

Preponderant agent, what is that?

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Abstract

Preponderant agent is a new instrument for preventing and reverting adverse impact in competition due to highly concentrated markets. Therefore, this paper's objective is to present and analyze the preponderant agent concept in Mexico with emphasis on the broadcast sector, the telecommunication regulator decisions and the courts' interpretation. The objectives were achieved by researching and analyzing the main legal documents, the Congress reports and debates, the regulator's decisions and other relevant regulator's documents, as well as final decisions by the courts in connection with broadcast sector. Among the findings are that certain topics were not duly addressed by the Mexican regulator, or by the Congress, whereas the courts were more willing to hold decisions in favor of public interest based on constitutional intent and deference to the regulator's decision. This paper will be valuable for persons interested in telecommunications, broadcast and antitrust. Although the preponderant agent concept created in Mexico is not necessarily a "best practice", it does provide an alternative instrument in antitrust. Moreover, the courts decisions also provide criteria regarding regulatory deference for the regulator.

Keywords: telecommunications, broadcast, antitrust, preponderant, significant market power.

A. INTRODUCTION

Mexico's telecommunication and broadcast sectors are highly concentrated in a few corporate groups. This is the result of building a country – after the Mexican Revolution started on 1910 – based on monopolistic interests on a local, regional and national level (Alvarez, 391).¹ Since capital formation and economies of scale were so vital in developing a functional infrastructure, the government deemed competition as against the public interest and licenses were granted on a discretionary basis (Alvarez, 389-394).

The Mexican 1990s was characterized by privatizations and economic liberalization, and telecommunications were no exception. Privatizations included the telecom historic operator and public monopoly, Telmex (1990), a public TV broadcasting network (Imevisión – Channels 7 and 13, 1993), and the satellite monopoly known as Satmex, in 1997 (Alvarez, 396-400, 407-409). The Telecommunications Law enacted in 1995 (now repealed) opened the telecom sector to competition. Increased competition was supposed to improve the quality of services, increase access and lower prices. The Mexican telecom reform (2013-2014) purport to tackle the effects of

such high concentrations inter alia through the creation of a new regulator with antitrust faculties and against whose decisions there could be no injunction, and through the determination of preponderant agents to which special obligations would be imposed to prevent adverse effects to competition. This article addresses the concept of preponderant agent, its origins and objective of establishing it in the Mexican Constitution. Then the determination made by the Mexican telecom regulator (Instituto Federal de Telecomunicaciones, IFT) will be analyzed, along with the arguments presented in both telecommunications and in broadcast for declaring certain corporate groups and affiliates, as part of the economic interest group to be held as a preponderant agent. The differences in telecom and broadcast for calculating each groups with more than 50% national participation on its respective sector, will be presented, analyzed and criticized. Afterwards the courts' decision and criteria for the preponderant agent in broadcast will be explored, highlighting the relevance for the IFT considering the high regulatory deference in judicial proceedings that is expected to continue. Certain special obligations imposed in for the preponderant agent in broadcast will be analyzed, namely, those regarding relevant audiovisual content and advertisement. Finally, this article ends with some remarks that include those regarding preponderant agent concept, the effectiveness of special obligations, the absence of plurality analysis by regulator, the regulatory deference precedent thanks to the courts resolution over preponderant agents, and additional facts like the recently concluded public bid for free-to-air commercial TV, that might have consequences over preponderant agent determination in the broadcast sector. Preponderant agent (*agente económico preponderante*) is a new instrument introduced in the Mexican Constitution by the telecom reform (2013) which purports to identify economic agents with excessive market power and impose special obligations to cope with such power through a fast-track procedure. The IFT was mandated to determine those carriers in the telecom and the broadcast sectors that hold more than 50% of national participation in such services based on the number of users, audience, network traffic or capacity.

