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ECONOMIC ANALYSIS IN MERGER INVESTIGATIONS – Contribution from Mexico

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More documentation related to this discussion can be found at: oe.cd/mergerinv.

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Economic Analysis in Merger Investigations

- Contribution from Mexico (COFECE & IFT) –

COFECE

1. Introduction

1. In the past seven years, significant progress has been made in Mexico's merger review. The Federal Economic Competition Commission (COFECE or Commission) has implemented measures to have a clearer, more effective and efficient merger review process. These include modification of regulations to close loopholes, clarify concepts and reduce regulatory burdens;¹ engaging in better communication with economic agents to improve timing, transparency and predictability of merger review;² and the introduction of an electronic filing system to streamline the process.^{3, 4}
2. COFECE has also systematically implemented actions to strengthen its internal capacity in merger review, allocating greater resources to the Mergers Unit, increasing the number of case-handlers and promoting the integration of mixed teams, to efficiently address the growing complexities of mergers and reinforce its economic analysis.
3. This contribution gives an overview of COFECE's institutional arrangement to review mergers, including the integration of economists in the assessment of mergers, the Mexican legal framework for merger review, and the use of economic techniques in merger control.

¹ The 2018 amendments to the Regulatory Provisions of the Federal Economic Competition Law (LFCE) were made to develop specific aspects of the merger review proceedings conducted by COFECE, among other changes. The Regulatory Provisions of the LFCE are available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2019/08/19.08.01-Disposiciones-Regulatorias-de-la-LFCE-ultima-reforma.pdf>

² For example, COFECE has published guidance documents with the objective of bringing transparency, ensure predictability and more certainty to economic agents on its procedures. These documents include: The Guide for the Notification of Concentrations, available in Spanish at: https://www.cofece.mx/wp-content/uploads/2019/02/guia-0042015_not_concentraciones-DGC-VF1.pdf; and The Guidelines for the Notification of Concentrations by electronic means, available at: <https://www.cofece.mx/wp-content/uploads/2019/07/Lineamientos-concentraciones-reforma-18-jul-2019.pdf>

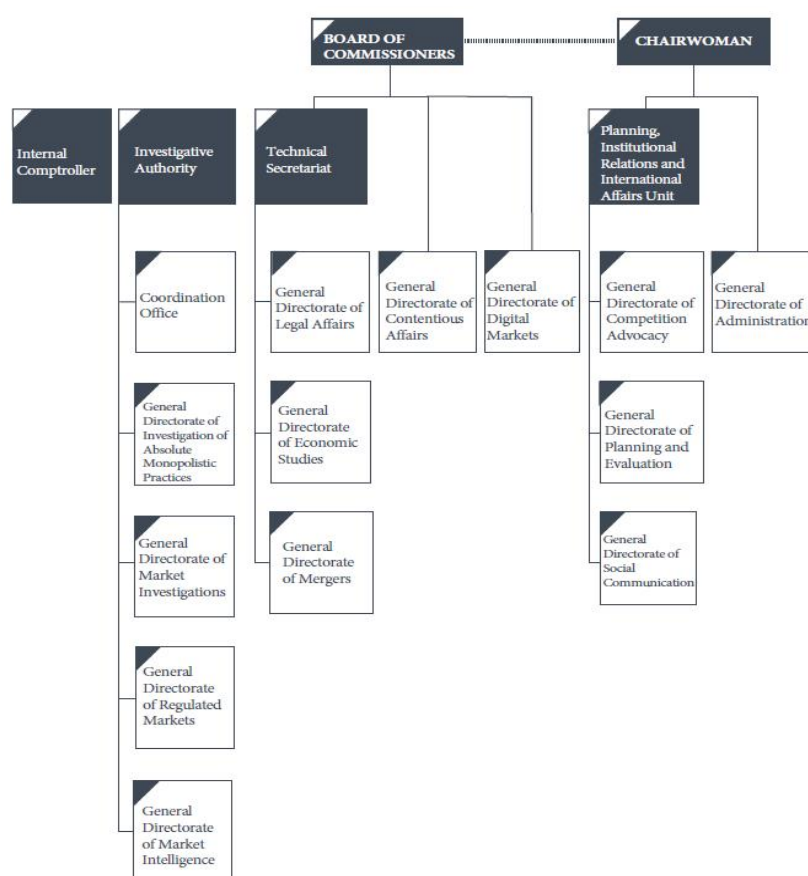
³ In 2018, COFECE implemented the Electronic Concentration Notification System (SINEC for its acronym in Spanish), which is a part of COFECE's Electronic Procedure System (SITEC for its acronym in Spanish). Since January 2020, notification of mergers that COFECE must review by law, will only be received through the Electronic Procedure System at the Commission's website: <https://www.cofece.mx/sitec/>

⁴ The Electronic Concentration Notification System (SINEC) has been of great importance to face the challenges posed by the COVID-19 pandemic. During the first months of the sanitary emergency, COFECE suspended legal timeframes and deadlines for all procedures, excepting those related to merger control. COFECE made this decision because most of merger control procedures were carried through the SINEC, and because mergers are relevant for investment and job creation.

