (*Unidad de Medida y Actualización, UMA*). This is 481,100 MXN, approximately 24,646 USD, at an exchange rate of 1 USD=19.52MXN). The daily value of UMA for 2022 is 96.22 MXN.

divestiture of a merger of this type. Moreover, for unlawful mergers, articles 100 to 102 of the LFCE allow economic agents to propose commitments during the investigation phase in exchange for an exemption or a partial reduction of fines and the early closure of the investigation. These commitments have to be legally, economically viable and suitable to address COFECE's concerns and restore the competition process.<sup>7</sup>

22. In the investigation for a possible unlawful merger in the pharmaceutical market, which will be explained in the following section, commitments proposed by the economic agents involved in the transaction under investigation were accepted. These included the divestment of the acquired shares and the full payment of the credit through which the transaction was financed. This, in order to resolve the competition concerns raised by COFECE, considering that, precisely, through the financing scheme of the operation, another economic agent participating in the market could be given control or decisive influence over the company whose shares were the subject of the operation. Therefore, in this particular case, the commitments accepted were common to a consummated merger, since these involved a divestment of shares and the termination of the credit relationship that gave rise to its financing.

23. In this case, a challenge faced by COFECE is how to prevent or deter market participants from not complying with the established commitments, when the sanctioned economic agents, end up breaching, at least partially, what they have agreed.

## 6. Decisions on consummated mergers

24. COFECE has investigated various cases of consummated mergers. Two cases corresponding to possible unlawful mergers are presented below.

### 6.1. Moench, Nadro and Marzam

25. In April 2016, several newspaper articles known as the *Panama Papers* published a complex financial operation through which the Dutch fund Moench obtained a credit from a person close to the majority shareholder and president of the Board of the pharmaceutical distributor Nadro, to buy a part of Marzam's Group shares, which is also a participant in the market for the distribution of pharmaceutical products. In consequence of this information, the Investigative Authority initiated an ex officio investigation to determine a possible unlawful merger in the market for wholesale distribution and commercialization of pharmaceutical, personal hygiene and beauty products in the Mexican territory.<sup>8</sup>

26. During the investigation process, evidence was found indicating that, under certain assumptions, the financing scheme and contractual guarantees could transfer control of Marzam to Nadro. In June 2018, Moench and a natural person, Luis Doporto Alejandro, requested adherence to COFECE's exemption and fine reduction benefit. In exchange, they committed to restore the process of competition in the investigated market, either (i) through full payment of the credit or (ii) through the divestiture of the participation in Marzam acquired by Moench; both commitments to terminate any possible link between these pharmaceutical distributors. When verifying implementation of these commitments, COFECE found that Moench and Luis Doporto Alejandro presented an "alternative"

---

<sup>7</sup> COFECE has issued the Guidelines for the Procedure of Exemption or Reduction of Fines. This document is available in Spanish at: [https://www.cofece.mx/wp-content/uploads/2017/12/gua-0052015\\_disp\\_y\\_redmult.pdf](https://www.cofece.mx/wp-content/uploads/2017/12/gua-0052015_disp_y_redmult.pdf)

<sup>8</sup> Case file IO-001-2017, available at: <https://www.cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V2542/2/4490912.pdf>

scheme for complying with the resolution. This scheme comprised a series of legal actions abroad, which in the opinion of this Commission do not reliably undermine the possibility that Nadro could eventually exercise control or influence over Marzam, and whose content and implementation is different from the commitments originally established by the Board of Commissioners and accepted by the economic agents. In this context, the Board of Commissioners resolved sanction the Dutch fund Moench and Luis Doporto Alejandro, in addition to ordering the submission, within a set timeframe, of documentation and information that proves compliance with the original commitments. In June 2020, COFECE sanctioned the companies to failing to comply with the commitments made to totally and permanently eliminate any possible link between Nadro and Marzam, in the market for the distribution of pharmaceutical products.<sup>9,10</sup>

## 6.2. Nestlé, Nestec and Innovación de Alimentos

27. In March 2016, COFECE fined Nestlé Mexico, Société des Produits Nestlé, Nestec and Innovación de Alimentos for failing to notify a merger.<sup>11</sup> In this case, it was analyzed whether that merger could be considered unlawful under the terms of Articles 62 and 64 of the LFCE.

