

Telecommunications Reform and Other Policies that Impact on Both the Internet and ICTs for the Economic Development of Mexico

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Introduction

Several studies, as well as international experience, allow us to verify that there is a direct relationship between economic growth, the use of the internet and ICTs. The Mexican Government, in turn, has taken various steps that have a direct impact on technology. To date, however, there have been few studies that have critically analysed the actions taken by the Mexican Government in the light of international recommendations.

Additionally, it should be said that the use of the internet and information technologies presents new legal challenges, particularly certain concerns regarding the treatment of privacy, as well as other risks derived from espionage and the legal problems of each country. Consequently, we consider it appropriate to analyse critically certain governmental policies in connection with the internet and ICTs.

In this sense, this study will resolve the following questions: what legislative measures and other acts of authority has the Mexican Government taken to address this issue? What are both the beneficial and critical aspects of such measures? What are the challenges for the Mexican Government in order to efficiently regulate the telecommunications sector as well as the internet and other ICTs?

As such, this article will examine the general aspects of reform in the field of telecommunications, in addition to other regulations concerning the subject-matter of this work, the internet and other ICTs, bearing in mind its benefits in the economic field, and provide some details of each measure.

This article will also compare international practices with the measures adopted by the Mexican Government in order to deduce their benefits and pitfalls, and thereafter to construct some suggestions to improve the current legal framework. First, we will examine telecommunications reform, as well as policies for the supply of broadband infrastructure. Likewise, we will deal with other policies that have an impact on the development of ICTs and the internet. Finally, we will present the conclusions.

Analysis of the public policies

Several studies agree that there is a clear, positive correlation between investment in the internet and other ICTs and the growth of economic activity.¹ Investment in high-speed networks and ICT services creates a platform for economic growth, job creation and competitiveness.² Numerous studies show a positive impact on productivity, on GDP contribution and the creation of jobs in business sectors of ICTs.³

Policies for attracting investment

From a business perspective, the ICC Commission on the Digital Economy considers that the most appropriate policies for attracting investment and promoting innovation require:

- open markets that eliminate investment barriers;
- pro-investment policies;
- independent regulators;
- enforcement of the rule of law;
- adequate and effective protection and enforcement of intellectual property rights;
- pro-competitive and non-discriminatory legal, policy and regulatory frameworks that also increase user choice regarding quality and cost of services;
- independent courts;
- policy approaches that foster entrepreneurship and innovation.

Subsequently, we will examine telecommunications reform,⁴ in light of the prior set of policies. Because of the extent of this work, neither issues concerning adequate and effective protection and enforcement of

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¹ ICC Commission on the Digital Economy, *ICTs' and the Internet's impact on job creation and economic growth*, Policy briefing tool, International Chamber of Commerce, Document No.373/513 (July 23, 2012), p.3.

² *ICC BASIS Key messages*, Internet Governance Forum 2011 (July 21, 2011), p.3, <http://www.iccwbo.org/Data/Documents/Basis/Archives/Key-business-messages-IGF-2011,-21-July-2011/> [Accessed May 22, 2014].

³ McKinsey & Co, *Mobile broadband for the masses* (February 2009); Booz & Co, *Digital Highways: The role of Government in 21st Century Infrastructure* (2009), cited in ICC Commission on the Digital Economy, *ICTs' and the Internet's impact on job creation and economic growth* (July 23, 2012), p.3.

⁴ Published in the *Official Gazette of the Federation* (June 11, 2013), http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013 [Accessed May 22, 2014].

intellectual property rights, nor policies in connection with entrepreneurship and innovation, will be treated here.

Open markets

With regard to open markets that eliminate investment barriers, and other favourable policies, transitory art.5 of the reform allows 100 per cent of foreign direct investment in the realm of telecommunications and satellite communications. This is certainly very favourable, as Mexico requires the deployment of telecommunications infrastructures, in addition to more companies offering services that properly compete in the market.⁵

Independent regulators

Concerning independent regulators, the reform created two entities, the Federal Commission of Economic Competition (COFECE), its objective being to guarantee free competition, fighting monopolies, concentrations and other restrictions, and the Federal Institute of Telecommunications (IFETEL), its objective being to efficiently develop broadcasting and telecommunications. It should be noted that in the field of broadcasting and telecommunications, IFETEL also acts as the regulator for economic competence.⁶

Both regulators are autonomous by virtue of the constitution. Dr Clara Luz Álvarez stresses that the maximum autonomy granted to a public entity by the Mexican state is bestowed by the institution of an entity with constitutional autonomy. As such, an autonomous entity does not belong to the executive, legislative or judicial branch.⁷ Nevertheless, this autonomy or independence may be widely questioned.