2. Institutional arrangement for merger review

4. COFECE has established an institutional model that allows it to effectively comply with its mandate, which includes, among other actions, reviewing mergers to preserve competitive structures in markets.⁵
5. COFECE's institutional arrangement (see figure 1) has been designed to make efficient use of the legal, economic, and/or sector expertise that the institution has, and to ensure independent and objective decision-making.⁶

Figure 1. COFECE's Organizational Structure



⁵ According to Article 10 of the Federal Economic Competition Law (LFCE) COFECE's mandate is to ensure free competition and market participation, as well as investigating and combating monopolies, monopolistic practices, concentrations, and other restrictions to the efficient functioning of markets. The LFCE is available in English at: https://www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf. In addition, COFECE's Organizational Statute establishes COFECE's institutional structure, providing clarity on which unit within the authority is in charge of each procedure, and its obligations. The Organizational Statute is available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2020/07/20.07.03-Estatuto-Organico-Cofece-Compendio.pdf>

⁶ COFECE's institutional design provides for the separation of the Investigative Authority (investigation body) from the Board of Commissioners (decision-making body). The Investigative Authority has technical, administrative and operational autonomy and is responsible for conducting the investigation procedures.

6. The Board of Commissioners, which is the decision-making body, is supported by the Technical Secretariat (ST). The ST is responsible for the trial-like procedure (conducted after probes into probable anticompetitive conducts, allowing probably responsible parties to defend themselves before the Board reaches a decision), the merger review process and the market studies conducted by the Commission. To comply with this, the ST is integrated by the General Directorate of Mergers (or Mergers Unit), the General Directorate of Legal Affairs and the General Directorate of Economic Studies.
7. The General Directorate of Mergers is the unit in charge of the merger review procedure and may request the collaboration of the General Directorate of Economic Studies (a stand-alone “bureau of economics” headed by a Chief Economist, that provides technical assistance to several areas within COFECE,⁷ 8) when analysing complex merger cases.
8. Moreover, in July 2020, COFECE created the General Directorate of Digital Markets which serves as an advisory body to the Commission and is responsible for analysing the development of digital markets and its implications on competition. It will report directly to the Board of Commissioners. The Directorate may provide technical support to other areas of COFECE, including the General Directorate of Mergers, in the analysis of mergers that involve digital markets, or those in which the merging parties operate in these markets.⁹

2.1. The role of economists in assessing mergers

9. Since its creation, COFECE has developed different measures to modernize its merger review methods, and to promote the integration of complex economic and econometric analysis into all cases.
10. In the case of mergers review, this has been ensured by (i) allocating more resources to the Mergers Unit and, (ii) through the integration of mixed teams. For example, following the 2013 reform,¹⁰ the number of case-handlers in this Directorate grew from six to twenty-four people. Also, COFECE has provided ongoing training programs to ensure that all mergers staff further improve the quality of their economic analysis and keep up to date with modern analysis techniques.
11. All case-handler teams in the Mergers Unit are multidisciplinary and include both economists and lawyers. Currently, fourteen out of the twenty-four case handlers have an economics background allowing the Merger Unit to use more sophisticated economic tools, including statistical and econometric analysis in its merger reviews. Every case-handler

⁷ Except for the Investigative Authority (IA). Due to COFECE’s institutional design, a chief economist reporting to the Board of Commissioner could not advise the IA. The IA has its own Coordination Office which provides economic and legal advice to all the IA’s investigation units.

⁸ The General Directorate of Economic Studies is also responsible for conducting market studies that could serve as grounds for COFECE’s advocacy efforts and/or enforcement actions.

⁹ On July 3, 2020, the Board of Commissioners of COFECE reformed the Organizational Statute to create the General Directorate of Digital Markets, as part of the Digital Strategy. The Digital Strategy was launched by COFECE in March 2020 to handle digital markets. Its actions included the strengthening of COFECE’s technological infrastructure and the capacities of the staff in this area; the creation of a digital markets’ unit within the institution; and the strengthening of international cooperation and contact with international experts. The Digital Strategy is available in English at: https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_ENG_V10.pdf

¹⁰ In 2013, a major constitutional reform set a new competition framework in Mexico and gave way to the creation of the current Federal Economic Competition Commission (COFECE), a body with full constitutional autonomy and enhanced powers.

team, which includes at least one economist, is assigned with a merger case and is responsible for its analysis.

12. In practice, the Mergers Unit is divided into three groups which are specialized by sectors: (i) regulated markets, (ii) the services sector, and (iii) the manufacturing industry. Within this structure, the Unit has developed a better knowledge of the markets, and a greater specialization to better screen complex mergers. Currently, all these groups are headed by economists, although this is not a rule.
13. Economists are involved throughout and participate in the entire merger review process: initial review, crafting of information requests, negotiation of remedies, assessing efficiencies, as well as the general assessment of the merger, which involves understanding how the market works, formulating credible theories of harm and evaluating these theories.
14. During merger review, the General Directorate of Mergers conducts a legal and economic analysis. These analyses must be detailed and comprehensive for every merger and must provide solid arguments that are needed by the Board of Commissioners - that is mostly composed of economists - to issue their final resolution.
15. Furthermore, the Technical Secretariat staff also includes economists and lawyers. This staff participates in the review of the reports on mergers presented by General Directorate of Mergers. The Staff also harmonizes criteria before turning the reports to the Board of Commissioners. Finally, each Commissioner has economists on her/his staff.
16. It is worth mentioning that the use by the Mergers Unit of external economic expertise is not common. In general, the use of this type of external resources by COFECE is determined on a case by case basis and is employed only in cases that have a high technical complexity and for which the Commission does not have the expertise or resources required.

