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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Mexico --

28-29 November 2016

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

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-- MEXICO* --

1. Introduction

1. In Mexico, as in other jurisdictions like the United States of America, Canada and the European Union, mergers, which turnovers are above certain economic thresholds¹ established in the Federal Economic Competition Law (FECL),² have to be authorized by the antitrust authorities before the transactions are completed. Merger control in the FECL aims to prevent damages to competition resulting from the combination of independent economic agents. In that sense, the FECL sets thresholds to determine whether a transaction has to be notified to the competition authorities and to be authorized before it can be carried out.

2. In some cases, it is possible for the antitrust agencies to authorize a merger if the economic agents propose remedies that eliminate or mitigate the concerns of the authorities on competition issues. This applies particularly to those mergers in which the anticompetitive effects can be eliminated or prevented without affecting the purpose of the transaction. According to the FECL, a merger may be authorized, objected, or authorized subject to conditions, to prevent possible adverse effects to the competition process.

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

¹ The article 86 of the FECL states:

“The following mergers must be authorized by the Commission before their execution:

I. When the originating act or sequence of acts, notwithstanding the place of performance, are worth within Mexican territory, directly or indirectly, an amount in excess to the equivalent of eighteen million times the current daily general minimum wage in the Federal District;

II. When the originating act or sequence of acts, imply the accumulation of thirty-five percent or more of the assets or stock of an Economic Agent, whose annual sales originating in Mexican territory or assets in the country, are worth an amount in excess of the equivalent of eighteen million times the current daily general minimum wage in the Federal District, or

III. When the originating act or sequence of acts, imply an accumulation within Mexican territory of assets or capital stock in excess of the equivalent to eight million four hundred thousand times the current daily general minimum wage in the Federal District, and two or more of the Economic Agents participating in the concentration have annual sales originating in Mexican territory or assets in Mexican territory which are worth, jointly or separately, an amount in excess of forty eight million times the current daily general minimum wage in the Federal District.

(...)”

² Published on the Federal Official Gazette (DOF) on May 23, 2014. Available in Spanish at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf>

3. The most common remedies can be classified in two groups.³ The first group, known as “structural remedies” includes among other measures, the transfer of assets representing a certain market share to a *viable* (currently active) competitor, the divestiture of assets or parts of the business affected, and a temporal or permanent removal of barriers to entry (e.g. granting non-exclusive licenses to produce a patented product). The second group of remedies, known as “behavioural remedies”, concern with the future behaviour of the economic agent resulting from the transaction. The establishment of these remedies depends on the risks identified, the relevant market and the nature of the industry in which the merger will be carried out. In general, behavioural remedies are less favoured by antitrust agencies because they require a high level of monitoring and compliance enforcement.

2. Legal framework

4. A merger application must be filed with the Federal Telecommunications Institute (IFT) or the Federal Economic Competition Commission (COFECE), depending on the sector of the markets involved where the transactions belong.⁴ Particularly, merger applications in the telecommunications and/or broadcasting sectors have to be filed with the IFT, and mergers applications in any other sector have to be submitted to the COFECE.

5. There are some cases in which the nature of the markets involved in a merger are not clear or in which the transactions clearly include telecommunications and/or broadcasting markets but also markets in other sectors. To solve these conflicts, article 5 of the FECL establishes a communication channel between the IFT and the COFECE to determine, according to the applicable laws, which agency has the authority to review a specific merger. Therefore, when both the IFT and the COFECE consider that a merger falls within their jurisdiction, they have to submit the case to the Mexican Specialized Courts for Economic Competition, Broadcasting and Telecommunications, in order to determine if the file has to be handled by the IFT or the COFECE.

6. To assess a merger, article 63 of the FECL establishes five basic elements that have to be reviewed by the IFT or the COFECE according to each case. Subjected to an analysis on a case-by-case basis, they are the following:

- i) the relevant market
- ii) the market power of the competitors and concentration levels
- iii) the possible unilateral and coordinated effects on the relevant and related markets
- iv) the participation of the merging parties in other economic agents active in the relevant and related markets
- v) the efficiency gains resulting from the transaction.

³ For further information, see: <http://www.compcom.co.za/wp-content/uploads/2014/09/NgwenyaRobbMerger-Remedies.pdf>

⁴ As part of the amendments stated by the Constitutional Reform issued on June 11, 2013 the IFT was established as the competition authority in telecommunication and broadcasting sectors, while the COFECE remained as the antitrust authority for the other economic sectors. This Constitutional Reform is available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013
Available in English at:
http://www.sct.gob.mx/fileadmin/GITS/Traducci%C3%B3n_Ingl%C3%A9s_Reforma_Const_Telecom.pdf
Available in French at:
http://www.sct.gob.mx/fileadmin/GITS/Traducci%C3%B3n_Frances_Reforma_Const_Telecom.pdf

