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# JURISDICTION OF ANTITRUST AUTHORITIES IN MEXICO, A FOLLOW-UP: THE CASE OF AT&T’S ACQUISITION OF TIME WARNER (THE SECOND PRECEDENT)

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## Introduction

In the 2016 edition of LMG Rising Stars 2016<sup>3</sup>, we analysed the implications and reasoning set forth in the ruling issued by the Mexican Second Collegiate Circuit Court specialized in competition, broadcasting and telecommunications matters (the "Circuit Court") in the context of the Nokia / Alcatel-Lucent merger, first time ever in which the mechanism for deciding jurisdiction among the Federal Economic Competition Commission<sup>4</sup> ("COFECE") and the Federal Institute of Telecommunications ("IFT", and together with COFECE, the "Antitrust Authorities") was applied.

In March, 2017, the same Circuit Court ruled with respect to jurisdiction of the Antitrust Authorities in the context of AT&T's acquisition of Time Warner<sup>5</sup>. This is the second case in which a Circuit Court has ruled in a jurisdictional conflict among Antitrust Authorities. Both rulings are highly complementary, as they provide additional guidance to economic agents in those cases in which it is not clear whether a relevant market belongs to the T&B sectors.

## Background (Nokia / Alcatel-Lucent case)

In the Nokia / Alcatel-Lucent case, the parties filed the pre-merger notification with IFT considering such authority had full jurisdiction over the transaction; COFECE did not agree and claimed jurisdiction over the transaction. This triggered the mechanisms provided for in the Federal Economic Competition Law (the "Competition Law") in order to solve such jurisdictional issue, requiring the Circuit Court to issue a ruling. The Circuit Court ruled that in the context of merger review, the object of the analysis is not limited to the relevant market directly 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.

As a consequence, the Circuit Court ruled in favour of the IFT (as proposed by the parties in the pre-merger filing), stating that the telecommunications sector involves not only the operation of telecommunications networks and the provision of telecommunications services, but also related markets 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 (including interconnection and network interoperability); all of which fall within IFT's jurisdiction.

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.

This ruling however, did not address how jurisdiction should be assigned in the analysis of transactions involving diversified relevant markets, with only some markets directly related to T&B sectors.

## The AT&T / Time Warner Case

In October, 2016, AT&T announced its intention to acquire Time Warner (the "Transaction"). AT&T is a telecommunications service provider, whereas Time Warner is a global media and entertainment company engaged in several industries and markets, including audio-visual content for telecommunications and broadcasting services (including OTT services) ("T&B"); production and licensing of motion pictures for distribution to movie theatres and other exhibitors; distribution of content in physical media and digitally; licensing of videogames for digital and physical distribution; licensing of IP for consumer products; and publications and licensing of comic books.

In this case, the parties decided to submit two different pre-merger filings to each of IFT and COFECE, attending to the specific sector substantially related to each of the markets involved in the Transaction, submitting to IFT's review the analysis of markets related to content for the provision of T&B services and submitting to COFECE the analysis of all other markets involved in the transaction, including theatrical films, videogames, content for home entertainment (digital and physical media), IP for consumer products and comic books.

COFECE agreed with the parties' analysis and conclusions; however, IFT, in an attempt to extend the scope of the Nokia / Alcatel-Lucent case, claimed jurisdiction over all markets involved in the Transaction. As COFECE did not agree with IFT's claim, COFECE initiated the mechanism provided for in the Competition

Law and the case file was assigned to the Second Circuit Court.

### The Antitrust Authorities' Arguments

IFT's main arguments to sustain its jurisdiction over all markets were the following:

- Pursuant to the "related cause" principle (acknowledged by the Circuit Court in the Nokia/Alcatel-Lucent ruling), the Transaction should be analysed by a single antitrust authority in order to avoid contradictory decisions;
- All (or most) products and services offered by Time Warner are susceptible of becoming content commercialized and distributed through platforms subject to IFT's jurisdiction;
- Although the Transaction involves markets which do not belong to the T&B sectors, there is sufficient evidence to consider that the main effects of the Transaction will take place in such sectors;
- The parties' activities must be analysed as a whole, and not on a separate manner; otherwise, the Antitrust Authorities would not be able to analyse all relevant aspects of the Transaction and therefore, the analysis would be incomplete; and
- IFT has jurisdiction over content pursuant to the Federal Telecommunications and Broadcasting Law.

