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America Movil abuse of dominance case seems to be a "happy-end" story but not for everybody

Valentin Mircea (Consiliul Concurentei / Competition Council) · Tuesday, May 15th, 2012

Everybody at America Movil ("AM") – and especially its owner, Mr. Carlos Slim – should have welcomed with a sense of relief the (somehow unexpected) turn in the saga which started last year when the Mexican Federal Competition Commission ("CFC") hit AM' mobile telephony unit Telcel with the largest fine in the history of Mexico: almost 1 billion USD.

The facts of this case are clear. Telcel has a share of 70% of the mobile telephony market in Mexico, lower only to its share on the land lines market, which is of 80% (!). From this position Telcel charged overpriced tariffs for interconnection with other land-line and mobile telephony operators. Telcel benefited twice from this situation – it raised additional revenues from this service, estimated at 6 billion USD/year (according to the estimated savings mentioned in the press release of CFC) and it succeeded in maintaining its large market share without innovating and investing too much in its infrastructure (quality of the phone services in Mexico is rather poor and the penetration rate is low – for details regarding the Mexican market see <http://www.oecd.org/dataoecd/39/63/43628914.pdf>). The second advantage is, perhaps, even more important as it helped Telcel to preserve its "super-dominant" position on the Mexican market. The benefits attached to its larger customer base might exceed even the direct benefits derived from the charges applied to its competitors.

The tariffs applied by phone operators (both fix and mobile) for interconnection (in fact, for terminating the calls in its network) are very important for the development of competing operators. If these levels are high, the interconnection tariffs will function as a significant monetary barrier between different networks – customers will be motivated to make calls mostly within the home network, where their cost will be lower, rather than to customers belonging to other networks and to join or not depart from this network (the so-called "club effect"). Equally, the customers of the smaller networks will not be too much incentivized to make calls to the larger network (say Telcel, in this case) because the level of the interconnection tariffs will be reflected in the price they will pay on that occasion, as long as the principle "caller party pays (CPP)" applies. Hence, these customers will pay more for making phone calls.

As a consequence, the boundary between the networks, that is inherent for technical reasons, becomes a high fence and affects both the development of smaller networks (including new entrants) and the customers belonging to both the large and the small networks.

In order to counter the market share of the large phone operators, regulators and competition

agencies throughout the world made significant efforts in the recent years in order to reduce the level of the interconnection tariffs. This process was based on the idea that phone operators should not charge more than the cost incurred for terminating the call in their network and that the cost should include only those expenditures and investment needed in order to complete the call, not the investments made for the functioning of the network as such. Some jurisdictions admit the existence of a reasonable mark-up. The reduction of the tariffs is in an advanced stage in the United States of America and is making good progress in Europe, where the European Commission threw its weight into the process in order to overcome the slow speed of some national regulators and the reluctance of the mobile phone operators.

Coming back to the current situation in Mexico, having commitments instead of a fine is not a bad idea as long as fines should not be regarded as a purpose but as an instrument for an effective improvement of the competition conditions. “Effective” would mean that the effects are quick and tangible for consumers of telecom services in Mexico. It would also mean that life for Telcel would change from what it used to be before the COFECO decision and that competition will heat up, at least with the passion the Mexicans put in their music.

As it results from publicly available information, the levels proposed as commitments by Telcel – 2.4 cents USD in 2014 – are not too far from the levels estimated by the European Commission and the European telecom regulators and accepted (“bon gré, mal gré”, as the French say) by the European mobile operators. Still, the tariff is quite high, if we take into account that the tariffs calculated by some EU regulators will be at almost half of the figure indicated by Telcel (for instance, the tariffs in Italy will be capped at maximum 0,98 Euro cents ~ 1,25 cents USD as of July 1, 2013). Regarding the correct level of the tariff, the Mexican telecom regulator should undertake a proper calculation of the likely tariff, based on the LRIC (Long Run Incremental Cost) model and applied by a hypothetical efficient operators, as it happened in Europe (I understand that the Mexican telecoms regulator does have a cost model but it is not clear on what is based). Without a proper calculation model, the commitments made by Telcel to apply similar amounts for on-net calls and off-net calls would be inapplicable, as long as the on-net tariffs (prices applied for calls originated and terminated in the same network) are not easy to assess when the operator offers packages of services including, alongside phone calls, other services, such as messaging (SMS) or internet access. In addition, I do not fully understand why Telcel should be allowed to wait until 2014 before getting down to 2.4 cents USD? I do understand that Telcel wanted to have an “easy slope” downhill, but it is important to note that the negative effects on competition and on consumers will continue until the reductions fully come in force, going even below the 2.4 cents level. If the 2,4 cents USD will continue to apply and to be much higher than the effective costs, the negative effects on consumers and on the Mexican market will continue to accumulate.

Taking into account the large market shares of Telcel, the commitments should have included also measures aimed at facilitating competition and the development of the small competitors, such as national roaming (the possibility for the smaller operators to use the network of Telcel until they reach coverage similar to Telcel).

Another apparent failure for these commitments is the fact they do not cover the compensation of the victims of the abuse committed by Telcel. There is no abuse without victims and without damages – they are at the core of any case of this nature, beyond and above nice words such as “the public interest” and “welfare”. CFC itself stated that the damages produced by the high interconnection fees amount to 6 billion USD per year, as a reason to accept commitments aimed at “securing immediate benefits for consumers”. This statement speaks about the (shiny) future. But

what about the past ? What about the victims of the abuse committed by Telcel ? No successful ending of an antitrust case may be considered without the reinstatement of the status ante, i.e. the payment of the damages produced to the victims.

The crucial fact in this respect is whether or not the findings of CFC regarding the behavior of Telcel will remain valid, as long as the legal action against these findings should be abandoned. On the other hand, Telcel keeps denying that it was involved in any anti-competitive behavior at all. The outcome of this saga will definitely not help the injured parties (other telecom companies) or final consumers to start follow-on legal proceedings. Their position, already made difficult by the hurdles of a private enforcement in an antitrust matter – gathering a large number of affected consumers, having access to the evidence, calculating the level of the effective damage etc. – will become close to impossible in the above circumstances. This is not, for sure, good news for the private enforcement is antitrust in Mexico. According to “The International Handbook of Private Enforcement of Competition Law”, edited by Albert A.Foer and Jonathan W.Cuneo (Edward Elgar Publishing, in association with American Antitrust Institute, 2010) there is no private enforcement of an antitrust case in Mexico so far. If a case of the magnitude of the abuse of dominance of Telcel (America Movil) cannot stand as a basis for such legal actions, than the record noted by the above mentioned book is likely to stay for years. If this happens, the concessions made by Telcel in order to annul the fine may prove to be insignificant and this operator will continue to rule the Mexican market.

Therefore, in order to conclude: that the end of the story may be celebrated by some, but not by most.

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