

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

Working Party No. 3 on Co-operation and Enforcement

**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by
Mexico (IFT)**

4-5 December 2017

This document reproduces a written contribution from Mexico (IFT) submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.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]

JT03423971

Mexico - IFT

Introduction

1. This document approaches the extraterritorial reach of competition remedies¹ according to the Mexican legal framework and the experience of the Federal Telecommunications Institute (IFT). It also describes the general principle of territoriality in the Federal Economic Competition Law (LFCE) and discusses the international effects produced by national remedies.

2. The LFCE empowers competition authorities to accept or impose remedies to mergers and relative monopolistic practices (unilateral or joint abuse of dominance conducts). Since its creation in 2013, the IFT has enforced these powers on mergers, such as in the AT&T-Time Warner merger case.

1. Constitutional Framework

3. According to article 28 of the Mexican Constitution,² the IFT is the constitutional autonomous body responsible for the regulation and the efficient development of the telecommunications and broadcasting sectors in Mexico, empowered to act as the regulatory authority, entrusted to regulate, enforce and promote an efficient development of these sectors, in terms of the Federal Telecommunications and Broadcasting Law³, and as a competition authority, in the terms of the LFCE,⁴ entrusted to guarantee free market access and economic competition, and to prevent, investigate and combat monopolies, monopolistic practices, concentrations and other restrictions to the efficient functioning of the markets involved on this two sectors of the Mexican economy⁵.

2. Merger Notifications Procedures

4. The LFCE mandates several typical procedures on antitrust and competition matters. Merger notification procedures (articles 90 and 92 of the LFCE)⁶ are established

¹ As referred in the call for contributions, we understand «extraterritorial reach of competition remedies» as “measures which may need to be implemented outside the jurisdiction that has imposed them” or “extending **enforcement** jurisdiction beyond a country’s borders and citizens.”

² “Political Constitution of the United Mexican States” available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/1_150917.pdf

³ Available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTR_311017.pdf

⁴ Available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_270117.pdf An English version of the LFCE is available in: https://www.cofece.mx/cofece/images/Documentos_Micrositios/Federal_Economic_Competition_Law.pdf

⁵ The Federal Economic Competition Commission (COFECE) is in charge or reviewing other sectors of the Mexican economy i.e. aviation, transporting, energy, mining, etcetera. Both the COFECE and the IFT have equal and same faculties as national competition authorities, all of them provided in the LFCE.

⁶ The LFCE establishes two types of merger notification procedures. On one hand, article 90 of the LFCE states a normal notification procedure (with the possibility to require additional information and preventing 60 days of analysis). On the other hand, article 92 states a simplified one in which the assessment of a

in order to authorize, condition (remedies) or object transactions before they take its effects on Mexican territory.

5. The aim of the merger notification procedure is to prevent mergers with the purpose or effect to obstruct, diminish, harm or impede free market access and economic competition. When a merger fits the objective or effect prohibited by the LFCE, it is considered an unlawful concentration.⁷ In those cases, the applicable procedure grants to the parties the opportunity to propose remedies to readdress the negative effects on competition. In addition, the LFCE grants the attribution to the competition authority to accept or impose them,⁸ or to object the merger when remedies are unimpossible.⁹

6. The IFT is empowered to accept and impose those remedies proposed by the merging parties, to modify all or part of that proposal, to impose new ones or to object the merger. IFT's resolution must be necessary, sufficient and suitable to readdress the possible harms on competition.

3. The Territoriality Principle in the LFCE

7. The principle of territoriality in the application of the LFCE in Mexico is defined in the article 1:

“Article 1. This Law implements article 28 of the Political Constitution of the United Mexican States pertaining to free market access, economic competition, monopolies, monopolistic practices and concentrations. Further, this Law pursues public objectives and serves society's interests, and is applicable to all areas of economic activity¹⁰ and its observance is obligatory in the Mexican Republic.”

