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Ex-Post Assessment of Merger Remedies – Contribution from Mexico (COFECE & IFT)

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

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Ex-Post Assessment of Merger Remedies

- Part 1: Contribution from Mexico (COFECE) -

1. Introduction

1. The Federal Economic Competition Commission (Cofece or Commission) carries out assessments on the impact of its actions on the markets. *Ex-ante* and *ex-post* assessments allow Cofece to analyse the effects and quality of its decisions, optimize the use of resources and disseminate the benefits to society for every peso invested in the institution.
2. *Ex-ante* assessments are carried out with the available information at the time the Board of Commissioners issues its resolutions, while *ex-post* assessments quantify the economic benefits from Cofece's past actions and study the markets' dynamics once the markets have internalized the effects of such decisions. The results of these exercises contribute not only to measure the impact of Cofece's actions in the markets, but to improve the quality of future interventions.
3. *Ex-ante* and *ex-post* assessments are conducted in accordance with sections XXIII and XXIX of Article 12 of the Federal Economic Competition Law (LFCE or competition law), which empower Cofece, on the one hand, to request studies from independent academics and experts in the field that assess the performance of Cofece's actions; and on the other, to conduct or order studies, research works, and general reports on competition.¹
4. This contribution presents an overview of the Commission's work to conduct *ex-post* assessments, the methodology developed for these exercises and two examples related with the assessment of mergers analysed by Cofece.

2. Conducting ex-post assessments: the experience of Cofece

5. *Ex-post* assessments estimate the impact that the elimination or prevention of restrictions on the efficient functioning of the markets have on the equilibrium conditions of a market and, consequently, on consumers welfare. The estimates are carried out through the analysis of the equilibrium conditions that: (i) in the case of establishing preventive measures, such as in mergers, a market could reach if the Commission had not intervened, and (ii) in the case of ordering the termination of anticompetitive practices, a market reaches after the intervention of Cofece.
6. The available information to model market equilibrium conditions or the behaviour of market participants may be limited. Accordingly, the researcher may propose the relevant quantitative methods that allow a reasonable approach for the quantification of the

¹ The Organic Statute provides that the Planning, Liaison and International Affairs Unit of Cofece is responsible for coordinating and supervising the preparation and publication of information that facilitates the assessment of the Commission's actions, and that the General Directorate of Planning and Evaluation is the one charged with promoting, coordinating and facilitating the assessment of the Commission's activities by external institutions; generating and publishing information to allow the external evaluation of the Commission's activities; and conducting quantitative and qualitative studies of competition policy.

effects derived from the practice, from the interventions of Cofece, as well as the impact on welfare.

2.1. Cofece's methodology for the conduction of ex-post assessments

7. Based on international best practices and with the purpose of having a technical guide to conduct *ex-post* assessments, the Commission issued the *Methodology for the elaboration of ex-post assessments of the interventions of Cofece* (Methodology).²The Methodology sets out the criteria to determine which interventions may be subject to *ex-post* assessment, which include, but are not limited to, mergers that were blocked or that were authorized subject to the fulfilment of certain conditions.

8. This guide also establishes that the selection of cases subject to an *ex-post* assessment is in charge of the Commission's Working Group for the Evaluation of Competition Policy.³ This Working Group decides the cases to be assessed based on the following criteria⁴ which represent the "ideal" scenario for the conduction of an assessment:⁵

- Between two and four years have elapsed since the issuance of the resolution by the Board of Commissioners.
- There is sufficient statistical information available regarding prices, quantities and/or other variables relevant to the analysis.
- The intervened market is part of an economic sector that: i) produces generalized consumption goods, ii) has a high impact on economic growth, iii) has a cross-cutting impact on other sectors, iv) has characteristics that could facilitate anticompetitive practices, and/or v) has a greater impact on lower-income households.

9. Once the case to be evaluated has been selected, the Commission decides whether the assessment will be conducted internally or by external experts with experience in carrying out these assessments. In either case, the Methodology establishes the following stages for the assessment:

- a) **Analysis of the intervention:** It seeks an in-depth understanding of the details of the intervention, the economic agents involved, the conducts, or practices carried

² The Methodology is available in Spanish at:

https://www.cofece.mx/cofece/images/informes/metodologia_ev_expost_cofece.pdf

³ The Working Group is chaired by a Commissioner and is comprised also by the Head of the Investigative Authority, the Technical Secretariat, the Head of the Planning, Liaison and International Relations Unit. The general directorates related to the investigation of anticompetitive practices and merger analysis also participate.