The term “independent” means “free from outside control; not subject to another’s authority; capable of thinking or acting for oneself”.⁸ In this regard, an independent or autonomous body does not need the help or support of third parties in order to issue an opinion or determine a resolution; i.e. an autonomous or independent body renders its decision by itself. Nonetheless, contrasting this with the Mexican reality, we find that IFETEL must notify the corresponding secretary, who may issue a technical opinion with regard to matters

concerning the granting or revocation of concessions, authorisations for transfers and stock control changes, compensations, among others. It should be said that these opinions are not binding and should be issued within 30 days. Thus, the question arises, if they are not binding what is the reason for issuing such non-binding opinions?

It seems contradictory and inconsistent that IFETEL, being at the same time an independent regulator, must ask for a “technical” opinion from the Communications and Transportation Secretary (Communications Secretary) or the Public Credit and Treasury Secretary (Treasury Secretary) on matters that IFETEL should exclusively determine itself. As such, we may say that the independence of the regulator is in question. Moreover, as noted by Dr Clara Luz Álvarez, the reform enshrined a “red tape” effect and as a result, we may foresee uncertainty and unnecessary delays in this sector.⁹

Enforcement of the rule of law and independent courts

With regard to the rule of law, it must be said that general provisions, acts and omissions by both regulators, COFECE and IFETEL, may only be challenged by means of an indirect *amparo* action¹⁰ and there will be no stay of enforcement. However, there may be a stay of enforcement when the authority imposes fines, or orders the separation of assets, rights or shares or other forms of equity. The above decision will be enforced until the *amparo* action, if filed, is resolved.¹¹ Furthermore, the constitution foresees the regulation of content. This may result in a serious risk to the freedom of expression.¹²

With regard to independent courts, these were already established. Nonetheless, in our opinion it is very positive that the reform ordered the setting up of specialised courts for economic competition, broadcasting and telecommunications.¹³

Policies for broadband infrastructure

Creating an optimal framework to promote investment requires a mix of policies; particularly, for expanding the supply of broadband infrastructure the following are required.¹⁴

⁵ Notwithstanding the above, transitory art.5 limits the participation of foreign direct investment in broadcasting up to a maximum of 49%, taking into account the existing reciprocity of the country in which the investor is incorporated. In this regard, Dr Clara Luz Álvarez raises the question: what damage may be caused by the presence of foreign capitals invested in infrastructure and generating competition? There is no damage. Moreover, she adds that the Commission of Constitutional Matters of the House of Representatives added the requirement of reciprocity to foreign investment in broadcasting. The arguments presented by this Commission are not worthy of consideration and there is no justification as to why this restriction was imposed on radio and open television and not in the rest of the telecommunications sector. Foreign investment should not be restrained to the existence of reciprocity in the country of the investor’s origin. See Clara Luz Álvarez González de Castilla, “Reflexiones ante el Senado sobre el Dictamen de reforma constitucional en telecomunicaciones y competencia económica probado por la Cámara de Diputados [presentadas el 10 de abril de 2013]” (May 30, 2014), *Telecomunicaciones y Sociedad*, México, <http://telecomysociedad.blogspot.mx/2013/05/reflexiones-ante-el-senado-sobre-el.html> [Accessed May 22, 2014].

⁶ Federal Constitution art.28.

⁷ Clara Luz Álvarez González de Castilla, *Derecho de las Telecomunicaciones*, 2nd edn (México, UNAM Posgrado Derecho, Libertad de expresión, 2013), p.108.

⁸ See *Oxford Dictionaries*, <http://www.oxforddictionaries.com/es/definicion/ingles/independiente?q=independiente> [Accessed May 22, 2014]. The Spanish Language Dictionary of the Royal Spanish Academy defines “independent” as “hold[ing] his rights or opinions without admitting external intervention”.