What was the rationale for determining that more than 50% was an adequate percentage for a carrier to be preponderant? There is no evidence for the reasons to establish such percentage neither in the bill nor in the legislative process documents.⁸ Nonetheless, it appears as a very high percentage if compared with what the European Union (EU) once had in place. In 1998 the EU approved a Directive whereby an agent with more than 25% of market share was considered as with significant market power and had special obligations. When the IFT ruled that América Móvil and Televisa were each preponderant agents in telecommunications and broadcasting, the new Mexican Telecom Law had not yet been enacted (*Ley Federal de Telecomunicaciones y Radiodifusión*, LFTR), nor was there any specific procedure to follow. Consequently, the IFT initiated an administrative process to determine the preponderant agent, including a preliminary report. The preliminary report was notified to the agents that were considered to be preponderant; then these had the opportunity to respond to the preliminary report and to offer evidence to assert their positions; and finally, the IFT solved the issue with the final resolution that determined which companies were part of the preponderant agents in telecom and in the broadcast sector. In order to determine that América Móvil was preponderant, the IFT first declared that the economic interest group was composed by America Móvil (holding of Telmex and Telcel), Telmex (fixed telephony and data), Telcel (mobile telephony and data), Grupo Carso (holding of commercial, industrial, energy, infrastructure and construction sector companies¹³),

and Inbursa (financial group).¹⁴ Then it essentially made an addition of the number of subscribers of the main telecommunication services concluding that such companies were preponderant agents in telecommunications.

Declaring Televisa as preponderant agent in broadcast presented more challenges for the IFT than América Móvil case for several reasons. The first challenge was to determine which companies and persons were part of the economic interest group of Televisa. Televisa holds title to several licenses for free-to-air TV channels along the Mexican Republic commonly known as Canal de las Estrellas (channel 2), Canal 4, Canal 5 and Canal 9 (hereinafter “Televisa Channels”).¹⁵ But these channels are also retransmitted in several cities by independent free-to-air TV licensees in which Televisa does not hold any stock or share. IFT named these independent free-to-air TV licensees as “independent affiliates” as will be explained below.

B. LITERATURE REVIEW

The second challenge was to provide sufficient reasoning for determining a preponderant of the broadcast sector based on free-to-air commercial TV, but excluding free-to-air radio and free-to-air non-for-profit TV. For excluding radio, the IFT made a comparison between free-to-air radio and TV influence, income and patterns of consumption. IFT ruled inter alia that: free-to-air TV was far more concentrated than radio and hence was more able to significantly affect competition; TV was the main media of information access (73% TV, 37% radio); people were more exposed to TV (90%) than radio (76%) (Conaculta); advertisement on TV was the main way of commercializing products and services; TV held 85% of advertisement of the broadcast sector (CICOM); TV generated 86% of income whereas radio did only 14% (INEGI); 90% of the audience accessed TV in their home, whereas 58% accessed radio in their home. IFT excluded from the calculation of audience share the audience share related with non-for-profit free-to-air TV stations, provided that these (1) do not have any commercial or for profit objectives, (2) may not sell advertisements, (3) are not competitors of commercial free-to-air TV, and (4) provide a community service. The IFT observed that commercial free-to-air TV maximizes its profits regardless of non-for-profit TV audience, because companies may only advertise in commercial free-to-air TV channels. Additionally, non-for-profit were unable to affect competition as they are not competitors of commercial channels. Notwithstanding the above, the difference in audience share if not-for-profit TV was considered only varied 2%: Televisa audience share without considering not-for-profit stations equaled 67%, and including such stations its share was 65%.

The third challenge was that subscribers of a telecom service are easier to calculate because there are statistics of the number of fix or mobile lines, and there are agreements in place between the carrier and the subscriber (except for pre-paid mobile lines). On the other hand, measuring broadcast audience is not as objective as with telecom subscribers. The IFT considered the number of persons which were able to receive free-to-air TV in the Mexican Republic, and the market

audience share. The audience share is the percentage of persons that have access to a specific channel in relation with the total number of audience. Audience share is different from rating insofar as rating is based on the index of audience for a given channel. IFT based its findings in an audience research by IBOPE which took into account the audience from 6 to 23 hours. It is important to note that different methodologies are employed to determine the audience share in free-to-air TV and free-to-air radio. In free-to-air TV, there is a process for estimated audience through a device known as people meters. This device is installed in home TV sets of a statistical sample, and it records the channel/program being viewed and the number of spectators. Free-to-air radio audience is estimated by survey made by telephone or personally. These methodologies for assessing the share of audience in broadcast are not objective as counting number of users via the number of lines or the agreements in place as was the case for the telecom sector.