8. The general rule, coherently with the principles of legality and certainty of the Mexican Constitution,¹¹ states that the competition law is exclusively applicable to the national territory. By extension, this rule applies in the imposition of remedies as an enforcement tool to readdress competition risks.

9. Furthermore, globalized and interconnected world economy underpins the expansion of national economies and the arrival of several international and multilateral economy agents, the definition of international market, the cooperation between competition authorities¹² and the sharing of competition experiences.

transaction is faster (no more than 15 days and without additional information) and where the parties have to demonstrate that the transaction clearly will not hinder, damage or impede free market access and economic competition. The same article 92 states the hypothesis in which the authority shall consider that a merger does not have the purpose or effect to hinder, damage or impede free market access and economic competition.

⁷ Article 62 of LFCE.

⁸ The LFCE requires that the IFT notifies the parties before the imposition of remedies, to explain the risks to competition caused by the transaction and grant them the opportunity to propose remedies.

⁹ Articles 91, 127 fraction II and IX, and 131 of the LFCE.

¹⁰ As it was previously referred, the attributions and competence of the IFT are limited to telecommunications and broadcasting sectors.

¹¹ See articles 14 and 16 of the Mexican Constitution –referred at footnote 1-.

¹² The North American Free Trade Agreement between Mexico, Canada and the United States states in article 1501 that: “The Parties shall cooperate on issues of competition law enforcement policy, including mutual

10. In a globalized environment, the assessment of parties and markets requires competition analysis beyond the national frontiers. It is a fact that the principles and rules applicable on competition law allow to consider an extraterritorial assessment in many cases. For example: the geographic scope of a market, the notion of an interest economic group and the measure of control or influence between two or more economic agents.¹³

11. Regarding competition remedies, the same logic prevails. Even if the relevant market(s) is defined at the supra-national scope, by law, the remedies must be imposed within a national territory. A compelling task in designing the appropriate remedies is to foresee the possible impacts of such remedies to the economic activities carried abroad by multinational parties.

12. Although the IFT has no powers to impose extraterritorial remedies, it can impose any remedies better suited to countervail the anticompetitive effects of a conduct in the national territory, even if they may have international repercussions.

13. The following sections present the IFT's practice on imposing remedies whose enforcement is circumscribed to national jurisdiction, but its effective implementation may have effects on the activities that multinational parties carry abroad.

4. Legal Provisions on Remedies in the LFCE for Mergers

14. Article 91 of the LFCE establishes features for the imposition of conditions in the national territory.¹⁴ In this sense, the LFCE establishes the criteria that shall define the remedies: 1) reasonable, 2) necessary, 3) sufficient, 4) proportional and 5) directly oriented to readdress the identified risk or possible damage. These criteria are adopted to protect the maximum transparency and minimize possible damages to the parties involved.¹⁵

legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.”

¹³ According to article 58 of the LFCE, to determine the relevant market, competition authorities must consider, among other criteria, the distribution costs, its relevant inputs, its complementary goods and substitutes from other regions or abroad.

¹⁴ Article 91 of the LFCE reads: “Article 91. The conditions that the Commission may establish or accept from the Economic Agents, in terms of the previous article, may consist of:

- I. Carrying out or abstaining from a specific action;
- II. Divesting specific assets, rights, partnership interest or stock in favor of third parties;
- III. Modifying or eliminating terms or conditions from the acts intended to be executed;
- IV. Committing to implement actions that are intended to foster the participation of competitors in the market, as well as providing them access or selling of goods or services, or
- V. Other measures aimed at preventing the concentration from hindering, impairing or preventing competition or free market access.

The Commission may only impose or accept conditions that are directly related to correcting a concentration's effects. The conditions that are imposed or accepted shall be proportionate to the intended correction.”