3. Legal framework for merger review

17. The Federal Economic Competition Law (LFCE for its acronym in Spanish), defines a *concentration* as a merger, an acquisition of control (either de iure or de facto) or any other act by virtue of which there is a union of companies, associations, shares, trusts or assets. From here on in, for simplicity, concentrations will be simply referred to as mergers.
18. According to the LFCE,¹¹ a merger that exceeds the following thresholds cannot be executed until COFECE's clearance is obtained: (i) when the merger value exceeds 18 million Units of Measure and Update (UMA)¹² (around 74 million USD); (ii) when the merger implies an accumulation of 35% of the total shares of an economic agent with annual sales or assets in the country that exceed 18 million UMAs (around 74 million USD); or (iii) when the merger implies an accumulation in Mexican territory of assets or shares that exceed the equivalent to 8.4 million UMA (around 34.5 million USD), and two or more of the economic agents participating in the merger have annual sales or assets in Mexican territory exceeding 48 million UMAs (around 197.3 million USD).
19. Merger review in Mexico is done in one phase, unlike other jurisdictions in which a Phase II is opened to assess in more depth a merger's effects on competition. The LFCE provides that after notification,¹³ COFECE has sixty working days for the review process and issue a resolution (from the time when the file is completed, or additional information has been

¹¹ Article 86 of the LFCE.

¹² In 2020, 1 UMA equals 86.88 Mexican Pesos or 4.11 USD - at the exchange rate of 21.13 Mexican pesos per USD (04/11/2020).

¹³ Article 90 of the LFCE.

submitted by the merging economic agents). For complex mergers, the Commission can extend the standard time up to forty additional days.¹⁴ Remedy submission and modifications of submitted remedies may re-start the clock for another sixty plus forty working day period. If the Board of Commissioners does not adopt a decision within the legal timeframe, the transaction is considered cleared without objection.

4. Merger economic analysis

20. COFECE analyses if a merger may reduce, impair or prevent competition. The LFCE provides the following list of factors to be considered to determine if a merger has anticompetitive effects:¹⁵ (i) the definition of the relevant market as provided in the Law; (ii) the identification of the main economic agents in the market, their market power in the relevant market, and the degree of market concentration; (iii) the effects of the merger on relevant and related markets; (iv) cross-participation by the merging parties in other economic agents or vice versa; (v) information provided by the economic agents to demonstrate greater market efficiency as a result of the merger and which will impact favourably on the process of competition and free market access, and (vi) other analytical and technical criteria set by regulatory provisions.
21. The LFCE is flexible enough to allow the combination of a dominance and a “substantial lessening of competition” test elements.¹⁶ In this regard, COFECE considers that a merger may be anti-competitive if it (i) confers or strengthens market power; (ii) has the object or effect of displacing competitors of the market; or (iii) facilitates monopolistic practices (such as collusion or abuse of dominance). In addition, the pro-competitive effects (such as efficiency gains) of the proposed transaction are weighed against the anti-competitive effects. Efficiency gains must be proved by the parties and must be transferred to the consumers.¹⁷
22. Relevant markets are defined through a demand and supply side substitution analysis, including the use of the hypothetical monopolist test.
23. Also, to identify complex mergers the Commission calculates concentration indexes in the relevant market(s) based on its Concentration Index Criteria.¹⁸
24. According to this Criteria, COFECE uses the Herfindahl-Hirschman Index (HHI) in horizontal mergers, and the ‘safe harbours’ are:
 - the value of the increase of HHI (Δ) is less than 100 points;
 - the value of HHI after the transaction is below 2,000 points; and
 - the value of HHI after the transaction is between 2,000 and 2,500 points; Δ is located between 100 and 150 points, and the resulting economic agent after the transaction is not one of the four largest economic agents in the relevant market.

¹⁴ As described in paragraph 26.

¹⁵ Article 63 of the LFCE.

¹⁶ Article 64 of the LFCE.

¹⁷ Efficiency gains are defined under article 14 of the Regulatory Provisions of the Federal Economic Competition Law. Available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2020/03/Compendio-Disposiciones-Regulatorias-de-la-LFCE-ultima-reforma-04-03-2020.pdf>

¹⁸ Available at: https://cofece.mx/wp-content/uploads/2017/11/criterios_tecnicos_para_medir_concentracion_del_mercado.pdf