⁹ Álvarez González de Castilla, “Reflexiones ante el Senado sobre el Dictamen de reforma constitucional en telecomunicaciones y competencia económica probado por la Cámara de Diputados” (May 30, 2014), <http://telecomysociedad.blogspot.mx/2013/05/reflexiones-ante-el-senado-sobre-el.html> [Accessed May 22, 2014].

¹⁰ An *amparo* action is a claim for relief under general constitutional guarantee against violation of one’s civil rights by public authorities.

¹¹ Federal Constitution art.28.

¹² Federal Constitution art.6(B)(IV).

¹³ Reform Decree transitory art.12.

¹⁴ ICC Commission on the Digital Economy, *ICTs’ and the Internet’s impact on job creation and economic growth* (July 23, 2012), p.4.

Ensuring a competitive market

Governments must ensure a pro-competitive and market-driven policy framework that promotes investment and the deployment of broadband.

In this regard, art.6(3) of the reform obliges the state to guarantee the right of access to ICTs, broadcasting and telecommunications services, including broadband and the internet, establishing conditions of competition. It is favourable that the state shall encourage competition from companies that provide these services.

Ensuring efficient and effective frequency allocation

Governments strive to increase the available radio-electric spectrum for the deployment of advanced mobile broadband commercial services, putting an end to the current artificial scarcity of spectrum.

In this regard, art.28 of the Federal Constitution points out that radio-electric spectrum concessions will be granted by public bidding, preventing concentration and ensuring the lowest price of the services to the end-user. Nevertheless, economic factors will not be decisive to win the bidding.¹⁵

At the end of the terrestrial digital transition scheduled for December 31, 2015, concessionaires and permit holders must return the frequencies that were originally granted to them by the state in order to ensure the efficient use of the radio spectrum, competition and the maximum utilisation of the 700 MHz band.

The 700 MHz band is optimal for fourth generation mobile broadband services. It transports data at high speed and capacity. Moreover, it enables a wide coverage, especially in rural areas, owing to its low allocation between the frequencies of the radio-electric spectrum.¹⁶

At the same time, transitory art.16 establishes that IFETEL will assure the installation of a shared public telecommunications network that promotes the population's effective access to broadband communication and telecommunications services. This obligation will be initiated before the end of 2014 and should be in operation before the end of 2018. In addition, it must include the use of at least 90MHz of spectrum released by the digital terrestrial television transition; that is, a band of 700 Mhz.

As a result, the Mexican state will operate this network and will provide services to the wholesale trading companies, as well as to carriers of telecommunications networks under non-discrimination conditions at competitive prices. This decision has been widely questioned, since it is considered a setback, in the sense that the state would provide services when it allowed private investment to develop the sector; thus, the role of

the Mexican state will not be to replace or compete with the current or future carriers. Additionally, some scholars point out, unfavourably, that the state has shown its inability and inefficiency in operating telecommunications companies. Moreover, the lack of the state's experience in the operation of mobile networks is an additional pitfall.¹⁷ It is too early to determine the positive or negative effects of the above policies; however, the execution of these obligations by the Mexican state will no doubt be monitored and scrutinised.

Promoting access in rural, remote and under-served areas

Governments can promote access to broadband infrastructure in rural, remote or under-served areas, and should consider both the benefits and the costs before implementing such policies. These policies should not stifle private investment, which should be assured if the Government chooses more high-cost and/or low income areas where private investment is unlikely.

Rural areas of Mexico comprise 188,593 locations with fewer than 2,500 inhabitants; 17 per cent of the 5.9 million households have a fixed phone and 36 per cent have at least one mobile, 6 per cent have a computer and one half of those (3 per cent) are connected to the internet. In these localities, fewer than 4 per cent have some degree of literacy concerning basic telecommunication services.¹⁸

As such, there are many rural and marginalised areas that are not profitable or attractive for the provision of telecommunication services.¹⁹ In these areas, the state must guarantee access where competition is not interested in providing services. Nevertheless, it was unfortunate that the reform did not impose a constitutional obligation on the state to provide services in the under-served areas.

