

# Mexico takes two major steps towards telecommunications convergence

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With the recently enacted amendments to the Federal Radio and Television Law and the Federal Telecommunications Law, as well as with the resolution on convergence of fixed local telephony and restricted television and audio services, Mexico strives to locate itself in the telecommunications world spotlight.

Nevertheless, several anti-competitive implications must be addressed before this goal is accomplished.

## Principal anti-competitive implications of the reforms to the Radio And Television Laws

In the last period of sessions of the LIX Legislature,<sup>1</sup> several amendments to the Federal Radio and Television Law and the Federal Telecommunications Law (the reforms)<sup>2</sup> were approved.

In this section, we will analyse from the point of view of competition the principal implications of the controversial reforms, also known by their detractors as *Ley Televisa* (Televisa Law).<sup>3</sup>

### Reforms to the Federal Telecommunications Law

The Federal Telecommunications Law (*Ley Federal de Telecomunicaciones* or LFT) was amended primarily in order to establish the Federal Telecommunications Commission (Comisión Federal de Telecomunicaciones or COFETEL) as a regulatory body of radio and television, for which purpose the organic powers previously held by the General Office of Radio and Television Systems (Dirección General de Sistemas de Radio y Televisión) of the Ministry of Communications and Transportation (Secretaría de Comunicaciones y Transportes) were transferred, establishing that such commission will be a decentralised body of the Federal Public Administration (Administración Pública Federal).

The LFT also provides that this regulatory body will have technical, operative, expenditure and management autonomy for the purposes of reviewing, regulating, promoting and supervising the efficient development of telecommunications and radio broadcasting in Mexico. The 'new' COFETEL is composed of five commissioners (including the president), who are appointed by the head of the federal executive, and must be approved by the senate. The term in office at the commissioners is eight years, which is renewable where the terms are staggered. The president of COFETEL will be chosen by a vote of the commissioners and will remain in his position for four years (renewable for one additional period). The president of COFETEL has a tie-breaking vote.

COFETEL, among other things, shall give its opinion in relation to the granting, revocation, extension and assignment of concessions, and submit to the approval of the ministry the programmes of new radio spectrum band frequency bids for specified uses (such uses are described below).

### Reforms to the Federal Radio and Television Law

The Federal Radio and Television Law (*Ley Federal de Radio y Televisión* or LFRT) was substantially amended in order to broaden the spirit of the previous law and to regulate the use and exploitation of the national public good presented by the radio spectrum.

### Regulatory body

As mentioned in the section regarding the reforms to the LFT, both the LFT and LFRT were amended in order to establish that the ministry, through COFETEL, will be the agency responsible for regulating radio and television.

### Concessions and permits

The concessions and permits that can be granted for radio and television stations may be: commercial, official, cultural, experimental, for radio schools or for any other type.

Commercial stations require a concession, whereas those who engage in official, cultural, experimental activities or radio schools only require a permit granted directly by the ministry without the need to make a bid. The permit holders may only use 7 per cent of their total transmission time for the sale of advertising spaces.

The concessions for new radio and television stations will be granted through a public bidding process. When the federal government grants these concessions, it receives a payment in return.

The new LFRT establishes, unlike in the previous law, that the concessions will have a term of 20 years<sup>4</sup> and may be renewed to the same concessionaire, who will have preference over third parties, without needing to bid for renewal or pay the federal government any amount.

New concessions will be granted in accordance with a programme for assigning radio frequencies, and may be bid for by Mexican citizens or Mexican companies that exclude foreign investment.<sup>5</sup> In the bids made by interested parties, a technical offer and an economic offer should be presented, which must have the favourable opinion of the Federal Economic Competition Commission (Comisión Federal de Competencia Económica or CFC). The COFETEL will evaluate the contents of the bid (technical and economic) as well as its purpose and will declare who is the winner of the bidding, who then has a term of 30 days to pay the price of the concession.

In addition, the LFRT establishes that a concession or permit may be transferred to another person trained in accordance with the LFRT, provided three years have passed since the concession or permit was obtained and the person to whom it will be transferred obtains a favourable resolution from the CFC.

