

## The Mexican Parliament adopts sweeping telecom reform aiming at cracking down on dominant operators, inducing significant reform of competition law and agency

**Mexico, Regulated sectors, Abuse of dominance, Interim measures, Ex ante price control, Regulated prices, Foreign investment, Media pluralism, Concession, Telecommunication**

Mexican Congress (Congreso de la Unión), 11 June 2013, Telecom Reform

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On June 11th, 2013, a significant amendment to the Mexican Constitution known as “the new Telecommunications Act”, which also significantly impacts the competition regime, was enacted, and will enter into force on June, 12th.

The amendment is seen as resulting from the "Pact for Mexico", entered into by the major political parties in December 2012. It mainly aims at leveling the playing field of the telecom and broadcasting industry in Mexico, still dominated respectively by America Movil and Televisa, by giving a newly formed telecom regulator the power to crack down on monopolistic practices and keep telecom and broadcasting companies from controlling more than 50% of the market. But the reform also entails significant changes on competition related matters, the competition authority and its powers, which will have to be incorporated into the Mexican competition law in the near future.

### What the Reform says

In a nutshell, the reform induces a number of changes meant to significantly enhance the development of a dynamic, competitive and affordable telecom and broadcasting sector in Mexico:

The current telecom regulator, Cofetel (which was an administrative body dependent on the ministry of telecommunications and transport), will be replaced by **Ifetel** [1], and the existing Federal Competition Commission (**FCC**) will become the Federal Commission for Economic Competition (**FCEC**). Each of the agencies will be an autonomous authority having its own budget [2], the members of which will be selected through an open evaluation process [3], and which will be vested with new, far-reaching powers:

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- ▶ In addition to a classic sectorial regulation role (including the granting of broadcasting and telecom concessions, the regulation of the frequency spectrum, and ensuring access to active, passive infrastructure as well as to essential facilities), **Ifetel will have exclusive jurisdiction over competition issues in the broadcasting and telecom sectors;**
  - ▶ In particular, Ifetel will be in charge of **applying asymmetric regulation** “*aiming at efficiently removing barriers to free competition*”, of limiting national and regional concentration of frequencies, and of limiting cross-ownership of various communication means on the same market or geographic coverage area;
  - ▶ Importantly, Ifetel is specifically vested with the power to **order divestments** to ensure actual compliance with the above-mentioned objectives. In practice, **Ifetel will be in charge of identifying the “predominant” players, defined as those holding more than 50% market share [4]** in the provision of broadcasting or telecom services in Mexico. Then, Ifetel will have a tight 6-month period from its creation to impose the measures required to “*effectively unbundle the local network of the preponderant telecom player*”, so as to enable actual interconnection between any terminal point of the public telecom network, and the local network of the predominant player [5];
  - ▶ The FCEC, for its part, **will have exclusive jurisdiction over competition issues (antitrust and mergers) in all the other sectors** and will, in particular, have the power to impose measures to eliminate barriers to competition, regulate access to “essential inputs” [6], as well as **order divestments** to the extent necessary to eliminate anticompetitive effects.

Ifetel’s and the FCEC’s decisions shall only be appealed through an “*indirect amparo [7]*”, which shall not be suspensive, and which shall only be heard by specialized courts, to be created, and previously available administrative appeals will disappear [8]. A notable exception, however, is the FCEC’s decisions imposing fines or divestments, for which *amparos* will *de facto* continue to be suspensive until the case is heard;

**The reform is also designed to encourage more foreign investment, allowing non-Mexican companies to become majority shareholders for the first time**, as far as telecom and satellite communication is concerned. Direct foreign investment shall be permitted up to 49% as far as broadcasting is concerned, subject to equal treatment in the jurisdiction of the foreign investor (whereas it used to be limited to 49% in both cases);

The government will be in charge of an ambitious “universal digital inclusion” policy, aiming at enabling at least 70% of Mexican homes and 85% of Mexican SME’s to have internet access, at a speed which effectively enables downloading of information, comparable to the one registered on other countries of the OECD, and at internally competitive prices. The government, in coordination with Ifetel, will also have to **build a national broadband network**, to be completed by 2018.

## **How likely is it to efficiently remedy the current lack of competition in the telecom sector in Mexico?**

A recent OECD report [9] had pointed out the poor state of competition in the Mexican telecom sector, leading to excessive prices for consumers and a poor level of service – a fact to which any

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Mexican resident can testify. The OECD estimated the cost to the Mexican economy to be around USD 25 billion each year, equivalent to about 1.8% of GDP.

Among the factors which have contributed to this grim picture and resulted in Mexico being at the bottom of rankings of the OECD countries in market penetration for fixed, mobile and broadband markets [10], the report identified in particular:

- ▶ the weaknesses of the *amparo* system, the suspensive nature of which actually encourages firms to file a virtually endless number of “appeals” against regulatory decisions. *Amparos* were originally designed to protect personal freedoms, and to challenge decisions which may cause “irreparable damage” to individuals or companies. However, in practice, economic agents have systematically used – or abused according to the OECD – hundreds of such *amparos* to significantly delay or even to elude most of Cofetel’s and the FCC’s decisions [11];
- ▶ the lack of independence of Cofetel and the separate responsibilities for telecom policy making (ministry) and regulation (Cofetel) – the so-called “double-window”;
- ▶ the rather complex concession system;
- ▶ foreign investment restrictions;
- ▶ the lack of *ex ante* interconnection tariffs,...

