

Turf wars: the threat of stand-offs between Mexico's competition enforcers

Friday, 22 July 2016 (*1 month ago*) • Journal Feature Issue: [Volume 19 - Issue 7](#)

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When overhauling the country's antitrust enforcement in 2013, the Mexican legislature made the unusual decision to take away the competition agency's jurisdiction over the telecommunications sector – a move that many Mexican competition lawyers still question and criticise, but enforcers praise. **Alex Wilts** reports.

Since it was established in 1993, Mexico's competition enforcer has faced the daunting task of confronting the country's horde of intensely concentrated industries. Several key sectors have a history of being dominated by only a few players, and the telecommunications market is no exception.

For decades, Mexican consumers had few options when selecting television and telephone providers. Even as technology evolved over the past 20 years – ushering in broadband, expanded pay-TV offerings and mobile phones – customers' choices remained the same: América Móvil, Grupo Televisa, TV Azteca.

A prior competition agency, the Federal Competition Commission (Cofeco), opened several inquiries into the country's telecoms and broadband industries, only to watch its decisions get stalled by a lengthy judicial review process that could span years. Meanwhile, Mexico's telecommunications regulator, Cofetel, was forced to wait in the shadows, unable to act until one of Cofeco's declarations of dominance finally stuck.

To help deal with Mexico's monopoly problem, President Enrique Peña Nieto in 2013 signed into law far-reaching reforms that established two new competition enforcers: the Federal Telecommunications Institute (IFT) and the Federal Economic Competition Commission (COFEC). IFT now has the exclusive authority to regulate and enforce competition matters in Mexico's highly

concentrated telecoms and media markets, while COFECE is the nation's antitrust enforcer for all other industries.

Peña Nieto said at the time of the reforms that the IFT would give the "Mexican state increased capabilities for ensuring economic competition in all sectors and especially in telecommunications and radio broadcasting".

The law created a new, more powerful telecoms authority with the ability to use asymmetric regulation, meaning companies in the same industry can be subjected to different levels of enforcement. For example, the IFT can now compel any carrier with a market share greater than 50 per cent to sell off assets to smaller rivals.

Additionally, the constitutional reform established a new system of specialised courts to oversee competition law and telecoms cases. In a submission to the Organisation for Economic Co-operation and Development, Mexico's government said the courts are designed to handle cases more effectively and efficiently. Litigants can challenge only final resolutions by COFECE before the tribunals, which the government said would "avoid paralysis through the abuse of legal recourses".

The pros

Mexican competition lawyers have overwhelmingly criticised the new institutional design, calling it a terrible idea. However, Alejandra Palacios Prieto, chair of COFECE, has publicly praised the government's decision to cut telecommunications from her agency's remit.

"I call it a blessing in disguise because we have had the opportunity to focus on other sectors that are equally as important as the telecommunications one for Mexican consumers," Palacios says.

COFECE's investigation unit has become increasingly active since 2013 and has opened new probes in a range of industries. Early last year, the commission launched its first investigation of potential barriers to competition: a probe of how take-off and landing slots are assigned at Mexico City's international airport. This marked the first time the agency used its powers to regulate essential facilities since the amendments to the competition legislation gave it the prerogative.

Also in 2015, the authority began two other separate inquiries into the country's pension fund sector and the market for media information monitoring services. Both probes should yield evidence of whether the companies being investigated colluded with rivals in their respective markets.

Before the reforms, telecommunications matters demanded a large portion of the competition commission's time and resources, despite making up less than 5 per cent of the country's gross domestic product.

The former agency, Cofeco, spent more than a year tied up in a case challenging the mobile phone joint venture between mass media company Televisa and mobile telephone operator Iusacell. The authority eventually approved the deal in 2012, six months after blocking it over concerns it would invite collusion in the TV advertising and pay-TV markets. Also in 2012, Cofeco cancelled a record US\$1 billion fine against Telcel, the Mexican mobile phone arm of América Móvil. The agency had handed down the penalty in 2011 following a long-running abuse of dominance investigation.