28. For this case, the Investigative Authority carried an analysis to determine a causal relationship between this merger and its possible effects consisted (in the first instance) of reviewing by graphical methods the behavior of the selling prices of certain dairy products (in whose supply the two companies concur), in order to identify whether they had increased since the merger. This analysis was compared with respect to the behavior of inflation in this food sector.

29. In addition, and to determine if there was a statistically significant causal effect on the observed market prices, and that could be attributed to the operation, an econometric model of Difference-in-differences was made on the average sales prices for the aforementioned case. This approach allowed to identify the effect of an intervention on a treatment group, specifying the variable of interest. For the particular case of this merger, the average selling prices of the products offered where the two agents concur were compared both temporarily and between groups. That is, a producer was compared in two time periods (before and after the merger), as well as "treated" individuals (who are part of the treatment group) against "untreated" individuals (control group, in this case those involved in the merger), respectively. The result of the analysis showed that no evidence was found to support that the merger analyzed increased relative prices; therefore, it was concluded that the market power of those involved in the merger was not increased; that is, the acquirer has acquired and exercised the power to set prices unilaterally in all or some of the relevant markets identified in this investigation.

30. In accordance with that describe in the preceding paragraph, the Commission resolved that no evidence was found that the merger had caused harm to competition and free market access.<sup>12</sup>

---

<sup>9</sup> Press release COFECE-026-2020, available at: <https://www.cofece.mx/wp-content/uploads/2020/07/COFECE-026-2020-English.pdf>

<sup>10</sup> The decision in which COFECE determines non-compliance with commitments is under an "amparo" trial, whose resolution is currently pending.

<sup>11</sup> Press release COFECE-015-2019, available at: [https://www.cofece.mx/wp-content/uploads/2019/03/COFECE-015-2019\\_English.pdf](https://www.cofece.mx/wp-content/uploads/2019/03/COFECE-015-2019_English.pdf)

<sup>12</sup> Case file IO-004-2016. Available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V3478/2/4901454.pdf>

## *Federal Telecommunications Institute (IFT)*

### **1. Introduction**

31. The possibility of intervention by competition authorities in consummated mergers is necessary to, where appropriate, assess, limit and correct any negative effects; particularly, when these transactions fall below the established thresholds, the legal framework establishes exceptions to the notification, when the notifiers provided false information or, when, for some other circumstance, it is not possible to carry out an ex ante evaluation.

32. In this document, the IFT broadly describes the applicable legal framework for merger analysis in the telecommunications and broadcasting (T&B) sectors in Mexico, and its experience in investigation procedures involving consummated mergers that are not subject to the general regime of notification and authorization of mergers. Likewise, this document presents recent experiences to contribute to the discussion on the challenges of imposing structural remedies, even in unconsummated mergers.

### **2. Legal Framework**

33. The IFT is the competition authority and regulator in the T&B sectors in Mexico; its mandate is to regulate and promote competition and the efficient development of these sectors through the enforcement of the Federal Economic Competition Law (LFCE) and the Federal Telecommunications and Broadcasting Law (LFTR). The LFCE establishes the legal framework for merger analysis; however, the LFTR also contains some specific provisions on mergers, meaning that, for the exercise of its convergent powers in the T&B sectors, the IFT requires a harmonic, holistic and complementary enforcement of both legal instruments.

34. Article 86 of the LFCE establishes the thresholds to identify mergers that must be authorized by the IFT before they are carried out, while article 93 contains the exceptions for prior authorization. Article 65 of the LFCE establishes that the IFT cannot investigate mergers that:

- i. Have obtained a favorable resolution from the IFT, except when said resolution has been obtained based on false information or when the resolution has been subject to subsequent conditions or remedies and they have not been fulfilled within the established period,
- ii. Do not need to be previously notified to the IFT, once one year has elapsed since their completion.

