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Injecting Competition in Broadcasting through MCMO Regulations: Some Recommendations for Mexico

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I. INTRODUCTION

The new telecommunications regulator in Mexico, Instituto Federal de Telecomunicaciones ("IFT"), recently issued a public consultation on its draft regulation for must carry and must offer ("MCMO") conditions in the broadcasting sector. This, together with the recent Constitutional reforms on Telecommunications and Broadcasting, represents an unprecedented opportunity to instill the sector with much needed competition.[2]

For instance, in broadcasting, free-to-air ("FTA") TV is dominated by two main operators, Televisa and TV Azteca, each holding approximately 65 and 25 percent audience share, respectively. Both enjoy also a high level of concentration in infrastructure, audience, and publicity. Something similar occurs in telecommunications, where there is a high level of concentration: Telmex, the incumbent fixed-line operator, has close to 80 percent share of the fixed-line market, and Telcel, the incumbent's mobile affiliate, accounts for almost 70 percent of mobile subscribers.

The new regulatory effort in Mexico's telecom sector also allows for a comparison of the current state of regulation relative to other economies. We take the cases of Argentina, Australia, Brazil, Canada, Chile, the European Union (Ireland and the United Kingdom), India, Peru, and the United States, as illustrative of the different factors that lead to the decision to design and apply MCMO regulation.

This article proceeds as follows. We begin with a brief review of the need to regulate the telecom and broadcasting sector and discuss the circumstances that lead to regulation. Next, we summarize the main issues that the IFT is seeking to clarify, based on the Constitutional amendment of last June 2013, through secondary regulation and its likely effects in the sector. Among those effects is a requirement to protect the audience's right to programming content, while preserving and promoting competition in various broadcasting outlets. Although not

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[2] *See* OECD (2012), *OECD Review of Telecommunication Policy and Regulation in Mexico*, OECD Publishing. Available in: http://www.oecd.org/sti/broadband/49536828.pdf

specifically stated, these rights also include the rights of advertisers to have access to local audiences and the need to continue copyright protection.

Next, we review similar regulation in different economies and derive common elements and mechanisms used by different agencies to pursue regulatory objectives in broadcasting. We conclude with an attempt at deriving best practices in the application and enforcement of MCMO regulation worldwide that may be useful to consider in Mexico.

II. MCMO REGULATION

A. General Characteristics of Telecommunications and Broadcasting

The telecommunications and broadcasting sectors are characterized by a service activity in which economies of scale in production and network externalities in demand prevail, leading to high fixed infrastructure costs. On the supply side, these features lead to a reduced number of operators, with strong incentives for these operators to vertically integrate.

On the demand side, users tend to benefit from having other users consume these goods and services, which in turn leads all users to increase their consumption of goods or services—that is direct network externalities exist. In addition, there is evidence that individuals show persistence in their consumption patterns, even where entry has occurred in different broadcasting markets; it may be too soon, however, to determine whether this preference for legacy broadcasters continues.

An additional feature of broadcasting markets relevant to this discussion is that they operate as a multi-sided platform. Markets characterized as multi-sided platforms serve two or more groups of interdependent users who obtain mutual benefits by jointly participating in the platform. In other words, the demands of different user groups are strongly interrelated in an environment of network externalities in consumption.

Products and services in this sector are subject to fast technological innovation, which has opened potential niches for competition amid an environment of digital convergence. Today generators and transmitters of digital signals and content compete in the telecommunications market, either through FTA broadcasting, restricted or paid broadcasting (cable and satellite), mobile telephony, landline, or the internet.

B. Regulatory Objectives in Broadcasting

Modern regulatory agencies have tried to regulate this market through simple, clear, and transparent regulatory principles that promote interconnection between different networks, and foster technological convergence and competition among them in different marketing channels. More recently, in response to concerns of plurality, regulatory objectives also reflect these concerns, as they now consider relevant both that a diversity of viewpoints exist, and preventing the concentration of influence with only one media owner.[3] General principles that guide regulatory action include: clarity, transparency, network interconnectivity, technological convergence, competition, and plurality to promote efficiency and economic welfare.

[3] Definition taken from Ofcom, Measuring Media Plurality, June 2012.

