

TERRUM

Briefing, analysis, opinion and insight of legal affairs in Mexico

Digital Publication by ABOGADOS SIERRA Y VAZQUEZ

May 15, 2013
year 01 | No. 09



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A breakthrough of legal substance as well as of political form for the solution of a major structural challenge.
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“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”

The new adopted reform of the Telecommunications System in Mexico,

A breakthrough of legal substance as well as of political form for the solution of a major structural challenge.

by Carlos Sierra.

As part of the proposed major structural reforms of Mexico's legal system that the new government has implemented since taking office in December 1st 2012, which have thus far produced a major overhaul of Mexico's labor law, a constitutional reform in regards to the responsibility of the state in education and several surrounding changes in how the public education services will be reformed, a very substantial new Amparo Law that will prevent the abuse of this important instrument of constitutional control and protection of individuals against the violation of laws and constitutional guaranties,¹ at this time the legislative process is moving forward to implement a major reform of the constitutional and regulatory framework applicable to telecommunications.

Notably among all these important structural changes is the fact that all these major reforms, which among others have been demanded for decades by the general public and as a requirement to increase Mexico's competitiveness by overhauling the quality of its most important institutions, have been achieved merely in a few months and that all these, and hopefully others to come namely addressing Mexico's intricate fiscal system and on the opening and modernization of the oil and energy sector, have been the product of what is being a transcendental understanding to agree upon and to implement all these major changes adopted by the most relevant political forces of the country which have come together in the *Pacto por Mexico*,² a talented political agreement where partisanship and individual interest has been put aside to give priority to the discussion and joint generation of the most important structural changes that the country has experimented possibly since the Mexican Revolution took place during the early part of the twentieth century.

In the context of the *Pacto por Mexico* is that the Mexican congress has finally approved last week, and submitted for the approval of all local legislatures, a major telecommunications reform that will undoubtedly change the course under which this industry has been developing and will permit the entrance of new competitors for the benefit of cost, infrastructure and technology, while at the same time, will reduce to reasonable size the substantial power that is exercised by the damaging monopolies that have controlled this industry in Mexico during most part of its existence.

The purpose of this reform, which deals with information technologies as well as with radio and television broadcast and telecommunication services, recognizes that these means of communication have become an essential instrument of modern democracies and constitute a fundamental element of social participation and economic development as they favor and broaden the freedom of speech and the diffusion of contents, the access to information, competitiveness and growth and the fostering of education, health, security, knowledge and the wide spread of ideas and culture.³

1.- This important new law will be discussed in a separate article in this number of COELUM.

2.- www.pactopormexico.org

3.- As described in the Telecommunications Reform Initiative presented by President Enrique Peña Nieto on March 11, 2013.

The telecommunications reform initiative presented by the government highlights the need for modern nations to be inserted in the society of knowledge and information and to do so through the competitive development of telecommunications and radio broadcasting services as the principal elements to facilitate this prosperity. A comprehensive reform of telecommunications, the initiative states, is essential to develop a more equal society, to avoid exclusion and to implement the fundamental rights contemplated in many international instruments that are echoed in this proposal⁴

The reform recognizes that Mexico has fallen behind in providing access to these services in adequate form. It recognizes that growth in the telecommunications sector has fallen below the real potential of Mexico's competitiveness, that the market is concentrated in few which results in low rates of growth and penetration of these services, conditions that contribute to what the initiative denominates as the digital alphabetism of the twenty first century.

In the context of this, the reform highlights the duty of the state to generate the regulatory framework that can create a more homogenous growth and spread of the telecommunications infrastructure and services throughout the country.

In terms of infrastructure, the initiative states that while the services of fixed and mobile telephone, paid television, internet and broadband have shown positive dynamism in recent years opening access to more users of the information and communication technologies, this development has been insufficient to place Mexico in a favorable position in the international context of nations. As of December of 2012 in accordance with the COFETEL the number of fixed telephone lines in the country has reached 20.1 million, reflecting nearly zero growth during the past five years. The growth of mobile telephone systems has increased in comparison with fixed telephone lines and yet, in comparison with other countries, Mexico has registered only an average of 86 subscriptions per 100 habitants, while the average in the OECD member states has been of 109 causing the penetration in telephone services in Mexico to be the lowest of the OECD members and to be even lower than in other Latin American countries such as Argentina, Brazil and Chile.