35. Hence, the IFT can only evaluate ex post mergers that: i) do not require notification to the IFT because they do not meet the thresholds established for notification (up to one year after its completion), ii) are subject to ex ante authorization and said authorization has not been obtained (within a period of up to ten years), or iii) have been authorized by the IFT, but the resolution is obtained based on false information or when the conditions or

remedies imposed to the merger have not been met within the established period (within a period of up to ten years). In such cases, the IFT can investigate leads or indications of an unlawful merger, with the purpose or effect of hindering, diminishing, damaging or preventing competition.<sup>13</sup> Likewise, if the IFT concludes that an unlawful merger was carried out, the IFT can apply sanctions that include ordering the partial or total divestiture, the termination of control or the suppression of certain actions, and the imposition of fines, among others.<sup>14</sup>

36. Furthermore, the Ninth Transitory Article of the LFTR establishes an exception regime to the merger control established in the LFCE, applicable as long as there is a Preponderant Economic Agent (AEP) in the T&B sectors and the following requirements are met: i) that they do not exceed certain thresholds related to market share and sector concentration, that is, that there is a reduction in the Dominance Index<sup>15</sup> at the sector level and that the Hirschman-Herfindahl Index (HHI) does not increase over 200 points. Likewise, the resulting economic agent must have less than 20% share in the sector; ii) the AEP must not participate in the sector in which the merger is carried out, and iii) it must not have the effect of diminishing, damaging or impeding competition in the corresponding sector. Economic agents must only submit, within 10 days following the transaction, a notice containing the information usually presented in terms of the LFCE in a merger notification, as well as the information to demonstrate that the merger complies with the aforementioned requirements.

37. According to said article, the IFT will investigate such transactions and, if it finds the existence of Substantial Market Power (SMP),<sup>16</sup> it may impose the necessary measures to protect and promote competition, in terms of information, quality, rates, commercial offers, billing, among others.<sup>17</sup> Therefore, in terms of the LFTR, the IFT can investigate ex post all mergers that meet the exception established in the Ninth Transitory Article of the LFTR.

38. The remedies, actions, or measures that the IFT could take to avoid or correct damages to the competition process in merger cases may differ if they result of ex ante evaluations or ex post investigations. Particularly, in ex ante evaluations, the conditions or remedies imposed to a merger could be the following:<sup>18</sup>

- i. To carry out a certain action or refrain from carrying it out,
- ii. To dispose certain assets, rights, partnership interests or shares to third parties,
- iii. To modify or suppress terms and/or conditions of the acts that they intend to celebrate,

---

<sup>13</sup> LFCE, articles 62 & 64.

<sup>14</sup> LFCE, articles 85 & 127.

<sup>15</sup> To determine the Dominance Index (ID), we first calculate the percentage contribution  $hi$  of each economic agent to the HHI ( $hi = 100 \times qi^2 / HHI$ ) where  $qi$  are the shares of each economic agent in the corresponding sector. Then the value of ID will be determined through the Hirschman-Herfindahl formula, using  $hi$  contributions instead of  $qi$  shares ( $ID = \sum i hi^2$ ).

<sup>16</sup> The investigation is carried out in a 90-day period (Ninth Transitory Article of the LFTR), in accordance with the procedure established in article 96 of the LFCE.

<sup>17</sup> LFTR, article 282. Likewise, article 283 of the LFTR establishes that the IFT may impose on the agent with SMP the measures established in articles 266 to 277 of the LFTR, applicable to any AEP, including measures related to information, offer and quality of services, asymmetric regulation in rates and infrastructure, separation in its accounting, limitations on certain behaviors or actions, among others.

<sup>18</sup> LFCE, article 91.

- iv. To commit to carry out actions aimed at promoting competitors' participation in the market, as well as giving access or selling goods or services to them, or
- v. Other conditions or remedies with the purpose of preventing the transaction from diminishing, damaging or impeding competition.

39. Additionally, the terms or periods of time established by the legal frameworks to determine the remedies, actions or measures also differ between both procedures, since in ex post investigations a longer period usually elapses before reaching the corresponding resolution. In particular, if an investigation that derive from the enforcement of the Ninth Transitory Article concludes with the existence of an agent with SMP, an additional procedure is initiated, in order to establish the regulation and the necessary measures.<sup>19</sup> Thus, the terms of the ex post investigations as well as the imposition of the measures or actions to protect or promote competition could require more time in comparison to ex ante remedies.

