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by Mexico****5 December 2017**

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More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

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Introduction

1. This document describes the safe harbours and the legal presumptions provided in the Mexican competition legal framework applicable to the telecommunications and broadcasting sectors. Since the Constitutional Reform,¹ the Federal Telecommunications Institute (IFT), as the competition authority and the regulatory agency of those sectors, pursues regulatory convergence adopting competition criteria in matters subject to sectorial regulations, including the application of safe harbours and legal presumptions contained in the Federal Economic Competition Law (LFCE). For example, the criteria that apply to mergers and acquisitions also apply to transfers of concessions rights.

1. Conceptual framework

2. When the IFT process requests that involve regulated economic agents, it observes two main principles: certainty and efficiency.

3. Accordingly, in economic competition procedures, and particularly in those involving mergers and acquisitions, it is useful to have criteria that *a priori* allow to determine that a transaction with certain characteristics does not require a detailed and in-depth analysis in economic competition matters. Those criteria or set of criteria are known as safe harbours.

4. The most used indicators in safe harbours are market shares and market concentration indexes. Thus, when the levels of those indicators are lower than a certain threshold, it is generally not necessary to carry out a detailed and in-depth analysis of the effects of the notified transaction.

5. The use of legal presumptions in competition analysis allows the application of specific rules -conclusive or rebuttable-² in order to conclude if a specific conduct of the agents is legal or illegal without the need to carry out an investigation.

6. In broad terms, we identify three kinds of presumptions:

1. Evidential.- It refers to criteria that helps to conclude if a behavior is legal or illegal based on similar facts that have been proved before in other cases and in the available evidence;
2. Substantive.- It refers to criteria that establish if a behavior is legal or illegal *per se*. Under this rule, an assessment based on the rule of reason is not needed; and

¹ Published on June 2013; available in Spanish at: http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013, in English at: http://www.sct.gob.mx/fileadmin/GITS/Traducci%C3%B3n_Ingl%C3%A9s_Reforma_Const_Telecom.pdf, and in French at: http://www.sct.gob.mx/fileadmin/GITS/Traducci%C3%B3n_Francia_Reforma_Const_Telecom.pdf

² Bailey, David, 'Presumptions in EU Competition Law' (2010)31 European Competition Law Review 362-369.

3. Procedural.- It refers to procedural criteria of law enforcement; for example, it sets the circumstances when the involved parties could or could not provide evidence.
7. In summary, safe harbours and presumptions offer transparency, clarity, certainty and efficiency towards those regulated economic agents with respect to what is and is not allowed by the authority. Legal presumptions set objective rules to determine when a behavior is legal or illegal without the need of an analysis of effects, and safe harbours consist of technical criteria that describe certain circumstances where a detailed analysis of effects is not justified because it will presumably arrive to the same conclusion, but having required resources and a longer period of analysis.
8. The legal framework of the Mexican telecommunications and broadcasting sectors contains presumptions and safe harbours in economic competition matters. They are useful and have been used in procedures carried out by the IFT in mergers and acquisitions under the LFCE, and in tenders and auctions, transfers of concessions rights, among other regulatory procedures in the telecommunications and broadcasting sectors under the Federal Telecommunications and Broadcasting Law (LFTR).
9. The safe harbours and presumptions contained in the legal framework applied by the IFT in economic competition matters are described below.

2. Safe Harbours and Legal Presumptions in the LFCE

10. The LFCE sets safe harbours in which the authority shall issue a resolution in a shorter time (article 92 of the LFCE) than that stipulated in the general merger control framework (article 90 of the LFCE). It also sets legal presumptions in which economic agents are not required to notify the transactions to the authority (article 93 of the LFCE). The nature of this type of operations implies that notoriously they will not have the object or the effect of damaging the competition, without the need to carry out a detailed analysis in the first case or any analysis at all in the second case.
11. Specifically, article 92 of the LFCE gives to the economic agents the right of requesting the authority a resolution in a shorter time if they demonstrate that the acquiring party in the transaction does not participate in the relevant market or in related markets where the acquired party participates, and if none of the following circumstances occurs:
 1. The transaction implies the participation of the acquiring party in the relevant market for the first time;
 2. Before the transaction, the acquiring party does not have control over the acquired party and with the transaction the former increases its relative participation but without obtaining greater power to influence; or
 3. The acquiring party has control over a firm and, with the transaction it increases its share in the capital stock of that firm.
12. This rule forces the authority to issue a resolution in a shorter time (15 business days) than the established in the general framework (60 business days) because the transactions with the described characteristics do not modify the structure of the markets, so there is a presumption that it is unlikely that those transactions have the object or the effect of hindering, diminishing, damaging or impeding competition and free concurrence, and therefore do not require an in-depth analysis. However, when the