¹⁵ Those are relevant principles to analyze and impose conditions by the IFT. See article 90 section V of the LFCE, article 21 of the “Regulatory Rules for the Federal Economic Competition Law for

15. In its practice imposing remedies, the IFT has adopted the following mechanisms:
1. To communicate and share with the parties the risks to competition produced directly by the merger with sufficient time to react during the procedure. The risks to competition shall be formally notified and sufficiently explained to the parties, to allow them to propose suitable remedies.¹⁶ This mechanism protects the parties' right to be heard and it allows the IFT to acquire inner information about the potential implications of the measures, including their possible international repercussions.
 2. During the identification of competition risks, the IFT is committed to be receptive and to establish an open and transparent dialogue with the parties in order to appoint the best remedies. This does not limit the total jurisdiction and legitimacy of the agency to impose unilateral remedies nor the right of the parties to appeal the remedies in Court.¹⁷ When the merger arises competition concerns, once informed and respecting their right of audience, if the parties do not propose remedies, the LFCE empowers the IFT to impose them.¹⁸
 3. To give importance to frequent cooperation between national agencies, especially in those cases where a merger has effects on different jurisdictions,¹⁹ in order to share information, identify mutual concerns, design suitable remedies and prevent their overlapping. This exchange is carried out with a previous waiver between the agencies and the parties involved, and it allows the reduction of regulatory burden for competition authorities to understand the transaction.
 4. When imposing remedies, to consider that the extraterritorial reach is one of the elements taken into account for assessing and designing the appropriate measures to readdress the competition risks.²⁰ Doing this, the IFT considers the subject and the scope better suited to implement the remedy.
16. The LFCE does not provide the extraterritorial imposition of the IFT's resolutions, including the imposition of remedies. However, it empowers to the IFT to impose any remedy that is "directly related to correcting a concentration's effects" even if its implementation requires or implies changes to international corporate behavior of multinational parties.

telecommunications and broadcasting sectors", and "Control Mergers Guidelines on Telecommunications and Broadcasting Sectors," issued by the IFT on 2017, available in (Spanish Version) at: <http://www.ift.org.mx/sites/default/files/industria/temasrelevantes/9195/documentos/pift280617368.pdf>, pages 80 to 82.

¹⁶ Mechanism consider in the article 90, fraction V, paragraph two, of the LFCE.

¹⁷ The right to appeal is established in the article 28, twentieth paragraph, clause VII of the Mexican Constitution.

¹⁸ See "Merger Control Guidelines on the Telecommunications and Broadcasting Sectors", pages 79 and 80. Available in Spanish at: <http://www.ift.org.mx/sites/default/files/industria/temasrelevantes/9195/documentos/pift280617368.pdf>

¹⁹ The Economic Competition Unit of the IFT uses and preserves this mechanism with consideration to the parties and to other competition agencies, always protecting confidential information of the parties involved and with the previous existence of a waiver.

²⁰ This is mandatory according to the LFCE.

5. Summary of a Relevant Case: AT&T-Time Warner

17. On August 2017, the IFT authorized subject to behavioral remedies the AT&T-Time Warner international merger.²¹ This merger has been resolved by several jurisdictions, but it has not been closed because it is waiting for resolution in other jurisdictions.

5.1. Involved Parties

18. AT&T provides mobile telecommunications services in Mexico and it is a shareholder of Sky Mexico, which is a DTH pay TV company in the national territory.

19. Previously, in a different international merger with effects in Mexico, AT&T acquired shares in Sky Mexico, next to Grupo Televisa (GTV). As a result, AT&T owns 41.3% of Sky Mexico and GTV owns 58.7%. In addition, GTV operates other cable pay TV providers and licenses channels and programs.

20. 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.

5.2. Relevant competition concerns

21. Due to the participation of AT&T and GTV in Sky Mexico, the IFT foresaw the risks of coordinated behavior in two markets:

1. the provision and licensing of video programming content to providers of pay TV (the relevant market), and
2. the provision of pay TV services to end users (adjacent, related or downstream market).