40. In this context, the cases presented below show:

- i. The enforcement of article 65 of the LFCE, regarding mergers that cannot be investigated ex post, and its link with IFT's powers as a sectoral regulator;
- ii. The enforcement of the ex post investigation procedure established in the Ninth Transitory Article of the LFTR;
- iii. The practical challenges of implementing structural remedies, even in unconsummated mergers.

### 3. Case studies

#### 3.1. Unlawful merger investigation on radio<sup>20</sup>

41. In 2020, the IFT resolved on an investigation initiated by the IFT's Investigative Authority (AI) in 2016 for the probable existence of one or several unlawful mergers (article 62 of the LFCE) in the sound broadcasting market/radio service (SRS) in the national territory. The investigation began after various transfers of concession rights that were authorized by the IFT in accordance with article 110 of the LFTR, which establishes that in those cases "(...) *in which the transfer has the purpose of transferring the rights and obligations established in the concessions to another concessionaire that provides similar services in the same geographical area, the Institute may authorize the transfer, after analyzing the effects that said act has or may have on competition in the corresponding market.*" According to the AI: i) the assignment of concession titles could generate anticompetitive effects, and ii) the AI could investigate said operations given that its authorization in terms of article 110 of the LFTR did not in itself imply a ruling on competition, as those transactions were not subject to the merger notification procedure established in the LFCE.

---

<sup>19</sup> LFCE, article 96, clause X.

<sup>20</sup> IFT (2020). *Resolución mediante la cual el Pleno del IFT resuelve sobre las concentraciones ilícitas referidas en el artículo 62 de la Ley Federal de Competencia Económica, imputadas a XHEPR de Ciudad Juárez, S.A. de C.V., Fronteradio, S.A., XHIM-FM, S.A. de C.V., XHNZ-FM, S.A. de C.V., Frecuencia Modulada de Ciudad Juárez, S.A., Radio Uruapan, S.A. de C.V., XEURM-AM, S.A. de C.V., y XEIP-AM, S.A. de C.V., en el Expediente AI/IO-001-2016.* Resolution number P/IFT/110320/94. Available in Spanish at:

<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vp11032094acc.pdf>

42. The IFT's Board ordered the closure of the file, not charging the transactions as unlawful mergers, considering that the authorization granted by the IFT, as a converging authority, was valid and enforceable both for broadcasting regulation purposes, in terms of the LFTR, as well as for competition purposes in terms of the LFCE.

### 3.2. SMP Investigation on Pay TV

43. In 2020 & 2021, the IFT issued decisions on proceedings files AI/DC-002-2019<sup>21</sup> and AI/DC-003-2019,<sup>22</sup> respectively, referring to investigations from merger notices carried out in terms of the exception regime established in the Ninth Transitory Article of the LFTR. The IFT determined that: i) the economic interest group known as GTV<sup>23</sup> has SMP in the Pay TV service<sup>24</sup> in 35 relevant markets (municipalities) in 7 localities, and ii) that Megacable<sup>25</sup> has SMP in 9 relevant markets (municipalities) in 5 localities. Among other reasons, the following elements were identified in both files:

- The position of the leading supplier has not been offset by its competitors, and was reinforced because of the merger
- HHI levels indicate that these are concentrated markets
- High and steady market share levels from the leading provider
- Increasing Pay TV price indexes
- Barriers restricting the entry and positioning of new competitors
- Current and potential competitors have limited capabilities to exert significant competitive pressure
- High costs to change providers, from commercial practices.

44. Currently, the IFT is in the process of evaluating the imposition of specific measures on GTV and Megacable, in order to protect and promote competition in the

---

<sup>21</sup> IFT (2020). *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones resuelve sobre el Dictamen Preliminar emitido por la Autoridad Investigadora en el Expediente AI/DC-002-2019 que declaró la existencia de un grupo de interés económico con poder sustancial en treinta y cinco mercados relevantes correspondientes a la provisión del servicio de televisión y audio restringido a través de la tecnología satelital, cable e IPTV, ofrecido de manera individual o empaquetada con otros servicios de telecomunicaciones fijos.* Resolution number P/IFT/181120/436. Available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vp181120436acc.pdf>

<sup>10</sup> IFT (2021). *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones resuelve sobre la existencia de un grupo de interés económico con poder sustancial en mercados relevantes correspondientes a la provisión del servicio de televisión y audio restringidos, en el Expediente AI/DC-003-2019.* Resolution number P/IFT/EXT/291121/36. Available in Spanish at:

<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vpext29112136acc.pdf>

<sup>23</sup> It includes Grupo Televisa, S.A.B., Corporación de Radio y Televisión del Norte de México, S. de R.L. de C.V. (SKY), Cablemás, S.A. de C.V., Cablevisión Red, S.A. de C.V. (Telecable), Cablevisión, S.A. de C.V., FTTH de México, S.A. de C.V., Televisión Internacional, S.A. de C.V. (TVI) & TV Cable de Oriente, S.A. de C.V.

