

E-ALERT | Mexico Telecommunications Reform

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MEXICO ENACTS COMPREHENSIVE REFORM IN ITS TELECOMMUNICATIONS AND BROADCAST MEDIA SECTORS¹

A long-anticipated package of amendments to the Mexican Constitution, aimed at reforming Mexico's telecommunications and broadcast media sectors, became effective as of June 12, 2013.² Approval of these amendments was a top priority for President Enrique Peña Nieto's administration, as they are expected to usher in an era of much greater competition and openness in the Mexican telecommunications and broadcast media sectors. It is especially notable that the reforms very closely track the recommendations made less than a year ago by the OECD, in a report³ that was itself highly critical of the *status quo*. The new regime promises to be a real and very significant break from the past.

Key elements of the reforms include:

- **Permitting up to 100% foreign ownership of companies engaged in telecommunications services, including satellite communications. Up to 49% ownership will be allowed in radio and television broadcasting, subject to a requirement of reciprocity.**

The requirement that Mexican nationals own beneficially a majority of the voting shares in companies engaged in telecommunications services, including satellite communication, and otherwise have effective control of those companies, has been a deterrent to new investment, even though foreigners have been permitted to hold additional shares of capital stock to reflect a larger economic participation. Breaking with that policy will eliminate important distortions and inefficiencies that have typified contractual and business relationships between Mexican and foreign parties in the sector. It will also open the door for new entrants to acquire and recapitalize existing market participants who have thus far been unable to compete effectively with the incumbents. This represents an important opportunity for prospective foreign investors in these sectors to participate in these businesses on markedly different terms than those previously available and with full control over their own strategic direction, intellectual property, and financial investment. The partial opening of the broadcast media sector is also a substantial step in the direction of greater competition.

¹ We gratefully acknowledge the input of our friends and colleagues at [Creel, García-Cuellar, Aiza y Enríquez](#) in the preparation of this E-Alert.

² The text of the reforms, contained in a decree entitled *Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o, 7o, 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones*, was published in the *Diario Oficial de la Federación* on June 11, 2013, and is available at http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013.

³ See OECD, *OECD Review of Telecommunications Policy and Regulation in Mexico* (2012), available at <http://www.oecd.org/sti/broadband/50550219.pdf>.

- **Empowering a new regulatory authority to identify dominant market participants and to force those participants to remove barriers to entry.**

Under the amended legal framework, the Federal government will have a new industry regulator known as Ifetel (*Instituto Federal de Telecomunicaciones*), which will regulate the telecommunications and broadcast media sectors and have enforcement powers. Ifetel will have authority to grant and revoke all forms of concessions and licenses, as well as to impose fines and sanctions. Of particular interest is the fact that Ifetel will serve as the exclusive antitrust authority in both sectors; Mexico's federal competition body, the Federal Competition Commission (*Comisión Federal de Competencia*), will cease to have authority over the telecommunications and broadcast media sectors.

In the broadcast media context, the new legislative framework will establish "must carry" and "must offer" rules that will ensure that pay and open TV services will compete on a level playing field. In addition, two new national open television networks will be licensed, in a process that will be closed to the current duopoly. The resulting liberalization will no doubt create demand for new content and opportunities for new entrants in both the production and delivery of creative material. The transition from analogue to digital will be required to be completed by December 31, 2015, with corresponding spectrum frequencies being relinquished and made available for other use.

In telecommunications services, the new pro-competitive policy translates into a specific authorization to the Ifetel (*and* direction, with a very specific timetable from enactment) that (i) it identify the dominant market participants in each of the relevant telecommunications and broadcast media businesses, and (ii) it then order those dominant market participants to make their infrastructure available on a disaggregated basis to new entrants: so, for example, a competitor in mobile telephony should be able to secure access to the towers and other physical infrastructure of the dominant service provider, on commercially reasonable terms and at the points of its choosing.

- **Launching new broadband infrastructure.**

The reform calls for the *Comisión Federal de Electricidad*, the state-owned utility responsible for the generation and transmission of electricity, to assign to another agency of the federal government, *Telecomunicaciones de México*, the concessions that it holds to build and operate a nationwide telecommunications network, as well as all of the associated rights of way, towers, and equipment. The aim is to convert, by no later than December 31, 2018, what is currently a network of dark fiber that reaches every corner of the country (as well as the spectrum that will be freed-up by the digital transition) into an alternative national broadband backbone that will compete with the infrastructure currently controlled by Telmex. This will create important opportunities for prospective participants in the build-out process, including equipment suppliers, as well as for the eventual new entrants who will use the broadband backbone that will be developed in order to provide and distribute their own services. Notably, the reform expressly contemplates the possibility of structuring this major new infrastructure development as a public-private partnership.

- **Removing barriers to effective enforcement, simplifying the concession/administrative structure, and resolving disputes efficiently.**

A longstanding concern that the reform sought to address was the common practice of large players in the telecommunications and broadcast media sectors (and in other sectors as well) to seek and obtain injunctions that could delay enforcement of administrative orders for extended periods of time. Months or years could pass before a pro-competitive sanction or order could take effect. The reform significantly limits the availability of injunctive remedy, restricting it to cases in which economic fines are imposed or divestment of assets or other property is ordered.

Injunctive remedies would not be available, for example, in the case that Ifetel ordered a dominant market participant to make key items of its infrastructure available for interconnection or other use by existing or prospective competitors.

Also with a view to promoting agility and administrative efficiency, a “single concession” (*concesión única*) regime will be created, replacing the existing practice of issuing concessions with very limited or specific scope (with corresponding approval requirements for extension or expansion); existing and future concessionaires will be free to use their respective networks to offer the full range of telecommunications services. Finally, the reforms call for the creation of specialized courts, staffed with judges with the requisite experience and sophistication in competition law and in the relevant industry sectors, to address matters and controversies that arise with respect to the application of the reforms and of the new administrative structure generally. This is an important step in ensuring that controversies will be addressed efficiently, equitably, and with a sufficient understanding of the business realities in the sector.

Mexico’s telecommunications reform represents a bold and aggressive step, early in President Peña Nieto’s administration, aimed at removing barriers to competition, improving the delivery of key services, and enhancing the opportunity for innovation and productivity gains. From the perspective of existing or prospective investors in the relevant sectors, it is a momentous development.

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