⁴ The Commission's Strategic Plan establishes the criteria for prioritizing sectors to focus on those that maximize the effectiveness of Cofece's interventions. In this regard, the Working Group take these criteria as a basis and includes those that it considers relevant for the conduction of *ex-post* assessments.

⁵ These constitute the ideal scenario for carrying out the assessments established in the Methodology. However, due to the nature of each intervention, as well as the quantity and quality of information available, the implementation of the different stages as well as the technical criteria for conducting the assessments may differ from case to case.

out and their duration, as well as the investigation and resolution process conducted by the Commission.

- b) **Analysis of the intervened market and determination of the equilibrium conditions:** It explores the characteristics and structural conditions of the intervened market to understand its geographical dimension, participants and other variables related to supply and demand. Derived from the analysis of this information, market conditions are estimated before the suspension of the practice.
 - c) **Estimation of scenarios:** Once the intervened market has been analysed and the equilibrium conditions have been determined, the most suitable theoretical models are analysed so that, based on the available information, scenarios of the behaviour of economic agents with and without the intervention of Cofece can be constructed.
 - d) **Estimation of the impact on consumer welfare:** Based on the comparison of the scenarios from the previous stage, the impact of the intervention on consumer welfare is estimated through the calculation of the loss of consumer surplus, as well as the irrecoverable loss of efficiency that was prevented thanks to the intervention. For the estimation of empirical models and scenarios, the Methodology encourages the use of econometric techniques and methods that are considered as the most suitable for the information available, the analysed market and the characteristics of the conduct. Likewise, it is intended that the estimates are statistically significant so that they can be subjected to the tests that are considered relevant, as well as robustness tests to verify the structural validity of the estimators.
 - e) **Conclusions and recommendations:** Summarize the findings and discuss the theoretical and technical considerations that were used in order to find recommendations regarding, for example, how to highlight the importance of competition to reduce overcharges faced by consumers, how to deepen the study of best technical practices to conduct future assessments, and possible lines of investigation that could be conducted in the future to deepen the assessment of the case.
10. As a result of the aforementioned process, those conducting the assessment must present a preliminary version of the assessment, which will be reviewed by the members of the Working Group and by the Commissioners of the Board of Cofece. Comments and observations can be made to the evaluators, who in turn can decide whether to make any adjustments; this to always maintain the objectivity and impartiality of the assessment.
11. After this, the evaluators submit the final and definitive version of the assessment to the Board of Commissioners and the Working Group for its publication. To further promote and communicate the benefit of its interventions, once published, the Commission will execute a promotion campaign to inform about the findings of the assessment.⁶
12. To this day, the Commission has conducted the following *ex-post* assessments related to merger analysis:

⁶ All assessment exercises are published in the website of the Commission. Available, in Spanish, at <https://www.cofece.mx/publicaciones/documentos-de-planeacion-y-evaluacion/>

Table 1. Merger control-related interventions that have been evaluated ex-post

Intervention	Resolution by Cofece	Type of Assessment (Internal/External)	Year
Merger in the chemical industry	Blocked and, afterwards, authorized with conditions	Internal	2016
Merger in the film exhibition in movie theaters and related markets	Blocked and then authorized because of a reconsideration procedure	External	2017
Merger in the market of freight railway transportation	Blocked and then authorized as a result of a decision from the Judicial Power	External	2017
Airlines merger	Authorization subject to compliance with conditions	External	2019

13. Carrying out of these assessments allowed to identify and quantify the effects of the interventions of the Commission in merger control, including those operations in which conditions were implemented to mitigate risks that could restrict the efficient functioning of the markets to the detriment of competition.

3. Ex-post assessment of mergers analysed by Cofece

3.1. Merger in the airline market: Aeromexico and Delta⁷

14. In 2015, the airlines *Aeromexico* and *Delta* notified their intention to carry out a joint cooperation agreement that would allow them to jointly operate all their flights between Mexico and the United States. After its analysis, the Board of Commissioners identified that, although the concentration level measured by the IHH would be below 2,000 points, there were significant barriers to entry, so the effect of the operation could be a reduction in competition in the relevant market for regular air passenger transportation services between Mexico and the United States.

