

# ISSUE BRIEF **06.05.15**

## Must Carry, Must Offer in Mexico

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### INTRODUCTION

Mexico's free-to-air television programming has long been dominated by two corporate groups: Televisa and TV Azteca. They jointly hold—directly or through subsidiaries—95 percent of the commercial licenses, 90 percent of audience share, and 99 percent of the advertisement income.<sup>1</sup> Televisa is also a major pay TV player, controlling 62 percent of the market with its cable and satellite companies.<sup>2</sup> With this level of high concentration in the television sector, Mexico's 2014 telecommunications reform established constitutional “must carry” and “must offer” (MC/MO) regulations.

Must carry and must offer (MC/MO) are two sides of the same coin. Must carry (MC) refers to the obligation of pay TV providers to include free-to-air channels in their programming packages. Must offer (MO) regulations, on the other hand, mandate that free-to-air (FTA) broadcasters offer their channels to pay TV licensees so the channels can be included in pay TV programming packages.

While the reform legislation places rhetorical importance on promoting culturally diverse and pluralistic content for all broadcast audiences, there is little substantive commitment to these ideals. The Mexican variation of MC/MO is an ad hoc policy with many flaws. Congress failed to duly assess the impact on other provisions, like those related to the copyrights of content creators. Ultimately, the Supreme Court will determine the future of MC/MO in Mexico.

Given the reform's legal framework, however, content diversity and pluralism will not be enhanced by MC/MO in Mexico.

### THE EVOLUTION OF MC/MO POLICY IN MEXICO

Mexico's MC/MO policy arose as a patchwork of reactions to various acts by regulators and Congress.

Prior to Dish México's entry into the Mexican pay TV market in December 2008, pay TV success in Mexico was determined by whether programming packages offered Televisa's<sup>3</sup> channels 2 and 5, as acknowledged by the former Mexican Antitrust Commission (COFECO).<sup>4</sup> This allowed Televisa to leverage its market position vis-à-vis pay TV broadcasters.

In 2008, in order to comply with a condition imposed by COFECO to allow Televisa to acquire pay TV companies, Televisa began to offer its free-to-air channels as a bundle. However, the company expressly excluded pay TV providers with more than 5 million users and US\$1.5 billion of income. This policy targeted América Móvil—the parent company of Telmex and Telcel—which has long tried to receive an authorization to provide pay TV.

Televisa's dominance over audience share of free-to-air programming means MC has not been terribly relevant in Mexico. Pay TV customers want Televisa's channels and pay TV providers want to carry them.



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## TELECOMMUNICATIONS REFORM (2013–2014)

The recent telecommunications reform includes a constitutional provision for MC/MO.<sup>5</sup> Free-to-air broadcasters must allow pay TV companies to retransmit in the same coverage area without payment (must offer); pay TV companies must provide audiences with these free-to-air broadcasts without passing fees along to subscribers (must carry). For satellite pay TV companies, MC is mandated only with respect to free-to-air TV channels transmitted in at least 50 percent of the country. Federal, public TV stations are also included in the MC rules.

Dominant or preponderant agents, as determined by the Instituto Federal de Telecomunicaciones (IFT),<sup>6</sup> do not benefit from the free MC/MO arrangement. These companies must enter into agreements with free-to-air broadcasters to determine retransmission prices or risk license revocation.

The IFT has a broad constitutional mandate to regulate broadcast and antitrust issues.<sup>7</sup> In 2014, the IFT determined that channels 2 and 5 (Televisa) and 7 and 13 (TV Azteca) were transmitted in 50 percent of the country; satellite pay TV companies are therefore now obliged to carry these channels in their TV packages.<sup>8</sup> The IFT also declared America Móvil (Telmex, Telcel, and other related companies) preponderant in the telecommunication sector<sup>9</sup> and Televisa and its independent free-to-air TV affiliates (although not its pay TV companies) as preponderant in the broadcasting sector.<sup>10</sup>

The objective of MC/MO was not laid out explicitly in the Constitution. Nonetheless, it states that once there are “competitive conditions in the broadcast and telecommunications markets,” the free-of-charge provision will no longer be enforced and providers (broadcasters/pay TV providers) will have to confer on retransmission terms and prices. If negotiations fail, the IFT will determine the conditions and fees.

