THOUGHT LEADERSHIP FROM OUR EXPERTS

JURISDICTION OF ANTITRUST AUTHORITIES IN MEXICO: THE CASE OF THE NOKIA / ALCATEL-LUCENT MERGER

23/06/2016 Luis Gerardo García Santos Coy (/experts/creel-garcia-cuellar-aiza-y-enriquez/garcia-santos-coy-luis-gerardo/ga731435), Creel García-Cuéllar Aiza y Enríquez (/firms/creel-garcia-cuellar-aiza-y-enriquez/creel0ga), Mexico (/countries/mexico/mx) | Jorge Kargl Pavia (/experts/creel-garcia-cuellar-aiza-y-enriquez/pavia-jorge-kargl/lalyghvn), Creel García-Cuéllar Aiza y Enríquez (/firms/creel-garcia-cuellar-aiza-y-enriquez/creel0ga), Mexico (/countries/mexico/mx) Mauricio Serralde Rodríguez (/experts/creel-garcia-cuellar-aiza-y-enriquez/serralde-rodriguez-mauricio/lazqsbuh), Creel García-Cuéllar Aiza y Enríquez (/firms/creel-garcia-cuellar-aiza-y-enriquez/creel0ga), Mexico (/countries/mexico/mx)

Introduction

In Mexico (as in other jurisdictions), certain transactions[2] require approval on behalf of the antitrust authorities prior to their execution. In this regard, the analysis of a concentration is carried out by either of two different authorities: the Federal Institute of Telecommunications ("IFT"), having exclusive jurisdiction over the telecommunications and broadcasting sectors ("T&B") and the Federal Economic Competition Commission ("COFECE", and together with IFT, the "Antitrust Authorities"), with exclusive jurisdiction over all other sectors.[3]

Although this distinction is easily made in certain cases (i.e., transactions among T&B concessionaires), there are other which may not be black or white and may raise questions as to whether a transaction falls or not within the jurisdiction of COFECE or IFT.

In this regard, the Federal Economic Competition Law (the "Competition Law") sets forth a mechanism in case both Antitrust Authorities consider they have jurisdiction over a specific case (or that they do not), by which the case file must be forwarded to a Federal Collegiate Circuit Court specialized in competition, broadcasting and telecommunications matters (the "Circuit Court"), which will finally rule on which Antitrust Authority has jurisdiction.

This mechanism was first put to a test in September 2015 in the context of the Nokia / Alcatel-Lucent merger.4

The case

In April, 2015, Nokia and Alcatel-Lucent announced their intention to engage in a transaction by means of an offer on behalf of Nokia to acquire Alcatel-Lucent (the "Transaction").

The parties, after previous discussions with IFT, decided to submit the pre-merger filing to IFT and during the last stages of the merger review, COFECE informed the IFT that it considered itself to have jurisdiction over the case.

As the IFT insisted it had jurisdiction over the case, it initiated the mechanism provided for in the Competition Law and forwarded the case file to a Circuit Court.

The antitrust authorities' arguments

COFECE's main arguments to sustain its jurisdiction were the following:

(i) The manufacturing of the involved products (on its own) is not a part of the production process of the provision of telecommunications services and therefore, should be considered within the manufacturing sector; and

(ii) Neither Nokia nor Alcatel-Lucent are concessionaires nor providers of telecommunications services.

IFT's main arguments were the following:

(a) The products and services involved are used exclusively in telecommunications networks;

(b) IFT has jurisdiction over technical aspects involving infrastructure and equipment to be connected to telecommunications networks;

(c) The products involved in the Transaction are subject to technical standards imposed by IFT;

(d) IFT has jurisdiction over all activities related to the offer and demand in those markets in which the Transaction has an impact;

(e) It is not possible to assess the effects of the Transaction without analysing the effect it may have in the competitive landscape within the telecommunications services market;

(f) IFT's authority over the telecommunications sector is not limited to concessionaires and service providers, but it also includes the areas of infrastructure and devices that connect to telecommunications networks;

(g) In 2014, IFT analysed a transaction involving the lease of telecommunications sites (passive infrastructure), in which COFECE denied having jurisdiction by considering that the market belonged to the telecommunications and broadcasting sectors, regardless of the parties not being concessionaires or service providers.

The Circuit Court's ruling

When analysing the conflict, the Circuit Court determined that in merger review, the object of the analysis is not limited to the relevant market involved in a transaction, but should also address related markets, which requires knowledge and a critical analysis of the sector to which the relevant market belongs to.

In this regard, the Circuit Court considered that the telecommunications sector involves not only the operation of telecommunications networks and the provision of telecommunications services, but also aspects such as passive infrastructure, essential inputs and devices which are connected to the networks, as well as the technological conditions required for the provision of telecommunications services (such as interconnection and network interoperability).

The Circuit Court also concluded that a competitive analysis within the market of telecommunications networks cannot be segmented attending to the different stages of the production process (i.e., the production of inputs and the operation of the network) as there is a clear influence and dependency between one-another. Further, the Circuit Court considered that the analysis of the Transaction required a deep technical knowledge of the telecommunications sector, which was inherent to IFT's purpose.

Consequently, the Circuit Court ruled in favour of IFT, confirming its jurisdiction over the Transaction.

Conclusion

The ruling of the Circuit Court in the context of the Nokia / Alcatel-Lucent merger was the first time ever in which the mechanism for deciding jurisdiction among the Antitrust Authorities in Mexico was applied.

The ruling is relevant in the sense that it sets forth additional elements to those included in the Mexican Constitution to determine when a transaction should be deemed as part of the T&B sectors pursuant to the markets that may be affected.

Consequently, in those cases in which it is not clear whether a relevant product belongs to the T&B sector, economic agents should carefully analyze related markets in which a transaction may have an impact, as well as the level of specialization required to analyze in detail the relevant market and any affected related markets with respect to a given transaction.

1. Luis Gerardo García Santos Coy and Mauricio Serralde Rodríguez are partners and Jorge Kargl Pavía is a senior associate at Creel, García-Cuéllar, Aiza y Enríquez SC.
2. The Competition Law addresses merger review under the name of concentrations (*concentraciones*), which involves not only mergers but also the acquisition of control or any other similar acts or transactions that combine corporations, associations, partnerships, shares, trusts or assets in general between competitors, suppliers, customers or any other economic agents.
3. Both agencies were created as autonomous constitutional bodies (independent from the Executive branch) as a result of a constitutional amendment passed in June 2013.
4. File C.C.A. 2/2015; Second Collegiate Circuit Court specialized in competition, broadcasting and telecommunications matters.



Jorge Kargl Pavia

Jorge Kargl Pavía is a senior associate in the competition and antitrust practice at the firm. He...

Read more (/experts/creel-garcia-cuellar-aiza-y-enriquez/pavia-jorge-kargl/lalyghvn)

MORE FROM

Rising stars (/practiceareas/rising-stars/ris341)

Creel García-Cuéllar Aiza y Enríquez (/firms/creel-garcia-cuellar-aiza-y-enriquez/creel0ga)

Mexico (/countries/mexico/mx)

© Copyright Expert Guides v 1.0.784