In addition to the above, the reform recognizes that the situation affecting the broadcasting communications market, while having achieved nearly universal coverage, also present a concerning

4.- Among other instruments of international law that the Telecommunications Reform Initiative relates to be supportive of the purposes that it pursues are:

- Article 13 of the American Human Rights Convention;*
- the Declaration of Principles on the Freedom of Speech of the Interamerican Human Rights Convention;*
- the Declaration of Principles of the World Summit of the Information Society held in Geneve, Switzerland in 2003;*
- Resolution A/HRC/20/L.13 of 29 June 2012 of the Human Rights Council of the United Nations on the promotion, protection and enjoyment of human rights in Internet;*
- the consulting opinion No. OC-5/85 of 13 November 1985 stating that monopolies and oligopolies attempt against the freedoms of speech and information;*
- the Joint Declaration on the Freedom of Speech and Internet of the Organization of American States, dated 1 June 2011 establishing that the States "hold the obligation to promote the universal access to Internet to guarantee the effective enjoyment of the right to freedom of speech";*
- the recognition of by the Supreme Court of the Nation (Suprema Corte de Justicia de la Nación) of the social role that involves the effective access to the telecommunications and radio broadcasting services ([J]; 9th. Era; Pleno; S.J.F. and its Gazzette; Volume XXVI, December 2007; Páge. 986).*

Among other instruments of doctrine and international jurisprudence.

degree of concentration. In this sense, the reform highlights that these services, which are provided under concession of the state, shall be regarded as important mechanisms to the coverage and access to broadcasted television, stating that the form in which the radio-electric spectrum is valued, adjudicated and exploited requires a profound revision. A larger quantity of the radio-electric spectrum should become available to new competitors and its use made more efficient. Two new television networks are proposed under the initiative to expand television coverage to 98% of the population of the country guaranteeing with this the adequate scale to promote competition in this sector and to achieve the adequate diffusion of culture, plurality, national identity as well as to provide objective, impartial, truthful and timely information of events as well as the freedom of expression of ideas and opinions.⁵

The initiative transcends the mere regulatory aspects of activities such as mobile and fixed telephone service, broadband Internet access, paid and open air television and other telecommunication services, to actually amend the capacities and structure of the competition regulator, on the one hand, permitting the applications of strong measures of control to regulate asymmetric relationships between economic agents to prevent undue completion and, for the first time, to seriously affect the interests of long standing monopolies to permit more competition more technological developments and lower costs for these essential services.

On the other hand, this groundbreaking reform has also increased the capacities, autonomy and scope of the telecommunications regulator to sanction illegal practices and to grant and revoke concessions without such resolutions being impeded any longer from becoming effective by the continuing abuse of injunctions obtained under endless *amparo*⁶ proceedings and by the blurred attribution of capacities that the still existing Federal Communications Commission (*Comisión Federal de Telecomunicaciones (COFETEL)*) has vis a vis the capacities that are within the scope of the Ministry of Communications and Transport (*Secretaría de Comunicaciones y Transportes (SCT)*). Under the proposed reform the COFETEL will become now the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones (IFETEL)*), an independent regulatory entity with nearly absolute autonomy with the capacity to establish policy, to grant and revoke concessions,⁷ which will cease to be the attribution of the federal government and to impose sanctions to the relevant economic agents.

In regards to the changes that affect the competition regulator, the current Federal Economic Competition Commission (*Comisión Federal de Competencia Económica (COFECO)*) will be attributed with increased capacities to sanction and to impose fines, to regulate asymmetric competition and to divest assets of the relevant economic agents that constitute monopolies or that incur in monopolistic practices. At the same time the right of defense of these agents against the resolutions issued by the COFECO, or by the IFETEL for that matter, will become substantially reduced if not nearly eliminated in full to prevent further abuse under lengthy and recurring *amparo* proceedings.

5.- As described in the Telecommunications Reform Initiative presented by President Enrique Peña Nieto on March 11, 2013.

6.- The *amparo* is a constitutional recourse that can be exercised before a higher court when an act of an authority or the application of a law can be considered to violate the constitutional guarantees of any natural or legal person.

7.- The initiative contemplates the integration under concessions of existing permits and concessions that are currently granted by the federal government.

To implement these changes the telecommunications reform initiative, presented by president Enrique Peña Nieto on 11 March 2013 contemplates amendments to the following articles of the Mexican constitution:

- Article 6, first paragraph;
- Article 7;
- Article 27, sixth paragraph;
- Article 28, second paragraph;
- Article 73, fraction XVII;
- Article 78, fraction VII
- Article 94, sixth paragraph

and contemplates the addition of the following paragraphs:

- Article 6, a second, third and fourth paragraphs are added causing the current second paragraph to become Part A of the fourth paragraph and a Part B of Article 6 is added;
- Article 28, paragraphs thirteenth through twenty ninth are added.

Upon approval of half plus one of all local legislatures the constitutional changes that are contemplated in this reform will become effective. The preparation and enactment of secondary legislation that will regulate the new constitutional provisions as contemplated in the initiative will follow within the following 180 calendar days.

