

# COFECE deemed to have jurisdiction to review Uber-Cornershop merger

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## Facts Decision Comment

In Mexico, jurisdiction over competition and antitrust cases is divided between the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT). The IFT has jurisdiction in the broadcasting and telecoms sectors, while COFECE oversees all other sectors.

### Facts

In October 2019 Uber and Cornershop filed a merger notification before COFECE. The IFT subsequently considered itself to be the competent authority to review the merger since it would involve a technical analysis of internet use and providers, algorithms, data centres and affect regulatory matters such as network neutrality.

In November 2019 COFECE and the IFT asked the First Collegiate Court Specialised in Economic Competition, Broadcasting and Telecommunications (the Specialised Court) to determine which authority has jurisdiction to review the merger. [\(1\)](#)

### Decision

On 8 June 2020, after a long procedure and delays owing to the COVID-19 pandemic, the Specialised Court ruled in favour of COFECE, based on the following rationale:

- Uber and Cornershop are not telecoms licensees and use only telecoms services (as access to internet services) to provide their services through a digital platform;
- Uber and Cornershop provide logistics and intermediary services between consumers, drivers and distributors and not telecoms services, thus the competition analysis should consider the effect that the merger may have in the markets for logistics and intermediary services (including the traditional ones), which fall under the competence of COFECE; and
- the notifying parties use the Internet as an input, which is neither the service that they provide nor the source of their revenues.

The Specialised Court added that the competent authority must have the technical capabilities to be able to identify the relevant markets involved; otherwise, the analysis of the concentration would be insufficient to guarantee the competition process.

This decision set an important precedent for determining the competences of COFECE and the IFT to review mergers in the digital age, although the Specialised Court also envisaged that the jurisdictional analysis may be case by case.

### Comment

The increasing use of technology for essential and non-essential everyday activities stresses the relevance of digital platforms and tools which allow a wide variety of goods and services to be offered. As such, mergers between such platforms should be carefully analysed and the corresponding procedure should be time sensitive, particularly if incidental proceedings (eg, a jurisdictional conflict) are conducted before studying a merger on its merits.

The above case was not the first conflict between COFECE and the IFT over jurisdiction (eg, the Nokia-Alcatel [\(2\)](#) and AT&T-Time Warner [\(3\)](#) mergers); however, it is the first case involving digital platforms. The decision is considered to set an important precedent on the jurisdictions of COFECE and the IFT; however, it must be borne in mind that the conflict was resolved six months after being

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filed, while the Chilean antitrust agency authorised the transaction a week later.

Cases involving digital platforms have several elements (eg, a variety of services and products may be offered by and several parties may participate on such platforms) that make it hard to determine whether COFECE or IFT has jurisdiction to perform the review. Therefore, specific criteria on such matters must be determined to avoid future delays such as that seen in the Uber-Cornershop merger.

Despite the IFT's jurisdiction claim based on technical expertise, the Specialised Court ruled that the operation of the platforms used by Uber and Cornershop were not the markets in need of revision, especially considering that the logistics and intermediary services provided therethrough are a source of revenue for the companies.

The Specialised Court's decision suggests that using jurisdictional standards in cases involving digital platforms might be useful not only for concentrations, but also antitrust investigations. The key issue is to identify the predominant services or products being offered through such platforms and the revenue stream of the companies managing them. For example, the IFT would be deemed to have jurisdiction if the services provided remain within said platforms as social networks, e-advertising, streaming media services and financial services (eg, cryptocurrency).

Although, the Specialised Court's rationale contemplated that neither Uber nor Cornershop were concessionaires of telecoms and broadcasting networks, this might not be a general criterion to apply, since jurisdiction should be determined based on the market of the companies involved rather than their intrinsic characteristics. For example, the IFT might be considered competent for a merger involving streaming media platforms such as Amazon and Netflix, even though they are not concessionaires of the telecoms network under Mexican law (at least not yet).

On the other hand, COFECE might be competent to analyse cases involving digital platforms that provide services or products that do not remain on the platform (eg, services relating to delivery logistics, inventories and the administration of goods). The technical operation of digital platforms in such cases will not be considered a market *per se*. In other words, it will have to be determined whether the source of income is obtained because of the platform *per se* or the services offered through it.

Under any scenario, a close collaboration between COFECE and the IFT will be of the utmost necessity to set clear jurisdictional criteria and provide certainty not just to economic agents, but also substantive procedures. Even a close collaboration should be desirable in case COFECE requires support in its technical capabilities to analyse this kind of transaction. These necessities are particularly relevant during the COVID-19 pandemic, where merger control resolutions must be resolved expeditiously.

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## **Endnotes**

(1) Jurisdictional conflict File 4/2019, processed by the First Collegiate Court Specialised in Economic Competition, Broadcasting and Telecommunications. Available [here](#).

(2) File UCE/CNC-002-2015. More information in Resolution 2/2015 of the Council of the Federal Judicature (Spanish version). Available [here](#).

(3) File UCE/CNC-004-2016. More information in the Resolution 1/2017 of the Council of the Federal Judicature (Spanish version). Available [here](#).

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