Universal digital inclusion policy

In contrast to the foregoing, we see it as a positive step that the Mexican Federal Executive Branch, by virtue of transitory art.14, is compelled to execute the Universal Digital Inclusion Policy, which will include goals in terms of infrastructure, accessibility and connectivity, ICTs, digital skills, digital government programmes, promoting public and private investment in telehealth, telemedicine and electronic clinical record applications, among others.

The Constitution wants 70 per cent of all households and 85 per cent of all micro, small and medium-sized companies in Mexico have a real speed for downloading information. This will be within the average registered in the member countries of the Organisation for Cooperation and Economic Development (OECD), at internationally competitive prices. With regard to the

¹⁵ Non-profit concessions will be granted for social and public use, without public bidding, but rather by means of a direct allocation.

¹⁶ Jorge Fernando Negrete, "La banda 700 MHz y el estado 'malfactor'" (April 15, 2013), CNN Expansión, <http://www.cnnexpansion.com/opinion/2013/04/14/700-mhz-y-el-estado-malfactor> [Accessed May 22, 2014].

¹⁷ Negrete, "La banda 700 MHz y el estado 'malfactor'" (April 15, 2013), CNN Expansión, <http://www.cnnexpansion.com/opinion/2013/04/14/700-mhz-y-el-estado-malfactor> [Accessed May 22, 2014].

¹⁸ Secretaría de Comunicaciones y Transportes, *Agenda Digital.mx*, México (2012) <http://www.agendadigital.mx/descargas/AgendaDigitalmx.pdf>.

¹⁹ Álvarez González de Castilla, "Reflexiones ante el Senado sobre el Dictamen de reforma constitucional en telecomunicaciones y competencia económica probado por la Cámara de Diputados" (May 30, 2014), <http://telecomysociedad.blogspot.mx/2013/05/reflexiones-ante-el-senado-sobre-el.html> [Accessed May 22, 2014].

prices, Dr Clara Luz Álvarez criticises the above, since prices should be affordable to the population in accordance with their own particular circumstances, especially taking into account that prices in Mexico are higher than internationally competitive prices. This may prove to be unacceptable when wages in Mexico are the lowest among the OECD countries.²⁰

Apart from that, in accordance with transitory art.17, it is encouraging to see that the National Development Plan and other programmes are to include actions for a broadband programme in public places to reach universal coverage.

Other policies and relevant ordinances

National Development Plan 2013–2018

The National Development Plan established the “Modern and Near Government” strategy, a “National Digital Strategy to promote the adoption and development of ICTs” and to encourage an “effective government” that propels Mexico into the information and knowledge society. Likewise, this Plan includes the National Digital Strategy, which will be in the charge of the Office of the Presidency of the Republic in the Department of Coordination of the National Digital Strategy. This represents, for Dr Julio Tellez, a great achievement; however, it is insufficient and he suggests an extension to the execution powers with budget support.²¹

Agenda for digital government

This agenda is in the charge of the Secretary of Public Administration (Secretaría de la Función Pública—SFP), which chairs the Inter-ministerial Commission for the Development of the Electronic Government and comprises different actions to improve efficiency, productivity and government transparency. This Agenda also seeks the utilisation of processes such as electronic/digital signatures, digital certificates, as well as procedures, in addition to interoperability among the three spheres of government (federal, state and municipal).²²

Digital e-Mexico Agenda

The Communications Secretary is the head of the “Digital Agenda of the e-Mexico National System”, which is defined as a strategy to propel the transition of the country towards the information and knowledge society. It establishes general and strategic objectives, lines of action and goals that coincide with the millennium goals of the United Nations. The main objective of this Agenda is to “accelerate and to make accessible to all the technological

adoption process in all spheres of national life”, guiding its use to impact on competitiveness in human and social development, as well as granting greater empowerment to citizens.

Moreover, this Agenda aims to: (1) break down the digital divide that separates Mexicans from ICTs; (2) make accessible all institutional and community broadband connectivity; (3) increase the availability and relevance of content, services and applications having effect on both government and society.