15. Furthermore, the Board of Commissioners identified two main barriers: i) the lack of available slots at saturated airports and, ii) the Bilateral Agreement between the United States and Mexico, which restricted to two the number of airlines from each country that can provide service between each pair of cities, except for some destinations where they allow up to three airlines per country.

16. In March 2016, the Board of Commissioners authorized the merger subject to the fulfilment of conditions.⁸ The conditions were: i) to yield eight pairs of slots at the Mexico City International Airport (AICM), equivalent to those used in 2015 by *Delta* at the same airport, to current or potential competitors that can provide or could be able to provide regular air transportation services for passengers on cross-border flights, and ii) *Aeromexico* and *Delta* could not maintain the designated routes that overlapped and were granted under the terms of the Bilateral Air Agreement; consequentially, one of the airlines had to yield its designations.

⁷ A case study summarizing this merger is available, in Spanish, at <https://www.cofece.mx/wp-content/uploads/2017/11/AMX-DELTA-v2.pdf>

⁸The first merger was analyzed under file CNT-050-2015, the public version of the resolution is available, in Spanish, at <https://www.cofece.mx/cfresoluciones/docs/concentraciones/v5325/0/3648710.pdf>

17. In November 2016, before the conditions imposed were fulfilled, the airlines requested Cofece to approve Delta's acquisition of up to 32.33% of *Aeromexico's* capital stock, an operation that was also conditioned in February 2017.⁹ The analysis carried out for the resolution of this new file considered the same elements of the previous file as barriers (or possible barriers) to entry, except those associated with the Bilateral Agreement; since this was moved to an open skies agreement. Thus, the Board of Commissioners concluded that the obligation to transfer the portfolio of eight pairs of slots before making the public offer for *Aeromexico* would eliminate the possible risks to the competition process.

18. This ex-post assessment, which was conducted externally in 2019, had the objective of assessing the impact of the conditioned merger over the market of public passenger air transport between Mexico and the United States, considering as a counterfactual scenario the approval of the concentration without conditions.

19. To model the equilibrium conditions in the market, it was considered a market in which companies competed sequentially in quantities (Stackelberg Model); because the logistics and flight scheduling process is carried out based on the destination and size of the plane (number of passengers) and not by the rates charged. The estimation of the equilibrium of the model allowed to obtain the equilibrium production levels, the price and the quantity that would prevail in the market if the merger were to be approved without conditions.

20. The main results were that *Aeromexico's* and *Delta's* prices and quantities move in opposite directions, meaning that if the efficiency gains resulting from the association between these companies were small, then it would have increased the price and reduced output. This result justified the Commission's decision to block the merger as originally notified and subjecting its authorization to fulfilment of conditions.

21. Additionally, a difference-in-differences model was estimated. The assessment found that, if the conditions hadn't been imposed, the volume of passengers would have been 3.62% lower and prices would have increased between 2.20% and 5%. Thus, the monetary impact of the Commission's intervention represented between 2.6% and 6.0% of the market value in 2014 (before the merger) or, alternatively, 1.09 and 2.48 times the budget allocated to Cofece in 2018.

3.2. Merger in the chemical industry: PVC market

22. In September 2008, *Mexichem*, a company in the PVC market, notified before the former Federal Competition Commission (CFC) its intention to acquire three companies with activities both in the production of PVC resins and in the production and commercialization of piping and fittings of the same material. Of the three operations, two were confined to the market for the production and commercialization of PVC pipes and fittings and in one of these the CFC resolved that the merger did not represent a risk to competition and authorized it.¹⁰

23. However, in the second operation, consisting in the acquisition of *Plasticos Rex*, the CFC determined that *Mexichem* would get a very high market participation in a market where there would not be competitors with enough volume of operation to discipline the behaviour of the company resulting from the merger. In the case of the third operation,

⁹ The second operation was analyzed under file CNT-127-2016.

¹⁰ The three operations were analyzed under files CNT-091-2008, CNT-093-2008 and CNT-099-2009.

which consisted in the acquisition of *Cydsa*, the CFC also identified risks to competition since both merging parties were the only two suppliers in the market for the elaboration and sale of PVC resin in suspension, thus the merger would have created a monopoly and was blocked.

