

**MEDIA
OWNERSHIP
MONITOR**



**REPORTEROS
SIN FRONTERAS**
POR LA LIBERTAD DE PRENSA

**DESCRIPTION OF THE LEGAL
FRAMEWORK IN THE CONCENTRATION
AND OWNERSHIP OF THE MEDIA IN
MEXICO**

OBSERVACOM

**Written by:
Aleida Calleja**

Mexico City, March 2018

INDEX

I. The new policy framework in Mexico	2
1.1 Constitutional Reform	2
1.2 Federal Telecommunications and Broadcasting Law	4
1.3 Media concentration in the new legal framework	5
1.4 New participants in the market, mergers and acquisitions	10
• <i>Pay TV</i>	10
• <i>Open television</i>	12
• <i>Radio</i>	13
II. Control and monitoring of the concentration of media	14
2.1 Regulatory Authority	14
2.2 Control and monitoring of concentration	15
2.3 Legal guarantees of Independence	16
2.4 Sanctioning power of the authority, pluralism and concentration	17
2.5 Method and criteria for the evaluation of the media concentration levels	17
III. Transparency and accountability	18
3.1 Transparency and accountability in the legal framework	18
3.2 Transparency in ownership of the media	19
IV. Discriminatory policies and practices. Barriers to entry	20
4.1 Discrimination in access to the frequencies	21
4.2 Discrimination in the availability or sufficiency	21
4.3 Official advertising	22
• <i>Official Timeslots and audiences</i>	22
• <i>State Timeslots</i>	22
• <i>Groups where the money is distributed</i>	23
4.4 Violations of freedom of expression	24
V. Conclusions	24

Introduction

The following document has been drafted under the framework of the project Media Ownership Monitor (MOM), conducted by Reporters Without Borders and the Mexican civil association Centro Nacional de Comunicación Social (CENCOS). Without being too exhaustive, it describes the main regulations and public policies related to media concentration.

The document offers some conclusions that together with the main findings of the project MOM Mexico intends to offer some elements for a debate on the need of public policy for promotion of media diversity and pluralism, which will widen the exercise of the freedom of expression and contribute towards the consolidation of the democratization process in Mexico

I

The new policy framework in Mexico

The control of the information agenda, the markets and their interference in State institutions to defend their interests such as the so-called "Telebancada"¹, and the impact that the #YoSoy132 movement had at the time, exerted a citizens' demand towards the political class that in 2012 was reflected in the so-called Pact for Mexico, signed by the incoming President of the Republic, Enrique Peña Nieto of the PRI, and the main political forces, as part of structural reforms among which was the Constitutional Reform in the field of Telecommunications, Broadcasting and Economic Competition².

Added to this context, the OECD issued a report in 2012 that diagnosed the lack of independence of the regulators with unclear dividing lines that caused a 'double window' for those being regulated, which allowed for the evasion of regulatory measures on the part of the industry through judicial protection. In short, what the OECD outlined were weak institutions faced with very concentrated regulated parties with ample power.

1.1 Constitutional Reform

With the Constitutional Reform of 2013, a concrete response was given to many demands for a comprehensive change to the regulatory framework in the sector and Articles 6, 7, 27, 28, 73, 78, 94 and 105 were reformed with 18 transitory articles that can be summarized by:

- Telecommunications and broadcasting being defined as public services of general interest, increasing the stewardship of the State in the administration of the spectrum.
- For the first time it recognizes concessions for public use so that the media of the government move towards a public model.

¹The "telebancada", which are legislators directly linked to television companies because they have held important management positions in them and that tend to congregate in the PVEM (Green Party), although they are also in the PRI and the PAN, who aim to concentrate their efforts on legislation and public policies to benefit the television duopoly Televisa-TV Azteca and other business areas in which they participate: What legislators make up the 'telebancada'? in <http://www.redpolitica.mx/congreso/que-legisladores-conforman-la-telebancada>. Consulted on February 19th, 2016.

² In http://pactopormexico.org/reforma-telecomunicaciones/Iniciativa_Reforma_Constitucional_Telecom.pdf Consulted March 24th, 2016.

- All operating licenses are defined as concessions. The singular concession format is created in order to provide all kinds of services through networks. Concessions of the radio spectrum for commercial purposes will be granted through public bidding and through direct award for non-profit organizations.
- The rights of broadcasting audiences, the rights of users in telecommunications and the right of universal access to information and communication technologies are recognized. Misleading advertising is prohibited. National independent production is recognised.
- It creates the legal concept of Preponderant Economic Agent (Agente Económico Preponderante, AEP), understood as an agent or economic group with a national stake, directly or indirectly, of 50% or more in the national markets in telecommunications and broadcasting; this percentage is measured either by the number of users, subscribers, audience, by the traffic in their networks or by the capacity thereof used, with the possibility of the disincorporation of assets, shares or any other input to limit the concentration. It requires that the secondary law must contain specific prohibitions on cross subsidies or preferential treatment, so that operators do not grant subsidies to the services they provide, either by themselves or through their subsidiaries, branches, affiliates or those belonging to the same economic interest group. Companies that are classified as AEP, and which have dominant power, must have an asymmetric regulation.
- The Federal Institute of Telecommunications (Instituto Federal de Telecomunicaciones, IFT) was created with constitutional autonomy, with powers to regulate audiovisual contents, the administration of the radio spectrum and economic competition in the radio broadcasting and telecommunications sectors; it imposes limits on national and regional concentration of frequencies and on cross-ownership controlled by various communications media that are broadcasting and telecommunications concessionaires that serve the same market or geographical area; and to order the disincorporation of assets, rights or parties to ensure compliance with these limits. The creation of an IFT Advisory Board is determined.
- It establishes the obligation for the AEP in telecommunications to disaggregate the local network, to give access to its infrastructure to its competitors. Concessionaires may choose the elements of the local network that they require from the preponderant agent and the point of access to it. The measures include the regulation of prices and tariffs, technical and quality conditions, as well as an implementation calendar in order to procure universal coverage and increase the penetration of telecommunications services.
- Free retransmission of open television signals on pay television (must carry and must offer) to non-dominant operators and the obligation to retransmit signals from public television stations of federal institutions is guaranteed.
- Foreign investment is opened to 100% in telecommunications and 49% in broadcasting, the latter under the principle of reciprocity.
- It has access to the creation of the Shared Network (700 Mhz band), with public or private investment, ensuring that no operator has influence on the operation of the network. Under the principles of infrastructure sharing and the unbundled sale of all its services and capabilities, it will exclusively provide services to commercial companies and operators of telecommunications networks, without providing services to the end user, through a Public-Private Partnership.

- It has specific deadlines for the bidding of two new digital television frequencies with national coverage for the entry of new competitors, limiting the participation of those operators that have more than 12 Mhz.; and public television with national coverage that would have operative and management autonomy is created.
- Public Registry of Telecommunications and Broadcasting Concessions is constituted.
- It determines Collegiate Circuit Courts and District Courts specialized in economic competition, radio broadcasting and telecommunications.
- Operators will not be able to resort to direct amparo (injunction proceeding) to obtain the suspension of the resolutions of the authority, which can only be challenged through the indirect amparo proceeding. No administrative appeal will be admitted and it may only be challenged through the indirect amparo proceeding.

The Constitution set preemptory times for the execution of some of its items such as the conformation of the IFT and the determination of AEP in the corresponding markets, among other points.

The process of reaching this Constitutional Reform was highly complex; this was due to the large number of economic interests involved in addressing companies with enormous power such as Televisa in the case of radio broadcasting and América Móvil or Grupo Carso (TELMEX) belonging to magnate Carlos Slim in the case of telecommunications; it was clear that entities such as the newly created AEP had as their main objective these companies that at present have more than a 50% share in national markets. The reform ended up establishing limits more decisively in the telecommunications sector than in the broadcasting sector, which in practice protected the television consortium more.