Against this background, many points of the reform certainly appear to be on the right track: the non-suspensive effect of *amparos* against Ifetel’s decisions [12], the creation of specialized courts to hear challenges against both Ifetel’s and the FCEC’s decisions, Ifetel’s independence and clear policy-making role (e.g. decisions on pricing, network unbundling and interconnection rates), the opening of majority foreign investment in telecom and satellite communication, etc.

However, many important issues are left to secondary legislation still to be enacted. For example, the reform establishes a **general principle of “severe prosecution” of a number of anticompetitive practices**: “concentration of essential inputs” having the object of raising prices, any agreement between competitors to restrain competition or charge excessive prices to consumers, and any kind of “undue advantage” at the prejudice of the public of a given “social class”.

Secondary legislation will have to create the **specific criminal infringements** applicable to such practices, but it is unclear how this will integrate in the current competition framework, which was significantly reformed in May 2011 [13] and already punishes some of these practices.

Similarly, the creation of specialized courts to hear competition and regulation cases was already part of the 2011 competition reform, but, to date, no such courts have been created.

## What about the new Federal Commission for Economic Competition?

The current FCC will remain in existence until the FCEC is created. While losing jurisdiction over all competition issues relating to the telecom and broadcasting sectors, the FCEC might find some

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comfort in its new power to order divestments to restore competition in all the other sectors.

Secondary legislation will be critical to identify the cases in which such structural remedies could be imposed, as, apart from merger control, it is unprecedented in most jurisdictions.

In addition, the current FCC's practice in merger control divestments is still developing, and relatively opaque: first, the FCC does not make public its main concerns and reasons why divestments in a given merger case would be required, before rendering its decision. Secondly, for "confidentiality" reasons, the FCC does not either make public the parties' proposals for divestments, including in cases where it rejects the parties' proposals and consequently imposes a ban on the relevant transaction [14].

Efficient implementation of this new, far-reaching power, would require the setting up of clear, transparent criteria as to cases in which divestments could be imposed, as well as the types and scope of divestments.

Among the challenges Mexican operators will be faced with is the coexistence of 2 parallel decisional practices in competition matters: a general one by the FCEC and a sector-specific one by the Ifetel. How much discretion will the Ifetel enjoy in terms of "pure" competition concepts (e.g. barriers to entry, concentration, etc.) when applying them to its exclusive jurisdiction sectors? What about cases where the two agencies might render contradictory decisions when applying the same concept, but to different sectors?

The coming months shall certainly be interesting times in Mexico, as the clock will start ticking on June, 12th: from then on, Mexican Congress will have 6 months to pass the required secondary legislation, Ifetel and the FCEC shall be in principle created within 80 days and any *amparo* against the existing agencies' decisions shall follow the new regime.

**NB** Regarding this case, see also :

[Omar Guerrero Rodríguez, Alan Ramirez Casazza, The Mexican Congress amends telecom legislation introducing significant changes in competition law, 11 June 2013, e-Competitions, n°52502](#)

[1] *Instituto Federal de Telecomunicaciones*.

[2] The House of Representatives will be in charge of guaranteeing that the respective budget of Ifetel and the FCEC shall be sufficient to enable them to efficiently perform their respective duties.

[3] At the initial stage. On the basis of the results (i.e. the grades obtained) of such open competitions, a blue ribbon committee will identify a short list of applicants, which will then be submitted to the President of the Republic, who will in turn submit his selections from among the nominated individuals to the Senate for ratification. A two-thirds vote will be required for approval of any nominee. The commissioners will be appointed for a non-renewable 9-year term (note that the presidential term of office in Mexico is limited to a single six-year term).

[4] Measured by number of users, of subscribers, audience, by network traffic or used capacity of network.

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[5] Interestingly, such measures are specifically mentioned to be also applicable to firms enjoying “substantial market power” in the relevant market for services provided to end users. This refers to the concept used under Mexican law, which is broadly equivalent to that of dominance under EU competition law, and which will apply to the broadcasting sector.

[6] This concept would have to be defined by secondary legislation, but should broadly correspond to the notion of essential infrastructure, but will apparently apply to raw materials as well.

[7] In the Mexican judicial system, *amparos* are constitutional claims used for the protection of personal freedoms and constitutional rights, but also for the judicial review of administrative actions. In some cases, an *amparo* can lead to suspension of a decision if considered to affect and cause irreparable damage to individuals or companies.

[8] This particular amendment will have a significant practical impact in merger control cases, where typically the administrative appeal process was used to negotiate conditions for a transaction to be cleared.

[9] See [OECD Review of Telecommunication Policy and Regulation in Mexico](#), December 2012.

[10] According to such report, the incumbent America Movil (owning Telmex and Telcel) still owns about 80% of fixed and 70% of mobile telephony markets, while the average market share of the mobile incumbent in OECD countries is roughly 40%.

[11] Part of the problem also lies in the fact that most Mexican courts have very little knowledge of competition and regulatory issues, and thus largely tend to rule on pure procedural grounds. This, in turn, encourages the use/abuse of systematic *amparos*.

[12] Although the Senate introduced a significant exception for the FCEC’s decisions imposing a fine or divestments, for which *amparos* will continue to have de facto suspensive effects.

[13] Actually, a proposal of implementing regulation of the 2011 competition reform is currently being drafted by the FCC. Part of such a draft regulation might still be applicable, subject to the actual scope of secondary legislation to be passed, and subject to the new FCEC willing to accept this “inheritance”.

[14] See, for example, the FCC’s prohibition of Nestlé’s acquisition of Pfizer infant nutrition business, on November 20, 2012 considering that the parties’ proposed divestments were not sufficient, while the published decision did not provide any information as to the package offered by the parties (eventually, upon “second review”, the FCC cleared this transaction in April 2013, subject to divestiture commitments).

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