Schema for interoperability and open data of the Federal Public Administration

The Secretary of Public Administration published on September 6, 2011 in the Official Gazette of the Federation²³ a Resolution establishing the “Schema for Interoperability and Open Data of the Federal Public Administration”. This resolution establishes the bases, principles and policies which must be observed by the Public Federal Administration. This is for the integration of digital services, as well as the re-use and share of both information platforms and systems in order to increase the operational efficiency of the Government in relation to society.

According to Dr Julio Tellez, this Schema is closely related to international trends regarding open government; i.e. the obligation of democratic government to accountability under strict standards of transparency involving citizens. Furthermore, this scholar considers that this is a big step towards co-operation and the exchange of information between agencies and entities of the Federal Government to enhance public services.²⁴

National Digital Agenda

The National Digital Agenda is a joint effort of industry, academia and legislative powers. This policy is an umbrella which aims to line up the objectives, policies and actions of all e-sectors of society to generate competitiveness through the strengthening of ICTs.

The mission of this Agenda is:

“[T]o contribute to accelerated economic, social and human development in the country through potential offered by the deployment of ICTs in order to improve the quality of life, increase transparency, augment competitiveness and make a better government by means of greater citizens’ participation and engagement.”²⁵

²⁰ Álvarez González de Castilla, “Reflexiones ante el Senado sobre el Dictamen de reforma constitucional en telecomunicaciones y competencia económica probado por la Cámara de Diputados” (May 30, 2014), <http://telecomysociedad.blogspot.mx/2013/05/reflexiones-ante-el-senado-sobre-el.html> [Accessed May 22, 2014].

²¹ Julio Tellez Valdés, *Lex Cloud Computing: Estudio Jurídico del Cómputo en la Nube en México* (México, III, UNAM, 2013), p.43.

²² Tellez Valdés, *Lex Cloud Computing* (2013), p.43.

²³ See http://www.dof.gob.mx/nota_detalle.php?codigo=5208001&fecha=06/09/2011 [Accessed May 22, 2014].

²⁴ Tellez Valdés, *Lex Cloud Computing* (2013), p.43.

²⁵ Agenda Digital Nacional.

AgendaDigital.mx

AgendaDigital.mx aims to be a guiding document that articulates the Mexican public policies for the use and management of ICTs. This Agenda presents an analysis of the state of connectivity in Mexico and the degree of progress in both the use and the appropriation of ICTs in various sectors, by the analysis of the main indicators of connectivity. Moreover, it provides an analysis of the use and appropriation of ICTs for the social and economic development of Mexico.

On the basis of such analyses the document establishes a vision in terms of use and appropriation of ICTs by 2015. To achieve this vision, the Agenda describes six objectives for consolidation. Twenty-three lines of action are derived from each objective. These strategies and their implementation are the core of the Agenda. The six objectives of the AgendaDigital.mx are as follows:

1. internet for all;
2. ICTs for equity and social inclusion;
3. ICTs for education;
4. ICTs for health;
5. ICTs for competitiveness;
6. digital government.

Conclusion

As set forth above, the Mexican Government is mindful of the benefits provided by ICTs and the internet for the economic development of the country. Consequently, the

Mexican Government has instituted comprehensive reform in the field of telecommunications, as well as various policies that will favourably impact on the economic development of the country.

International recommendations to encourage investment in the field of telecommunications are supported by the policies adopted by the Mexican State, particularly the independence of courts and open markets.

Nevertheless, there are other details that must be carefully addressed to correct any inefficiencies, lessen legal uncertainty and avoid unneeded delays in the resolution of affairs. Thus, the Mexican Government must ensure the implementation of this constitutional reform in the secondary laws.

Moreover, the joint co-operation of IFETEL with the Communications Secretary and the Treasury Secretary will be decisive in securing the effective independence of the regulator. The Government must encourage all far-reaching efforts and strive to make broadband services accessible in rural areas as well as promote and implement the universal digital inclusion policy. Additionally, the state must act diligently in order to properly articulate digital policies in federal, state and municipal governments, so that, all together, they meet the desired purpose and succeed in this endeavour. Apart from that, the reappearance of the entrepreneurial state managing a network and providing wholesale services to companies presents a major challenge for the telecommunications sector. These concerns will no doubt be watched as the development of this sector in Mexico progresses.