One of the most controversial provisions of the recently approved LFRT establishes that the concessionaires who wish to provide additional telecommunications services<sup>6</sup> through the concessioned frequency band may obtain an authorisation without the need to bid for it. For this, the ministry may require payment, taking into account the width of the radio spectrum band, the geographic coverage and the payment that was made to obtain the original concession. Given that as an expansion of services the concessionaire may provide telecommunications services, the concession title must be amended in order to reflect the new authorisation.

### Commentary on the reforms

It has been widely commented that the reforms were an attempt to update a visibly outdated law that urgently needed reform. Many have argued, however, that the reforms, more than being a benefit to industry, were made in order to protect the interests of the large

communications companies that exist in Mexico.

Those who have supported the reforms mention that their primary purpose is to promote the use of certain services that can be provided through the exploitation of the radio spectrum they have concessioned, in order to be able to provide better channels of access to users, as well as a wider range of services.

Below we analyse the principal implications of the reforms in relation to their competitive effect.

#### Independence of COFETEL and the commissioners

It has been mentioned that one of the primary purposes of the reforms has been to provide COFETEL with economic, technical and legal independence, but the independence of such body is not total, since the majority of the important decisions must have the authorisation of the ministry.

It is also important to mention that notwithstanding that the appointment of the commissioners must be approved by the senate, the reforms do not clearly establish that the commissioners comprising the full COFETEL must be independent and not have any relationship to the companies they will regulate.

#### Concessions

With regard to the concessions, it is important to note that those who are already concessionaires will have preference with respect to third parties, leaving it to the entire discretion of COFETEL to establish the criteria for determining the preference. Nor are any rules established for the case of a third party that wishes to bid for a concession when one ends, and therefore it is very unlikely that a concession already granted can be sought by another party, unless the concession is not reissued to the previous concessionaire by direct instructions of COFETEL or the ministry.

Furthermore, in view of the fact that the LFRT establishes that for the renewal of a concession it is not necessary to bid, the concessionaires that renew their concession will not be obliged to make any payment for renewal, nor obtain a favourable resolution from the CFC.

In view of this, it seems that competition is not promoted and barriers are established to entrance into the radio and television market, since preference is given to the existing concessionaires who are exempt from the payments that must be made by those who want to enter the market.

#### New services through concessioned frequency bands

As mentioned previously, one of the new provisions of the LFRT is that the current concessionaires are authorised to provide telecommunications services in addition to radio broadcasting through the concessioned frequency bands. Among the additional services that can be used through a frequency band are data transmission and mobile telephone services, as well as other telecommunications services.

As a result of the above-mentioned provision, the concessionaires of radio and television may, without needing to submit a bid (as telecommunications concessionaires must) and without having to make the payment<sup>7</sup> to obtain a concession, provide wireless telecommunications services.

Notwithstanding that the telecommunications service will have more participants in the initial stages, in the medium term there will be significant barriers to entry into the market, since the new telecommunications concessionaires will be at a disadvantage in relation to the radio and television concessionaires that wish to expand the services of their frequency, given that the new concessionaires must bid, pay for the concession and also invest in the necessary infrastructure.

#### Disadvantages of the permit holders

In view of the fact that the LFRT only authorises the permit holders to sell 7 per cent of their programming, it is very likely that the investment in relation to the purposes of the permits (culture, education, etc) will decrease, given that they will have much more difficulty in obtaining the necessary funds for technology, salaries, etc. As a result of this, it is very likely that the government will have to give direct subsidies to the radio and television permit holders.

#### Resolution on convergence of fixed Local telephony and restricted television and audio services

Recently, the Ministry of Communications and Transportation (SCT) sent to the Federal Regulatory Improvement Commission<sup>8</sup> (Comisión Federal de Mejora Regulatoria or COFEMER) a bill entitled Resolution on Convergence of fixed local telephony and restricted television and audio services provided through wired and wireless public networks.<sup>9</sup> Through this, it is intended that a simplified regulatory and administrative procedure for authorising the concessionaires of restricted television and audio (wired and wireless) will be established, to provide the fixed service of local telephony for the purpose of promoting the convergence of telecommunication services networks (RPT), as well as healthy competition among RPT concessionaires who provide restricted television and radio services, and concessionaires of public telecommunications networks that provide fixed local telephony services by the interconnection and inter-operability of their networks. In addition, in this resolution, specific time periods are established for the development of public bidirectional telecommunications networks for restricted television and audio services in areas where such infrastructure does not exist.

