

Unclassified

DAF/COMP/WP3/WD(2016)36

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Jun-2016

English - Or. English

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

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Mexico (IFT) --

14-15 June 2016

This document reproduces a written contribution from Mexico's Federal Institute of Telecommunications submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm*

JT03397848

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MEXICO (IFT)*

1. This document describes the framework applicable to merger control in the Mexican telecommunications and broadcasting sectors, where the competent authority is the Federal Institute of Telecommunications (IFT, for its acronym in Spanish). The antitrust law establishes that the competition authority shall not authorize, but rather investigate and sanction those anticompetitive mergers that have the object or effect to block, decrease, harm or hinder competition. Therefore, the legal framework for merger control focuses only on competition issues that may lessen free concurrence and competition in the markets and do not establishes a requirement analysis of non-competition “public interest” considerations.

1. Legal framework in the telecommunications and broadcasting sectors

2. The Constitutional Reform on telecommunications, published on June 2013,¹ created two competition authorities: the IFT in the telecommunications and broadcasting sectors and the Federal Commission for Economic Competition (COFECE, for its acronym in Spanish) in other sectors of the economy. Both authorities are independent bodies in their decisions.

3. Subsequently, the Federal Economic Competition Law (LFCE, for its acronym in Spanish) was published, and it is in force since July 2014.² It aims to promote, protect and ensure free concurrence and economic competition, and prevent anticompetitive mergers, barriers to entry and other restrictions to the efficient functioning of markets.

4. Because there are two competition authorities in Mexico, the LFCE provides an explicit procedure for transactions where it is not clear which is the competent authority to review and resolve, and it involves a Specialized Court in Competition, Broadcasting and Telecommunications, which is responsible to rule who will be competent: the IFT or the COFECE.³

5. On January 2015, the IFT issued the Regulatory Provisions of the LFCE for the Telecommunications and Broadcasting Sectors (Provisions of the LFCE),⁴ following a public consultation. The Provisions of the LFCE aim to regulate the specific application of the LFCE to the telecommunications and broadcasting sectors. They include detailed rules for the notification and analysis of mergers and acquisitions, implementation of trial-form proceedings, and merger qualification, among other processes.

6. Moreover, according to the Federal Telecommunications and Broadcasting Law (LFTR, for its acronym in Spanish), in force since August 2014,⁵ the IFT is also the regulatory body in the

* Federal Telecommunications Institute.

¹ Available in Spanish at http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013

² Available in Spanish at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf>

³ See Article 5th of the LFCE.

⁴ Available in Spanish at http://www.dof.gob.mx/nota_detalle.php?codigo=5378340&fecha=12/01/2015

⁵ Available in Spanish at http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTR_181215.pdf

telecommunications and broadcasting sectors. Therefore, the IFT is the competent authority to review and authorize the licensing, directly or through tenders and auctions, transfers of concessions rights, among other regulatory procedures in the telecommunications and broadcasting sectors.

7. In summary, in the Mexican telecommunications and broadcasting sectors, the IFT is both the regulator and the competition authority, and the legal framework include the LFTR, the LFCE and the Provisions of the LFCE.

2. Merger control framework

7. The merger control in the LFCE aims to prevent damage to competition resulting from the combination of previously independent economic agents. In that sense, the LFCE sets thresholds to determine whether a transaction has to be notified to the competition authority before it is carried out.⁶

8. It is worth mentioning that the LFCE sets out exceptions for merger notification when the transaction does not have the purpose or effect to decrease, harm or hinder competition.⁷ Additionally, the LFTR provides that mergers in the telecommunications and broadcasting sectors does not need authorization *ex ante* from the IFT, and it will be evaluated *ex post*, as long as they comply with the following: i) the *dominance index*⁸ is reduced and the Herfindahl-Hirschman Index (HHI) is not increased by more than 200 points; ii) the share in the sector of the resulting economic agent is less than 20%; iii) the *dominant operator*, in the sector the transaction is taking place, is not involved in the transaction; and iv) the transaction does not have the effect of decrease, harm or hinder competition in the sector.⁹

9. The LFCE establishes that the competition authority shall not authorize, but rather investigate and punish those anticompetitive mergers that have the object or effect to block, decrease, harm or hinder competition;¹⁰ the elements that the authority shall consider as evidence of an anticompetitive merger are the following: i) it confers or increase significant market power, ii) it has or may have the purpose or effect of creating barriers to entry, block access to third parties to the relevant market or related markets, or iii) it has the purpose or effect to facilitate the exercise of monopolistic practices (unilateral or coordinated) in the merger by the participants.¹¹

10. In the same sense, the LFCE states that in determining whether a merger must be authorized or sanctioned, the authority must consider the effects of the merger in the relevant market with respect to other competitors as well as in other markets and economic agents related, and the elements that economic agents provide to prove market efficiency that would be achieved from the merger and that it would have a favorable effect on the overall process of competition.¹²

11. In this regard, the Provisions of the LFCE state that it is considered that a merger achieves greater efficiency and has a favorable effect on the process of competition, when the economic agent

⁶ The LFCE sets out three thresholds. See Article 86 of the LFCE.