Following the logic of a multi-sided market platform that characterizes the sector, the ultimate goal of regulation in telecommunications and broadcasting is, on the one hand, to allow audiences access to a sufficient variety of service options that meets their preferences within a competitive environment in terms of variety, price, and quality. On the other, regulation seeks to facilitate different generators of content and their advertisers—the money-making side of this platform—to provide information and entertainment services to their desired audiences.

Thus, a clear policy objective is to raise the economic and social welfare of the different user groups involved in the market (i.e., audiences, generators, and transmitters of content and advertisers) and to guarantee the rights of audiences—in the case of Mexico, this is defined as allowing "[…] free access to plural and timely information and to seek, receive and impart ideas of any kind through any means of expression." (Article 6 of the Mexican Constitution).

In the specific case of broadcast television, audiences are interested in enjoying programming with relevant information and entertainment value for them, while advertisers are willing to pay to get their messages to potential consumer groups. FTA operators are then interested in capturing as large an audience as possible to attract airtime purchases from local and national advertisers.

In the case of pay television networks, subscribers are interested in seeing programming that is popular (i.e. consistent with their preferences such that they derive some degree of "utility" from viewership), local (in the sense that content is relevant to the environment in which the audience and advertisers converge and operate), with the greatest variety and best viable transmission quality available. Subscribers may be willing to pay for access to a platform that gives them these services, so that in contrast to the FTA TV model, the Pay TV providers receive additional income from subscribers.

On the one hand, FTA and Pay TV operators compete for audiences and for local and national advertisers who may see their airtime as complementary and/or substitutable. On the other hand, there is a vertical relationship between Pay TV and FTA operators as Pay TV operators offer an additional distribution outlet for content by FTA operators, who are able to reach a selected group of viewers who would not view the FTA´s content if this were not shown over a paid TV platform. In addition, FTA broadcasters are able to extend their network by offering their signal through Pay TV operators to better exploit network externalities. Pay TV operators also benefit from FTA content as it increases the variety of content available to their users.

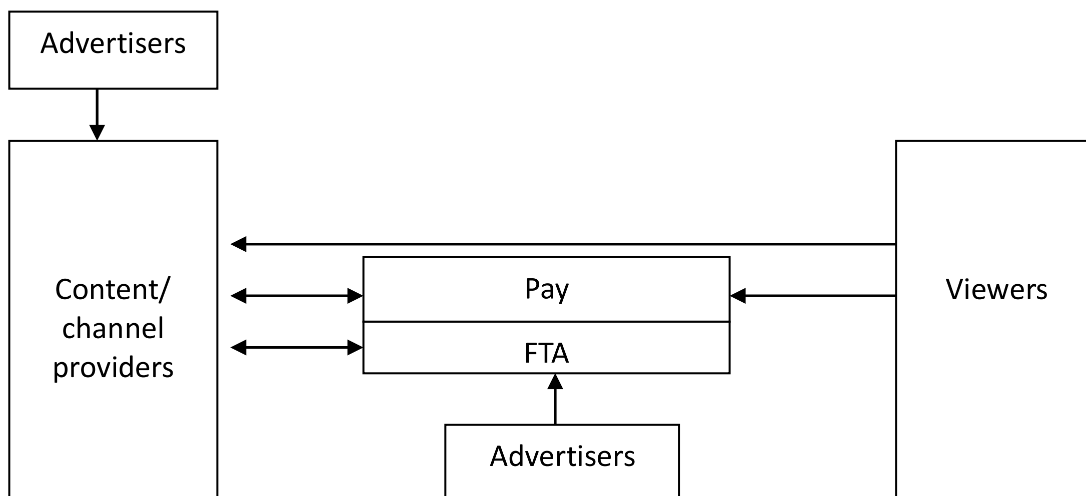
C. The Goals of Must Carry and Must Offer Regulation

Any regulation aiming to establish must carry and must offer conditions must take into account the interaction among the different players in the broadcasting value chain: content generators, transmitters, wholesale programmers, channel schedulers, retail TV (FTA and Pay TV operators—cable, satellite, and possibly streaming), as well as local and national advertisers. In addition, it must consider the multi-sided nature of this market. In the absence of a careful analysis, broadcasters may have incentives to relay signals that will provide the highest profit without regard to the specific needs of the audience or advertisers who are ultimately the consumers in this two-sided market.