This resolution has caused concern and complaints by several participants in the telecommunications industry, especially from those who have network concessions to provide cable television services, since they consider that the resolution and the corresponding amendment of the concession titles of all the companies of the sector, including the title of Teléfonos de México SA de CV (TELMEX), will only benefit the latter, who in 2003 operated approximately 95 per cent of the 16.3 million fixed telephone lines in service.<sup>10</sup>

As a result of this, COFEMER, based on an administrative collaboration agreement, requested the opinion of the CFC on the effects on the competitive process and the free market of the RPT convergence, in order to produce an integrated convergence policy that guarantees competition in the telecommunications sector.

In this respect, the CFC stated in its opinion<sup>11</sup> that, although the convergence of different telecommunications networks could have the effect of promoting competition among the concessionaires themselves, stimulating investment and promoting a greater offering of telecommunications services at lower prices with higher quality and greater variety and that, in turn, such convergence would generate a substantial increase in the competitiveness of the economy, first certain questions should be resolved in order to avoid the creation of barriers to entry and discriminatory conditions for concessionaires of services which, far from promoting healthy competition among economic agents, would favour the appearance of monopolistic practices, principally against the concessionaires of restricted cable television networks (RTVC) and wireless (by the multipoint multi-channel distribution system RMMDS).

Thus, the CFC argued that the resolution conditions the provision of fixed local telephony by the RTVC and RMMDS concessionaires to the interconnection of their networks with at least one RTF concessionaire and vice versa, which is by all lights discriminatory, because it will result in the initial stage of the convergence, in the RTF, RTVC and RMMDS concessionaires granting the interconnection to a concessionaire of their choice leading to the creation of

important entry barriers adversely affecting the competitive process and the free market, to the extent that such barriers facilitate anti-competitive concentration in the telephony, internet and restricted television market in the economic agent most favoured by such barriers. Therefore the interconnection to every concessionaire that requests it is indispensable to avoid entrance barriers and restrictions on the competitive process and the free market.

In addition, the CFC considered that the portability of telephone numbers in local services areas constitutes an important factor in the promotion of competition among operators of fixed local telephony services and its absence would cause problems for the efficient functioning of the telephony markets, blocking the entrance of competitors and imposing costs on users in the choice of the telephony service. Therefore, the effective application of portability, before the authorisation of restricted television and audio services in such operators' networks, is indispensable for the development and consolidation of competition in the context of the convergence. Otherwise there is an elevated risk of delaying or impeding the entrance of the RTVC and RMMDS concessionaires into the fixed telephony markets.

Furthermore, the CFC stated that the reduction of the two-year waiting period for the RTF concessionaires to offer restricted television and audio services, when the construction and operation of bidirectional RTVC or RMMDS in zones where this infrastructure does not exist is carried out before such time period, is inconvenient because it does not provide any incentive for the RTVC or RMMDS concessionaires to accelerate their investments under the perspective of making use of the waiting period to promote their telephony services.

In addition, the CFC indicated in its opinion to COFEMER that the restrictions established in the concession titles that impede the RTF concessionaires from providing restricted television and audio services and the RTVC and RMMDS from offering fixed telephone services, are part of a policy that has limited the convergence of these platforms and, therefore, they should be eliminated. It warned, however, that such restrictions should only be eliminated with respect to those concessionaires that comply with the terms and commitments that, for purposes of avoiding the creation of entrance barriers and other practices that adversely affect the competitive process, are established in the resolution.

Moreover, the CFC indicated that the resolution does not take into consideration that the RTF concessionaires that have entered the market since 1996 have seen their capacity to compete diminished due to the lack of alternatives in the provision of local access (the last mile), and therefore the commission considered it important to facilitate, in coordination with the Ministry of Energy and the CFC, the bidding for the lease of the media and low tension networks of the Federal Electricity Commission to those interested in using them to provide telecommunications services, based on criteria that prevent the anti-competitive concentration of that infrastructure.