COFECE's main arguments were the following:

- IFT's jurisdiction is limited to matters in the T&B sectors and there are no grounds to sustain that IFT has the authority to review the effects of the Transaction in any other sector;
- IFT did not provide any technical arguments evidencing that all markets involved in the Transaction are substantially related to the T&B sectors;
- The parties' activities may be clearly divided into those related to the T&B sectors and those which are completely independent and autonomous therefrom, which should be analysed by COFECE;
- Regardless of the fact that all content may, at some point, be distributed through T&B services, such markets are independent from the T&B sector. Considering otherwise would imply that IFT has jurisdiction over aspects such as the price of movie theatre tickets or physical discs;
- Content delivered through physical media will only have an impact in T&B services when such content is delivered through such services, but not before and, therefore, will only fall within IFT's jurisdiction at that point in time and only with respect to the licensing of such content for its distribution through T&B services;
- Even when the digital distribution of content (e.g., videogames) requires an Internet connection, such products have no impact whatsoever in the provision of such T&B services and therefore, any potential impact thereat is ancillary at the most;
- The markets of the licensing of IP for consumer products, publications and licensing of comic books have no link whatsoever with the T&B sectors;
- Even if IFT has jurisdiction regarding content, its authority is limited to supervising T&B service providers include content ratings in their transmissions and such authority is not applicable to any other content-related aspect;
- Different forms of distribution of a product can and should be analysed separately if such distribution forms are independent from one-another;
- The "related cause" principle acknowledged in the Nokia/Alcatel-Lucent ruling was based on the specific products and services involved in such transaction, and therefore, the applicability of this criteria must be determined on a case-by-case basis; and
- In those cases in which a transaction has an impact in diversified and independent markets, some involving the T&B sectors and some others involving different sectors, such transaction must be analysed by both IFT and COFECE attending to their jurisdiction over each market.

### The Circuit Court's Ruling

When analysing the conflict, the Circuit Court once again concurred with the form and terms on which the parties proposed and notified the transaction, by agreeing with COFECE's arguments (which were also presented by the parties to the Transaction), and therefore concluding that the determination of IFT's and COFECE's jurisdiction follows several criteria, including specialization, which depends on the level of complexity and technicality assigned required for a specific analysis.

The Circuit Court stated that specialization does not prevent both IFT and COFECE from analysing a transaction in the context of their respective jurisdictions if a transaction has an impact in diversified and independent markets, which may or may not be related to the T&B sectors, provided that such markets can function autonomously.

Lastly, the Circuit Court further clarified the extent of the ruling issued in the Nokia/Alcatel-Lucent case, stating that a jurisdictional analysis based on whether specific products may be a part of the production chain for the provision of T&B services may be helpful, but is not definitive, and whether such products or services are substantially related to the T&B sectors must also be taken into consideration.

### 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. In such case, the Circuit Court concluded that 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.

Such ruling is now complemented with the ruling in the AT&T /Time Warner case, as the Circuit Court has further stated that jurisdiction is not decided based only on whether a market is linked to the provision of T&B services, but also on whether a specific market is "substantially" related thereto.

This distinction is relevant as even when a specific product or service may have a link to T&B services (e.g., products delivered through T&B services), if such link is ancillary and not substantial, such market will fall within COFECE's jurisdiction.

These two precedents now constitute a landmark for future jurisdictional disputes among the IFT and COFECE.

1. The authors participated in both precedents representing their clients.
2. Luis Gerardo García Santos Coy and Mauricio Serralde Rodríguez are partners and Jorge Kargl Pavia is a senior associate at Creel, García-Cuellar, Aiza y Enríquez SC.
3. Available online at <https://www.expertguides.com/articles/jurisdiction-of-antitrust-authorities-in-mexico-the-case-of-the-nokia-alcatel-lucent-merger/ARCWESRA> (/articles/jurisdiction-of-antitrust-authorities-in-mexico-the-case-of-the-nokia-alcatel-lucent-merger/ARCWESRA).
4. COFECE is the antitrust authority with jurisdiction over all markets and sectors, except for the telecommunications and broadcasting sectors which are reserved exclusively to IFT.
5. File C.C.A. 1/2017; Second Collegiate Circuit Court specialized in competition, broadcasting and telecommunications matters.



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