Must carry/must offer rules are regulatory interventions that require justification. Here we address the justification question, adopting the conventional approach of evaluating the outcome in the absence of intervention and assessing whether there would be adverse effects without it, either through market failure or through other consequences such as loss of plurality or universal service.

The commercial context is illustrated in Figure 1. Content or channel providers generate revenues from some combination of advertisers, broadcasters, and (particularly in the case of over the top ("OTT") services) directly from viewers. Pay TV operators generate revenues from viewers. FTA broadcasters generate revenues from advertisers, and both of these receive revenues or make payments to content providers. Viewers pay for the experience either in monetary terms or by making their eyeballs available to watch advertisements. It is important to recognize that broadcasters often make their own content: vertical integration of this kind is an important feature of the situation.

Figure 1



The monetary flows in broadcasting as a whole provide the wider context, but our immediate focus is on flows between content providers and broadcasters/platform providers. We observe that, absent regulation, such flows can—in net terms—go in either direction. In some cases a broadcaster will pay for content to be available for distribution on its platform; this will occur if the content is unique and seen as attracting viewers to the broadcaster. In other cases a content provider offering one of a number of substitutable "basic" channels may have to pay for distribution. The direction of flow depends essentially on the balance of advantage between the two sides of the bargain.

At any moment physical constraints on carriage capacity limit what can be carried by each broadcaster and on each major platform (cable, Digital Terrestrial Television (DTT), etc.). While these constraints have clearly loosened since the days when the broadcasting sector consisted of a handful of analogue terrestrial channels, the vast expansion of carriage capacity in recent decades has been matched by an equally vast proliferation of content.

Why not in these circumstances just accept the outcome that market forces produce? Here we answer this question not in terms of the struggle between the commercial forces favoring or disfavoring particular forms of regulation, but in terms of possible adverse effects on viewers in a market free-for-all. These effects fall broadly into three categories:

Abuse of market power*:* Some premium content confers market power on its owner or acquirer, because of its irreproducibility; thus there can by definition be only one 'best' soccer league in any country. The holder of such rights, if vertically integrated into broadcasting, can leverage its market power into other components of the value chain, including the retail Pay TV market. This is the origin of much must-offer regulation, which requires owners of certain program rights to make them available to multiple broadcasters and platforms.[4] If the FTA broadcasting market is highly concentrated, a must-offer obligation may be imposed requiring popular FTA programming to be made available on nascent pay channels, for example.

Wider access to public service broadcasting services*:* Public service broadcasting content typically reflects both positive and negative programming requirements, which require, respectively, the inclusion of certain types of programming (say, children's or cultural programming) and the exclusion of other types of programming (say, violent programming). It is consistent with the logic of the intervention that such programming be made available to as wide an audience as possible. Hence must-carry obligations for certain types of FTA programming are imposed on pay platforms in many countries.

Localism*:* It is desirable that in the interests of pluralism, viewers have access to local programs dealing with important issues in their own communities, as well as national programs which are usually more commercially supportable. For this reason, pay broadcasters are often required to retransmit local channels (a must-carry obligation).

As with most access questions, must-carry/must-offer regulation involves two questions: the scope of mandated access and the terms and conditions on which it is made available. With limited carriage capacity, some form of rationing is often required. With must offer, price regulation is usually required, the usual alternatives of *cost–based pricing* and *retail minus* being the usual candidates. *Carriage prices* are also relevant for must-carry obligations. Since FTA broadcasts are normally advertiser-financed, and since must carry increases viewers, the question of attribution of the enhanced advertising revenue comes into play.

III. PROPOSED REGULATION OF MCMO CONDITIONS IN MEXICO

A. Mexico's Proposed Regulation

The Mexican government is currently attempting to ground in secondary legislation some of the general principles included in the Constitutional reform of last June 2013 concerning must-offer and must-carry conditions. One of the transitory articles of the decree (the eighth) requires FTA TV licensees to offer their television signals to Pay TV licensees (i.e. must-offer obligations).