<sup>24</sup> Provided by any technology (wired, IPTV or satellite) and in any mode of consumption (individual or in packages that include it). IFT (2020). Resolution number P/IFT/181120/436. Available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vp181120436.pdf>

<sup>25</sup> Includes Megacable Holdings, Telefonía por Cable, Entretenimiento Satelital, S.A. de C.V., PCTV & Proveedora de Servicios de Televisión, S.A. de C.V.

referred relevant markets.<sup>26</sup> This procedure contemplates a competition opinion on the measures intended to be imposed.

### 3.3. Disney-Fox Merger<sup>27</sup>

45. In 2018, TWDC Enterprises 18 Corp., formerly The Walt Disney Company (Disney) and TFCF Corporation, formerly Twenty-First Century Fox, Inc. (Fox) notified a merger consisting in the acquisition by Disney of Fox's assets, including film and television studios, channels for Pay TV service and international television businesses. The merger was authorized subject to the following remedies: 1) divesting the assets and operations of Fox Sports in Mexico (or with effects in Mexico) related to the production and licensing of sports channels, 2) separating directors and activities of the resulting economic agent from the operation and the A&E Group (conformed, among others, by AETN, indirect owner of factual channels: A&E, History, H2 and Lifetime, in which Disney has a 50% shareholding), and 3) the resulting economic agent will not grant the distribution of its factual channels to the A&E Group.

46. The divestiture activities were identified as those in which Disney and Fox were current or potential competitors in Mexico, such as, the provision and licensing of Fox Sports sports channels, since, as a result of the merger, it was not possible to rule out effects on prices and a raise of entry barriers for these important inputs for the provision of Pay TV and over-the-top services.

47. One of the practical challenges when implementing these remedies was that the business segment to be divested did not have an independent operation and had links with other businesses that were transferred to Disney in which no risks were detected. Also, the economic agents requested an extension to comply with the imposed remedies, in addition to various suspensions of the disincorporation period, arguing that they were unable to carry out all the actions to comply with the structural remedies, mainly due to effects from of the COVID-19 pandemic. Finally, compliance with these remedies was certified on January 12, 2022.<sup>28</sup>

## 4. Conclusions

48. The IFT's powers to review consummated mergers are determined in its legal framework as a competition authority and as a regulator in the T&B sectors. These powers are mainly limited to operations that were not authorized following the general merger notification procedure established in the LFCE, either because the parties did not comply with the obligation to notify when they should have done so or because the merger fits in the exception provided for in the Ninth Transitory Article of the LFTR.

49. Within IFT's experience, the ex ante and ex post mergers' review differ in terms of the type of conditions, actions, or procompetitive measures that it can impose, but mainly in the period for its determination.

---

<sup>26</sup> LFTR, articles 281, 282 & 283.

<sup>27</sup> The merger was processed under file number UCE/CNC-001-2018 and a resolution was issued on resolution number P/IFT/110319/122. Available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/verpubpift110319122canxuce.pdf>

<sup>28</sup> IFT (2022). Resolution number P/IFT/120122/7. Available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vp1201227acc.pdf>

50. Finally, regarding the type of remedies, although the literature and practice in competition generally favor structural remedies when analyzing ex ante mergers, they also warn that these may not be available when analyzing ex post mergers and that, even if they are imposed ex ante, they could face practical implementation challenges. The experience of the IFT in cases involving structural remedies effectively indicates that complex and even unforeseen situations can be faced to comply with said conditions, so competition authorities must carefully analyze their actions, in order to obtain the best possible outcome for the market and, at the same time, compel agents to offer and comply with adequate remedies in future operations.