1.2 Federal Telecommunications and Broadcasting Law

Although the constitution determined that within a period of 180 calendar days from its publication, Congress should issue the new secondary legal framework, the proposal of President Peña Nieto arrived at Congress almost a year later on³ March 24, 2014 through the Federal Telecommunications and Broadcasting Law Initiative (Ley Federal de Telecomunicaciones y Radiodifusión, LFTR) and the Public Broadcasting System Law of the Mexican State. By this time the PRD and the PAN had broken with the Pact for Mexico.

It was a complex and confrontational process in which civil society organizations, factions of the parties in Congress, academics and trade unions, among others, accused the counter-reform initiative of going against the precepts of the constitution by favoring the interests of commercial television, undermining the powers of the regulatory body, limiting competition favoring concentration in broadcasting, lax and ineffective measures for limits to concentration and cross-ownership of media, of affecting public, community and indigenous media, as well as violating audience rights and others such as of privacy and protection of personal data.

A study on the composition and interaction of the network of public broadcasting and telecommunications policies in the negotiation of the law and its effects on the regulatory

³ <http://www.sct.gob.mx/despliega-noticias/article/envia-el-ejecutivo-federal-la-iniciativa-de-ley-federal-de-telecomunicaciones-y-radiodifusion/>

regime (Smith, 2015: 119)⁴ concludes that the legislators' margin of action was determined by the technical complexity of the issues, as well as by Televisa's political influence on the decision-making process, which had much more capacity for pressure than TELMEX, because legislators perceive the information potential of the television for their political careers rather than other information platforms; thus, Televisa continues to have "tangible power over the political system far above other players in the industry", therefore the regulatory provisions are limited in scope in many central aspects.

1.3 Media concentration in the new legal framework

The reform establishes the requirements to impose limits on concentration in the telecommunications and broadcasting sectors (Article 28).

As an ex ante measure to limit monopolistic practices and a greater concentration, the concept of AEP was established in transitory article Eight, Section III. In the same article, the IFT was instructed that within a period of no more than 180 days from its consolidation, it would determine the existence of the AEPs and impose measures to prevent competition from being affected. These should have included, as applicable, those related to information, supply and quality of services, exclusive agreements, limitations on the use of equipment terminals between networks, asymmetric regulation of tariffs and network infrastructures, including the disaggregation of their essential elements and, where applicable, the accounting, functional or structural separation of said agents.

The Declaration of Preponderance was made in March 2014 prior to the Federal Telecommunications and Broadcasting Law (LFTR) having come into existence. The Constitution, without giving major guiding criteria on the concept of preponderance, resulted in the interpretation being made effective by sector (telecommunications and broadcasting) according to Transitory Article Eight and not by services, as was set forth in Transitory Article Two which determines that the measures for promotion of competition in television, radio, telephony and data services should be applied in all segments to ensure effective competition as a whole. This contradiction generated an intense debate to the extent that this interpretation favored Televisa in its pay television businesses.

Traditionally in Mexico the legal apparatus defined restricted satellite and cable television in the telecommunications sector; at the time of the reforms Televisa had a high percentage in this market, so when the Declaration was made by sector, the application of an asymmetric regulation to this company was impeded in what turns out to be the platform that has the highest conditions for technological convergence to be able to provide triple play services (fixed telephony, internet and television).

Furthermore, as a measure to decentralize the open television market and the inclusion of new players, Transitory Article Eight established a period of no more than 180 days from the composition of the IFT to issue the bidding requirements for two new television channels with national coverage, under the principles of efficient functioning of the markets, maximum

⁴ The stakeholders that studied this work were government stakeholders: The executive power; state non-governmental stakeholders: COFETEL, IFT; key business players: frequency concessionaires and civil associations that influence this agenda in Mexico.

national coverage of services, and the right to information and social function, paying particular attention to entry barriers and existing characteristics in the market.

A padlock was imposed so that those concessionaires or groups related to commercial, organizational, economic or legal ties that had 12 MHz of radio spectrum or more in any geographical coverage area could not participate in bids, such that Televisa and TV Azteca were left out in advance, who exceeded those MHz with their channels.

Regarding the limits to the concentration, what the LFTR instead established were measures to promote competition, also by using the Federal Law of Economic Competition (LFCE), under the concept of substantial market power (Article 279). The IFT is empowered to determine the existence of agents with substantial power in any relevant market from the sectors, but the law was lax in the definition and measures for concentration limits, restricting the powers of the regulator for this purpose and impeding it from preventing Televisa from increasing its stake in pay TV through Transitory Article Nine, which establishes that:

"As long as there is a dominant economic agent in the telecommunications and broadcasting sectors, in order to promote competition and develop viable competitors in the long term, the authorization of the Federal Institute of Telecommunications will not be required for the concentrations carried out between economic agents holding concessions, nor the concession assignments and the changes of control that derive from them..."

The same article determines that the IFT will investigate said concentrations within a period of no more than ninety calendar days, and if it finds that there is substantial power in the market of telecommunications networks that provide voice, data or video services or in that of radio and television according to the corresponding sector, it may impose the necessary measures to protect and promote free competition in this market, in accordance with the provisions of the LFTR and LFCE.

For this reason, commissioners Adriana Labardini and María Elena Estavillo proposed to lodge a constitutional controversy due to invasion of powers by the Congress, but the Plenary of the IFT by majority of votes rejected the proposal. Some of the relevant points that were noted by the commissioners were:

Item	Limitations
Preponderance and substantial power	It is determined by sector and not by service in audiovisual matters which allows Televisa to be declared preponderant in broadcasting, but not in cable television which is a telecommunications service (Article 262). In addition, transitory Article 9 is included which allows it to buy more restricted TV companies ⁵ for not being preponderant in telecommunications, preventing the IFT from exercising its ex ante preventative powers in terms of authorization and analysis of concentrations, creating a regime of exception for certain agents in certain sectors.

⁵ The day after the entry into force of the LFTR, on August 14, in a statement to its investors, Televisa announced the purchase of 100% of the capital stock of Grupo Cable TV, the Cablecom operator, for 8.85 billion pesos; with this it took control of 63% of the nation's pay television, without this being determined as being preponderant, and therefore without an asymmetric regulation being imposed.

	The preponderant status is unduly equated with that of an economic agent with substantial power, imposing the same obligations on them when regarding economic competition, they are different legal entities (Article 138)
Asymmetric regulation of preponderants	Determination of rates for broadcasting services, without the IFT being able to regulate according to economic and regulatory analysis prior to the competition. (Articles 120, 131 and 272)
Crossed ownership	It envisages an atypical regime and mechanisms that do not constitute limits to cross-ownership, but rather permissive modalities of cross-ownership, depriving the IFT of the power to set the limits that the Constitution empowers it with, preventing the IFT analysis from being established casuistically to impose the appropriate measures (Articles 285, 286 and 287)
Multiprogramming	The possibilities of the IFT are limited to use multiprogramming as a measure to promote plurality and/or competition, restricting its powers to define the obligations of preponderant agents or those with substantial power, as well as cross-ownership rules. (Article 158)

Source: Personal elaboration based upon the discussion document of the IFT Plenary (2014) In pift030914265dictamensobrecontroversia)⁶.

Regarding the rules for limiting horizontal and vertical ownership in broadcasting that are not covered by the LFTR. Regarding cross-ownership, no specific definition is established, but it does address assumptions and measures that are quite lax.

In the case of broadcasting and telecommunications concessionaires that serve the same market or geographical coverage area, which prevents or limits access to plural information in such markets and zones, the IFT must:

- Indicate to the restricted TV operator the news or public interest information channels that shall be included in their services, insofar as is necessary to guarantee access to plural and timely information.
- Include at least three channels whose content is predominantly the production of independent national program-makers whose financing is mostly of Mexican origin.