[4] *See* M. Cave & P. Crowther, *Regulating access to content in the European Union*, (4) J. LAW & ECON. REG. pp. 133-150 (2011).

This article also includes must-carry obligations as Pay TV licensees must retransmit FTA TV signals. In both cases, the Constitution decrees, the signals offered and their retransmission must be "[...] free of charge and without discrimination, within the same geographic coverage area so, complete, simultaneous and without changes, including advertisements, and with the same signal quality that is broadcast [...]."

In a sense, the Constitutional mandate overrides any questions regarding the terms and conditions upon which content is made available, which we mentioned previously. This represents a challenge in its implementation as it specifically protects rights of audiences but omits to mention the two-sided nature of the market and any copyright issue that may arise with retransmission among different platforms (FTA and Pay TV) or regions (national, regional, local-to-local). It does, however, leave open for further clarification in regulation the question of the scope of mandated access—a key focus of the IFT in its draft regulations.

Must-carry and must-offer conditions in the Constitution distinguish three types of broadcasters: those who provide FTA television broadcasting, those who provide Pay TV service, and those who provide satellite Pay TV services. These broadcasters have the right—not the obligation—to retransmit any broadcasted signal within their area of coverage, but they have the obligation to retransmit public service broadcasts at a federal level.

The distinction among pay TV broadcasters is relevant because satellite providers are exempted from carrying all must-offer content and are only required to carry FTA channels with coverage of more than 50 percent of the national territory. Only those telecommunications and broadcasters who have been declared "with substantial market power" in any of the telecommunications and broadcasted markets will have to pay for this FTA signal. These economic agents are barred from passing on the additional costs of the service to their subscribers or users.

B. Some Shortcomings of the Proposed Guidelines Relative to the MCMO Reform

The phrasing in the Constitutional text leaves open several interpretations for the must offer rule on FTA broadcasters as it pertains to satellite providers. First, is the determination of the 50 percent national coverage rule, which the guidelines attempt to clarify by defining concepts such as transmission channels, relevant audience, territorial coverage, national chains and commercial brands, similar programming, etc. But there are other concepts and methodologies that the guidelines do not clarify and in some cases do not address.

As we have noted before, the purpose of regulation in this market is to ensure that services meet preferences for two main groups of consumers: audiences and advertisers. The Constitutional decree considered these groups, particularly the first group, to be so important as to define the rights of audiences as a human right. Audiences, similarly to citizens, are rarely homogeneous and their needs and preference have to be ascertained at a local level. Nonetheless, the proposed guidelines leave out precisely those human rights considerations, in favor of proposing a rule that will enable operators to carry four "standardized" signals over a national territory that includes more than 100 million diverse viewers and advertisers.

In more specific terms, territorial coverage at a geographic/territorial level ignores the nature of the programming consumption that is local/city-wide/municipal in nature. Given the

nature of telecommunications markets, both audiences and advertisers would be interested in sending and receiving information at a local level. Welfare is maximized the greater the specificity of service that consumers aspire to.

This degree of specificity is very important in four aspects: political messages and campaigns, local advertising and events, local news, and emergency alerts. A serious shortcoming of the current proposal can be gleaned in the political arena whereby a local politician could quickly become a national figure simply by appearing in national territory in one of the four "standardized" signals that cannot be modified.

On the other hand, rating programming content of the different signals based on their similarity, and not on local demand for content, ignores consumer preferences in specific localities/cities/ municipalities. The audience in Mexico City, for example, will hardly have an interest in local news and advertisements in border cities and vice versa.

Finally, there is no consideration about the two-sided nature of the market. The rights of advertisers to reach certain audiences, for example, are completely ignored.

Some key questions that do not appear to be addressed are: What was the original market failure that made this regulation necessary? Where is the problem of potential abuse of dominance in this market? Is it the owner of the signal or of the content or is it the broadcaster? Must-carry and must-offer rules are different in nature and seek to resolve different problems in a preemptive manner: abuse of dominance, widening access to public broadcasts, and fostering localism.