25. If the indexes exceed the thresholds established in the Criteria, the transaction will be subject to an in-depth review. In such reviews, as mentioned above, the Commission will assess, amongst other factors, the existence of barriers to entry and the degree of concentration in the relevant market(s). These are the cases in which the forty working days extension is applied.
26. Before the creation of COFECE,¹⁹ economic analysis performed during the merger review process was simple. Data availability limitations, as well as limited resources (teams were small within the Mergers Unit) did not allow for sophisticated economic tools to be implemented. During that time, there was a strong emphasis of statistical information (sales information, market shares, among others).
27. Currently, economic analysis is embedded within merger control, not only in the use of econometric or other statistical tools, but in providing the conceptual framework in which to analyse the functioning of markets and assess the possible effects of a merger, developing and defining theories of harm. Also, COFECE always complements the use of quantitative tools²⁰ with other types of evidence.²¹ The Commission knows that econometric techniques are useful, but they have limitations. Therefore, the Commission is cautious when interpreting econometric techniques and will always complement these tools with qualitative evidence, mainly from the parties' internal documents.²²
28. The Commission obtains quantitative and qualitative information during its merger analysis process (such as internal documents). The data used in the economic analysis at the Mergers Unit is principally obtained from the parties, competitors or other participants in the industry, as well as other public sources. Economists and lawyers participate in documentary evidence review and both consider and assess the legal and economic aspects of the merger.
29. As COFECE's merger review has advanced over the years, more sophisticated economic tools are used, in line with best international practices, particularly for complex merger

¹⁹ In 2013, a constitutional reform resulted in the extinction of the former competition authority, the Federal Competition Commission (CFC) and in the creation of the Federal Economic Competition Commission (COFECE), a constitutional autonomous body in charge of enforcing competition policy in all economic sectors except for the telecommunication and broadcasting sectors.

²⁰ Economic analysis often includes the use of quantitative tools. Types of quantitative analysis include critical loss analysis; price correlation; switching analysis and diversion ratios; upwards pricing pressure measures; entry analysis econometric analysis and merger simulation. Quantitative tools include for example the HHI (Herfindahl-Hirschman Index) to determine market shares, or the SSNIP test (Small but Significant and Non-Transitory Increase in Price) to determine relevant markets.

²¹ The Guide for the Notification of Concentrations, issued by COFECE provides a non-exhaustive list of documents and information that may be required as evidence in case of complex merger cases to conduct in-depth analysis and determine the relevant market and related markets, and effects of the merger. According to best international practices, qualitative evidence may include documentary evidence, such as corporate strategy documents, planning documents, and sales reports; descriptive evidence from market participants (i.e., customers, suppliers, competitors, and employees of the merging parties), written responses to inquiries and compulsory requests for information. In particular, COFECE gives significant weight to internal documents, particularly those generated during the normal course of business. COFECE's guide is available in Spanish at: https://www.cofece.mx/wp-content/uploads/2019/02/guia-0042015_not_concentraciones-DGC-VF1.pdf.

²² Relevance of qualitative evidence can be illustrated by the merger between the magnet wire companies Rea and Xignux. In this case COFECE found in internal documents that the transaction as proposed would merge the main and third-largest competitors in the production and distribution of magnet wire in North America, giving rise to a company with a significant market share in terms of sales that might have facilitated increases in prices, with no other competitors to counteract these effects. Thus, COFECE blocked the transaction. File CNT-069-2017, resolution available in Spanish at: <https://resoluciones.cofece.mx/CFCResoluciones/docs/Concentraciones/V5781/2/4055264.pdf>

cases. An example is the merger between two airlines in which an econometric model was used to estimate the price determinants for transnational flights.²³ In this case, the Commission implemented an econometric model to determine which variables affected the price per kilometre of flights to or from Mexico, and particularly the role played by the Mexico City Airport hub, as well as the current and potential competitive pressure imposed by each airline, particularly the merging parties. It is worth mentioning that, although market definition and imposed remedies were different in each jurisdiction, COFECE exchanged views on the economic analysis of the transaction with the US Department of Transportation (DoT).

30. Gross Upward Pricing Pressure Index (GUPPI) has also been used in the analysis of mergers involving the production, sale and distribution of beverages,²⁴ and the production and distribution of magnet wire.²⁵ In the first case, because of the availability of data for prices and margins, particularly from a study presented by the economic agents, the Commission was able to utilize the GUPPI index to determine the competitive pressure exerted by different beverages (soft drinks, soy-based products, as well as other beverages). The merger analysis required studying the incentives of a potential increase in prices of a portfolio of products by adding a new one. This index was implemented in order to determine whether the goods produced by the merging parties were close substitutes, as well as the incentives that an economic agent has to increase its price when it incorporates a new product to its portfolio. Similar considerations regarding data availability were taken regarding the case of magnet wire.
31. Regarding the supermarket industry,²⁶ the Commission performed a merger simulation based on data presented by the merging parties and public data sources. The model was used to estimate how a supermarket chain might change its prices (i) if the stores it acquired were converted into its own stores and (ii) if the stores that overlapped with its current stores were closed. This way, the Commission was able to determine the competitive pressure that these stores exercised.
32. Finally, it is important to stress that while COFECE has made major efforts towards the incorporation of a more sophisticated economic-based analysis into its merger review; tools and methods to be implemented when assessing a merger are chosen on a case-by-case basis. Therefore, depending on the characteristics of the transaction, different types of analyses may be used. The strategy to be taken by COFECE in each case will be defined by the availability of data; collected qualitative and quantitative evidence; complexity of the merger; time and resources needed to review the transaction; among other relevant aspects.

²³ In 2015, Delta and Aeromexico announced their intention to enter into a joint venture, and requested approval from both COFECE in Mexico and immunity from antitrust laws from the US Department of Transport (DOT). COFECE approved the operation pending certain terms and conditions in May 2016. In view of the geographical scope of the transaction, COFECE cooperated with the US Department of Transportation (DoT) regarding the transaction's effects in both jurisdictions. File CNT-050-2015 Resolution in Spanish available at:

<https://resoluciones.cofece.mx/CFCResoluciones/docs/Concentraciones/V5325/0/3648710.pdf>.