In June 2014, the Mexican Congress enacted a series of laws to implement these constitutional changes to the

telecommunications sector. The 1996 Copyright Act<sup>11</sup> was also amended to acknowledge MC/MO, but without specifying whether content creators and artists could oppose some stipulations of the new law in light of their copyrights (e.g., opposing retransmission or demanding royalties for retransmission through MC).<sup>12</sup>

## LIMITATIONS OF THE REFORM FOR CONTENT CREATORS AND CONSUMERS

### Copyright Issues

A copyright case between Televisa (plaintiff) and Dish México (defendant) in a Mexico City court began long before the constitutional amendment took place. Copyright matters may be brought to both federal and local judges, but the local judge in question sent an order to the IFT to refrain from acting in MC/MO issues, arguing that the IFT had no authority over such matters. As of April 2015, this jurisdictional issue has been brought to the Supreme Court. However, the court’s decision might focus narrowly on the IFT’s scope of authority instead of resolving whether content creators and artists have a right to oppose retransmission or demand royalties for MC retransmission of their work.

### Pluralism and Diversity

Televisa and TV Azteca dominate Mexico’s free-to-air programming; truly independent local channels are very limited. Increasing the diversity and pluralism of content has been a key rationale behind MC in other countries. In Mexico, however, satellite providers are only obliged to carry programming that reaches 50 percent of the country. Satellite makes up nearly half of all pay TV providers in Mexico, so this greatly diminishes the influence of MC on content diversity and pluralism.

To determine which free-to-air TV channels would be distributed through satellite TV, the IFT identified—with information annually provided by broadcasters—the channels that had at least 75 percent of the same programming

from 6:00 a.m. to midnight, even if such programming was presented in a different order.<sup>13</sup> In other words, there was no assessment whatsoever as to how this content contributes to pluralism and diversity. Of course, with the 50 percent stipulation, the law also puts local content at a disadvantage.

It is also worth noting that the IFT limited MC to free-to-air TV; MC does not apply to radio broadcasting, as it does in the European Union, for example.

### License Revocation for MC/MO Noncompliance

License revocation is the most extreme regulatory penalty for a telecommunications service provider; it can be justified only for public interest reasons. However, the new legislation stipulates that the license of any preponderant or dominant actor that has benefited from free MC/MO would be revoked. Under ideal circumstances, a dispute between a free-to-air broadcaster and a pay TV provider, in which the latter has benefited from free MC, would be resolved in court, where the free-to-air broadcaster would try to claim its outstanding profits. Of course, this policy was directed at América Móvil and its subsidiary, Telmex.

Consequently, it is important to note the context of the prohibition of free MC for dominant and preponderant market players. In a Telmex license that dates back to 1990, Telmex is expressly prohibited from providing television service. Although Telmex has long requested an amendment to this limitation, the government has denied the company's efforts; now the Constitution imposes several hurdles before this could take place. Dish México, a satellite pay TV company and the sole competitor of Sky (Televisa's satellite affiliate), entered into certain agreements with media conglomerate MVS Comunicaciones and Telmex. Telmex and Dish México have stated that this relationship was only to streamline invoicing and revenue collection on account statements for Telmex clients. After the constitutional amendment was approved, Dish México was eager to include Televisa and TV Azteca's broadcast channels. When

constitutional MC entered into force, Dish México gladly obliged.

In January 2015, the IFT sanctioned Telmex-MVS-Dish México because the arrangements among these companies represented a de facto merger, and as such, they should have filed a notice. The IFT expressly stated that such a merger does not have anticompetitive effects, nor was it a prohibited merger. As it did not receive a prior notice of the merger, however, the IFT imposed different sanctions on the companies.<sup>14</sup> The IFT could also initiate a revocation of Telmex's license if it finds that Telmex benefited from the free-of-charge MC/MO rules. The IFT will have to analyze the Telmex-MVS-Dish case to determine whether Telmex benefited from MC, although a revocation of this Mexican telecom giant's license seems more academic than probable.

## INTERNATIONAL COMPARISONS

MC rules have been enacted around the world mainly to preserve pluralistic, diverse and local content, and MO rules are sometimes included to complement and reinforce MC. In Mexico, MO has been much more relevant than MC due to Televisa's free-to-air market power, and MC/MO rules have been implemented to increase competition. However, as mentioned above, it is unlikely that they will improve the diversity or pluralism of programming.

In order to understand how MC/MO can be used to enhance competition as well as content offerings, it is worth looking at MC/MO in other countries around the world. This is particularly relevant because Mexican legislators appear not to have reviewed MC/MO regulations elsewhere as they drafted and debated the rules for Mexico.

### United States

While the United States does not have must offer rules, MC was implemented in 1992 because pay TV transmitted the free-to-air local channels of big broadcasters but would not include those of small and independent local broadcasters. Therefore, MC sought to provide programming relevant

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to local audiences' needs and interests, as well as prevent pay TV operators from giving preference to large, more lucrative broadcasters.