When Palacios first became head of the new agency in 2014, she says, Mexican news reporters would ask her about the responsibilities of the authority.

"Then I would say: 'We do everything but telecom and broadcasting,'" she recounts. "So their automatic answer would be: 'What do you do?' And my answer was: 'We need to monitor the other 95 per cent of GDP.'"

Officials at the new sector regulator also praise the division of duties.

"I believe this institutional change has been very positive, not only for telecoms, but also for these other sectors," IFT commissioner María Elena Estavillo says. "Their activity has been centring on sectors and matters that they had not analysed before. It's clear that they've been widening their scope."

According to a January 2015 report by the Organisation for Economic Co-operation and Development (OECD), the dominant operator in Mexico's fixed-line telephony market is Telmex, with an 80 per cent market share. Meanwhile, Telcel has a 70 per cent share in the mobile market. OECD studies have suggested that data prices are relatively high.

Amendments to the country's competition law gave IFT the power to force companies to divest assets if they have too much control over a market. In 2014,

América Móvil decided to sell off some assets to a new independent company, thereby reducing its share in landlines and mobile phones to below 50 per cent to appease the agency. The company made the announcement after IFT declared it to be the dominant company in Mexico's phone market, which likely would have meant the forced divestiture of large slabs of the telecom's empire. At the time, América Móvil had control over about 70 per cent of Mexico's mobile market and 60 per cent of fixed lines.

IFT also launched its first investigation into market power in the pay-TV sector following the passing of the new measure. The inquiry ended in 2015 when the agency cleared Televisa and its pay-TV concessionaires of holding market power, despite a 62.2 percent national market share.

The telecoms regulator published a report this year discussing how the government's implementation of the reforms has led to greater competition and significantly reduced prices in telecoms markets. Despite inflation of 9.1 per cent in Mexico between June 2013 and December 2015, telecommunications service prices fell by 23.2 per cent over that period. During the same period, the international long-distance call rates fell 40 per cent due to the agency's elimination of domestic long-distance call fees, the report says. Meanwhile, mobile phone call prices decreased more than 32 per cent.

The IFT noted that pay-TV services in Mexico have also grown more than 30 per cent since the telecoms reform: "Consequently, nearly 60 per cent of households and companies in Mexico now have cable or satellite pay-TV services."

According to the IFT, telecommunications GDP and private infrastructure investment experienced virtually no significant growth between 2013 and 2014. However, investment from 2014 to 2015 grew 34.8 per cent, while telecommunications GDP increased by 11 per cent over the same period.

"This means that 2015 was a year in which there was a remarkable rise in the sector's GDP together with strong growth in investment, which is a positive signal for the telecommunications in Mexico for 2016," the report says.

However, the report also acknowledges that not enough time has passed since the government passed the amendments for a "substantial structural reconfiguration" of the telecoms and broadcasting sectors to have occurred.

The cons

Despite signs of telecoms market improvements and COFECE's enhanced ability to focus on other sectors, observers say the new institutional design is the one thing the government got wrong when reforming competition enforcement.

Eleanor Fox, a professor at New York University School of Law, says Mexico should not have taken the power to enforce antitrust law against telecoms away from COFECE. Sector regulators often become compromised because of frequent interactions with the regulated, she says.

"They deal with the same industry people all of the time and tend to see problems from their point of view," Fox says. "You can in theory have a good regulator that takes care of the problem, but you also can have regulators that are captured [by the telecoms owners], and they don't take care of the problem."

While COFECE is solely an antitrust enforcer, IFT regulates Mexico's telecommunications sector and also enforces competition law with regard to the industry. Fox says the old competition commission provided an independent eye to further safeguard public interest, in addition to the sector-specific agency.

"The regulator almost always in any event is going to have the power to attack anticompetitive conduct," Fox says. "And the question is whether the competition authority should also have the power" – which it no longer does over Mexico's telecoms market.