²⁴ Merger between Coca-Cola and AdeS Unilever. File CNT-091-2016. Resolution in Spanish available at: <https://resoluciones.cofece.mx/CFCResoluciones/docs/Concentraciones/V5401/0/3696575.pdf>

²⁵ Merger between Rea and Xignux. File CNT-069-2017. Resolution in Spanish available at: <https://resoluciones.cofece.mx/CFCResoluciones/docs/Concentraciones/V5781/2/4055264.pdf>

²⁶ Merger between Soriana and Comercial Mexicana. File CNT-021-2015. Resolution in Spanish available at: <https://www.cofece.mx/cfcreoluciones/docs/Concentraciones/V1730/0/2289112.pdf>

Federal Telecommunications Institute (IFT)

1. Introduction

33. In Mexico, the Federal Telecommunications Institute (IFT) is the regulatory and competition authority in the telecommunications and broadcasting sectors²⁷.
34. This document aims to describe in a general way the practice by IFT regarding economic analysis in merger control, and to comment on how the economists at the IFT participate in this analysis.

2. Economic Analysis of Mergers

35. The IFT analyzes mergers notified by economic agents, based on the Federal Economic Competition Law (LFCE, by its acronym in Spanish). The LFCE provides the elements to define the relevant and related markets involved, the degree of concentration in the analyzed markets, the existence of barriers to entry, the possible effects that arise from the merger, the efficiency gains, and the elements to identify any possible signs of an unlawful merger. The current legal framework is broad enough to allow the IFT the use of all kinds of economic tools and models in each of the stages of its merger analysis.

Box 1. Mexican Legal Framework

The LFCE, issued in 2014, establishes a single merger control regime and criteria of general application. Mandatory previous notification applies to operations that surpass certain legal thresholds, and the competition authority can investigate (non-notified) consummated mergers and challenge those that have adverse competitive effects.

The legal standard for the merger review is settled in articles 58, 59, 61, 63 y 64 of the LFCE, and its corresponding articles in the regulatory provisions of the LFCE for the telecommunications and broadcasting sectors (DRLFCE, by its acronym in Spanish). The legal standard aims to determine whether the transaction's purpose or effect is to hinder, harm or impede competition and free market access regarding identical, similar or substantially related products or services. Those mergers are unlawful and must be challenged or, when viable, subject to structural or behavioral remedies.

Regarding a merger, the IFT shall consider as indications of an unlawful transaction, if:

- It confers or may confer the surviving entity, the acquirer or the economic agent resulting from the merger, substantial market power in terms of LFCE, or it increases or could increase that power;
- It has or could have the purpose or effect of imposing barriers to entry, preventing third parties access to the relevant or related markets or essential facilities, or of displacing other economic agents; or

²⁷ In México, there are two federal-level competition agencies with legal jurisdiction separated by sectors: the IFT and the Federal Economic Competition Commission (COFECE, by its acronym in Spanish), the latter is competent for sectors different from telecommunications and broadcasting.

- Its purpose or effect is to substantially facilitate the merging parties to incur in practices prohibited under LFCE and, particularly, in monopolistic practices.
- The statutory criteria for the analysis include:
 - Defining the relevant and related market(s);
 - Identifying the leading economic agents that supply the market(s), analyze their power, and the degree of concentration in those market(s);
 - Identifying parties as economic agents, determining the economic interest group to which they belong, considering all the means of influence or control by or over other economic agents or other people's business;
 - Assessing the effects of the transaction in the relevant and related market(s), on competitors, consumers or other economic agents; and
 - In case of identifying risks, merging parties have the right to demonstrate efficiency gains derived from the transaction, and to propose remedies that overcome the possible anticompetitive effects (i.e., it is not the authority, but the law that grants the opportunity to propose remedies). Additionally, because the analysis is prospective, it may include likely future effects.

Some gains in efficiency may be:

- Obtaining savings in resources that allow the production or supply of the same quantity of the good or service at a lower cost or a greater quantity of the good or service at the same cost, without reducing the quality;
- Cost reduction if two or more goods or services are produced jointly rather than separately;
- The transfer or development of technology that generates an improvement in the production or provision of goods or services;
- The decrease in production or commercialization costs resulting from the expansion of an infrastructure or distribution network, and
- Others that demonstrate that net contributions to consumer welfare resulting from the merger exceed their anticompetitive effects.

If the IFT concludes that a merger may hinder competition in some markets but does not consider objecting it, the IFT may impose or accept proposed conditions. In terms of the LFCE, among the conditions that the IFT can establish or, where appropriate, can accept to authorize a merger are:

- Carrying out a certain behavior or refraining from doing it (behavioral conditions);
- Transferring of certain assets, rights or shares to third parties (divestiture or structural separation);
- Modifying or removing terms or conditions of the intended acts;
- The obligation to carry out acts aimed at promoting competitors' participation in the market, as well as giving them access or selling them goods or services; or

- Others imposed to prevent the merger from decreasing, hindering or preventing competition.