24. In 2009, the parties requested again the authorization of the CFC arguing a change in the circumstances due to the elimination of a countervailing duty applies to the imports of suspension PVC resins. After reviewing the new operation, the Commission found changes in the market that reduced the risks originally identified and the merger between *Mexichem* and *Cydsa* was authorized under certain conditions to protect competition in the market of PVC pipes.

25. The assessment of this case, conducted internally by Cofece in 2016, used a structural simulation of the Stackelberg leader-follower duopoly model in which market prices, produced quantities and the elasticity of the demand of the market were used to calibrate the parameters. This simulation model was used to estimate that, if the merger had been approved the first time without remedies, a monopoly scenario would have resulted, leading to a price increase of 36.26% and reduction in quantity traded of 21.38%. Consequently, the results of the analysis indicated that both decisions of the CFC were favourable for consumers. The first intervention avoided damages to consumer welfare for approximately 7.3 million dollars, by avoiding the creation of a monopoly.

26. Additionally, the analysis included another comparison: the hypothetical scenario with a monopolist supplier and without countervailing duties. The price in this case fell 29.42%, while the traded quantity grew 83.46%. The comparison of results is consistent with the theory from the moment when conditions allowed the entry of new producers to the market, which increases competition and leads to lower prices. These calculations reveal a consumer welfare gain of almost 10.1 million dollars, by promoting the elimination of antidumping fees that created barriers to entry for potential foreign competitors.

4. Conclusions: challenges and opportunities for ex-post assessments

27. While the results of *ex-post* assessments show the importance of the actions conducted by the Commission to increase the welfare of Mexican consumers, their elaboration has significant challenges, especially regarding the availability of information and resources.

28. Lack of information is one of the most important challenges and is directly reflected in the scope of each assessment, in terms of the effects it analyses and the level of detail of its results. For example, in the *ex-post* assessment of the merger subject to conditions between *Aeromexico-Delta*, the researchers had limited access to the information necessary to carry out their analysis, since in official Mexican sources there was no disaggregated data by route and airline in terms of the number of passengers transported. In this case, this limitation was overcome through the search of information available in other jurisdictions, particularly in the United States.

29. Another major challenge is the lack of human and material resources available to carry out the assessments. The budget and staff available to Cofece to conduct these exercises internally is insufficient, since officials responsible for them also carry out other substantive activities. This forces the Commission to hire assessment services externally, which is also challenging due to the resources needed to hire external experts but, in contrast, this also allows to ensure quality, objectivity and impartiality in the conduction of *ex-post* assessments.

30. As it has been mentioned before, one of the most important aspects of *ex-post* assessments is that they provide evidence and information that can be used to promote the benefits of competition policy and to show how the work of the agency contributes to improving, not only the economy, but also the welfare of consumers and households. This is why the Commission undertakes several efforts to communicate the economic benefits from its interventions either through conferences, webinars, or written materials.

31. For example, in 2022, Cofece published the book *What does Mexico gains when there is competition? Economic benefit of eight interventions of Cofece* in which it compiles the results of eight *ex-post* assessments conducted by the Commission (including the two cases covered in sections 3.1 and 3.2).¹¹ With this book, Cofece aims at providing quantitative evidence that allows for the application of an evidence-based competition policy and also serves as a measure of the efficiency of the actions of the Commission and helps to define future interventions.¹²

¹¹ This book was awarded an Honorable Mention in the 2023 WB/ICN Competition Advocacy Contest. More details can be found at <https://www.worldbank.org/en/events/2023/05/22/competition-advocacy-contest-2023>

¹² The book is available in English at <https://www.cofece.mx/wp-content/uploads/2022/12/PE-ExPost-eng-28112022.pdf>

Ex-Post Assessment of Merger Remedies

- Part 2: Contribution from Mexico (IFT) -

5. Introduction

32. An ex-post evaluation of merger remedies allows competition authorities to determine whether those remedies achieved the purpose of preventing or avoiding the harms to competition that were identified in the merger decision and whether the remedy proceeded as expected. This practice should be compulsory for all competition agencies, at least for transactions that have been challenged and for those that have been authorized but with doubts about their effect on competition. From a public policy perspective, this is a useful way to make an agency accountable and transparent to consumers and the public.

33. Ex-post evaluations require several resources including monetary and the existence of specialists in competition issues not linked to companies and their representatives to guarantee an independent assessment. These aspects represent the main obstacles to implement studies of this kind, at least in the Mexican jurisdiction.