7. Regarding unilateral and coordinated effects, as mentioned above, if a merger presents risks of anticompetitive effects in the relevant or related markets, it can be authorized subject to remedies. The FECL provides two moments in which the merging parties may submit their proposed remedies. First, in the notification document, when the economic agents know or have information on the potentially anticompetitive effects of the merger. Second, after the IFT finds anticompetitive risks from the merger, and notifies this concern at least ten days prior to the scheduled hearing of the IFT's Board of Commissioners. In this case, the merging parties are allowed to submit commitments to eliminate the anticompetitive effects of the transaction. A proposal of remedies may be submitted until one day after the case is scheduled for a hearing of the Board of Commissioners.⁵

8. The Board of Commissioners has the power to either accept or modify the proposed remedies, or to deny the merger's authorization. According to article 91 of the FECL, the remedies accepted or imposed by the authority have to be directly related and proportional to the correction of the merger's anticompetitive effects. To that end, the FECL lists a few examples of structural and behavioural remedies that can be used by the authority, such as:

- carrying out or abstaining from specific conducts
- the divestiture of specific assets, rights, partnership interests or stock to third parties or viable competitors
- the modification or elimination of certain conditions of the agreements or acts intended to be executed
- committing to implement actions to foster the participation of competitors in the market, as well as providing them access or selling them goods or services.

9. The IFT is working on a Merger Guidelines document⁶ expected to be issued for public consultation at the end of 2016. The purpose of these guidelines is to provide clear and better understanding of the elements that the authority will assess in evaluating merger proposals in the telecommunications and broadcasting sectors. Specifically, the guidelines will include methodologies and criteria for analysing merger cases, for imposing remedies, and for assessing harms to competition.

3. Challenges in the design of remedies

10. In most cases, the proposals of remedies offered by economic agents are focused on behavioural remedies that are less expensive and easier to implement, in contrast to structural remedies, such as the sale of assets or business. Nevertheless, the authorities have the obligation and the power to assess competition risks and to evaluate proposals of remedies submitted by the economic agents. In this process, the IFT exchanges information with the merging parties regarding possible antitrust concerns and potential acceptable remedies.

11. During the mergers procedures, according to article 90, clause III, of the FECL, the authority has the power to request information to all economic agents participating in the relevant market or any related market. The request for information does not give any economic agent the right to be a part in the procedure. The information and documents provided have the purpose of giving the authority a better understanding of the transaction, the gains in efficiency, and the possible anticompetitive effects. As a result of this procedure, in the past, the IFT's Board of Commissioners has imposed structural and behavioural remedies, on a case-by-case basis.

⁵ For more information, see article 90, fraction V, of the LFCE, and article 21 of the Regulatory Provisions of the FECL, published on the DOF on January 12, 2015. Available in Spanish at: http://www.dof.gob.mx/nota_detalle.php?codigo=5378340&fecha=12/01/2015

⁶ For more information, see in Spanish: <http://www.ift.org.mx/sites/default/files/pat-2016-acc.pdf> and in English: <http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/awp2016vf.pdf>

12. The FECL does not provide specific value to the information submitted by economic agents, but the information must be taken into account by IFT in assessing the merger and the establishment of remedies. In this regard, the authority does not use market testing on a regular basis due to the confidentiality of the remedy proposals. Nevertheless, IFT requests information to competitors of the merging parties about markets' performance in order to evaluate conditioned authorizations.

4. Implementation of remedies

13. Once the IFT has authorized a merger subject to remedies, it has to periodically review compliance as long as it deems necessary. In the case of structural remedies, the implementation is generally carried out immediately after the consummation of the transactions; therefore, the monitoring process is simpler and does not extend over a long period of time. On the other hand, in behavioural remedies, the IFT uses as the main monitoring tool, periodical submissions of documents and information to prove compliance with the commitments established in the resolutions.

14. Since the establishment of IFT on September 2013 to the present day, every merger application has been authorized. Four applications were authorized subject to the fulfilment of conditions or remedies, and the rest were authorized without conditions, as proposed by the economic agents. For such reasons, none of the resolutions issued by the IFT on merger cases have been legally challenged and hence, none of them have been tested by the Mexican specialized courts.

15. In fact, given the time it would require to challenge IFT's decisions and receive a final resolution from the specialized courts, it could be more efficient for the economic agents to submit a new merger proposal taking into account the anticompetitive concerns and possible remedies that came out in the earlier application. This does not mean that IFT's decisions in merger cases cannot be challenged before a court and obtain a favourable resolution, but due to the interests of the merging parties to close the deal as soon as possible, it would be easier to submit a new merger application.

5. Relevant cases and practice

1. It is important to mention that, since the establishment of the IFT in 2013 as the national competition authority for telecommunications and broadcasting sectors, apart from reviewing the 14 mergers mentioned above, where four were authorized subject to the fulfilment of remedies by the economic agents involved in the transactions, the IFT's Board of Commissioners also has established remedies for economic agents interested in participating in tenders and auction procedures for spectrum licenses.