The IFT took as reference for audience share the results of a study by IBOPE of 2012 as the proceeding had initiated in November 2013. IBOPE study bases its results in a representative sample of the Mexican Republic audience through the use of people meters in major cities (Mexico city, Guadalajara and Monterrey) and 25 other places. IBOPE studies had traditionally been used by Televisa to assess its audience share, and were used by Televisa in its report filed before the Mexican Stock Exchange. Afterwards, Televisa initiated litigation against IBOPE regarding an agreement between them. Consequently, Televisa challenged the appropriateness of IBOPE's study, and the IFT – and further the courts – dismissed such claim as Televisa had in the past recognized IBOPE's results as valid. The IFT also considered the number of users by network capacity (MHz/Population) to determine Televisa as preponderant. This metric takes into account the number of users able to receive free-to-air TV signals on the authorized coverage area, and the spectrum capacity (6 MHz). Pursuant to this metric, Televisa had 54% of the MHz for free-to-air TV. The IFT ultimately determined that Televisa (including its independent affiliates) was the preponderant in the broadcast sector, because (1) Televisa held 67% of the audience share, and (2) Televisa held 54% of the MHz of free-to-air TV.

A major criticism to IFT preponderant resolution regarding Televisa was that it did not include Televisa's pay TV companies. Notwithstanding that pay TV and free-to-air TV are related markets due to their audiovisual content and TV advertisement markets, IFT did not refer to Televisa's pay TV companies. In the case of America Móvil the IFT determined that Grupo Carso and Inbursa should be considered within that same economic interest group despite the fact that they did not hold title to any telecom license, yet IFT considered that as they had a strong relation with Telmex and Telcel, they had to be summoned to the preponderant proceedings.²³ Following the same argument of América Móvil's resolution, why the IFT did not include Televisa's pay TV companies? The answer is unknown to the public. However, it could have been a political decision to omit any reference whatsoever to Televisa's pay TV companies so that none of the preponderant special obligations (analyzed below) would apply to them. Currently, the IFT is conducting a research regarding Televisa's market power in pay TV market and preliminary determined that Televisa has significant market power in 2,124 pay TV local markets.²⁴ This type

of procedure has been in place since 1993, and the results in the Mexican telecom sector had been null until now. Although now the IFT has more scope of authority and no injunctions can be granted against IFT's decisions, IFT's investigation time and the procedure itself will take several months until its conclusion. After the final IFT decision as to whether Televisa has significant market power in pay TV, IFT would then be followed by another administrative procedure to impose special obligations to avoid abuse of its market power, consequently the effectiveness and timeliness of this procedure is still an open question. Against the preponderant decisions, several judicial review proceedings (*juicios de amparo*) were initiated before the specialized courts²⁶ on March 2014 months before the new LFTR was enacted on July 2014. The main debate at Congress during the legislative process for approval of the LFTR was as to whether a preponderant agent should be considered by a whole sector or by single services. The Senate and Deputy Chamber reports regarding the LFTR proposed an interpretation that preponderant would be by sector rather than by services. The LFTR simply copied the constitutional provision regarding preponderant *ad verbatim* and described the special obligations that could be imposed to the preponderant in telecom and to the preponderant in broadcast. Notwithstanding the above, the courts were only bound by the Constitution and not by the LFTR as it was enacted after the IFT preponderant resolutions.

Judicial resolutions over broadcast preponderant provide a very interesting approach by the courts in at least three aspects: the constitutional intent as how preponderant should be determined; the regulatory deference over IFT decisions that the courts are willing to accept; and the type of scrutiny that courts will likely have over telecom and antitrust regulators' decisions. As pointed out in section "Preponderant agents concept" above, the Constitution is unclear whether the determination of a preponderant agent must be based on the whole sector or if it could be determined by a single service of a given sector. The final judicial decision acknowledged the ambiguity of the Constitution's wording, but confirmed IFT's decision based on the constitutional intent of the preponderant figure and on the expertise of the IFT as regulator for antitrust matters on telecom and broadcast. If the constitutional intent was to prevent negative effects on competition and hence to end users, then that could be achieved by declaring Televisa as preponderant in the broadcast sector considering only free-to-air TV. One of the judicial resolutions regarding the judicial proceeding (*juicio de amparo*) of one independent affiliate, thoroughly developed the concept of regulatory deference by courts and the level of judicial scrutiny for regulators decisions. Consequently, this criteria is perhaps one of the most relevant for the future of the Mexican regulators in telecommunications and antitrust.