22. The IFT considered that the merger could harm competition because, following the LFCE's criteria, it was likely to create incentives:

- to foreclose those (relevant and related) markets, create barriers to entry and impede access to other economic agents; and
- to exchange information or coordinate their behavior in the relevant market.

5.3. Remedies proposed by the merging parties

23. AT&T and Time Warner, through several communications and meetings with the IFT, had knowledge of the competition concerns, and voluntarily proposed remedies before the formal notification took place. Once parties' proposal was assessed, the IFT imposed the conditions that it found reasonable, necessary, sufficient, proportional and directly oriented to readdress the identified risk or possible damage.

²¹ The full text of the resolution is available in Spanish at: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf.

5.4. Remedies imposed by the IFT

24. In consequence, the IFT imposed several remedies that were grouped as follows:²²

1. Separation of the members of the Board of Sky Mexico from those persons that are involved in the activities of Time Warner;
2. Functional separation of the parties from the activities of HBO LAG, a group of companies in which Time Warner has a stockholder position;
3. Conditions to commercial negotiation of contracts; and
4. Mechanism for reporting and surveillance.

25. None of the remedies imply an extraterritorial obligation, but some of them may influence the international corporate behavior of the parties involved in the transaction.

26. Regarding the separation of the personal involved in the activities of Time Warner from the Board members of Sky Mexico,²³ the condition influences the international corporate behavior of AT&T and Time Warner Groups.

27. The first group of remedies establishes that those officials, directors or employees of AT&T or Time Warner that take part in the decisions concerning the preparation, negotiation and administration of video programming or commercial strategies of video programming:

- Cannot be a member of the Board or a relevant official, director or employee in Sky Mexico;
- Cannot report directly or indirectly to any of those corporate positions; or
- Cannot participate on those activities.

28. In addition,²⁴ no member of the Board or a relevant official, director or employee in Sky Mexico could report or share information, different from the public domain, with any of the officials, directors or employees of the AT&T or Time Warner Groups, or with Board members of HBO LAG.

29. HBO LAG is an undertaking located abroad and its activities include intermediate users of programming (i.e. Pay TV providers) in Mexican territory and other Latin American Countries. Merging parties, under protest of saying the truth, affirmed that Time Warner's activities as content provider were already separated from those of HBO LAG's.

30. In consequence, the second group of conditions establishes that, as long as that separation between Time Warner and HBO LAG prevails, additional remedies were necessary only to prevent the exchange of information that could lessen their independent operation.²⁵ If this separation were to disappear, both entities would be subject to the first group of imposed remedies. Therefore, this set of remedies may have international repercussions due to the HBO LAG's activities in Latin America.

31. The IFT states in its resolution that the remedies must be implemented by all the members of both groups involved in the merger, and not only by those that operate in

²² Pages 160 to 169 of the resolution.

²³ This is part of the condition number 12 imposed by the IFT in the resolution of the case.

²⁴ *Idem*.

²⁵ This is part of the conditions number 16 and 17 imposed by the IFT in the resolution of the case.

Mexico. It also establishes guidelines to the parties on how they could choose members of Mexican Boards (i.e. Sky Mexico) and the separation with those members of the Board from the respective parties' groups, specifically, in order to preserve independence and prevent coordination effects in topics and decisions.

32. This work has not the intention to be exhaustive, but the conditions described above reflect the possible extraterritorial spillover effects of remedies imposed by the IFT in order to address competition concerns that arise in national markets.

5.5. International Technical Assistance

33. During the assessment of this merger, the IFT conducted technical collaboration with the U.S. Department of Justice, the competition authority in charge of reviewing the case in the United States. This mechanism was implemented through waivers of confidentiality between authorities and the involved parties, which allowed a clear dialogue regarding the concerns in each jurisdiction. IFT supports stronger cooperation efforts between national competition agencies.