If these measures are not complied with, the IFT must impose limits on the national or regional concentration of broadcasting frequencies, on the granting of new broadcasting concessions, and on the cross-ownership of companies that control various media that are broadcasting and telecommunications concessionaires that serve the same market or coverage area (Articles 285 and 286).

For the imposition of concentration limits, the regulator must consider as criteria the restrictions or limitations on access to plural information, the existence of barriers to the entry of new

⁶ Document presented to the Plenary session of the IFT by the commissioners Adriana Labardini and María Elena Estavillo to contest the LFTR before the SCJN due to invasion of powers of the Congress, a proposal that was rejected by the rest of the members of the Plenary. In: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/pift030914265dictamensobrecontroversia.pdf> Consulted on January 28th, 2016.

agents, and the elements that could foreseeably alter both such barriers and the supply from other competitors in that market or coverage area; the existence of other means of information and their relevance; the possibilities of access of economic agents and their competitors to essential inputs that allow them to offer similar or equivalent services; the behavior during the previous two years, as well as the increases in efficiency that could derive from the activity of the economic agent that favorably affect the competition process in that market and coverage area.

In the event that the measures are not effective, it may order the disincorporation of assets, rights or stocks of the operator to ensure compliance with these measures and grant the right for economic agents to submit a divestment program to the Institute, which will approve or modify it (Articles 287 and 288).

In the case of substantial market power, the IFT may impose specific obligations and limitations on economic agents, depending on the market or service in question, including information, quality, rates, commercial offers, and billing (Articles 282 and 283).

In the case of broadcasting, there are eleven measures applicable to the AEP (Article 266), which may be summarized as follows:

- The application of the rules of must offer for pay TV operators free of charge.
- The impediment to participate by itself or through groups related through commercial, organizational, economic or legal ties in new bids. Leaving the IFT free to authorize its participation in the bidding for broadcasting frequencies.
- Provide the IFT with the separate accounting of its concessions and information on its infrastructure.
- Allow other broadcasting concessionaires access and use of their passive infrastructure, on a non-discriminatory basis and without subjecting them to the acquisition of other goods and services.
- Carry out a reference public offer that contains terms and tariffs for passive infrastructure sharing.
- Not to restrict access to advertising when it implies the displacement of its competitors; publish on its website and provide the IFT with information regarding the various advertising services it offers and refrain from applying discriminatory treatment with respect to advertising space.
- Obtain authorization from IFT if it intends to acquire control, manage, establish commercial alliances or have direct or indirect shareholding in other broadcasting companies. Refrain from participating directly or indirectly in the capital stock, administration or control of the preponderant economic agent in telecommunications.
- Refrain from participating directly or indirectly in companies that carry out the production, printing, marketing or distribution of printed media of daily circulation, whether local, regional or national, as determined by the IFT.
- Refrain from contracting exclusive rights for sporting events with high expected nationwide audience levels. The IFT must issue a list every two years in which it indicates the reasons why it considers that such abstention will generate effective competition.
- Obtain the authorization of the IFT to participate with other economic agents in the acquisition of transmission rights of audiovisual content to be broadcast in order to improve the terms of said acquisition; it may only participate or remain in purchase clubs of audiovisual content or

any analogous form with authorization of and any additional specific measures that the IFT considers necessary.

In the case of telecommunications, there are 37 measures applicable to the preponderant economic agent (Articles 267 and 269 to 275) which are summarized as follows:

- Submit annually for the approval of the Institute the public reference offers for the services of: interconnection, visiting user, passive infrastructure sharing, effective unbundling of the local public telecommunications network, access, including links, and wholesale resale services.
- Present for IFT authorization the fees that it applies to the services it provides to the public, to the intermediate services it provides to other concessionaires, and to its operation in a disaggregated and individual manner in order to prevent cross subsidies between services or schemes that displace the competition.
- Submit annual information about its complete infrastructure and allow interconnection and interoperability between public network concessionaires at any feasible point, regardless of where they are located, and provide interconnection capacities in the terms in which they are requested.
- Not to establish obligations, contractual penalties or restrictions of any type in the agreements that they enter into, that have the effect of inhibiting the consumers so that they choose another service provider;
- Provide the Institute with separate accounting information by service, with the breakdown of the catalog of accounts of all the companies, which will reflect, where appropriate, implicit discounts and cross subsidies.
- Carry out at its expense the creation, development and implementation of processes, systems, facilities and other measures to allow the efficient provision under conditions of competition of the elements and services of disaggregation to other concessionaires of public networks as determined by the Institute.

The measures designed in the law in the case of broadcasting, although they have pluralism as one of their objectives, only address the rules of economic competition (preponderance and substantial market power). Although it leaves the regulator free, in some aspects, to establish more specific criteria for both sectors in terms of competition, as we will see later on in the broadcasting part, the performance of the IFT has been limited.

As in the constitution, the law imposed greater measures on the telecommunications sector than on broadcasting. Cross-ownership only included the daily press (where Televisa does not have a stake, which is the AEP in broadcasting) and other elements were not taken into account such as digital media, which to date do not have any specific regulation regarding economic competition and their related markets.

For concentrations and mergers Article 112 determines that companies do not need authorization from the IFT for transactions no greater than 10%, although they do have the obligation to give notice to the regulator; in case there are no observations made, the operation can proceed. It will not be necessary to submit the notice when the subscription or assignment refers to shares or equity participations representative of neutral investment in terms of the Foreign Investment Law, or when there are capital increases that are subscribed by the same shareholders, provided that they do not modify the proportion of the participation of each of them in the share capital. Neither will it be required to submit the notice in the case of the

merger of companies, splits or corporate restructuring, provided that the changes in shareholding are within the same control group or within the same economic agent.

The law also contemplates other mechanisms in which concentrations are permitted such as agreements with broadcasters to be incorporated as affiliates; the leasing of the spectrum granted to other broadcasters; the purchase of stations through the procedure called transfer of rights, which allows the entering into of markets where there are no frequencies to be tendered.

The Federal Law of Economic Competition (Ley Federal de Competencia Económica, LFCE) establishes the guidelines for concentrations, mergers, substantial market power, anticompetitive conduct and monopolistic practices. Article 61 defines concentration as the merger, acquisition of control or any act by virtue of which companies, associations, shares, stocks, trusts or assets in general that are carried out between competitors, suppliers, customers or any other economic agents.

To evaluate concentrations, Article 63 establishes that the participation of those involved in the concentration with other economic agents must be taken into account and if they belong to an Economic Interest Group to determine if they can coordinate group activities to operate in the markets, to exercise decisive influence either de jure or de facto. In the analysis, an element to be taken into account is the existence of links by blood kinship or affinity in one or several corporate entities belonging to an Economic Interest Group in related markets.

1.4 New participants in the market, mergers and acquisitions

Pay TV

As anticipated, Transitory Article Nine allowed the Televisa Group (GT) to have a greater participation in pay TV, acquiring Grupo Cable TV (Cablecom) in 2014, Cablevisión Red (Telecable) in 2015 and Telecable in 2016; that same Article directs the institute to investigate concentrations to determine if they have substantial market power and impose the measures it deems necessary in order to protect competition. For its part, Transitory Article 39 ordered the regulator to initiate an investigation to determine the existence of economic agents with substantial power in any of the relevant markets of the sectors, among which restricted television should have been included.

On two occasions the IFT determined that the GT had no substantial market power by which to abuse its position of power. The first resolution was in September 2015⁷, even though its Economic Competition Unit found that Televisa dominates 2,124 pay TV markets of the 2,436 markets analyzed and controls relevant content. This means that this company is one of the few service providers in 87% of the municipalities in the country; it manages both the satellite platform (via Sky) and the cable platform which gives it an advantage over its rivals, plus the fact that there are few competitors due to the high entry barriers; however, the IFT Plenary by majority vote resolved in the negative.