In view of the opinion rendered by the CFC, on 19 July 2006 the COFEMER sent to the SCT the final opinion<sup>12</sup> with regard to the resolution, which included the comments and suggestions that, in the judgment of the CFC, should be applied to the bill by the SCT, in order to ensure a policy for the convergence of the telecommunications services under healthy competitive conditions and, in addition, asked the SCT to present it a new version of the resolution addressing the requested adjustments, which according to the assistant secretary of communications of the SCT will be presented to the CFC soon, given that it is hoped that the resolution will go into effect in November 2006. For its part, the SCT has indicated that it will include the comments of the CFC in the final version of the resolution, since it agrees with these comments. It was stated, however, that the COFEMER went too far in its suggestions given

that it is only an agency that facilitates the regulatory process of the federal administration and it does not set the competitive criteria nor issue the telecommunications policy of the country.

During this process, and more precisely during the public consultation period, the COFEMER received and took into consideration the opinions of different interested parties and participants in the telecommunications industry. Therefore, and given the importance of this topic for both the agents concerned and the users, as well as several related governmental authorities, the opinions have been very diverse and, in some cases, clearly reflect the large economic interests that certain participants have in this respect. Such is the case of TELMEX, which considered that in the opinion issued by the CFC, "preference was clearly given to the restricted TV distribution networks in terms of the opening periods and applicable regulation, under the argument that these networks require interconnection to offer telephony, while the RTF would be able to provide the restricted TV service without need of those conditions, overlooking the fact that the RTVC and RMMDS today provide their services through a monopoly framework in practically all the important cities of the country, and that postponing competition in those cities is to the detriment of consumers and the free market."<sup>13</sup>

As can be seen, the important interests involved in the convergence and the consequent opening of the telecommunications market have resulted in certain agents wishing to hold up the entrance into force of the resolution, arguing that it was developed with a clear preference for the RTVC and RMMDS concessionaires. There are others, however, who consider the resolution clearly discriminatory, only favouring the largest telephone company in the country. Therefore, there is a risk that the resolution will not be finalised, or at least not during this administration, if other aspects are not taken into consideration, such as the dominance of TELMEX in the telephony market.

For now COFEMER, to whom the response of the SCT to the observations made on the resolution will be sent, will have the last word, and it will be then when we will find out if the RTF concessionaires will be authorised, in a shortened process, to provide RTVC and RMMDS services and vice versa, or if such convergence will have to come from an entire revision and not just a partial one in relation to competition and the free telecommunications market.

## Notes

- 1 Also, the last legislative period of the administration of Vicente Fox.
- 2 Such reforms were published in the Official Federal Gazette on 11 April 2006.
- 3 Televisa is the principal television broadcaster in Mexico, also having a significant presence in radio broadcasting. It is public knowledge that Televisa was one of the principal promoters of the Radio and Television Reforms.
- 4 The previous Federal Radio and Television Law established that the concessions were granted for a term of 30 years.
- 5 According to article 6, section III of the Foreign Investment Law and article 14 of the LFRT, the activities of radio and television are reserved to Mexicans or Mexican companies with Mexican partners or shareholders. In addition, foreign governments or foreign persons may not under any circumstances be admitted as partners or associates (nor encumber, alienate or convey in trust in their favour) of a concession or permit holding company or such interests will become the property of the state.
- 6 These additional services may be, among others, data transmission and mobile telephone services.
- 7 Notwithstanding that COFETEL will establish the obligation to pay for the authorisation to provide additional services, this payment will not be very high given that what has already been paid for the concession of the radio spectrum will be taken into account.

- 8 Government body of the Ministry of Economy, responsible for promoting transparency in the drafting and application of the regulations drafted by the decentralised agencies and bodies of the Federal Public Administration. See articles 69-E and 69-H of the Federal Administrative Procedures Law.
- 9 Sent by the SCT to COFEMER on 19 April 2006.
- 10 See ruling No. PRES-10096-2006-102 sent by Lic Eduardo Pérez Motta, president of the Federal Competition Commission to Lic Carlos García Fernández, head of COFEMER.
- 11 Idem.
- 12 See full Opinion sent by Lic David Quezada Bonilla, general coordinator of manifestations of regulatory impact of COFEMER to Lic María de la Luz Ruiz Mariscal, chief of staff of the SCT.
- 13 Opinion sent to COFEMER by Francisco Javier Islas Mancera, general attorney in fact for litigation and collections and acts of administration of TELMEX, on 14 July 2006.

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