34. There are different methodologies to measure the efficacy of merger remedies, but, in general, we can identify the next elements considered in all of them: market share, product variety, quality of the offered services and products, innovation, presence of new entrants in the market, prices, costs and consumer welfare.

35. So far, the IFT has not issued a formal ex-post assessment of merger remedies. Instead, it has closely monitored the imposed remedies on landmark decisions, and it has distinguished key elements to determine how effective those remedies have been. Additionally, it has conducted studies to assess the behavior of certain markets after an IFT decision has been placed upon them, specifically in dealing with merger and auction decisions.

6. Merger remedies assessments at the IFT

36. Merger analysis at the IFT is not just about big mergers and acquisitions (M&A) that exceed the filing thresholds contained in article 86 of the Federal Competition Law (LFCE). There is also a competition assessment for transactions presented to the IFT as a regulatory authority in the Telecommunications and Broadcasting sectors (T&B) in terms of Federal Telecommunications and Broadcasting Law (LFTR) (regulatory transactions), including frequency assignment processes. These come as an advantage of bringing the regulatory and antitrust powers in the T&B sectors into the same agency.

37. Here is a brief description of the three types of merger assessment conducted by IFT.

6.1. Merger control for M&A deals, filed in terms of article 86 of LFCE

38. This is a regular merger control process stated under article 90 of the LFCE.¹³ Any transaction that occurs in the telecom and/or broadcasting industry that meets the monetary threshold¹⁴ to be notified must not be consummated until it receives authorization from the IFT. Several of these cases refer to international firms merging across several jurisdictions, and the transactions regularly involve multiple markets.

39. For those transactions in which the IFT observes potential harm to competition, it may reject or condition the transaction using structural and/or behavioral remedies, including divestitures or structural separation, that are designed to prevent possible anticompetitive effects.

40. The IFT has challenged several mergers filed in terms of article 86 of LFCE:

- AT&T-DirectTV merger (2014). Remedies resulted in divestment of AT&T's interest in AMX.¹⁵
- AT&T-Iusacell merger (2014). Remedies to divest fixed telecommunications business of Iusacell (Total Play).¹⁶
- Grupo Televisa/TVI merger (2016). Remedies to divest any participation of Grupo Multimedios in Grupo Televisa.¹⁷
- AT&T-Time Warner merger (2017). Remedies to guarantee: i) access to ATT's programming channels and ii) the independence between SKY México and Time Warner.¹⁸
- Disney-Fox merger (2019). Remedies to divest Fox Sports business in Mexico.¹⁹
- Macquarie-China-Mexico Fund merger (2023). Remedies to divest Macquarie.²⁰

¹³ There is a simplified or expedited version of this merger control process under article 92 of the LFCE. This exception applies in cases where it is notorious that the merger will not hinder, lessen, or impede competition.

¹⁴ Article 86 of the LFCE states the following thresholds:

- The value of the transaction is equivalent in Mexico - as a result of an act or a series of acts directly or indirectly (regardless of the place of execution)- to an amount that exceeds USD103 million (based on the Central Bank - Banxico's exchange rate as of October 30, 2023).
- The value of the assets/sales of the target company exceeds USD103 million, and the merger involves an act or a series of acts by which the acquiror intends to take over 35% or more of the assets or equity of the target.
- The concentration is between two or more economic agents whose annual sales in Mexico or assets in Mexico (either jointly or separately) exceed USD275 million, as a result of an act or a series of acts, and the accumulation of assets or equity in Mexico exceeds USD48 million.

¹⁵ See: <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/vp2piftext131114225.pdf>

¹⁶ See: <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/vp2piftext181214282.pdf>

¹⁷ See: https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/versionpublicapiftext1902167_1.pdf

¹⁸ See: <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/vppif150817487.pdf>

¹⁹ See: <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/verpubpif110319122canxuce.pdf>

²⁰ See: <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/vp120723335vpconfidencial.pdf>

6.2. Merger analysis for regulatory transactions

41. The LFTR²¹ provides that “regulatory transactions” that do not exceed the notification thresholds are subject to an antitrust review when they involve telecom and/or broadcasting spectrum licenses and the purpose of the transaction is to transfer licenses to another company that provides similar services in the same geographical area.

42. On those cases, a filing process under the LFCE is not conducted by the IFT, but rather a merger analysis is carried out during the regulatory approval in terms of the LFTR. Such regulatory transactions may be, among others, acquisition of licensee companies, spectrum swaps, T&B license transfers, and leasing agreements.