Source: IFT

36. In every case, people with training in economics lead the analysis and processing of mergers. The economists in charge develop the theories of harm and identify potential tools of analysis considering the available information. Also, they ensure that the process is carried out in a timely manner in accordance with the applicable regulations, with support from personnel with legal background.

Box 2. The Area in IFT in Charge of the Merger Notification Process

The merger notification process is carried out by the Economic Competition Unit (UCE, by its acronym in Spanish) of the IFT through the General Direction of Mergers and Concessions (DGCC, by its acronym in Spanish). Currently, sixteen people are part of the DGCC: twelve with a background on economics, two lawyers and two administrative staff. The General Director of Concentrations and Concessions is an economist. The years of experience of the Directors, including the General Director, ranges from 4-5 years and up to 21 years.

Usually, merger cases are assigned to a team of economists supervised by a Director, supported by one or two deputy directors, also economists. The lawyers of the DGCC accompany these teams in all cases.

In the analysis of mergers, the IFT has not used expert external economists.

The regulatory convergence that characterizes the IFT allows the DGCC to participate in the evaluation of mergers and opinions in terms of the LFCE, and in operations concerning concessions that are notified in terms of the Federal Telecommunications and Broadcasting Law, both evaluated under similar competition standards. Among the regulatory procedures reviewed in competition matters by the DGCC are:

- i) leasing of frequency bands;
- ii) exchange of frequency bands between concessionaires;
- iii) transfer of concessions;
- iv) subscription or sale of shares of concessionaires; and
- v) granting of broadcasting concessions for public and social use.

Likewise, the DGCC participates in the bidding procedures for spectrum frequencies with the issuance of opinions, proposing the incorporation of measures to promote and protect competition in the bidding rules, and opinions in terms of competition for each of those interested in participating in the bidding processes.

Source: IFT

37. In the analysis of mergers, the IFT uses economic tools such as the relevant market definition and the concentration index, as well as other determining elements. When

defining the relevant and related markets, the IFT starts a detailed analysis of the goods and services that the notifying parties, under their economic interest group dimension, produce, distribute and/or sell, as well as their participation in different value chains (including potential goods and services). Subsequently, and following the logic of the hypothetical monopolist test, the IFT observes which products or services and to what extent they exert competitive pressure on those provided by the companies that intervene in the merger.

38. The IFT identifies competitors that participate or that would participate in the markets, including their market shares and the corresponding degree of concentration.²⁸ The IFT also considers other elements established in the LFCE and in its regulatory provisions, such as barriers to entry, possibility of access to inputs, recent behavior of agents and economic efficiencies resulting from the mergers.
39. To avoid obstructing the execution of the mergers, the IFT promptly resolves those operations that noticeably do not have negative effects on the markets. The use of more sophisticated tools, such as the development of economic models, which consume time and resources, is reserved for complex cases. Since September 2014, the IFT has processed twenty-eight mergers, imposing conditions on six of them; four of which have involved

²⁸ In the Concentration Index Criterion adopted by the IFT (available in Spanish at <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdolia/dofift170316101.pdf>) three concentration levels are identified:

- Low, where the Herfindahl Hirschman Index (IHH) is lower or equal to 2,000 points after the merger.
- Moderate, where the IHH is between the 2,000 and 3,000 points.
- High, where the IHH is higher than 3,000 points.

The IFT considers that it is unlikely that a merger has the purpose or effect of hindering, diminishing, damaging or impeding competition, when any of the following situations occurs afterwards:

- a) $IHH \leq 2,000$ points.
- b) $2,000 < IHH \leq 3,000$ and $\Delta IHH \leq 150$ points.
- c) $IHH > 3,000$ and $\Delta IHH \leq 100$ points.

structural divestitures.²⁹ In the AT&T/Time Warner case, its analysis considered an arithmetic³⁰ type model to evaluate the possible vertical effects of the operation.

40. In complex cases, the IFT has considered the application of quantitative economic techniques such as merger simulations, diversion ratios, pricing pressure indices, critical loss analysis, and various econometric models. However, it has faced difficulties in incorporating them into its resolutions, mainly because of the difficulty in obtaining data with sufficient quality and time to produce robust results.
41. Many of the markets involved in the mergers notified to the IFT are multi-sided platforms, for which standard economic tools and results do not directly apply.³¹ In these situations, the economic analysis can be very complex since it must consider the existence of multiple groups of consumers with interdependent demands; the calculations are significantly challenging and much more information is required. Furthermore, the complexity of these analyses increases as they are markets related to technological development, which makes them highly dynamic, and therefore prone to quick modifications of the business models and the scope of the platforms; thus, this situation complicates their modeling.
42. One of the fundamental elements of the IFT's merger analysis is to gather the necessary and sufficient information to substantiate the decisions. The first source of information comes from the notifying parties; additionally, the IFT has the power to request information

²⁹ In the merger by which AT&T raised the acquisition of DirecTV, file UCE/CNC-003-2014, the DGCC indicated to the Parties, during its processing, that this operation could generate coordination risks with Grupo Televisa / Innova (Sky México); the latter company where DirecTV had a 41% shareholding and Grupo Televisa the remaining 51%. This, in the event that AT&T maintained 8.4% of the capital stock of América Móvil, as well as the power to appoint members of the board of directors in that company. AT&T agreed to divest this holding, including the rights to appoint members of the board of América Móvil prior to the IFT authorizing the operation.