5.1 TVI's acquisition by Grupo Televisa (GTV)

16. On February 2016, the IFT authorized subject to conditions a transaction by which Corporativo Vasco de Quiroga, S.A. de C.V. (CVQ) owned by Grupo Televisa, S.A.B. (GTV), acquired the control of Televisión Internacional, S.A. de C.V. (TVI) from Grupo Multimedios.⁷

17. In its analysis, the IFT found several risks of coordinated effects arising from a structural link between GTV and Grupo Multimedios. The risks of coordinated effects, were in broadcast TV and radio services, given that GTV and Grupo Multimedios are the biggest commercial television broadcaster in the north of Mexico, and compete in seven local broadcasting markets, as well as in six local commercial radio markets. In this regard, the participation of Grupo Multimedios in CVQ could become a communication channel for GTV and Grupo Multimedios to coordinate their activities in the markets in which they competed. The merger was approved subject to conditions aimed at avoiding potential harmful effects in the related markets.

⁷ File UCE/CNC-003-2015, available in Spanish at: http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_190216_7.pdf

18. 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. On February 19, 2016, the IFT's Board of Commissioners accepted the proposal of remedies.

5.2 Acquisitions of DirecTV, GSF Telecom and Nextel México by AT&T

19. On November 2014, the IFT authorized the acquisition of DirecTV by AT&T, subject to the fulfilment of behavioural remedies.⁸ The merger was part of an international transaction with effects in the Mexican markets.

20. 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 GTV, which is a significant player in several markets of telecommunications and broadcasting sectors in Mexico.

21. During the review of the case, AT&T divested its shareholding in América Móvil (AMX, the holding of 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. Despite this divestiture, the IFT found risks of coordinated effects in several markets arising from the transaction, because it would have established an informal communication channel between AMX, AT&T and GTV, due to the prior relations between AT&T and AMX. These risks were mitigated through a series of behavioural conditions which details were not disclosed.

22. On December 2014, the IFT authorized subject to conditions the acquisition of GSF Telecom Holdings, S.A.P.I. de C.V. (GSF) by AT&T.⁹ GSF was involved in two businesses:

- Fixed Telecommunication Business, through Total Play (a Pay-TV provider)
- Mobile Telecommunication Business, through Iusacell and Unefon.

23. At the time, AT&T was acquiring DirecTV in other jurisdictions, a provider of Pay TV services via satellite with participation in Mexico through the company Sky Mexico. The IFT concluded that the acquisition of GSF by AT&T could damage the competition process in the provision of Pay TV services because GSF participated in that market through Total Play.

24. The IFT also found that the purchase of GSF by AT&T could affect the competition process in the provision of fixed telephony, fixed Internet access and dedicated links services, because AMX is the largest competitor in these services, and AT&T had a previous relationship with AMX. In this regard, the acquisition of GSF's Fixed Telecommunication Business by AT&T could facilitate and create incentives for coordinated conducts between AMX and AT&T/GSF.

25. To eliminate the anticompetitive effects, the merging parties proposed in their transaction a structural remedy to divest the Fixed Telecommunication Business of GSF—including the Pay TV service—to Grupo Salinas Telecom. S.A. de C.V., the previous owner of GSF. IFT's Board of Commissioners authorized the merger subject to the divestiture of GSF's Fixed Telecommunication Business prior to the acquisition of GSF, and behavioural remedies to avoid coordinated effects between AT&T and AMX.

⁸ File UCE/CNC-003-2014, available in Spanish at: http://apps.ift.org.mx/publicdata/P_IFT_EXT_131114_225_Version_Publica.pdf

⁹ File UCE/CNC-006-2014, available in Spanish at: http://apps.ift.org.mx/publicdata/P_IFT_EXT_181214_282_Version_Publica.pdf

26. After the acquisition of GSF by AT&T, on April 2015, the IFT also authorized subject to remedies the acquisition of Nextel México by AT&T.¹⁰ Nextel México was the fourth biggest provider of mobile telecommunications services in the country with a market share of 2.9% subscribers.

27. The IFT considered that the merger would not have adverse effects neither on the provision of mobile services nor on the accumulation of spectrum. However, the IFT found some risks of coordinated effects arising from the operation because of the previous relationship between AT&T and AMX. These risks were addressed through behavioural remedies.

5.3 *Broadcasting licenses Auction*

28. On November 2014, the IFT carried out an auction of licenses for broadcasting services at a national scope. The bidding rules established as a requirement that participants must get a positive competition opinion from the IFT before the auction process to prevent concentrations of radio spectrum which could decrease, harm or hinder the competition process. Also, the bidding rules prohibited participation of economic agents with 12 MHz of radio spectrum or more to provide broadcasting services in any geographic area.

29. The IFT identified that Grupo Tepeyac, a company interested in the auction, had a subsidiary related to GTV, which has concessions to provide broadcasting services for 12 MHz of radio spectrum or more in many locations throughout the country. The IFT determined that Grupo Tepeyac could participate in the auction, subject to the divestiture of its subsidiary related with GTV.¹¹

¹⁰ File UCE/CNC-001-2015, available in Spanish at:
http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_290415_86.pdf

¹¹ File UCE/OLC-008-2014, available in Spanish at:
<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/piftext131114223versionpublica.pdf>