The only argument for this determination was that competitors of GT had grown by 2% and GT decreased its participation in that same percentage: it decreased from 64.1 to 62.2%, for which the rest of the operators had the capacity to react under the conditions of the existing market,

⁷ In http://www.ift.org.mx/sites/default/files/contenidogeneral/unidad-de-competencia-economica/versionpublicaresolucionai-dc-002-2015_0.pdf Consulted April 23rd, 2016

so there was no competitive pressure on the part of GT, in addition to having the obligation to give free access (must offer) to its competitors to open TV channels of greater value to the audiences, which prevents GT from using these inputs to limit the ability to compete with other pay TV service providers.

The IFT did not take into account regional markets for its resolution, as established in Article 28 of the Constitution, nor of the content markets, commercial advertising, the increase in pay TV rates and the convergent services that can be provided through these platforms. The resolution of the regulator was interpreted by many analysts as a measure of protection for the company to continue concentrating this market.⁸ The same resolution was issued in April 2016, after Grupo Televisa bought 100% of the shares representing the capital stock of Cablevisión Red, S.A. of C.V. (Telecable). From its analysis, the Plenary only took into account the national situation without contemplating that in the 62 localities of Televisa-Telecable merged coverage it reached up to 82.5% of participation in that regional market.

When there is less competition, the users in the municipalities that do not have other restricted TV options have to assume the increase in rates that have already been registered by the IFT itself, in addition to having to stick to the configuration of services that oblige them to contract telephony, internet and television, without being able to choose only one of them. Local advertisers for their part have to accept the rates because there are no other suppliers.

Another consequence is the possibility of less diversity of content, especially local ones that are produced by small cable companies. In addition to controlling the market, GT imposes its content through its ability to negotiate with programming companies that sell the rights to broadcast certain pay television channels, and by producing 30 channels of restricted television can also package channels freely, imposing their own channels, through which the lack of content quality is also repeated in pay TV, reducing the diversity and the plurality of content that the IFT is supposed to guarantee according to Article 6 of the constitution.

The company Televisora del Valle de México, a subsidiary of TV Azteca and operator of Channel 40, appealed against the resolution of the IFT and on January 19, 2017 the First Collegiate Circuit Court on Administrative Matters specializing in Economic Competition, Broadcasting and Telecommunications, determined that the resolution of the IFT was beyond rationality and was illegal, based only on information collected between September 2014 and March 2015, when the Investigative Unit had prepared investigations from 2009 until August 2014; thus, it ordered the Plenary to reinstate the procedure to determine whether the GT had substantial power.

In February 2017, the IFT Plenary determined that GT did have substantial power in the relevant pay television market, with the possibility of being able to set prices above the market; however, there was no provision to establish asymmetric regulation measures to avoid the abuse of the company due to its dominant position.

Televisa appealed and in February 2018, the Supreme Court of Justice of the Nation revoked the IFT resolution and ordered it to issue a new one. At the time of finishing this report, the

⁸ News reports: <http://www.eluniversal.com.mx/entrada-de-opinion/columna/irene-levy/cartera/2015/10/5/houdini-el-ift-y-la-dominancia-de-televisa>, <http://www.amedi.org.mx/ift-debe-investigar-a-fondo-poder-sustancial-en-tv-de-paga-en-mercados-locales/>, <http://www.elfinanciero.com.mx/empresas/implicaciones-de-fallo-del-ift-sobre-televisa-divide-opiniones.html>

arguments under which the Court made this decision were not known. According to sector analysts, the arguments of the Court affected the real possibility of regulating the substantial power of the company in this market and in all the rest⁹.

In the telecommunications sector it is the service that has raised the tariffs more for users, unlike others that have gone down. According to the latest IFT data for 2017, the Televisa Group has 56.8% of the pay TV market, and 47.3% of the cable TV and 63.6% satellite markets; far behind are its competitors: Dish-MVSia with 21.2% in TV via satellite and Megacable with 14.2% for cable¹⁰.

Open television

In 2015, the bidding process for two new open television channels with national coverage (IFT-1) was initiated. Of the eight initial participants, only Grupo Radio Centro S.A.B. de C.V. and Cadena Tres I S.A. de C.V. (Grupo Imagen), continued until the end and the chains were awarded, but due to non-payment of the consideration, the former was disqualified and the chain was declared abandoned.

Grupo Imagen began broadcasting in November 2016 and its programming offer was not very different from the current channels. Its owner Olegario Vázquez Aldir is also General Director of Grupo Empresarial Ángeles (GEA) and has investment holdings in the press through the Excelsior Newspaper, in radio with Grupo Imagen with several stations with which it has a national chain; and before obtaining the TV channel had a metropolitan coverage channel called Cadena Tres. He has interests in other businesses such as the Angeles and Cima hospital chain, the Camino Real, Real INN Hotels and Quinta Real hotel chains; the Grupo Aeroportuario del Pacífico and the football team Gallos Blancos in Querétaro. In 2015 he was appointed a permanent member of the Mexican Olympic Committee.

Criticism of this open television bidding process was that at no time was the program proposal included in the bidding requirements as a qualification criterion in order to promote pluralism and diversity, as established in Article 78 of the LFTR, which indicates that the IFT must consider in the bidding processes for commercial broadcasting that the programming project is consistent with the purposes for which the concession is requested, which promote and include the dissemination of national, regional and local content.

While the regulations included the delivery of the programming proposal, they did not include any rating; the authority argued that it did so in compliance with the so-called programming freedom established in the Law, a concept that cannot be found in jurisprudence or any theoretical framework for its definition and justification.

⁹ Clara Luz Álvarez: “Televisa saved, IFT convicted”. In

<http://www.reforma.com/aplicaciones/editoriales/editorial.aspx?id=130146>

Irene Levy: “RIP to domination in pay TV”. In <http://www.eluniversal.com.mx/columna/irene-levy/cartera/rip-la-dominancia-en-tv-de-paga>

Gabriel Sosa Plata: “Televisa wins out over IFT?” In <http://www.sinembargo.mx/27-02-2018/3390625>

Javier Núñez Melgoza: “The SCJN defines the future of competition policy”:

<https://www.economista.com.mx/opinion/La-SCJN-define-el-futuro-de-la-politica-de-competencia-20180306-0021.html>

¹⁰ Ibid.

With an abandoned national chain and the opening of new frequencies, a second bidding process (IFT-6) was held in April 2017, but the possibility was left open that competitors could make alliances to form a national chain or go after local and regional channels.

Again the institute did not include the rating of the programming proposal and the main criterion for the assignment of the frequencies was the economic criterion through bids by the competitors. The constitution establishes in its Article 28 and the Law that the economic criterion cannot be the main criterion when allocating frequencies from the radioelectric spectrum; this provision has a greater centrality in terms of broadcasting frequencies, otherwise only those that have the enough economic power can access them to exercise freedom of expression. Under this premise, and based on international standards in the matter, in 2007 the Supreme Court of Justice of the Nation determined the unconstitutionality of the so-called Televisa Law that in one of its articles determined access to frequencies through the bidding mechanism.

These new rules were determined with the intention that the new players in the broadcasting field would promote pluralism and diversity, but in the end those who offered the most money from the minimum reference price determined by the IFT in each term won; in other words, what we saw was the realization of an auction that contradicts the legal framework.

According to the IFT data, 32 channels located in 29 coverage areas were assigned to 13 participants in the tender, of which only four groups are new stakeholders, the others are already operators or belong to Economic Interest Groups linked to the sector, only 22% of the channels were obtained by new competitors in the market¹¹.

Radio

As in the open television tenders, the IFT maintained the economic criterion as the main factor for allocation of stations in the AM and FM bands, nor did it take into account the programming proposal or the concentration measurement of frequencies in a single Economic Interest Group at the national level.