43. As in the case of mergers presented in terms of LFCE, the analysis implemented by the IFT on these regulatory transactions has the purpose to determine if any of those could cause the emergence of substantial power or represent potential harms to competition. Then, for those regulatory transactions that pose potential risk to competition, the IFT issues resolutions in terms of the LFTR that may reject the authorization or subject the authorization to remedies.

44. These regulatory transactions are not less important than big M&A deals, as they may be occurring in highly concentrated markets at a local or national geographical level, which makes the IFT’s intervention essential.

45. In addition, regulatory transactions should not be confused with voluntary notifications presented in terms of LFCE, as these type of regulatory transactions’ notification and review is mandatory in terms of LFTR. Although, it could happen that a regulatory transaction could be notified as a voluntary notification in terms of the LFCE, which is not improper.

46. The IFT has challenged several regulatory transactions filed in terms of LFTR with the next implications:

- Radiodifusora XERPR-AM, S.A. de C.V. and Radiodifusora XETAK-AM, S.A. de C.V.’s acquisitions of radio broadcasting licenses in Chiapas, Mexico (2015). Transactions blocked.²²
- Acquisitions of radio broadcasting licenses in Manzanillo and Tecomán, Colima, Mexico (2021). Remedies resulted in separation of two families with cross-common interests in several radio broadcasting license companies.

6.3. Merger analysis for regulatory proceedings

47. The IFT conducts a competition assessment in regulatory proceedings, as it happens in regulatory transactions, by using different elements to evaluate mergers contained in the LFCE. Licensing processes through auctions in the T&B industries are the main subject of this type of competition analysis.

48. When the IFT conducts the bidding processes or auctions on spectrum for T&B services in terms of the LFTR, including tv channels or radio stations licenses, the IFT undertakes two principal tasks. The first task is to incorporate measures to promote and protect competition into the auction rules, including market caps and economic incentives

²¹ Articles 110 and 112.

²² See: https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/versionpublicapif18031590_1.pdf and https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/versionpublicapif18031591_2.pdf

to new entrants. The second task is to carry out an economic competition analysis to evaluate each of the economic agents interested in the bidding process. For the second, the IFT applies the measures integrated in bidding rules to each agent and identifies whether the participation of an economic agent could provoke potential risk to competition in the tender and/or in the market. The IFT has enough powers to block the participation of a specific agent during an auction or to subject its participation to behavioral and/or structural remedies. All this process has the purpose to determine if the firms that manifested their interest to become bidders are suitable to participate in the auction and be eligible for a license.

49. This assessment is done by the IFT under the basis of a merger analysis, as the potential participant firms may be either incumbent players or new entrants in the market where the license is going to be granted. On the one hand, by getting a new license, an incumbent operator may be gaining market power, creating barriers to entry, or simply getting incentives to foreclose the market. On the other hand, by getting a new license, a new entrant is entering the market to compete with incumbent operators. In those cases, a merger assessment allows to allocate limited resources and/or public goods in hands of those that are more suitable, previously determining that their participation do not represent a risk for competition terms.

50. In addition to incorporating measures to promote and protect competition into the IFT-1 (tv services), IFT-4 (radio broadcasting services), IFT-6 (tv services) and IFT-8 (radio broadcasting services) auctions, the IFT has blocked or conditioned the participation of interested economic agents in, among others, the following cases:

- In the IFT-4 radio broadcasting auction. More than 50% of the opinions were conditioned and more than 10 were issued to prevent competition risks.
- In the IFT-6 broadcast television auction. Telsusa and Comunicación 2000 radio companies were conditioned to terminate retransmission agreements with Grupo Televisa.

51. To summarize, a merger assessment is useful in assessing regulatory transactions and regulatory proceedings, and structural or behavioral remedies can also be imposed by the IFT to get an authorization or a telecom and/or broadcasting license as a result of an auction process.

7. Cases of ex-post assessment of merger remedies

52. The LFCE does not impose mandatory ex-post assessment of merger remedies. Nevertheless, the Economic Competition Unit (UCE) of the IFT is starting to delineate a formal study on this regard and some studies and reports have been released to assess the behavior of certain markets after an IFT decision has been placed upon them.²³

53. Considering that a formal study of ex-post assessment of merger remedies has not been implemented, the following paragraphs mention some of the key elements related to ex-post evaluation that the IFT has observed for some cases in which the IFT has imposed remedies.