⁷ See Article 93th of the LFCE.

⁸ The *dominance index* is calculated by squaring the percentage contribution of each firm in a market to the HHI, and then summing the resulting numbers. The percentage contribution is calculated as $hi=100xqi^2/IHH$, where qi are the market share of each firm.

⁹ See Transitory Article 9th of the LFTR.

¹⁰ See Article 60th of the LFCE.

¹¹ See Article 64th of the LFCE.

¹² See Article 63th of the LFCE.

demonstrates that the efficiency gains derived from the merger will exceed its possible anti-competitive effects on the market and this will enhance consumer welfare.¹³

12. In merger control, according to the LFCE, the authority can authorize, object or authorize the merger subject to conditions aimed at preventing possible adverse effects on competition.¹⁴

13. On October 2015, the IFT decided to submit to public consultation, for a period of 30 working days, the rules for calculating and applying a market concentration index in the telecommunications and broadcasting sectors. The IFT received comments from providers of telecommunications and broadcasting services, members of the academia and by a business chamber. These comments were considered in the final rules, in force since April 2016, which establish: 1) the use of the HHI to determine the degree of market concentration and 2) thresholds for the HHI and its variation, as an indication, to identify mergers that are unlikely to harm competition and free concurrence.¹⁵ The rules also state situations in which the IFT could perform a deeper analysis, even when the merger does not exceed the thresholds, such as when the acquired party may be a maverick firm or when the merger may create incentives or facilitate coordination between economic agents in the relevant market or related markets.

2.1 Considerations of “public interest” are not included in merger control

14. As described above, in Mexico, the legal framework for merger control focuses only on competition issues that harm free concurrence and competition in the relevant market or related markets. Thus, the approach to determine whether a merger must be authorized or not consists only of economic competition factors and considerations of “public interest” are not required.

16. In particular, the rules published by the IFT in April 2016 to identify mergers that are unlikely to decrease, harm or hinder competition, are based solely on competition factors and do not establish a requirement analysis of non-competition or “public interest” factors.

3. Significant mergers in the telecommunications and broadcasting sectors

3.1 Acquisitions

3.1.1 Acquisition of Iusacell by AT&T Incorporated (AT&T)

15. On December 2014, the IFT authorized, subject to conditions, the acquisition of GSF by AT&T. GSF was a provider of mobile telecommunications services, through Iusacell, and fixed telecommunications services (Fixed Business), including Pay TV through Total Play.

16. Iusacell was the third provider of mobile telecommunications services in the country with a nationwide network and a market share of 5.8% in terms of subscribers. The Iusacell’ owners, GSF, also participate in the country as provider of fixed telecommunications services, including Pay TV services, under the brand Total Play.

17. AT&T had redefined its position in the Mexican mobile market through selling the share it held in América Móvil (AMX, the owner of Telcel and the dominant operator in the telecommunications sector) since 2002.

¹³ See Article 14th of the Provisions of the LFCE.

¹⁴ See Article 90th of the LFCE.

¹⁵ Available in Spanish at http://www.dof.gob.mx/nota_detalle.php?codigo=5432595&fecha=11/04/2016

18. The IFT considered that the merger would not confer substantial market power to the resulting entity mainly because of the small market share it would have, AT&T did not offer mobile telecommunications services in Mexico at that time and the strong competition it would face from the remaining providers, especially from the biggest one, Telcel, that had a market share of 69.7% in terms of subscribers.

19. Notwithstanding the foregoing, AT&T was in the process of acquiring DirecTV, a provider of Pay TV services via satellite through SKY Mexico. Therefore, the IFT concluded that the acquisition of GSF by AT&T could damage the competition in the provision of Pay TV services because GSF participated in that market through Total Play.

20. Also, the IFT considered that the acquisition of GSF by AT&T could damage the competition in the provision of fixed telephony, fixed Internet access and dedicated links services, because AMX is the main competitor in these services and AT&T had a previous relationship with AMX, so the acquisition of GSF's Fixed Business could facilitate and create incentives for coordination between AMX and AT&T/GSF.