The tender for 2017 of 257 frequencies (191 on FM and 66 on AM) was considered historic, as never before had such a large number of radio frequencies been put out to tender. According to the regulator, 141 (114 on FM and 27 on AM) were concessioned to 66 different winning participants. 65% of the participants were current licensees, while the remaining 35% were new players.

Many of the radio frequencies, as in open television, remained in the hands of existing operators, the entry of new players being much less, and although the regulator has publicly stated that it will now have greater content options, the fact is that having more media does not automatically translate into diversity of content and plurality of perspectives. The omission of rating content may result in the new stations instead of investing in production becoming repeaters of the same content of the large radio and television channels, offering more of the same.

¹¹ Information available at: <http://www.ift.org.mx/comunicacion-y-medios/comunicados-ift/es/el-ift-entrego-titulos-de-concesion-los-ganadores-en-la-licitacion-por-canales-de-television>

So far no foreign companies have participated in the tenders. Prior to the legal changes, there was only foreign investment in radio with the Spanish group Prisa in alliance with Televisa through the radio station W Radio.

Although the legal framework made important advances regarding concentration, the omission of the rules for integral, horizontal and cross-sectional concentration does not allow the imposing of limits on the undue ownership of the media; however, the immediate possibility of changes to the law in Congress is not foreseen since this year there will be a presidential election and the renewal of the congress.

II

Control and monitoring of the concentration of media

2.1 Regulatory Authority

One of the main achievements of the reform was the creation of the IFT as the regulatory authority with constitutional autonomy in order to guarantee the independence of the regulator before the governmental and regulated interests; it functions as a collegiate body.

Constitutionally all its powers must have as its ultimate goal to ensure what is established in Article 6 on the right to information, including the right of access to plural information, Article 7 on freedom of expression and Article 28 on economic competition. However, the measures implemented so far by the regulator only consider a purely technical and economic perspective.

This lack of assumption of powers by the regulator can be seen more clearly in the private vote cast by the magistrate Jean Claude Tron Petit in the Protection in review 142/2015¹², in which he affirms that the constituent in broadening the rights to information also endowed the regulator with greater powers precisely to protect pluralism, linking it to a broader objective to protect the rights of citizens to express themselves freely and to obtain information without obstacles imposed by the government, or mainly, by economic agents in the telecommunications and broadcasting sectors, so that its powers extend to its obligation to prevent these rights from being limited by third parties and promote the necessary conditions for the effective enjoyment of rights, since its protection has been considered insufficient in the context of deregulated markets left to the law of supply and demand (CJF, 2016: 66, 67 and 69).

The fact that the notion of pluralism is already integrated into official documents is a step forward, but the most important step is the design and implementation of concrete actions to operationalize all those measures to guarantee it.

The legal framework gives broad powers to the IFT to regulate both sectors through the concession licenses, compliance monitoring, sanctions, preparation of studies, investigations, among others (Articles 7 to 9 of the LFTR and 15 to 33), but although it was created as a convergent regulatory body, the truth is that there are still blind spots in the legal scaffolding,

¹² First Collegiate Circuit Court in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications Resident in Mexico City. The appeal was promoted by the audiences that were affected by the cancellation of journalist Carmen Aristégui's newscast by the company MVS Radio, stating that their right to plural information had been affected in accordance with Article 6 of the Decree. One of the instances summoned was the IFT, which in its reasoned report argued that it did not correspond to its powers to regulate the actions of the concessionaires to define their programming.

as shown in the case of the approval of the merger of AT&T and Warner, where the faculties of the Federal Commission of Economic Competition (Comisión Federal de Competencia Económica, COFECE) and the IFT were spliced, creating parallel procedures and that allowed a multiplatform concentration that will have important effects on the media ecosystem.

A judicial ruling in the case, imposed both upon the COFECE and the IFT to work together, leaving the IFT to only verify the conditions of the telecommunications infrastructure, this provision was criticized by the OECD in its Study on Telecommunications and Broadcasting in Mexico 2017, which it qualifies as an error insofar as the decision did not consider the implications of the convergence between voice, video and data, because this merger allows a single company to have all the technological platforms together with the control of a large amount of content, which can generate competitive and concentration asymmetries never before seen, for that reason the OECD recommended that in the future the IFT maintain the mandate to deal with these cases of competition.

Even when the LFTR took away some faculties from the IFT that were given to the Ministry of the Interior (Segob), and to the SCT, among others, the judicial branch has issued relevant sentences extending them. One of them from 2015 from the Supreme Court that was resolved, that the IFT constitutes "a key piece of a new constitutional engineering, whose purpose is to extend the threshold of protection of the rights of freedom of expression and access to information" and that the regulator has "a dual function: to regulate the technical and economic issues of the sector, as well as the human rights of expression and access to information in the current era of technologies", for which it has "quasi-legislative, quasi-executive and quasi-judicial powers." (Constitutional Controversy 117/2014).

However, the main criticism received by the agency is that it does not fully assume its powers, such as the issuance of Guidelines to guarantee the neutrality of the network, the asymmetric regulation measures for the GT as an economic agent with substantial power in the market of pay television; the definitions and criteria for promoting pluralism in broadcasting and effective competition, the Guidelines for limits on commercial advertising in broadcasting, the coverage obligations for broadband access for operators in order to enforce the constitutional right of universal access in the matter, among others. Judicial resolutions such as the sufficient budget allocated to the IFT are conditions that would allow it to perform better.

2.2 Control and monitoring of concentration

At the time experts rated the measures towards the AEP as lax, especially in broadcasting¹³. In the year 2017 reviews were made of its effectiveness and the IFT renewed the measures that several analysts again qualified as insufficient and even less demanding¹⁴.

In the case of América Móvil (AM), the measures imposed since 2014 and reviewed had few results. Although the IFT ordered the functional separation of its companies and the creation of a company for the provision of fixed wholesale services in order to allow its competitors to access its network, the consequence is that, without obligations of coverage, the competition is encouraged but for the same markets in which AM gives the service in which it has developed its fiber optic network. One step further would have been to strengthen these obligations to the

¹³ Report at: <https://www.altonivel.com.mx/lo-le-espera-al-negocio-televisa-en-tv-paga/>

¹⁴ Report at: <http://www.observacom.org/medidas-del-ift-para-america-movil-y-televisa-son-insuficientes-para-limitar-la-concentracion-en-mexico-dicen-expertos/>

operators, especially to the preponderant one, otherwise the relevant markets will continue to be strengthened, leaving aside those with the least access to broadband.

In the case of Grupo Televisa (GT), the reviewed measures involve the obligation to provide a signal service; the impossibility of acquiring the exclusive rights of transmission of relevant audiovisual content unless it shares a sub-licensing with other operators, the obligation to publish information on the terms and conditions in which it commercializes advertising; the separate accounting of the services provided and the establishment of deadlines to make this information available in the Electronic Management System.

The measures regarding broadcasting fell short, as in the first measures that in fact showed their limitations, such as the sharing of passive infrastructure; in two years not a single contract was concluded with its competitors due to the obstacles of the company. In addition, the regulator took away the express prohibition to GT of acquiring exclusive rights of relevant audiovisual content under the concept of sub-licensing, that is, they would be able to buy them and then sell them to their competitors, when in advance we know that the company has a great capacity to control this type of markets in the country. The only progress made was in imposing greater transparency on the advertising packages.

2.3 Legal guarantees of Independence

In order to avoid appointments that responded to governments in office or to the interests of those being regulated, the procedure for the composition of the commissioners that would integrate the IFT Plenary (Article 28) was established from the constitution via an Evaluation Committee made up by the directors of the Bank of Mexico, the National Institute for the Evaluation of Education and the National Institute of Statistics and Geography.