²³ A full list of the studies done by the IFT's Economic Competition Unit is available in Spanish at this webpage: <https://www.ift.org.mx/industria/competencia-economica/competencia-economica/estudios>

7.1. In M&A deals filed in terms of article 86 of LFCE

7.1.1. *Ex post evaluation of the Disney-Fox case*

54. In August 2018, The Walt Disney Company (Disney) and Twenty-First Century Fox, Inc. (Fox) notified a global merger transaction to the IFT. By virtue of the acquisition, Disney would acquire, among others, Fox's films and tv studios, cable tv channels and international audiovisual content businesses. At the time of notification, Disney owned the ESPN sport channels and Fox owned the Fox Sports channels, including OTT distribution systems. If Disney had taken over the Fox Sports channels, a substantial market concentration would have occurred in the supply of sport pay-tv channels, by giving the acquiror unilateral capacity to affect the way in which those channels are supplied and priced to pay-tv cable operators and, therefore, the users.

55. As a result of the merger control process, the IFT ordered Disney to divest the Fox Sport pay-tv channel, including OTT distribution systems, as a condition to authorize the proposed merger. Disney accepted the condition and then closed the deal.²⁴ The purpose of such a structural remedy was for Disney to transfer the Fox Sport pay-tv channels and the OTT distribution system involved to an independent third-party purchaser, who could take over the divested business with the purpose to preserve a suitable and viable competitor in the market of sports pay-tv channels.

56. Unlike traditional business divestitures that only require the selling of physical infrastructure or tangible assets, Fox Sport's divestiture comprised tangible and intangible assets of an ongoing business in which the market value of the company resided, among others, on its licensing agreements and content rights.²⁵

57. In November 2021, Grupo Lauman Holdings, S. de R.L. de C.V. (Grupo Lauman), an independent third-party purchaser, took over the divested business. Since the transferring of the Fox Sport channels' business to Grupo Lauman, the IFT continues overseeing any misconduct that may lead to antitrust violations in terms of its Disney-Fox merger's decision. Precisely, some of the remedies imposed to the merger that complemented the structural remedy will expire later in time (none of them earlier than November 2024), such as the remedies of not compete, not repurchase, not recruit key personnel and not affect the viability and competitiveness of the divested business.

58. To assess the effectiveness of the Disney-Fox merger remedies, the IFT has corroborated the presence of the following key elements:

- a) The HHI has remained stable before and after the merger.

²⁴ There were also behavioral remedies imposed by the IFT in the market for factual channels, but those are not mentioned for the purpose of this document.

²⁵ As a full description of the divestiture process would take dozens of pages, it suffices to say that substantive decisions of the IFT in this process involved: i) identifying and separating all the assets necessary to preserve the value of the divested company, ii) taking proper measures to guarantee a successful transfer of the ongoing business, iii) approving and coordinating the activities of internationals selling trustees and monitoring trustee, iv) assessing potential purchasers, and iv) overseeing the assignments and license transfers of the sports pay-tv content from Fox Corp. to the new independent third-party purchaser in competitive, viable and suitable terms.

- b) The divested business has remained stable in preserving content rights, licensing agreements, subscribers, clients, and suppliers.²⁶
- c) The divested business has preserved relevant content and broadcasting rights.
- d) The rating of the divested business has remained with minimal changes in the post-merger scenario.
- e) Disney cannot compete against the divested business for broadcasting rights or content.
- f) The position of Disney and of the divested business has remained similar as in the pre-merger scenario.
- g) Interviews with market participants have been conducted to corroborate the enforcement of the merger remedies and their appropriateness.

59. The aforementioned elements anticipate that the structural remedy imposed to the Disney-Fox global transaction by the IFT has proven to be successful, as it has effectively prevented from giving Disney a unilateral capacity to affect the supply and pricing of sports pay-tv channels to pay-tv cable operators.

7.2. In regulatory transactions

7.2.1. Structural separation of in local FM commercial radio stations

60. In 2020, two FM commercial radio stations licensees (transferors) notified a regulatory transaction consisting of a transfer of their respective radio licenses to two companies (transferees) owned by a Family conglomerate with presence in different regions across the country. Under the LFTR,²⁷ the transactions cannot be consummated until they receive competition and regulatory clearance from the IFT.