authority perceives that the transaction does not fall on the provisions of article 92 of the LFCE or when the notifying parties do not provide evidence, the authority will process and evaluate the transaction in accordance with the general procedure established in article 90 of the LFCE.

13. According to article 93 of the LFCE, the assessment and authorization of transactions with the following characteristics are not required since mergers and acquisitions with those characteristics do not represent a risk to economic competition:

1. When the transaction involves a corporate restructuring, in which the involved parties belong to the same economic interest group and no third party participates in the transaction;
2. When the acquiring party increases its participation in the social capital of a firm in which it has control since its constitution or beginning of operations;
3. When the transaction concerns the constitution of administration, guarantee or other trusts, without the purpose or consequence of the transfer of assets to a different firm of both the trustor and the corresponding fiduciary;
4. When the transaction concerns acts that took place abroad related to non-resident companies for tax purposes in Mexico, of foreign companies, provided that the companies involved in such acts neither acquire control of Mexican firms, nor accumulate additional assets in the national territory in addition to those that they possessed before the transaction;
5. When the acquiring party is a variable income investment company and the transaction has the purpose of acquiring shares, bonds, securities or documents with resources from the sale of shares of the investment company among the investing public, except if as a result or because of the operations, the investment company may have a significant influence in the decisions of the acquired economic agent;
6. When the transaction implies the acquisition of less than 10% of a firm's shares listed in any stock exchange market; less than 10% of the votes, with no rights to designate or revoke members of the board of directors, no rights to impose decisions in the shareholders meetings and no rights to direct or influence the administration, operation and strategy of the firm; or
7. When the acquisition is made by one or more investment funds that do not have investments in firms that participate in the same relevant market as the acquired party and when those funds have purely speculative purposes, that is, when they do not acquire more than 10% of the capital with the sole purpose of obtaining returns for its investors, and without having *de facto* or *de iure* power to appoint directors, administrators or executives, neither significantly influence in the decision-making bodies nor have the intention to participate, direct or influence the administration, operation, decisions, strategy or commercial policies of the economic agent object of the acquisition.

14. This rule sets an exception in the mergers notification procedure to the benefit of the regulated agents, which can adhere to that right and do not have to notify a transaction that under their consideration meets the described characteristics. This notification and analysis exception is established because transactions with the described characteristics neither modify the structure of the markets nor imply the acquisition of influence or control in the acquired party, so there is a presumption that those transactions do not have the purpose or effect of hindering, diminishing, damaging or impeding competition and free concurrence, and consequently, an analysis of the object and effects is not required.

15. Another presumption established in the LFCE refers to cartels. They are considered anticompetitive and illegal *per se* without the need to perform an analysis by its object or its effects. Cartels are sanctioned according to the LFCE, without prejudice to the civil and penal sanctions that, if applicable, may result.

16. According to article 53 of the LFCE, cartels consist of contracts, agreements, arrangements or combinations between competitors whose purpose are any of the following:

1. To fix, raise, co-ordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets;
2. Not to produce, process, distribute, market or acquire but only a limited amount of goods, or the provision of a restricted number, volume or frequency of services;
3. To divide, distribute, assign or impose portions or segments of a current or potential market of goods and services, through clients, suppliers, times spans or spaces;
4. To establish, arrange or coordinate bids or abstention in tenders, contests or auctions; and
5. To exchange information with any of the objects or effects already referred in this article.