The Evaluation Committee sets up its sessions each time a commissioner vacancy occurs. It must issue a public call for applicants to apply an exam on knowledge of the subject, and for the formulation of the exam the opinion of at least two institutions of higher education shall be considered.

For each vacancy the Committee sends a list with a minimum of three and a maximum of five candidates who would have obtained the highest approval ratings to the President of the Republic, from that list the President chooses a candidate who is proposed for their ratification by the vote of two thirds of the Chamber of Senators. In case it rejects the candidate proposed by the Executive, the president will submit a new proposal.

The commissioners must have a professional degree; they must have performed, in prominent form for at least three years, a professional, public service or academic activities substantially related to radio broadcasting or telecommunications; they may not have occupied, in the last three years, any employment or managerial function in the regulated companies or the entities related to them, being those which are regulated by the IFT, among others. The Commissioners are subject to the system of responsibilities of public officials and of impeachment. Their commission is for nine years without re-election.

According to the same article of the constitution the commissioners must issue their resolutions with full independence, but the last appointments ratified by the Senate have been criticized because no criteria have been established to evaluate the independence of the proposed persons, it is enough that they have had the highest results in the knowledge test.

2.4 Sanctioning power of the authority, pluralism and concentration

The legal reform establishes that the general rules, acts or omissions of the IFT can only be challenged solely through the indirect injunction (amparo) procedure and will not be subject to suspension until there is a final decision, and specialized courts are created for the first time in telecommunications, broadcasting and economic competition.

The purpose of both measures was to avoid regulatory paralysis due to the high litigiousness of regulated parties, which through judicial strategies for a long time have evaded regulation or sanction measures by means of the suspension of the acts of authority, as well as to prevent the courts from issuing sentences as appropriate to the regulated parties without having the appropriate technical knowledge as would often happen.

The Council of the Federal Judiciary put into operation two District Courts and two Collegiate Courts in Administrative Matters specialized in economic competition, radio broadcasting and telecommunications, with residence in Mexico City and Jurisdiction throughout the Republic.

On their performance, the courts have received criticism from the regulated parties and other stakeholders involved in the agenda because in their sentences, most of the time, they find in favor of the regulator¹⁵; therefore, many of the cases go to the Collegiate Court, which recently in December 2017 suffered a setback in its institutional design due to the sudden departure, and without any public justification of the magistrate Jean Claude Tron Petit, who had a term set until 2020 and was returned to the administrative tribunals. Some analysts consider his exit as a reprisal for his independence on the part of the most powerful regulated entities, since he was the judge who created the jurisprudential concept of the Economic Interest Group to protect competition and determined that the independent affiliates of Televisa are part of its group of economic interest, confirming that Televisa is preponderant, in addition, his ruling was the one that forced the reinstatement of the process to the IFT on the substantial power of Televisa in the pay-TV market and has defended publicly and in sentences issues that are uncomfortable for the broadcasting industry like the rights of the audience¹⁶. This measure of the judicial power raises suspicions about the undue interference of those regulated in the justice system, as it had happened before the reform.

2.5 Method and criteria for the evaluation of the media concentration levels

In April 2016 the IFT issued the Technical Criterion for the Calculation and Application of a Quantitative Index to determine the degree of concentration in markets and services¹⁷; the IHH index is the one used to measure the markets and although it states that it will not make its decisions using the concentration index as its sole analytical element, it does not establish the criterion of pluralism in broadcasting at any time.

The OECD (2017) recommended that the IFT broaden its knowledge of the pluralism of audiovisual content and explore better ways to evaluate it in order to implement regulations that

¹⁵ <http://www.eluniversal.com.mx/entrada-de-opinion/columna/javier-tejado-donde/cartera/2015/09/8/los-juzgados-cooptados-por-el>

¹⁶ Information available at: <http://www.eluniversal.com.mx/columna/irene-levy/cartera/tron-petit-el-magistrado-incomodo> and <http://claraluzalvarez.org/?p=394>

¹⁷ At <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/dofpift170316101.pdf> consulted April 24th, 2016.

include the diversity of the property, including convergent services such as television via IPTV, among others, and the role played by the public broadcasting service.

It also considered that elements such as pluralism, diversity, foreign ownership and market concentration should be taken into account in cross-ownership investigations, production and programming agreements between Mexican television companies and foreign companies, as well as between broadcasting concessionaires and print and video media companies, sports clubs, stadiums, et cetera.

III Transparency and accountability

In this matter, the same OECD report criticizes the fact that the IFT does not publish the conditions imposed on the parties involved in a merger to obtain the approval of concentration operations. It is not clear why it sometimes does not disclose information to the public about the commitments that are signed by merging parties in order to obtain approval.

The absence of information from the broadcasting sector is also notable, its Quarterly Statistical Reports report a lot of information on the Relationship between Concentration Levels and Price Indexes for Telecommunications Services, but not in broadcasting, the official data on the use of broadcasting services, advertising and investment in production are limited or non-existent, there are no indicators available for monitoring the evolution of the complete audience of the radio and open TV market.

That is why one of the recommendations of the OECD to Mexico was to improve the collection and analysis of statistical information of the broadcasting sector, as well as to create the tools and actions to measure commercial television audience, including a classification system of the audience, which is independent of the commercial concessionaires. It also proposed evaluating the possibility of collecting indicators on Internet-related services, which is increasingly important knowledge in a convergent market.

As long as this information is not available and made public, it is a relevant impediment to being able to monitor the degree of concentration in the markets of both sectors and the imposition of asymmetric regulatory measures.

3.1 Transparency and accountability in the legal framework

In the Constitution and in the LFTR it is foreseen that the IFT will submit annually a work program and a quarterly report of activities to the Executive and Legislative Powers that will be public (Articles 17 and 47). The legislature may summon the Commissioners on specific issues.

In the secondary law, the institutional design imposed that its sessions, agreements and resolutions will be public with those exceptions determined by law. Article 30 lays out the rules of contact of the commissioners with persons representing the interests of the regulated agents, only by interview, and all the commissioners must be summoned. From each interview there will be a record kept that must contain at a minimum the place, date, time, the full names of all

the people who were present and the topics covered. This information must be published in the IFT portal.

The interviews must be recorded and stored in electronic, optical or other media, being kept as reserved information, except for the other parties in the proceedings in the form of a lawsuit, the other commissioners, the Internal Comptroller and the Senate of the Republic in case of a removal procedure of a commissioner.

Plenary sessions must be of a public character except those in which matters with confidential or reserved information are dealt with. Plenary sessions will be recorded and published through public versions with their respective transcriptions on the internet portal. If the Plenary sessions are private, they must publicly explain why. The votes of the commissioners are public, even in the case of private sessions. The IFT is obliged to comply with the laws of transparency and access to information as are all instances of the State (Articles 47, 48, 49, 50 and 52).

Most of the measures considered in the law have been fulfilled by the institute, others not, such as making the sessions public in real time, in those in which the presence of actors other than the IFT is not admitted, which has generated complaints for not complying with the law and maximum publicity¹⁸.

3.2 Transparency in ownership of the media

The Constitution required a Public Registry of Concessions (Article 28). In the LFTR (Articles 176 to 180) the creation of the Public Registry of Telecommunications is laid out, which is comprised by the Public Registry of Concessions and the National Infrastructure Information System. It is the obligation of the IFT to keep updated a computerized system of spectrum management with all the information, which can be summarized in the following measures:

- The concession titles and the authorizations granted, with their modifications, technology, location and characteristics of the emissions, as well as that relative to the deployment of the installed infrastructure. The concessionaires are obliged to deliver this information to the Institute.
- Public offers carried out by the concessionaires declared as AEP or with substantial power; public rates, including discounts and bonuses; the shareholder structure of the concessionaires, as well as changes in shareholding control, ownership or operation of companies related to concessions.
- The annual work programs, the quarterly reports of the Institute's activities, as well as the studies and consultations that it generates; the statistics and indicators generated and updated by the National Institute of Statistics and Geography, in regards to telecommunications and broadcasting.
- The specific measures and obligations imposed on the concessionaires that are determined to have substantial or preponderant power, and the results of the supervisory actions of the IFT regarding their compliance; the participation statistics of the concessionaires and economic interest group in each market and the sanctions imposed.

