

Client Alert

Latham & Watkins Litigation Department

Mexico's Largest Mobile Operator Proposes a Settlement to Enhance Competition Leading Mexico's Antitrust Authority to Repeal Its Historic Fine

Last Thursday, Mexico's antitrust commission repealed its largest fine ever issued—a US\$925 million fine against Telcel, a communications company that controls approximately 70 percent of the Mexican mobile market with 66.7 million wireless subscribers.¹ The Federal Competition Commission (CFC), initially imposed this fine on April 7, 2011, after a six-year investigation into Telcel.² Authorities believed that the company was using its market power to displace competitors by imposing high interconnection charges on its twenty rival competitors in order for them to access Telcel's wireless network.³ The CFC alleged that the mobile company was engaging in a margin squeeze, by charging high wholesale prices for interconnection while instituting low retail pricing, in violation of Article 10 of the Mexican Competition Law. The CFC alleged this conduct raised costs for downstream rivals and drove out competitors.⁴ Telcel responded that the interconnection rates had been freely negotiated by the parties in contracts overseen and approved by Mexican telecommunication regulators,⁵ and appealed the fine. On appeal, Telcel proposed a settlement agreement which the CFC accepted on the premise that the terms of the agreement will more effectively benefit competition than imposing a massive fine against the company.⁶

The settlement consists of five conduct remedies designed to ensure that “the size of Telcel's network isn't used to sideline competitors,” the CFC explained.⁷ Telcel agreed to reduce the amount it charges on incoming calls by billing to the second, rather than rounding up to the minute. In addition, the company will reduce its interconnection rates by 62 percent, from seven cents to two cents per minute. Telcel also agreed to offer equal interconnection rates to all operators and charge its customers the same amount for calls within its network as it does for calls to its competitors' networks. Telcel will maintain these rates through 2014, at which time the company will work with regulators to further reduce its fees. Failure to comply with the terms of the agreement can result in a fine of up to eight percent of Telcel's annual revenue. The CFC estimated that inflated interconnection rates were costing Mexican consumers up to \$US6 billion per year, so the settlement will lower these rates while also protecting legitimate business practices.⁸ Telcel did not admit any anticompetitive wrongdoing, nor did the regulator find such, in executing the settlement.

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The pricing relief included in the settlement is an extraordinary antitrust remedy. Most antitrust remedies focus on improving competitive processes and opportunities, which thereafter can affect pricing, but do not tend to govern pricing itself because of substantial monitoring costs and the risk that such behavioral remedies will restrain potentially procompetitive behavior, lead the firm to cut back on productive investments and/or prevent the firm from responding effectively to changing market conditions.⁹ By regulating price directly as part of this remedy, the CFC seems to have set such doubts aside and created a precedent for resolving future enforcement actions with pricing commitments. The ultimate fate of the remedies adopted in this specific case should be a subject of intense interest by antitrust enforcement agencies worldwide, since similar issues—both substantive and institutional—tend to arise in many industries and in many different jurisdictions.

The settlement, which was executed just days before Mexico's first presidential debate for the July general election, was negotiated after Mexico's sweeping reforms of its competition laws. Following the Mexican competition authorities' pledge to enhance the competitive environment in the telecommunications market, Congress and the Supreme Court strengthened penalties in this arena.¹⁰ In April 2011, Mexico's Congress approved a tough new antimonopoly law that raised fines for monopolistic practices and instituted prison terms for executives in violation of the competition laws.¹¹ Last May, the Supreme Court banned América Móvil from suspending the Federal Telecommunication Commission's (Cofetel) imposition of lower interconnection fees by filing for an injunction and ruled that Cofetel's tariffs would be in effect during such pending litigation.¹² Notwithstanding this aggressive enforcement environment, Mexico's enforcers declined to impose the maximum possible penalties against Telcel or its parent company América Móvil, which has 225 million subscribers in 18 countries.

Endnotes

- ¹ Comisión Federal de Competencia México, *Impone CFC a Telcel Compromisos Para Reducir Tarifas de Interconexión en Beneficio de los Consumidores*, CFC-10-2012 (May 3, 2012), <http://cfc.gob.mx/images/stories/Publicaciones/CFC%2010-2012.pdf>.
- ² Comisión Federal de Competencia México, *Resolución del Pleno de la Comisión Federal de Competencia*, DE-37-2006, Apr. 7, 2011, <http://resoluciones.cfc.gob.mx/DOCS/Asuntos%20Juridicos/V45/6/1518064.pdf>.
- ³ *Id.*
- ⁴ Diario Oficial de la Federación (Mex.), *translated in* Federal Law of Economic Competition (Dec. 24, 1992), <http://www.apeccp.org.tw/doc/Mexico/Competition/mxcom1.html>, *modified in* Diario Oficial, 10 de mayo 2011, <http://www.cfc.gob.mx/images/stories/Noticias/Comunicados2011/decretoreformaslfce.pdf>.
- ⁵ *Supra* note 2.
- ⁶ *Supra* note 1.
- ⁷ *Id.*
- ⁸ *Supra* note 1.
- ⁹ *See e.g., generally* Antitrust Division Policy Guide to Merger Remedies, U.S. Dep't of Justice, Antitrust Division (October 2004), at <http://www.usdoj.gov/atr/public/guidelines/205108.htm>
- ¹⁰ Comisión Federal de Competencia México, *Recomendaciones para promover un marco regulatorio más favorable a la competencia en la interconexión entre redes de Telecomunicaciones* (June 2009), <http://www.oecd.org/dataoecd/32/6/45049465.pdf>.

¹¹ See Maria A. Fehretdinov & Abbott B. Lipsky Jr., *Mexico's Tough New Approach To Antitrust Enforcement*, Law360, June 6, 2011, <http://www.law360.com/articles/248607>.

¹² See Suprema Corte de Justicia de la Nación, <http://www.scjn.gob.mx/Paginas/Inicio.aspx> (last visited May 8, 2012). Under Mexico's telecommunication laws, if operators are unable to agree on an interconnection rate, Cofetel can intervene and set the rate. Yet, by challenging the regulator's actions, América Móvil could suspend the imposition of Cofetel's lower interconnection tariffs until after the litigation had ended.

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