3. Technical Criteria to Assess Concentration Levels: Herfindahl-Hirschman Index (HHI)

17. According to the LFCE, in the merger control procedure, the competition authority must consider the concentration level in the market, and the Regulatory Provisions of the LFCE for the Telecommunications and Broadcasting Sectors (Provisions of the LFCE)³ establish that the IFT has to publish the criteria to calculate the concentration in the market through an index.

18. Accordingly, on April 2016, the IFT issued the criteria for calculating and applying a market concentration index in the telecommunications and broadcasting sectors (Concentration Criteria)⁴ 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.

19. In particular, the Concentration Criteria establish a safe harbor in the sense that it is unlikely that a transaction has the object or the effect of hindering, diminishing, damaging or impeding competition and free concurrence, when after the transaction one of the following situations occurs:⁵

1. $HHI \leq 2,000$ points.
2. $2,000 < HHI \leq 3,000$ and $\Delta HH \leq 150$ points.
3. $HHI > 3,000$ and $\Delta HH \leq 100$ points.

⁴ Available in Spanish at http://www.dof.gob.mx/nota_detalle.php?codigo=5432595&fecha=11/04/2016

⁵ These thresholds were set considering the structural characteristics of the markets in the telecommunications and broadcasting sectors in Mexico.

20. The Concentration Criteria 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 co-ordination between economic agents in the relevant market or related markets.

21. As it is described, this rule is a benchmark applied on a case-by-case basis. In some cases, even when the rule is fulfilled, the transaction analyzed may require an in-depth analysis and the evaluation of all available evidence in order to identify if there is an exception of the rule, and thus, the need to carry out a detailed analysis. If competition risks arise, then the authority shall notify them to the parties, who have the option to prove efficiency gains that overcome those risks and will result in an improvement to the consumer welfare.⁶

4. Threshold for Market Share

22. The Concentration Criteria offers the following threshold for market share above which a transaction requires a detailed assessment. Article 7, paragraph b), of the Concentration Criteria establishes:

“Even when a transaction implies that the values of the HHI and its variation are within the thresholds established previously, the IFT may consider that the transaction could generate potential risks of hindering, diminishing, damaging or impeding competition and free concurrence, if the economic agents involved in the transaction reach a participation higher than 35 %.”

23. Accordingly, a merger in which the HHI falls within the thresholds of the Concentration Criteria would not be subject to in-depth analysis if, after the transaction, the parties reach a market share below 35%.

24. Taking this element into account, the IFT has considered in several cases that if a transaction generates a market share below 35%, it is unlikely that it has the object or the effect of hindering, diminishing, damaging or impeding competition and free concurrence. This threshold has been used in the assessment of transactions in the spectrum secondary market in which the IFT has decided to allow spectrum holdings for the provision of mobile telecommunications to up to 35% when there is enough spectrum available for new and existent competitors.

5. Regulatory Procedures

25. In some procedures, such as public auctions, the IFT has imposed spectrum caps in order to protect and promote competition and free concurrence, and avoid accumulations contrary to the public interest.

26. The IFT established those spectrum caps in order to prevent concentration levels that may generate concerns of economic competition. These caps constitute an absolute rule within the auction in the sense that if they are not met, the interested parties will not be able to participate.

⁶ See article 14 of the Provisions of the LFCE.

5.1. Broadcasting Licenses Auction

27. In 2014, the IFT carried out the first 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 electric spectrum which could decrease, harm or hinder competition.

28. The bidding rules established the next condition:

“Those economic agents who currently accumulate concessions to provide broadcasting services for 12 MHz (equivalent to 2 transmission channels) of radio electric spectrum or more in any geographical area cannot participate in the auction.”⁷

5.2. Radio Licenses Auction

29. In 2016-2017, the IFT carried out an auction of licenses for radio commercial services in different localities. The bidding rules established as a requirement the evaluation of the interested economic agents with the purpose of preventing accumulations of radio concessions which could decrease, harm or hinder competition.

30. The bidding rules established the next condition:

“The interested parties cannot participate in those localities in which the number of commercial concessions they have plus those that they could accumulate in the tender, would be greater than 30% of the total concessions for commercial use in the locality plus those that could be assigned in the tender procedure.”

⁷ As established in the Constitutional Reform, specifically for the first auction to allocate two national broadcasting networks.