The specialized court ruled that IFT decisions in general must be upheld provided that they are reasonable and proportional. IFT as the telecom regulator has to make decisions making economic and technical assessments. Such decisions must be in line with the IFT mandates, and must not violate constitutional rights (e.g. due process, justification of the acts, and accuracy of facts) which could end up in unfairness. There are different types of discretionary competencies depending on what Congress enacted: major discretionary faculties are those in which there is no

reference or terms that limit the regulator's decision; intermediate discretionary faculties are those that the regulator may exercise within the scope of interpretation of undefined legal concepts.

C. RESULT AND DISCUSSION

The determination of a preponderant agent by itself would not achieve any public interest objective, because knowing that an agent holds a certain market share does not correct market failures or prevents abuse of market power. Consequently, the special obligations imposed to preponderant agents are the instruments by virtue of which measures are established to prevent and deter any harm to competition. The IFT imposed several special obligations to Grupo Televisa as a preponderant agent related with passive infrastructure sharing³⁷, with audiovisual contents, with advertisement, and with information. This section will address audiovisual content and advertisement special obligations because those are directly connected with its market power in both free-to-air TV and pay TV. IFT determined a prohibition – to both telecom and broadcast preponderant agents –, to acquire relevant audiovisual content with exclusivity. Relevant audiovisual content would be that which is non-replicable and which is highly expected by the audience. The rationale expressed by the IFT was that because such type of content is non-replicable and highly expected, then a preponderant with its market power could affect competition if it had the exclusivity over relevant audiovisual content. A preponderant may acquire relevant audiovisual content provided it did not do so with an exclusivity clause.

Two questions immediately arose after IFT's preponderant resolution: (1) which were the so called relevant audiovisual contents, and (2) what would happen with those relevant contents that had already been acquired by preponderant agents with an exclusivity clause. To answer the first question, the IFT took into account historical rating (audience index) of free-to-air TV and pay TV. IFT determined that only sports events held the non-replicable characteristic, because they had no similar substitute, and that only events with national coverage had the highly expected characteristic. At the end the following sports events were considered as relevant audiovisual content: all games of the Mexican men soccer team; inauguration and closing ceremonies of the Summer Olympic Games; inauguration, quarter finals, semifinals and final games of Soccer World Cup of FIFA; and final soccer games of the first division organized by the Mexican Football Federation (Liga MX). Previous to IFT's preponderant resolutions, Televisa had acquired the exclusive rights for the Mexican Republic to the Soccer World Cup of FIFA Russia 2018 and Qatar 2022; and América Móvil had acquired exclusive rights for the Mexican Republic to the Summer Olympic Games of Rio de Janeiro 2016. Did the relevant audiovisual content exclusivity prohibition include the ones previously acquired? If yes, then the preponderant agents could argue that this prohibition was having retroactive effects against them and therefore was contrary to the Mexican Constitution. This argument could be offset by public interest reasons, which must prevail over private interest. If the answer were no, then how could IFT argue that the adverse effects on audience rights and upon competition would have to be borne until 2022?

The IFT decided simply to ignore the issue. Its silence will certainly be used by the preponderant agents to preserve their current exclusivities referred to in last paragraph.