In the merger by which AT&T raised the acquisition of GSF Telecom/Iusacell/ Total Play, file UCE/CNC-006-2014, the IFT's Board imposed conditions for AT&T to divest the fixed telecommunications business (Total Play). It concluded that such merger would generate coordination risks with an economic agent that participates in the provision of fixed telecommunications services, including the provision of Pay TV service: Grupo Televisa / Sky México, while AT&T has an indirect shareholding of 41% Sky México.

In the merger by which Grupo Televisa proposed to acquire TVI's remaining 50% of share capital from Grupo Multimedios, file UCE/CNC-003-2015, the IFT imposed conditions so that shareholders from Grupo Multimedios will divest shareholdings, as well as the rights to appoint members of the board of directors, of companies belonging to the economic interest group controlled by Grupo Televisa. It was concluded that this operation would generate coordination risks in the provision of the free-to-air TV service, including in the provision of advertising spaces on that platform, in the northeast of Mexico, as Grupo Televisa and Grupo Multimedios were the two main providers in that region.

In the Disney/Fox case, file UCE/CNC-001-2018, the IFT imposed conditions for Disney to divest the Fox Sports Mexico business in the relevant market for the provision and licensing of TV programming channels for Pay TV providers in the sports category. It concluded that this merger would generate market power risks given the position that both agents would achieve if the operation were authorized.

In cases UCE/CNC-003-2014, UCE/CNC-006-2014, UCE/CNC-001-2015 (AT&T acquires Axtel), UCE/CNC-004-2016 (AT&T acquires Time Warner) and UCE/CNC-001-2018, the IFT also imposed behavioral conditions.

³⁰ This type of model analyzes the costs and benefits that the merged parties would obtain with a foreclosure strategy against competitors in different markets along the value chain, in order to determine if it would be profitable. The cost of input exclusion is the profit lost by the merged entity because of not supplying an input, or supplying less of it to its competitors. The profit is the resulting increase in downstream profits due to reduced competition at this level of the value chain.

³¹ See David S. Evans, The Consensus among Economists on Multisided Platforms and its Implications for Excluding Evidence that Ignores It, 13 April 2013. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249817

from any person, economic agent or public authority, without recognizing them as parties in the procedure.

43. The IFT does not implement surveys in its analysis, but rather requests information on certain economic agents. These requests, related to the products, pricing strategies and historical behavior of the parties involved in the merger, are made primarily to the parties' main customers. An important challenge that the IFT faces when resorting to information requests to third parties is adjusting to the period the law establishes for issuing a resolution, since it is not suspended.
44. The UCE (Economic Competition Unit of the IFT, by its acronym in Spanish) maintains close collaboration with other areas of the IFT. For example, in mergers involving audiovisual content, the Media and Audiovisual Content Unit (UMCA, by its acronym in Spanish) has provided valuable input and expertise, through various registers, databases, studies and surveys with information on the platforms that distribute content such as open-to-air television, Pay TV and Over The Top (OTT) video.

3. Assessment in a Selected Merger Case: the AT&T/Time Warner Merger

45. In August 2017, the IFT authorized, subject to compliance with conditions, the merger comprising the acquisition of Time Warner Inc. (Time Warner) by AT&T Inc. (AT&T).³² The operation was finalized on June 14, 2018.

3.1. Economic agents involved

46. In its analysis, the IFT identified that in Mexico:

- **AT&T** offers mobile telecommunications services and is a shareholder of Sky México, a Pay TV company with satellite technology. In addition, through DIRECTV it participates in the provision and licensing of a channel specialized in golf.
- Sky México's shares are divided between Grupo Televisa (GTV), with a 58.7% stake, and the AT&T group, which owns the remaining shares equivalent to 41.3%. GTV also operates other providers of cable Pay TV; this group of companies being the main provider of Pay TV in the country, besides offering channel and program licenses.
- **Time Warner** provides and licenses video programming content (channels and programs) through different divisions of its business (Turner, HBO and Warner). Through HBO LAG,³³ it provides and licenses Time Warner and third-party channels to Pay TV providers in Mexico.

3.2. Information

47. The IFT requested the notifying parties to provide detailed information about their businesses (current and potential), commercial strategies and clients, among others.

³² A public version of the resolution is available in Spanish at: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf.

³³ HBO LAG is a group of companies located abroad and its activities include the licensing of programming channels to Pay TV providers in Mexico and other Latin American countries. According to information provided under oath by the notifying parties, Time Warner's activities as a content provider are separate from those of HBO LAG.

Additionally, it requested information from third parties that included channel programmers, Pay TV providers and OTT video service providers.

48. The UCE also took into consideration the information obtained by the UMCA in the 2015 National Survey of Audiovisual Content Consumption.³⁴

49. From the information gathered, the following elements were obtained, among others:

- Programming channels, even within the same programmatic category, offer different content with the objective of maximizing their diffusion, given the varied preferences of users, resulting in a high degree of differentiation between each of them.
- Time Warner's participation in the provision of Pay TV channels is substantial, considering the number of channels it offers and its audience, and comparable only with the participation of GTV.
- Pay TV providers regard programming channels with a significant position in the taste of audiences, such as Time Warner and GTV channels, as necessary for their programmatic offerings.
- Channel packaging is a common practice. Therefore, the lack of dealing a package with several necessary channels would affect the ability of Pay TV providers to compete.
- GTV's position as a Pay TV provider, with approximately 61% of users nationwide (including SKY México and its subsidiaries that provide cable service), is sufficient to prevent AT&T/Time Warner from increasing the prices or restricting the sale conditions of the programming it supplies to it, but no other economic agent falls into similar circumstances.