Eduardo Pérez Motta, who headed the predecessor agency Cofeco from 2003 to 2013, expressed a similar point at an antitrust symposium at Georgetown University in 2013. He criticised the structure of the country's new competition regime, on the grounds that "the sectoral regulator tends to be logically more captured by [the] regulated agents" than a competition authority dealing with all economic actors would be.

Further clarifying what he meant, Pérez Motta said: "The problem is they fall in love with the regulator guys. Let's put it that way."

One Mexican competition lawyer says that having two authorities dealing with different sectors is unhealthy because COFECE and IFT have different sets of criteria for their economic analyses, creating confusion among practitioners.

Another says: “Sometimes it’s not clear what agency should deal with certain matters.”

Since COFECE and IFT were established less than three years ago, there has been one case in which it became public that both authorities thought they had jurisdiction: the *Nokia/Alcatel-Lucent* deal. Information technology company Nokia and telecommunications equipment provider Alcatel-Lucent notified IFT of their merger in June 2015. The agency began its merger review, but soon after, COFECE claimed jurisdiction.

The Second Specialised Court issued its decision that IFT had authority to review the merger in October 2015, and the agency went on to approve the tie-up later that month. Those familiar with the case said the jurisdictional issue was resolved relatively quickly; the law gives the court up to 10 days to decide which agency has jurisdiction.

“A specialised tribunal decided who had jurisdiction over the case and the problem was solved,” Palacios says. “It sounds complicated, but in reality hasn’t been an issue.”

IFT commissioner María Elena Estavillo adds that as technology evolves, it may become harder to determine whether a case falls under the purview of the telecoms enforcer or COFECE. “But we will have to go to the court in those cases,” she says. “And this [Nokia] case will give us some light in other cases.”

However, competition lawyers in Mexico say that jurisdictional issues could lead to further enforcement inefficiencies, particularly when it comes to mergers – where deals left pending for too long could die.

One practitioner says the tussle over the *Nokia/Alcatel-Lucent* tie-up is proof that the institutional design “was not a good idea”, because the IFT had to suspend its proceedings while waiting for the court’s decision on which authority should conduct the merger review.

Kenya has witnessed similar turf wars due to the communications and competition regulators’ overlap in jurisdiction, particularly regarding which institution should handle certain dominance and anticompetitive behaviour cases. For example, the Competition Authority of Kenya reportedly foiled the Communications Authority’s attempts last year to declare the mobile network

operator Safaricom a dominant market player, because the competition authority disputed the assertion.

In January 2016, the Kenyan parliament helped resolve the institutions' jurisdictional issues by clarifying that the Competition Authority is the primary regulator for all competition matters. The sector regulator must confer with the competition authority when evaluating a telecom's market power and determining abuse of dominance.

Other potential problems have stemmed from the Mexican government's separating telecom competition enforcement entirely from the country's main antitrust agency.

IFT commissioner Estavillo concedes that it is difficult to find lawyers and economists that have experience in the antitrust field as well as specialised knowledge of the telecom sector.

"To find people knowledgeable in both these areas is not easy," Estavillo says.

Meanwhile, Mexican competition law practitioners have expressed unease that an authority with what they say is little to no experience in competition matters is resolving telecommunications antitrust cases.

Wait and see

Fernando Carreño Nuñez de Alvarez at Von Wobeser y Sierra in Mexico City sees both sides of the debate. "There are cases in which it could be unclear which authority is competent to act," he says.

Even so, he noted that both COFECE and IFT have been increasing their number of cases, as well as the sophistication of their arguments. Last year, COFECE received three times the number of total leniency applications it received in 2014. The commission also started six abuse of dominance investigations compared with only two the year before.

In addition to the IFT's investigation into Televisa's alleged market power in the pay-TV sector, the agency has also initiated probes into possible monopolistic practices in the markets for interconnection services, as well as broadband.

The decision of separate the Mexican antitrust authorities into COFECE and IFT “was initially viewed by many practitioners as a possible regression on the antitrust practice,” he says. “It is still early to analyse the effects of the division of antitrust authorities in Mexico.”

“However, based on the results reached by both agencies, it appears that sceptical practitioners may be wrong.”