

Dish/América Móvil: analysis of incentives and contractual obligations to determine existence of concentrations in Mexico

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The Federal Economic Competition Law (FECL)⁽¹⁾ considers a concentration to be any act between economic agents by which control is acquired or companies or assets are united. This concept includes acts that do not necessarily mean obtaining control through shareholding or transference of assets or shares but have similar effects.

Facts

In 2008, EchoStar Group and MVS Group (the parties) formed an alliance and launched the pay-TV service "Dish". This alliance generated a new offer in the pay-TV market focused on the population segment that previously did not have access to the pay-TV service. This merger was approved by the former Economic Competition Commission in 2008.

In the context of this project, the parties and América Móvil (through Telmex and Telnor) agreed on certain commercial agreements, such as a service agreement and a call option agreement.⁽²⁾ Under the latter contracts, América Móvil could potentially be a partner of the parties in the future if the agreed conditions and authorisations were met. The agreements implied setting:

- a typical commercial relationship among the parties and América Móvil; and
- the basis to prepare a future investment in the Dish Project.

However, in 2015, the Mexican Federal Telecommunications Institute (IFT) assessed the agreements and concluded these had updated the merger so that it surpassed the thresholds of the FECL, and therefore it had to be notified. As a consequence, the IFT imposed a penalty against Grupo MVS, Echostar and América Móvil for breaching the obligation of notifying a merger that surpasses the thresholds of the FECL before its execution; however, it recognised that the launch of the Dish project did not generate anticompetitive, but pro-competitive, effects on the market.

The parties and América Móvil challenged the IFT's ruling before the specialised courts. Recently, the Grupo MVS's *amparo* (protection) trial was decided in the last instance and the judiciary decided that the agreements did not constitute a merger. The relevance of this case focuses on the question to which extent the creation of common interest and aligned incentives through contractual arrangements constitute a merger. In fact, all contractual agreements are designed to constrain the actions of the parties involved and many of them are meant to align incentives, such as franchise contracts. However, not all agreements should be deemed as concentrations and should not require prior authorisation from the competition authorities.

Decision

IFT ruling

Based on several contracts, including a call option agreement, the IFT found that the agreements had updated a merger as they:

- aligned the incentives between the parties;
- generated information and communication channels among Echostar, Dish and América Móvil with the purpose of establishing a cooperation relationship;
- granted Dish access to the América Móvil's distribution network, which is not offered to other agents; and
- gave América Móvil control over Dish through several provisions (eg, veto powers in Dish granted to América Móvil in certain matters).

The IFT considered that the supposed merger should have been notified prior to its execution, as the credit granted by América Móvil to Dish implied a capital contribution that exceeded one of the thresholds of the FECL.

Second specialised judge's ruling

The following aspects were highlighted in the second specialised judge's first instance decision:⁽³⁾

- The provisions established in the contracts were typical obligations of lenders to protect the ability to pay and preserve Dish's value.
- Considering the economic and accounting expert opinions presented in the proceeding, the contractual provisions did not grant América Móvil interference in Dish's core business decisions.
- Although the contracts were made so that América Móvil could make the purchase option effective at some point, it did not occur, and even less so when the parties during the IFT proceeding terminated the purchase option.
- The contracts only comprised the provision of certain services, and the company maintained its autonomy regarding the core of its business.
- Consequently, the IFT did not demonstrate that Echostar and Grupo MVS had incurred a concentration with América Móvil.



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Second specialised tribunal's judgment

As a result, the IFT challenged the second specialised judge's ruling. In the final decision, the second specialised tribunal confirmed the judge's ruling by stating the following:⁽⁴⁾

- The economic analysis is relevant to studying the companies' incentives and behaviours to assess competition infringements. An appropriate tool is the economic opinions that can evaluate companies' motivations to celebrate certain agreements and assess indirect evidence.
- When a judge uses indirect evidence, they must discard alternative hypotheses. Even if the judge has an initial theory regarding the reasonable explanation of the circumstances (abstract presumption), they must still identify other plausible explanations and determine whether they can be discarded (concrete hypothesis).
- In this case, there were two hypotheses on the circumstances under review:
 - the contracts included rights and obligations that implied coordination between companies to achieve joint control of the operation of Dish; and
 - the contracts contained conditions to preserve the commercial interest of América Móvil to acquire Dish's capital stock in the future, which reflects the intention of the former to acquire control of the latter. The parties argued the last hypothesis in the administrative procedure.
- Following the principle of presumption of innocence, there is a reasonable doubt regarding the economic rationale of the contracts and the acquisition of control that the IFT de facto alleged. Considering the expert opinions offered in the *amparo* trial, the IFT failed to discard that the reasonable explanation of the contracts was just to protect the commercial integrity of Dish and the parties' interest in a commercial relationship to ultimately carry out the concentration. And even though, at some point, América Móvil could exercise the purchase option, it did not occur.

The Tribunal clarified that the IFT was not required to directly prove the exercise of control (actual or potential); however, as mentioned, there was a reasonable doubt or an alternative explanation that the IFT did not rule out.

Comment

The FECL comprises a broad definition of the term concentration; therefore, a careful analysis of vertical or horizontal agreements should be made. Nonetheless, it is essential to consider that all agreements imply a loss of independence at a certain level, but this does not mean that all agreements should be deemed as concentrations. Instead, the criteria should focus on assessing whether, with a long-term contract, a company loses considerable autonomy to participate in a market. Consequently, exercising the rights and obligations of the contract changes the dynamics and structure of a market.

The relevance of the judiciary's final decision on this case can be summarised with the following aspects:

- The need to rule out alternative hypotheses is recognised when indirect evidentiary is used to determine whether competition infringements existed.
- Using economic and accounting experts' opinions is pertinent to analysing the incentives behind the economic agents' behaviour.
- It is recognised that a concentration, through the execution of contracts aside from those to transfer assets or shares, could be a concentration when control over a company's core decisions is granted.

In the light of the above, it will be relevant to follow how this precedent will be used in future administrative and judicial decisions.

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Endnotes

(1) Article 61 of the FECL.

(2) Resolution issued in file number E-IFT/UC/DGIPM/PMR/0003/2013 and others, issued on 7 January 2015.

(3) Ruling of the second district judge in Administrative Matters Specialised in Antitrust, Broadcasting and Telecommunications in 14/2015.

(4) Ruling of the Second Collegiate Tribunal in Administrative Matters Specialised in Antitrust, Broadcasting and Telecommunications in 246/2019 in connection to the resolution issued by the IFT to comply with the latter ruling in file E-IFT/UC/DGIPM/PMR/0003/2013 on 12 January 2022.