In Mexico, the main competition problem that led to the application by the Competition Commission of this rule is the refusal of generators of content (FTA TV) to sell their signal to Pay TV operators. The ideal mechanism to limit this kind of abuse was a must-offer rule. Nevertheless, although a potential abuse of dominance problem has not been detected among Pay TV operators, it was regarded as important to defend content plurality objectives for audiences as well. At the time, the Competition Commission opted to impose must-carry obligations to ensure that Pay TV operators would carry programming and ads to larger audiences who would benefit from a greater variety of programming (see our discussion of Mexico in the next section).

International experience, however, presents an interesting contrast to the market failure that each country and sectorial regulator has faced in the broadcasting sector. We believe that a review of this experience can better inform the Mexican regulator both in determining what its policy objectives are, its priorities in attaining these objectives, and in elaborating further on its proposed guidelines for MCMO regulation. We turn to these international examples next.

IV. INTERNATIONAL EXPERIENCES IN MCMO REGULATION

Broadly speaking, most countries have tried to ensure that Pay TV subscribers have access to free-to-air broadcasting transmissions. Depending on the particular situation of each market, countries can be separated into three broad categories, though this clustering is by no means clear-cut, as two defining issues tend to be tackled simultaneously:

a) The first group is formed by countries where market forces have—with very little intervention—reasonably solved the problem, and FTA broadcasts are available to all Pay TV subscribers.

b) A second group is defined by situations where broadcasters are in a better negotiating position than Pay TV carriers and, thus, regulation focuses more on must-offer obligations.

c) Finally, a third category is formed by countries where the reverse is true, so regulation addresses must-carry obligations (e.g., the United States). We briefly address some case studies that illustrate these different regulatory approaches.

A. Argentina

Current regulation in Argentina for broadcasting services is Ley Nº 26.522, enacted on October 10th 2009. Before the present law broadcasting services were regulated by Ley Nº 22.285, enacted by the *de facto* government in 1980.

The new law was developed to update democratic needs, as set forth by the current government. There were several interesting points, commonly referred to as "the 21 points," that established that broadcasting cannot be managed only as a commercial business and that it needs to be independent from pressures, both public and private.

There are no specific must-carry / must-offer regulations in the new law, but in Articles 21 and 65, there are specific references to the "Joint Declaration on Diversity in Broadcasting" of December 2007. Among them, "[…] specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, must-carry rules, a requirement that both distribution and reception technologies are complementary and/or interoperable, including across national frontiers, and non-discriminatory access to support services, such as electronic program guides." This, in essence, allows the establishment of must-carry / must-offer rules to be imposed at the regulators' will (Autoridad Federal de Servicios de Comunicación Audiovisual, AFSCA).

Some of these must-carry obligations refer to the retransmission of specific content, such as national or local content, educational content or public channels, and others refer to the retransmission of FTA channels. In Article 65, it is stated that stationary reception subscription television services shall include unencoded broadcasts and signals generated by Radio Television Argentina Sociedad del Estado, all public broadcasters and signals of the National State, and those in which the National State has an interest. Additionally, non-satellite subscription television services shall include at least one signal of own local production that satisfies the same requirements as for FTA television broadcasts.

Moreover, in the same Article there is an obligation for broadcasters owned by Provincial Governments, Buenos Aires City Government, municipalities, and national universities that they shall broadcast educational, cultural, or public interest programs equivalent to at least twenty percent of total program contents. This obligation, however, is not enforceable with private and non-state broadcasters. Also, there are specifications regarding national content. The same article states that audio broadcasters shall broadcast at least 70 percent of national production, while FTA television broadcaster shall broadcast at least 60 percent of national production.

On the other hand, other must-carry specifications refer to the retransmission of FTA channels. For instance, in Article 65 it is stated that non-satellite subscription television services shall include unencoded signals generated by the originating FTA television services with the same coverage as their service area.