21. In consequence, the IFT authorized the transaction, subject to, among other conditions, the desincorporation of the GSF's Fixed Business before the acquisition of GSF, the owner of Iusacell.

3.1.2 Acquisition of Nextel International LLC (Nextel México) by AT&T

22. After the acquisition of Iusacell by AT&T, on April 2015, the IFT authorized, subject to conditions, the acquisition of Nextel México by AT&T. Nextel México was the fourth provider of mobile telecommunications services in the country through nationwide networks with Motorola Iden and WCDMA-HSPA+ technologies, with a market share of 2.9% in terms of subscribers.

23. The IFT considered that the merger would not confer substantial market power to the resulting entity mainly because of the small market share it would have, and the strong competition it would face from the remaining providers, specially from the biggest one, Telcel, that had a market share of 69.5% in terms of subscribers.

24. Also, the accumulation of a regional average of 42% of the spectrum available for the provision of mobile services was not considered to limit access to this input for current or potential competitors mainly because an important quantity of spectrum in the 700 MHz, AWS and 2.5 GHz bands would be made available for the provision of mobile services through different mechanisms in the short and medium terms.¹⁶

25. The IFT found some risks of coordinated effects arising from the operation because of the previous relationship between AT&T and América Móvil. These risks were addressed through a series of conditions.

3.1.3 Acquisition of Alcatel Lucent by Nokia Corporation (Nokia)

26. On September 2015, the IFT authorized the acquisition of Alcatel Lucent by Nokia, an international merger with effects in Mexico. The parties to the transaction had horizontal overlap in the manufacture of access and core network mobile telecommunications equipment and related services. The IFT concluded that the transaction would not decrease, harm, or hinder competition in the affected markets mainly because of the small increment in market shares the transaction implied.

¹⁶ In 2015 and 2016, the IFT carried out an auction for the allocation of 80 MHz of spectrum for mobile services in the AWS band. The winners were AT&T and AMX; a block of 5x2 MHz was not allocated.

27. Both of the Mexican competition authorities, the IFT and COFECE, claimed to have legal powers to review this transaction. The case was brought before a court which ruled that the IFT was the competent authority to review any transaction that had effects on markets where a direct input to the provision of telecommunications or broadcasting services was traded, either because of its powers to regulate the input or its expertise in the functioning of those markets.

3.2 *Regulatory procedures analyzed as a merger*

3.2.1 *Broadcasting licences auction*

28. In 2014, the IFT carried out an auction of licenses for broadcasting services of national scope. The bidding rules established as a requirement the evaluation of the interested economic agents, with the purpose of preventing concentrations of radio spectrum which could decrease, harm or hinder competition.

29. The bidding rules also established the next condition (spectrum cap): those economic agents who currently accumulate concessions to provide broadcasting services for 12 MHz of radio spectrum or more in any geographical area cannot participate in the auction.

30. The IFT identified that Grupo Tepeyac, one of those interested in participating in the auction, had a subsidiary related with Grupo Televisa (GTV), who has concessions to provide broadcasting services for 12 MHz of radio spectrum or more in many locations throughout the country. So, the IFT determined that Grupo Tepeyac could participate in the auction, subject to the desincorporation of its subsidiary related with GTV. A third party won the auction for providing broadcasting services at a national level.

3.2.2 *Licences for non commercial radio services*

31. In 2013 and 2014, the IFT denied two requests for permission to provide non-commercial radio services. In one case, the applicant had four commercial radio stations in the location of interest, which represented a share of 30.8% in terms of the number of commercial radio stations and 50% in terms of audience of radio services. In the other case, the applicant had 2 commercial radio stations in the location of interest, which represented a share of 18.8% in terms of the number of commercial radio stations and also had one non-commercial radio station.

32. In both cases, the IFT determined that the granting of permission requested to provide non-commercial radio services had the object or effect to create barriers to entry and to block access to new operators to compete in the provision of commercial radio services.

3.2.3 *Transfers of concessions rights*

33. In 2015, the IFT denied two requests for transferring concessions to provide commercial radio services. In one case, the transferee had four commercial radio stations in the location, and if the transaction took place, it would have reached a share of 41.7% in terms of the number of commercial radio stations. In the other case, the transferee had three commercial radio stations in the location, and if the transaction took place, it would have reached a share of 44.4% in terms of the number of commercial radio stations.

34. In both cases, the IFT determined that the share those economic agents would have reached was significant, there were barriers to entry in the relevant market, the number of competitors would be small, among others elements. In consequence, the IFT objected the transactions because those could decrease, harm or hinder competition in the provision of commercial radio services.