3.3. Model

50. The IFT implemented a vertical arithmetic model to analyze whether the economic agent resulting from the operation would have incentives to hinder access to the upstream market for the provision of channels to Pay TV providers. This, in order to favor Sky México in the downstream market for the provision of Pay TV (foreclosure). The IFT estimated the income that AT&T/Time Warner could obtain by carrying out this practice and contrasted it with the income that it would obtain by not carrying it out. The model used the following equation:

$$\pi_1 - \pi_0 = \Delta P_0 Q_o - (P_o + \Delta P_0) Q' + P_{GTV} Q'_{GTV} + P_s Q'_s + 0.41 U_s Q'_s$$

Where,

P_o := Licensing price per subscriber of Other Competitors³⁵;

Q_o := Other Competitors' initial subscribers;

P_{GTV} := Licensing price per subscriber of GTV;

Q_{GTV} := GTV's initial subscribers;

P_s := Licensing price per subscriber of Sky México;

Q_s := SkyMéxico's initial subscribers;

Q' := subscribers lost by Other Competitors;

Q'_{GTV} := subscribers moving to GTV;

Q'_s := subscribers moving to Sky México;

U_s := Sky México profits.

³⁴ This survey, conducted by the UMCA, was carried out from October 24 to November 22, 2015, with the objective of knowing the consumption habit of audiovisual content by radio and television audiences, as well as the demand for said content on the internet. Information available in Spanish at: <http://www.ift.org.mx/comunicacion-y-medios/estudios-y-reportes-de-analisis-de-medios-y-contenidos-audiovisuales>

³⁵ Other Competitors refers to SKY México and GTV's competitors in Pay TV service.

51. The quantitative exercise considered the following elements:

- AT&T/Time Warner increases the licensing fees for its Pay TV channels by 10% (except to Sky México and GTV, due to AT&T and GTV's equity interest in Sky México).
- This increase in rates would cause an increase in the prices of the Pay TV packages offered to the final consumer.
- The only ones that would maintain their commercial offers with the same prices would be Sky México and GTV, so end users would change to these providers.
- Sky México, which provides Pay TV in the DTH (Direct to Home) mode, has national coverage.
- Given the situation described, some end users would choose to change their Pay TV provider (they would move to GTV or Sky México, since they would not increase their prices) and others would definitively stop contracting the services.
- The analysis considered that, in some locations, depending on the presence of GTV, users could choose between GTV and Sky México, or have only Sky México as the best option.
- With those elements, the IFT evaluated the net effect of a foreclosure strategy on AT&T/Time Warner's profits, since these would increase as a consequence of the third parties' increase in the prices, and of its income from its participation in Sky México (the 41.3% of profits), which would experience an increase in their end users and, therefore, in their sales. On the other hand, AT&T/Time Warner would reduce its income due to the loss of users, and therefore sales, that would stop acquiring the Pay TV service of Sky Mexico and GTV's competitors.
- The analysis estimated the loss of subscribers (those who leave the market), carrying out five scenarios, setting the percentage of subscribers who no longer continued to acquire the Pay TV service with other competitors, and varying the percentage (with respect to the other competitors) of subscribers who leave the market.

52. From the results in the evaluated scenarios, the IFT concluded that, the income that AT&T/Time Warner would obtain, on one hand, from the increase in prices in the provision of channels, and on the other, from the profits on its participation in Sky México, would be higher than the possible losses for carrying out the described practice. In other words, AT&T/Time Warner's profits by putting foreclosure into practice would be higher than those they would obtain if they did not.³⁶

3.4. Competition Risks

53. The IFT concluded that the merger could generate risks due to vertical effects in the markets for the provision and licensing of programming channels to Pay TV providers and for the provision of Pay TV services to end users.

54. The IFT's evaluation focused on the capacity and incentives that the economic agent resulting from the merger would have, considering AT&T's minority stake in Sky México, to implement a foreclosure strategy in the identified markets. The IFT also evaluated whether (partial) vertical integration could facilitate the commission of collusive conduct,

³⁶ The public version of the annex containing the methodology and results of the numerical analysis is available Spanish at: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf (See *Anexo I*).

due to the possibility that after the merger Sky México would have access to information on the operations of competitors through Time Warner.

3.5. Remedies in the AT&T-Time Warner Merger

55. The IFT imposed various conditions to counteract the anticompetitive effects generated by the merger, which obligate the parties to observe them, and can be grouped into the following categories:
- i. Maintain independence, in terms of decision-making and the flow of information, between Sky México and Time Warner; and between HBO LAG and the rest of AT&T/Time Warner and, therefore, with Sky México.
 - ii. Ensure that AT&T/Time Warner responds to all requests for access to its restricted television channels by third party providers of the pay TV service, offering similar terms and conditions when negotiating comparable requests.
 - iii. Implement monitoring, verification and complaint mechanisms.