¹⁸ Report "Condemn the IFT for closing public session": <http://noticias.terra.com.mx/mexico/condenan-que-ift-cierre-sesion-publica.f2af11b5efea8410VgnCLD200000b1bf46d0RCRD.html> y <http://www.elnorte.com/aplicacioneslibre/articulo/default.aspx?id=349331&md5=b3f2d9dc531ae87f9bdee6cdd1701f33&ta=0dfdbac11765226904c16cb9ad1b2efe&po=4>

However, the information is so disaggregated that it is very difficult to locate the Economic Interest Groups and therefore the levels of ownership of the media. This record does not include the investments and the income sources of the concessionaires, key bodies and their functions in the media, interests in other economic sectors, influential people in the editorial policy, affiliations of owners and their families, public advertising revenues, financing from other external sources.

The existence of transparency mechanisms of the ownership of the media at all levels is fundamental because this allows for having elements to be taken into account when designing the processes of granting new licenses. It is not that the regulator does not have the information, because the Law (Article 112) states that the concessionaire, when it is a corporate entity, will submit to the Institute its share structure, with its respective percentages of participation, so that it should elaborate public versions to make the ownership of the media more transparent.

IV

Discriminatory policies and practices. Barriers to entry

Up until before the legal changes, broadcasting concessionaires paid smaller amounts for the concession titles and the payment of fees for the use of the spectrum. At present, the IFT has developed payment formulas¹⁹ in accordance with Articles 101 and 102 of the Law.

The regulator has been sensitive in the case of concessions for indigenous and community social use and in 2015 intervened before the Chamber of Deputies that they be exempted from the payment of duties, which has not happened with concessionaires of that nature that provide the telecommunications service, as can be seen in the case of the civil association Telecomunicaciones Indígenas Comunitarias (Community Indigenous Telecommunications).

This organization obtained a concession title to install a mobile cellular telephone network for various communities in Chiapas, Veracruz, Guerrero, Puebla and Oaxaca, which are not served by the market. The service is given to its inhabitants at a very accessible cost (just over two dollars per month), and the network is managed and operated by the communities themselves. But this successful project is at the point of collapsing in the face the refusal of the institute to exempt them from the payment of more than 58 thousand dollars for the use of the spectrum, nor has it taken any action before the legislators as at the time it did for community broadcasters.

The reasons why the institute does it for one case and not another are not publicly known, as a principle there is no motivated reason for such differentiation that can lead to such discriminatory behavior as the same treatment cannot be given to commercial telecommunications operators as to the non-profit ones.

The recognition of the public, social, community and indigenous sectors in the constitution (Articles 6 and 28) is one of the most important advances in terms of equality as they were not foreseen by any previous legal system and it is the guiding principle that subsequently was reflected in the LFTR. However, in the specific criteria and mechanisms for access to and

¹⁹ Detailed information can be consulted at: <http://www.ift.org.mx/tramites/pago-anual-para-el-uso-de-frecuencias-del-espectro-radioelectrico>

operation of the frequencies, measures that are discriminatory in terms of access, availability and enforceability mechanisms were imposed.

4.1 Discrimination in access to the frequencies

The LFTR maintains discretionary power to grant the frequencies; while for the commercial sector the rules are clear for access through public bidding mechanisms, in the case of social and public media use Article 85 allows the IFT to discretionally impose the conditions for the granting of concessions, by establishing that it may request "at least" the requirements established by law, without setting a limit; these two words may give rise to requesting many more requirements, which is contrary to the legal certainty that any citizen must have when starting an administrative process.

Article 90, section IV, includes a reserve for community and indigenous radio stations restricted to AM bands ranging from 1605 to 1705 KHz and 10% in the FM band that goes from 88 to 108 MHz, in the upper part of FM.

This reserve, in addition to excluding open television, is discriminatory in restricting the frequencies for which groups decide to transmit, this differential treatment for this sector is an arbitrary interference, since there is no technological, economic or other rationality that justifies it.

4.2 Discrimination in the availability or sufficiency

Article 89 establishes discriminatory conditions in the sources of financing to the detriment of community and indigenous media, such as the prohibition of the sale of non-profit advertising under the principle that the resources obtained are not for profit but for reinvestment in the social project of the medium.

The main source of resources allowed for community and indigenous media is official advertising; however, the stipulated 1% will be increasingly reduced as more media of this nature exist. The padlock for states and municipalities to allocate "up to 1%" of the official guideline is an arbitrary restriction, there is no justification for social media to be set that percentage while for commercials it can be up to 99% of their public budgets

The Concession Licensing Guidelines issued by the IFT, which greatly improved the conditions for access to the frequencies, have not been translated into practice under less restrictive conditions, according to internal documents of the World Association of Community Radio Broadcasters (AMARC-Mexico) and the minutes of the IFT Advisory Board²⁰ and public denunciations²¹. Despite the new administrative design, the practices of the civil servants continue to be limiting in the interpretation of the rules, which is why the groups still have many difficulties in accessing the concessions.

This situation shows that in terms of public policy the new institutional designs do not eradicate old bureaucratic practices and logic by themselves, the processes of change are more complex and long.

²⁰ Transcription version of December 3rd, 2015:

http://consejoconsultivo.ift.org.mx/docs/sesiones/2015/Estenografica_Consejo_Con_031215.pdf and <http://consejoconsultivo.ift.org.mx/sesiones.html>

²¹ Newspaper report "Community radio is denied to indigenous zones" in:

<http://www.eluniversal.com.mx/articulo/cartera/telecom/2016/02/15/le-niegan-radio-comunitaria-zonas-indigenas#>

4.3 Official advertising

Official advertising is not regulated at all and the little regulation that exists does not inhibit practices of discretion, corruption and censorship in the communications media. Constitutional Article 134, product of the electoral reform of 2014, provided that Congress should issue a regulatory law on official advertising by April 30, 2014, but it was never carried out. Faced with this legislative omission, the organization Article 19 filed a writ of amparo for the violation of the right to freedom of expression, to the extent that official advertising serves as a mechanism of indirect restriction by not having regulations that impose limits on its misuse. The Supreme Court of Justice of the Nation agreed with the plaintiffs, resulting in its resolution that by no later than April 30, 2018, the law must be issued.

Until now, each federal agency and the different levels of government assign resources discretionally. The Ministry of the Interior (Segob) is the body that, through the Undersecretariat of Media Regulations, coordinates this matter with the different federal institutions.

The legal framework that justifies these attributions can be found in Article 27, section XXXIX of the Organic Law of the Federal Public Administration, Article 38 of the Federal Budget and Fiscal Responsibility Law, which states that the programming and exercise of resources destined to social communication must be authorized by said Secretariat, which must be guided by objective, impartial and transparent criteria that guarantee equal opportunities to the different media, which does not happen.

Official Timeslots and audiences

Since the 1960 Law, broadcasting concessionaires are obliged to give airtime to the federal government and political parties for their messages called Official Timeslots and which are divided into State and Fiscal Timeslots.

The Directorate General of Radio, Television and Cinematography (RTC) of the Segob, shares the administration of said timeslots with the Federal Electoral Institute: In regular periods (of non-elections) RTC is in charge of 88% and the National Electoral Institute (INE) 12%; in electoral periods the INE administers 48 minutes of the timeslots as a result of the constitutional reform of 2007 that prohibits the purchase or acquisition of timeslots in electronic media by political parties.