Every three years, current MC rules allow free-to-air TV channels to elect between (1) allowing free access to all pay TV providers in a given regional broadcast market (must carry) or (2) negotiating with each pay TV company the terms and compensation for retransmission (may carry).

A "carry one, carry all" approach governs satellite TV: If a local TV channel is distributed by the satellite pay TV company, then all the local TV channels of the same area must be distributed as well.<sup>15</sup>

### Canada

The Canadian MC system is exceptional in that it reflects the country's ethno-cultural, linguistic, and regional diversity. It also aims to increase accessibility for persons with disabilities. Preference is given to original Canadian programming. The costs of MC are passed from pay TV providers to their customers. At least every five years, the Canadian Radio-television and Telecommunications Commission determines which channels will benefit from MC and the subsequent pricing scheme.<sup>16</sup>

### European Union

In the 1990s, MC rules sought to assure diverse and pluralistic programming for pay TV users in the European Union, as well as the inclusion of general interest free-to-air TV channels in pay TV programming packages. Some countries also enacted MO to complement MC, and, in certain cases, enabled pay TV companies to give customers more competitive programming. Free-to-air TV and pay TV companies were free to negotiate transmission costs and copyright royalties.<sup>17</sup>

Today, the Universal Service Directive<sup>18</sup> allows EU member states to impose MC on electronic communication networks (i.e., cable TV and Internet Protocol TV<sup>19</sup>), which are the main media through which people access free-to-air channels. MC includes free-to-air radio and TV, as well as other

supplementary services. Compensation may be mandated in order to cover the costs of retransmission of broadcast channels.

## CONCLUSION

In a country where 73 percent of citizens obtain information through television, the companies that control TV content are especially powerful.<sup>20</sup> Pluralism and diversity are two of the main challenges to the quality of Mexico's telecommunications sector. Establishing ways to achieve these goals would limit the influence of Televisa and TV Azteca, allowing people to receive and interpret information from a broader array of sources and ideological perspectives. MC/MO regulations have the potential to promote diverse and pluralistic programming, but in Mexico, these rules focus only on increasing competition and give little regard to content, copyright holders, or television audiences.

## ENDNOTES

1. Federal Institute of Telecommunications, "Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones determina el valor mínimo de referencia, a que se refiere el numeral 4.1.3.5 de las Bases de Licitación Pública para concesionar el uso, aprovechamiento y explotación comercial de canales de transmisión para la prestación del servicio público de televisión radiodifundida digital, a efecto de formar dos cadenas nacionales en los Estados Unidos Mexicanos (Licitación No. IFT-1)" [Agreement whereby the Plenary Authority of the Federal Institute of Telecommunications determines the minimum benchmark, in reference to paragraph 4.1.3.5 of the Rules for Public Tender to concession the use, development, and commercial exploitation of channels of transmission for the public provision of digital television broadcasting, in order to form two national networks in the United Mexican States (Solicitation No. IFT- 1)], April 15, 2014. See [http://www.ift.org.mx/iftweb/wp-content/uploads/2014/04/IFT\\_EXT\\_150414\\_90\\_valor\\_minimo.pdf](http://www.ift.org.mx/iftweb/wp-content/uploads/2014/04/IFT_EXT_150414_90_valor_minimo.pdf).

**The IFT will have to analyze the Telmex–MVS–Dish case to determine whether Telmex benefited from MC, although a revocation of this Mexican telecom giant's license seems more academic than probable.**

2. Televisa's 60.1 percent of share on the pay TV market is prior to its acquisition of Cablevisión Red, which held 3.9 percent of the pay TV market. Federal Institute of Telecommunications, "Informe Estadístico del 3 Trimestre 2014" [3rd Quarter 2014 Statistical Report], 38, <http://www.ift.org.mx/iftweb/wp-content/uploads/2015/03/InformeEstadisticoVF.pdf>.

3. Televisa is Mexico's first national television corporation and was founded in 1955 through the consolidation of three other television stations. Since then, Televisa has dominated the Mexican television market.

4. Clara Luz Alvarez, *Derecho de las Telecomunicaciones* (Mexico City: Fundalex and Posgrado de Derecho de la UNAM, 2013), 219–222.

5. Government of Mexico, "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" [Decree amending and supplementing various provisions of Articles 6, 7, 27, 28, 73, 78, 94, and 105 of the Constitution of the United Mexican States], June 11, 2013.

