

CLIENT UPDATE

TELECOMMUNICATIONS REFORM IMPLEMENTATION

The Mexican President introduced to Congress an omnibus bill proposing two new statutes and a number of changes to existing legislation implementing amendments to the Mexican Federal Constitution (the “Constitution”), which came into effect on June 12, 2013.

The reform’s objectives include increasing competition in telecommunications, improving access to the same, increasing participation by foreign investors, reducing costs for consumers, promoting market transparency and strengthening powers of regulatory agencies, through which the amendments are expected to establish better prospects for Mexico’s economic growth.

The following are key provisions of the proposed implementing legislation:

- A newly created regulator, the Federal Telecommunications Institute, is empowered to determine which companies are dominant participants in telecommunications and radio
- The newly created regulator is empowered to breakdown the local network of the dominant participant in telephone, paid TV and internet services, and impose other obligations on the same so as to foster effective competition
- Licenses to operate telecommunications and radio facilities are to be granted by such regulator following a public bidding process
- Pay TV carriers must carry open TV channels without charge
- Open TV companies must offer open TV channels to pay TV companies without discrimination and without charge
- Foreign investment is permitted in up to 100% of telecommunications and satellite communications companies and up to 49% in radio companies
- The Federal Telecommunications Institute, shall publish a basis for a bid to create two new TV companies with full country coverage
- Public telecommunications networks may be built through Public-Private Partnerships
- The Federal Government shall build a new telecom services public network

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Federal Telecommunications Institute

A new regulator with substantial autonomy and enforcement powers, the Federal Telecommunications Institute (the “FTI”), is created. The FTI is empowered to regulate broadband content, telecommunications and radio. The FTI is vested with economic competition regulatory powers in telecommunications and radio.

The FTI is empowered to determine which companies are dominant participants in radio and telecommunications.

In essence, a dominant participant is a participant that has a participation of 50% or more measured as a percentage of (i) users, (ii) traffic in networks or (iii) installed capacity.

The new regulator is empowered to order (i) the breakdown and segregation of the local network of the dominant participant in telephone, paid TV and internet, so that any licensed telecommunications user may effectively access the public telecommunications network from the user’s network, (ii) the imposition of limits in the concentration of rights in respect to radio frequencies, and (iii) the imposition of limits in the concentration of ownership of radio and telecommunications facilities.

It may regulate tariffs asymmetrically and it may order divestment of assets. Such measures shall terminate at the time there is deemed to be conditions for an effective competition in the field.

Licenses

Licenses to operate telecommunications and radio facilities are to be granted by the FTI following a public bidding process, for up to a 30 year period, which can be renewed for the same length of time of the original license. Licenses to operate satellite facilities are to be granted by the FTI for up to 20 years, renewable as well.

Licenses can be transferred by assignment with the previous authorization of the FTI. The same are subject to early termination by the FTI in case of breach to the terms of the license.

Telecommunications Networks

A licensee of a public telecommunications network must allow any licensed telecommunications user to effectively access the public telecommunications network from the user’s network, following a procedure supervised by the FTI. A dominant participant must grant most favored participant rates to a licensee requesting a connection. The FTI is empowered to resolve disputes on the subject. Connection contracts between a dominant participant and a licensed telecommunication user are required to be executed and registered with the Public Telecommunications Registry.

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As mentioned before, the FTI is empowered to regulate tariffs between a dominant licensee and other licensed telecommunications users asymmetrically. Such measures shall terminate at the time the FTI considers that there are conditions for an effective competition in the field, under criteria established by the relevant statute.

Internet Providers

A set of rules seeking freedom to contract, quality, transparency and privacy are to govern the activities of internet provision licensees and other related authorized parties.

“Must Carry” and “Must Offer”

The proposed implementing legislation imposes new obligations, including the following:

1. “Must Carry”

Pay TV systems “must carry” all local TV stations without charge.