In summary, the most notable features of the telecommunications reform can be highlighted as follows:

- To recover state control of the telecommunications sector for the adequate adjudication, development and exploitation of the assets that are subject concession of the state.
- To part existing monopolies to foster free competition and economic growth as well as to guarantee universal service coverage at accessible costs.
- To amend the Constitution to guarantee the right to access information and communication technologies such as Internet and to the democratization of its contents.
- To guarantee universal coverage of television, radio, telephone and data services at competitive costs with emphasis on the quality of the services and contents.
- To create opportunities to new competitors which will have more possibilities to grow, invest, innovate, reduce their costs and improve quality.
- To guarantee equal rights to the access to broadband services in rural as well as in urban areas.
- To create a new institutional architecture to remove the capacity of the government to grant concessions and to transfer this to the IFETEL to be created as an autonomous, independent regulatory entity.
- To increase the available radio electric spectrum in open air television, mobile and

fixed telephone services and Internet avoiding these improvements and the rights of the population to be subject of lengthy litigation between the suppliers of these services and between these and the state.

- To create specialized courts to deal with telecommunications matters to improve knowledge, specialization and the impartment of justice in these areas.
- To permit convergence of services and maximum use of existing resources which will be able to be provided by any concessionaire, being each able to provide television, radio, telephone and data transmission services to guarantee effective competition in broadcasting and telecommunications.
- To permit up to 100% foreign investment in telecommunications and satellite communications and up to 49% foreign investment in radio broadcasting.
- To promote the expedited transition to digital television.
- To cause the mandatory transmission of open air television channels by the paid television providers (“must carry”) and to cause the paid television suppliers to offer the signal of open air television channels to their customers at no cost (“must offer”).
- To develop infrastructure and networks that can be shared by all concessionaires avoiding the necessary use of the infrastructure developed by only one competitor with substantial power and to reduce the cost of its use.
- Establishment of single concessions, which means that the concessionaires will be able to provide all kinds of services through their networks as long as they comply with the obligations imposed by the IFETEL.

In the end it is important to emphasize the very comprehensive nature of this initiative and to add that when this major reform was presented by the government as an initiative under the *Pacto por Mexico*, all major telecommunications industry participants, including most of the targeted monopolies and all relevant public opinion entities and sectors, public opinion leaders, organizations and the general public, saluted the proposal and gathered together in support.

Consensus became evident that the whole country was aware and enthusiastic about the need for major change. The government has stated that the telecommunications reform initiative is of such importance that the GDP of the country could grow by more than 1% point per year once all the approved changes are implemented. We salute this initiative with excitement and we look forward to the subsequent initiatives to come.

President Peña Nieto promulgates new amparo law.

The president Enrique Peña Nieto promulgates this Monday the new law of amparo, approved in past days on the senate which allows the citizens to interpose this resource when they committed violations to their rights. With the reform it grants the general effects to the unconstitutional resolutions of a general norm by the National Justice Supreme Court, what shall be protected the rights of all people, even when they hasn't interpose the lawsuit, in accordance with information of the president. CNN expansion. 01/April/13.

Guanajuato wants his own train.

Guanajuato wants that the federal government give resources to concrete a railway project in addition to the trains that it also announce: the mobility system of Guanajuato. This train pretends, unite the five cities of the industrial corridor Leon- Celaya and the capital of the state, it has 20 years of preparation but the government of Guanajuato hopes that, with the federal strategy of the railway transport, become a reality. Today the Governor Miguel Marquez Marquez and his secretary of economical development, Hector Lopez Santillana, will have a meeting with the Secretary of Communication and Transportation Gerardo Ruiz Esparza and the sub secretary of Transportation Carlos Almada in order to convince them to support the project. The federal government saw viable this route, whose daily capacity will be of 82 thousand people, and also considerate that the continuity it's natural on the passenger trains, although the project has be already accepted by the Inversion Unity of the Secretary of Finance and Public Credit, there are not any compromise for investment in this six years of administration. A.M. 10/April/13.

Deliver to SCT studies of feasibility of train Mexico- Toluca.

The government of the state of Mexico delivers to the Secretary of Communication and Transportation the studies of feasibility of the train Mexico- Toluca, which could be built on 2015. The head of the secretary of the entity Apolinar Mena précised that in few days he will have a meeting with the head of the SCT of the country Gerardo Ruiz Esparza, in order to realize the official presentation of the project. Once that the project be presented, it will be the federal government, the one who decides the stroke, and all the modalities, and when it has all the requirements it will enter to tender in order to decides who build it. The head of the SCT in the country Gerardo Ruiz Esparza said that the final cost of the project will be of an estimate of 32 billion 500 hundred pesos. Notimex. 21/April/13.

Mexico: Congress approves new Telecommunication law.

The Mexican congress conceal the final approve of a telecommunication reform that pretends to reduce the power of the well known and lucrative telephone monopoly and television on the country. The law initiative, approved on Tuesday on the chamber of the senate, propose the creation of a powerful commission to regulate of an independent way and to punish the monopolistic practices and to eliminate the limit of foreign investment on fixed telephony and 49 % of investment on broadcasters and television. This measure affects America Movil, property of the Billionaire Carlos Slim who controls the 70% of the cellphone telephony and Televisa Group, property of the Billionaire Emilio Azcarraga who controls the 70% of the television market. The new Herald. 30/April/13.

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Digital Publication
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