6. "Preponderant agent" (*agente económico preponderante*) is a term introduced in the Mexican Constitution by the telecom reform and is used to identify economic agents with excessive market power and impose special obligations to cope with such power through a fast-track procedure. For more information on "preponderant agent" and judicial resolutions regarding the concept, see Clara Luz Alvarez, "Preponderant agent, what is that?" *Journal of Law and Regulation* 1, no. 1 (2015): 23–46, <http://www.ndsr.org/SEER/index.php?journal=rdsr&page=article&op=view&path%5B%5D=145>.

7. In Mexico, telecommunication and broadcasting are federal matters.

8. Federal Institute of Telecommunications, "Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite los Lineamientos generales en relación con lo dispuesto por la fracción I del artículo octavo transitorio del 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" [Agreement whereby the Plenary Authority of the Federal Institute of Telecommunications issues general guidelines regarding the provisions of Section I of the eighth transitory article of the Decree amending and supplementing various provisions of Articles 6, 7, 27, 28, 73, 78, 94 and 105 of the Constitution of the United Mexican States on Matters of Telecommunications], *Diario Oficial de la Federación*, February 27, 2014.

9. Federal Institute of Telecommunications, "Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico del que forman parte América Móvil, S.A.B. de C.V. et al., como agente económico preponderante en el sector de telecomunicaciones y le impone las medidas necesarias para evitar que se afecte la competencia y la libre concurrencia" [Resolution whereby the Plenary Authority of the Federal Institute of Telecommunications determines that the economic interest group, which includes America Movil, SAB de C.V. et al., as a preponderant operator in the telecommunications sector and imposes the necessary measures to avoid affecting competition and open access], March 6, 2014. See [www.ift.org.mx/iftweb/sector-de-telecomunicaciones/](http://www.ift.org.mx/iftweb/sector-de-telecomunicaciones/).

10. Federal Institute of Telecommunications, "Resolución mediante la cual el Pleno del Instituto Federal de telecomunicaciones determina al grupo de interés económico del que forman parte Grupo Televisa S.A.B., Canales de Televisión Populares et al., como agente económico preponderante en el sector radiodifusión y le impone las medidas necesarias para evitar que se afecte la competencia y la libre concurrencia" [Resolution whereby the Plenary Authority of the Federal Institute of Telecommunications determines that the economic interest group, which includes Grupo Televisa S.A.B., Canales de Televisión Populares et al., as a preponderant operator in the broadcasting sector and imposes the necessary measures to avoid affecting competition and open access], March 6, 2014. See [www.ift.org.mx/iftweb/sector-de-radiodifusion/](http://www.ift.org.mx/iftweb/sector-de-radiodifusion/).

11. The Copyright Act was enacted in 1996 and last amended in 2014.

**MC/MO regulations have the potential to promote diverse and pluralistic programming, but in Mexico, these rules focus only on increasing competition and give little regard to content, copyright holders, or television audiences.**

12. Government of Mexico, “Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión” [Decree by which the Federal Telecommunications and Broadcasting Act and the Public Broadcasting System Act of the Mexican State are issued, amending, supplementing, and repealing certain provisions related to telecommunications and broadcasting], July 14, 2014.

13. Federal Institute of Telecommunications, “Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite los Lineamientos generales” [Agreement by which the Plenary Authority of the Federal Institute of Telecommunications issues the General Guidelines].

14. Federal Institute of Telecommunications, “Resolución del expediente E-IFT/UC/DGIPM/PMR/003/2013 y acumulados, Teléfonos de México, S.A.B. de C.V. y otros” [Resolution of the record named E-IFT/UC/DGIPM/PMR/003/2013 and accumulated documents, Teléfonos de México, S.A.B. de C.V. and others], January 7, 2015.

15. See Stuart Minor Benjamin, Douglas Gary Lichtman, Howard A. Shelanski, and Philip J. Weiser, *Telecommunications Law and Policy*, 3rd. ed. (Durham, NC: Carolina Academic Press, 2012), 479–528.

16. Canadian Radio–television and Telecommunications Commission, “Broadcasting Regulatory Policy CRTC 2013–372,” August 8, 2013. See <http://www.crtc.gc.ca/eng/archive/2013/2013-372.htm>.

17. See Nico van Eijk and Bart van der Sloot, *Must-carry Regulation: A Must or a Burden?* (Strasbourg, France: European Audiovisual Observatory, 2012).

18. European Union, “Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), amended by Directive 2009/136/CE of the European Parliament and of the Council of 25 November 2009.”

19. In the United Kingdom, MC also includes other technological platforms, such as IPTV.

20. Federal Institute of Telecommunications, “Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico” [Resolution by which the Plenary Authority of the Federal Institute of Telecommunications determines the economic interest group].

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