2. “Must Offer”

A corresponding obligation is imposed on broadcasters to grant pay TV operators nondiscriminatory access to their TV channels without charge.

Dominant participants are not entitled to demand access free of charges. Should a difference to determine applicable charges ensue, the FTI, is empowered to determine the applicable rates.

Obligations of Dominant Participants

The FTI is empowered to impose a number of obligations on dominant radio and telecommunications participants.

In case of a dominant telecommunications participant, such obligations include yearly approval by the FTI of terms of connection, infrastructure sharing, infrastructure segregation, effective access and retail services. The FTI must approve annually tariffs for services to the public, services to other licensees and breakdown of operation terms, so as to ensure that there are no subsidies that may discourage competition. The regulator is required to supervise that there is effective and non-discriminatory connectivity and traffic between a dominant participant’s network and other licensees’ network. Licensees must be allowed to acquire services rendered by such participant either on a package or on a segregated basis without surcharges. All information relating to compliance with such obligations is required to be reported to and made public by the Public Telecommunications Registry.

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Increased Foreign Investment Participation

The ceilings of foreign investment participation are raised, so as to allow foreign investment in up to 100% of telecommunications and satellite communications companies and up to 49% in radio broadcasting companies, provided reciprocity with the home country of the respective investor exists in case of the latter.

New TV Networks with Full Country Coverage

The FTI is required to issue within 120 calendar days from its organization, a basis for a public bidding process to create two new TV companies with full country coverage.

PPP

Public telecommunications networks may be built through Public-Private Partnerships. There are, of course, core business, legal and tax issues applicable to players entering the telecommunications and radio space in Mexico, which must be carefully weighed before deciding on the most effective route of entry.

Sanctions

Breaches of applicable legislation subject violators to civil and criminal liabilities. Fines may range from 200 to 750,000 times daily minimum wage (approximately from US\$1 million to US\$3.85 million at current rates). Penalties for serious violations may include termination of a license. Criminal liability may include imprisonment terms that range from one through fifteen years.

Oversight Authority

The Ministry of the Interior (Secretaría de Gobernación) is empowered to supervise the contents of radio and telecommunications transmissions to make sure the same do not affect privacy, dignity, morals or public order. For a substantial period of Mexican history, the Ministry of the Interior exercised similar powers with a view towards maintaining political control of the country. It would be desirable for Congress to amend such powers when reviewing the proposed omnibus bill, so that the same would be transferred to the FTI, whose nature may facilitate a more objective, professional and independent review of the contents of transmissions that would not unduly affect freedom of speech.

Limitation on Stay Effects of Legal Actions

The Mexican federal courts may exercise significant powers through the suit of amparo, which consists of a power to deny, on a case-by-case basis, the enforcement of actions taken by the

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legislative or the executive branch in violation of the Federal Constitution. The purpose of this type of suit is to protect (amparar) private persons whose individual Constitutional rights have been violated through laws or acts of governmental authorities. The high level of the federal courts and their generally consistent independence from the executive branch has enabled them to turn the amparo suit into a fairly effective shield to protect private individuals from laws and actions which violate their rights.

However, certain types of amparo suits have the effect of staying the consequences of the action taken by the governmental authority challenged under the same. Participants in the telecommunications industry have often resorted to a tactic consisting of the filing of successive amparo suits to delay and virtually impede the effectiveness of governmental actions in the telecommunications industry to the detriment of much needed openness and competition in the industry.

As a general rule, participants challenging measures taken by the FTI in respect to dominant participants and remedial actions in respect to the same, will only be able to file indirect amparo suits, which do not have the effect of staying a governmental order, unless and until a final favorable court decision is rendered by the relevant court. As an exception to such rule, governmental decisions to breakdown and segregate the operations of a dominant participant and ensuing fines, can only be executed after an amparo suit that may be filed against the same is finally resolved.

Please do not hesitate to contact us with any questions.

Berdeja Abogados, S.C.

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