Finally, there are two criticisms to make to this prohibition. The first one is because in the case of Televisa, this prohibition is only for the free-to-air TV and could not be easily interpreted as to include Televisa's pay TV companies. Consequently, Televisa could acquire relevant audiovisual content in an exclusive manner through its pay TV companies, and that would not amount a violation to the special obligations imposed as a preponderant agent. The second one is that the prohibition to acquire in an exclusive manner relevant audiovisual content is only for preponderant agents, without considering that audience rights could also be compromised by their acquisition by other corporate groups. A preponderant special obligation regarding advertisement was imposed only to Televisa considering that it is linked with the provision of broadcast TV insofar as broadcast TV receives income to support its operations from the advertisers. The measure essentially obligates Televisa to have information regarding the terms and conditions for advertising on its free-to-air channels on its website. For such purposes Televisa must: include a model agreement; allow buying packages of free-to-air channels with other channels/programs of Televisa, or the possibility to acquire the right to retransmit a single channel; not discriminate, or refuse to enter into an agreement with a party interested in advertising in Televisa Channels. The criticism to such measure is that although the advertisement terms and conditions should be public, there is no way to identify whether Televisa is or is not discriminating. For example, in 2013 several non-governmental organizations requested Televisa, TV Azteca and other media companies to provide the terms and conditions to acquire advertisement space in their free-to-air TV channels. The objective of the advertisement was to alert the population of the risks of consuming soda and high-calorie beverages, and to promote water consumption. In the case of Televisa, there was never a response to the request. TV Azteca met with these NGOs, but afterwards responded they had no time left for advertisements. It is to be noted that soda and high-calorie food (junk food) are of the main advertisers on TV, and that Mexico has high levels of obesity among its population.

Whether the refusal to give space in free-to-air channels to this type of advertisements was a legitimate one (e.g. there is no time left for more ads) or was it a discrimination so that the major advertisers (e.g. soda companies) would not be upset, is not clear. However, this case evidences the need of having an electronic system so that Televisa would receive requests for advertisements and avoid any discrimination, or at least, provide a way of detecting discrimination. This type of system would have been the equivalent of the electronic system for interconnection matters for America Móvil as the telecom preponderant, whereby each request is filed and must be processed in the order it was received.

D. CONCLUSION

The courts confirmation of Televisa and its independent affiliates as preponderant in free-to-air TV is a milestone for telecommunication and antitrust in Mexico. Although the high concentration of Televisa in free-to-air TV has a long establish tradition of several decades, this is the first time that an antitrust instrument (preponderant agent) has confirmed it. The declaration of Televisa as preponderant by itself would mean nothing, without the special obligations.

The effectiveness of the special obligations imposed to Televisa as a free-to-air TV broadcaster is yet to be demonstrated. First because the special obligations (e.g. relevant audiovisual content exclusivity prohibition) do not apply to Televisa's pay TV companies. Second because the provisions for advertisement on free-to-air TV do not have mechanisms for demonstrating whether or not Televisa discriminates or refuses to enter into advertisement agreements with certain companies for different reasons (e.g. oust potential competitors, deny ads to persons with conflicting interests with major advertisers). Third because in Mexico law enforcement is still a major challenge, and affirming that Mexico is a real rule of law country is debatable. Also, one of the main problems for Mexican society and democracy are the lack of plurality and diversity on TV, which were not addressed at all in IFT's preponderant resolution. Plurality and diversity could improve democracy quality because the people would be able to receive information from different sources and ideologies, they could confront them and then form their own opinion in a free manner. Limited public entities free-to-air TV stations and very limited real independent local channels, are unable to cope the high concentration of 90% of audience share by Televisa and TV Azteca. This fact cannot be ignored when 94.9% of Mexican homes have TV⁴⁵, and 73% of Mexicans obtain information through TV.⁴⁶ Pro-plurality special obligations could have been to oblige Televisa to include a news program developed by independent journalists, for example.

Notwithstanding the above, the court's resolutions regarding preponderant agents set forth several triumphs for the IFT as the telecom regulator. Regulatory deference with light scrutiny appears to be the future of courts' decisions, as long as the IFT demonstrates it is exercising its discretionary competencies with technical/economic issues, its decisions are reasonable and proportional to the objectives set by the Constitution or by the law. concluded.⁴⁷ There were two participants. Each won a license to operate 6 MHz for digital TV until 2035.⁴⁸ Would the entrance of these two new Televisa's competitors change IFT determination of Televisa as a preponderant agent? As the IFT considered two variables for determining Televisa as preponderant, namely, audience share (67%) and users per network capacity (54%), then IFT would have to at least evidence that Televisa's audience share would continue to be more than 50% in the Mexican Republic. In the near future, it is unlikely that Televisa's audience share is reduced in a significant manner. Had IFT considered also plurality and diversity as rationales for determining Televisa as preponderant, then IFT would most certainly have arguments for maintaining this special regime upon Televisa. However, as IFT relied only on competition rationales, preponderant special obligations might have to be eventually revised.

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