61. Following a competition assessment (in the form of merger analysis) conducted by the UCE of the IFT, it was concluded that 1) the transaction could result in the obtaining of market power of the transferee family conglomerate, 2) HHI levels in the market of FM commercial radio broadcasting services in the coverage area would have increased beyond 2 500 point, with an HHI difference in the pre-merger and post-merger scenarios higher than 600 points, and 3) the transaction would have imposed barriers to entry and increased incentives from the transferee to behave anticompetitively. IFT ordered the transferee to be divided into two separate groups (structural separation of the transferee group) as it was integrated of at least two different families with cross-common shares in many others radio stations companies across the country, which lead the IFT to consider those families belong the same undertaking. If the undertaking didn't accept the order, the transaction would have been blocked.

62. This was a landmark case in the FM commercial radio broadcasting market, because after this decision was issued, the different families that integrated the transferee group decided to breakup and to end their cross-common share relationship in several radio companies, so they could compete and operate individually in different regions across the country. Thus, the transferee group was divided into two independent groups.

²⁶ Some broadcasting rights have expired (the few), while others have been added to the pay-tv programming (the most).

²⁷Articles 110 and 112.

63. To assess the effectiveness of the remedies imposed in this case, the IFT recently has corroborated key elements:

- a) The structural separation of the transferee group has substantially declined the HHI levels in local areas where the group used to participate.
- b) The IFT decision by itself ignited and influenced the structural separation of the group, to the point that this group and its members have asked the UCE for guidance during this divesture process.

64. The elements pointed out in this document are indicators that the remedies taken by IFT in this case has proven to be successful.

7.3. In regulatory proceedings

7.3.1. Blocking enterprises with substantial market power to participate on auctions and creating economic incentives to get new entrants

65. In 2017, the IFT conducted an auction for 148 commercial digital tv channels to render services across 17 States in the country (Auction IFT-6). The auction rules included a 12MHz spectrum cap for each covered area and established incentives to pure new competitors.

66. Following a competition assessment (in the form of a merger analysis), the IFT decided to condition 2 out of 16 participants to get into the bidding process by ordering them to break up their retransmission agreements with the incumbent operator with high market power nationally, Grupo Televisa. Otherwise, they would have been banned from getting into the auction in the locations covered by the retransmission agreements.

67. Although those 2 conditioned participants were not part of Grupo Televisa, the mere existence of the retransmission agreements raised concerns for bringing anticompetitive coordination with Grupo Televisa in the commercial digital tv market, especially if those two participants became winners in the auction for the locations covered by the retransmission agreements. To mitigate those concerns, the IFT ordered those 2 participants to cease their commercial relationship with Grupo Televisa completely before entering the bidding process.

68. The tailored spectrum caps and the incentives to new competitors included in the auction rules, coupled with the competition assessment over those 2 conditioned participants, proved to be effective remedies, because:

- a) As a result of the auction, 32 channels were granted in 29 coverage areas across the country, which comprises 17 States and provides tv services to approximately 45% of the national population.
- b) HHI levels in the commercial digital tv broadcasting services reduced in 339 points nationally.
- c) 4 out of 13 winners in the auction were declared pure new entrants in the national tv broadcasting services.
- d) Incumbent market operators with high market power, such as Grupo Televisa and TV Azteca reduced their market share, in terms of the number of transmission channels licensed.
- e) 10 new companies entered the national market and compete fiercely with incumbent operators.

- f) The participation and positive results on new entrants also proved the effectiveness of giving economic incentives to pure new companies, and how efficient becomes to limit incumbent operators from entering a bid.
69. The elements included in this document are indicators that the measures taken by IFT in the auction for 148 commercial digital tv channels has proven to be successful.

8. Final remarks

70. An ex-post evaluation of merger decisions should be a compulsory practice in all competition agencies at least for challenged transactions. Merger analysis at the IFT is not just about 1) big M&A transactions that exceed the notification thresholds. IFT implement merger analysis for 2) regulatory transactions review and 3) regulatory proceedings, and these come as an advantage of bringing the regulatory and antitrust powers into the same agency. In this document, key elements to implement ex-post assessment of merger remedies have been identified so as the cases in which IFT could begin this analysis. The key elements identified in this document may anticipate how successful certain remedies have proven to be in the three types of merger assessments done by the IFT.