State Timeslots

There are 30 minutes of daily broadcast on all radio stations and open television channels. Article 251 of the LFTR provides that concessionaires of commercial, public and social use shall carry out free daily transmissions in each station and for each programming channel, with a duration of up to thirty continuous or discontinuous minutes, dedicated to dissemination of material of educational, cultural and social interest.

Fiscal Timeslots.

This is the payment in kind of a federal tax to be made by commercial radio and television companies, for making use of Mexican air space to broadcast their signals. In these timeslots messages with a duration of 20 or 30 seconds are transmitted from the various federal agencies.

It is what is known in other countries as antenna right, which is the tax that companies have to pay to make use of the spectrum and that is paid in money. In Mexico it is a payment in kind via airtime for 12.5 percent of the total programming time of each station.

The use and distribution of these timeslots is discretionary and there are no clear criteria for allocation to the dependencies. According to the authorities' statements in a 2015 report "According to information from the Ministry of the Interior, in 2014, for example, the State stopped using almost 7 thousand hours both in radio and television corresponding to fiscal timeslots, that is to say, by way of tax payment of the concessionaires "²².

Having such a lot of airtime with both timeslots does not seem to justify the multimillion-dollar expenditure that different governments make on official advertising in electronic media. According to the organizations Article 19 and the Center of Analysis and Investigation, Fundar, that for years have documented the expenses in this area, in the first five years of the six-year term of Peña Nieto the federal government spent around two billion dollars (more than 36 billion pesos), equivalent to the budget used for the main scholarship program for the public universities.

This amount represents an exorbitant overrun of 71.86 percent beyond the budget approved by the Chamber of Deputies, in a context in which budgets have been cut in sectors such as health, environment and education, among others.

Groups where the money is distributed

According to the research of the organizations²³, on average television received 35% of the total resources spent; radio 19% and print media 17%. Internet spending remains marginal compared to other media, ranging from 5% to 7%; in the "Other" category, there is a considerable expense that includes various products such as leaflets, brochures, pamphlets, signs, promotional material for display booths, production, preproduction and postproduction in other media.

The analysis of the four years of the investigation shows that the federal government spent two out of five pesos on only six companies: Grupo Televisa with 17.07% of the total resources, TV Azteca with 9.8% (these figures only consider the exclusive expense in television without counting the money that these groups have been able to receive through their other companies of printed media, radio, Internet and "other" types of media), Estudios Churubusco with 3.34%, the advertising agency Starcom Worldwide with 3.15%, El Universal newspaper with 2.69%, and Grupo Radio Fórmula with 2.69%. In 2016, Televisa and TV Azteca were the groups that obtained the most resources.

There is sufficient documentation of how different government officials at all levels use official advertising to influence their information lines, promote personal images of politicians, influence electoral preferences, punish or reward the media, in short, control the media.

Although civil society organizations have managed to document this enormous expense, there are other items that are not included in the figures presented above, such as the money destined to the production of telenovelas to address the work of public dependencies, or to be filmed in

²² <http://www.eluniversal.com.mx/articulo/nacion/politica/2015/12/31/establece-segob-reglas-para-tiempos-en-radio-y-tv>

²³ Information available at: <http://fundar.org.mx/mexico/pdf/P.O.2013-2016oK2.pdf>

certain places for "tourist promotion", among others. Nor is the expenditure made by political parties (which are financed entirely with public money) in broadcasting recorded, and which is known as the black market for information.

Although the purchase of radio and television spaces for electoral processes is constitutionally prohibited, year after year the juicy public budget for political parties is distributed to the allied media, expressly violating the electoral law, such as Article 6 of the constitution that prohibits the transmission of advertising or propaganda presented as journalistic or news information; since it is common to buy news, newspaper coverage, among other formats that have generated a very profitable black market for the media, which have argued again and again that the prohibition is a violation of freedom of expression. The electoral authorities have many complaints and documentations of these practices, which they usually end up denying.

At the time of writing this report, the elaboration and approval of the regulatory law had not yet been finalized.

4.4 Violations of freedom of expression

The constant direct and indirect violations of freedom of expression are part of the national panorama. Among the direct ones are the aggressions, disappearances and murders of journalists, being one of the most lethal countries for the press in the world; other ways that are used are what is called the judicialization of freedom of expression that consists of filing of complaints against critical communicators or media; others are website blockades, unjustified dismissals and criminal demands for defamation and slander (in most states they have not been decriminalized).

The indirect ones are related to official advertising, delays in access to frequencies in the case of social media, and spying on journalists and social activists through software, the most famous case being in 2017, when the complaint was made known of the use of the Pegasus program that was implanted illegally on several journalists and social activists.

Year after year, various social and civil organizations present the documentation of violations that journalists and information workers undergo before international organizations that protect freedom of expression, these can be consulted in the annual reports of the Inter-American Commission on Human Rights and the United Nations. The situation is so serious that in November 2017 the Freedom of Expression Rapporteurs of both agencies made a joint official visit. In their preliminary report they found a situation that they rated as "the crisis of freedom of expression in Mexico"²⁴

V

Conclusions

It is tangible that the Constitutional Reform was the conducive framework for pointed changes in the institutional design, but those general principles did not reach to permeate the secondary provisions in many of its parts in order to fully guarantee pluralism, diversity and to limit media concentration.

The opening up of the spectrum in open broadcasting is unprecedented, but access to the commercial sector has prevailed mainly without any differentiation or specific criteria to

²⁴ Information available at: https://www.oas.org/es/cidh/expresion/docs/Observaciones_Preliminares_ESP.PDF

promote pluralism up to period of this present work. It is true that it can be a gradual process and there still remain to be verified the conditions under which the new competitors will operate, as well as the conditions under which the new bids and awards of new channels will be made, but in terms of empirical evidence so far analyzed, they lack a decided policy for the inclusion of varied actors. In 2018 the IFT will open bids for more commercial radio and television frequencies and award others for the public and social, community and indigenous sectors; we will see in the medium term if the concentration conditions will have some important variation.

It is positive that the normative documents integrate the fundamental principles in terms of freedom of expression and pluralism, a second decisive step is required to stop these being merely discursive notions and to become concrete actions.

A first conclusion of why is that the institutional vision continues to see people as users rather than as citizens, more as consumers of services than as subjects of laws. As long as this perspective remains in the definition of public problems, its strategies and actions in public policy will continue to respond to a competitive environment, but not to the empowerment of citizens.

The Constitution gave the IFT regulatory power in the broadest possible context, the SCJN supported this concept by interpreting including its capabilities to be able to regulate everything that the constituent omitted. The fact that it was arranged to be the guarantor of the right to information and freedom of expression in broadcasting and telecommunications, implies that its function is also to resolve and guarantee substantive regulatory measures for the vigorous exercise of these rights. However, the IFT has not fully assumed these powers, on the contrary, it denoted an evasion of them in various aspects of the policy, including that of effective economic competition.

In a sector in which this perspective of rights is just being opened in the body of law, it is logical that the bureaucratic apparatus has resistance to changes in conceptual notions, such as in the change of practices that they have maintained for decades. The opening up of contact with different sectors of society, their contexts and their demands are still new for a bureaucracy accustomed to dealing almost exclusively with state and business actors.

In terms of the general obligations to guarantee and protect in terms of human rights, there is a greater deficit in the latter, because the central decisions to impose limits on undue concentration in all its modalities are still not taken. Despite the broadening of powers of the IFT in matters of competition and pluralism, its decisions do not prioritize the antitrust origin of the new body of law, which was a substantial part of its creation.

After decades it was possible to change the legal scaffolding, even with its shortcomings and omissions, but that can be a beginning to expand the deliberative capacity for the strengthening of citizenship and democratic quality, although the path to tread is still long. It requires a greater vigilance of independent and citizen agencies to demand a better performance and greater independence of the regulator, just as it is necessary to reinforce the legislation to impose clear and transparent limits on the horizontal, vertical and cross-media ownership.