B. Australia

As in the United States, most issues related to must carry/must offer are addressed in copyright legislation. The Copyright Act of 1968 states that the maker of a television broadcast is the owner of any copyright subsisting in the broadcast (Division 5, Subdivision A, 99). The same act provides a statutory licensing scheme for re-transmission of an FTA broadcast, as long as written notice is provided and remuneration is paid to the relevant collecting society. Re-transmission, as defined in the Broadcasting Services Act ("BSA"), refers to the re-transmission of a broadcast, provided it is unaltered and either simultaneous with the original transmission or delayed until no later than the equivalent local time. Even though the act states that no "action, suit or proceeding lies against a person" that re-transmits content, this only applies to either national broadcasters or local broadcasters within the licensing area; it does not apply to re-transmissions of local content outside the licensing area, unless a permit is granted by the Australian Communications and Media Authority ("ACMA"). The re-transmissions, as specified, are not exempt from copyright rules, as set forth in the Copyright Act (Section 212 of BSA). Several exemptions are outlined for "self-help providers," which, in essence, re-transmit content for the sole or principal purpose of obtaining or improving reception.

Pay TV in Australia has not made significant inroads. Pay TV penetration is at just 29.2 percent of households (2012, latest official figure available). Ratings, as published by Oztam,[5] which is the recognized official source of television audience measurement, are estimated at 84.8 and 15.2 for FTA and Pay TV, respectively (as of week 5 of 2014); these ratings have remained stable since 2008. Even for Pay TV subscribers, FTA channels reach ratings of 56.2.

The Pay TV sector is dominated by Foxtel, which is a 50/50 joint venture between Telstra (the incumbent telecommunications provider) and NewsCorp (Fox), with a market share of over 90 percent (2.55 million subscribers). A significant part of Foxtel's share came from various acquisitions through time. It provides cable, fiber, and satellite Pay TV; satellite is only offered where it cannot offer fiber television services.

The unimpressive development of the Pay TV industry is a direct consequence of the quality and diversity of the offer of FTA channels (currently 16), as well as "anti-siphoning" legislation, set forth in the BSA. These rules prevent Pay TV providers from acquiring rights to televise certain listed events (for example, the Olympic Games, and certain Australian Rules football and cricket matches) unless certain conditions are met. Pay TV providers can only acquire the rights to transmit after FTA broadcasters pass on these events.

Anti-siphoning legislation was introduced in 1994 to ensure that television coverage of events of national importance and cultural significance were not siphoned off exclusively to

[5] www.oztam.com.au, an independent company owned by Australia's major commercial television broadcasters (the Seven Network, Nine Network and Network Ten) and has an independent, non-executive chairman

subscription TV subscribers. Currently, it covers 1,100 events, excluding the Olympics. These rules were reviewed in 2009, creating a two-tier list of events subject to anti-siphoning rules, allowing the minister to specify certain quotas, and restricting new platforms (e.g., IPTV) from acquiring exclusive rights of anti-siphoning events. The Australian Government recognizes that the anti-siphoning scheme creates commercial benefits for the FTA broadcasters at the expense of other platforms, but in its Convergence Review of March 2012[6], it stated that, given that the proposed changes were still before Parliament, it believed that it was not appropriate to recommend further changes. These recommendations have not yet been through the Legislature.

C. Brazil

In Brazil, must-carry rules are part of the current regulation of the broadcasting industry. Prior to the 90s, state participation in TV was quite limited, and occurred mainly through the creation of educational broadcasting companies. Apart from isolated initiatives, institutional forms that ensured media access were implemented only in the 1990's, through two main mechanisms: (i) community radio broadcasting and (ii) participation in community and university cable TV channels.

Community radio broadcasting was legally regulated in 1998, defining community radios as low power and limited-reach broadcasting stations directed by foundations and by non-profit community associations.

Community and university television channels are, as a result of the Cable TV Law (1995), obligatorily transmitted by Cable TV providers. This law—a remarkable exception in Brazilian legislation—was enacted as a result of a rich interaction between organized civil society groups, market, and governmental representatives. The outcome was an innovative law that imposed must-carry regulations, including new "public" channels (such as university and community channels), which should be carried on cable service provider's system.[7] Even so, the low penetration of the service and problems associated with the shared use of these channels still represent obstacles to the right to communicate.

Every Pay TV operator has the obligation of transmitting public legislative channels from municipalities, estates, and from the Federation.

Regarding private channels, Pay TV operators have the obligation of transmitting all channels available in their coverage areas, in format UHF or VHF. Additionally, they must transmit channels from universities, educational-cultural channels, community channels, and channels from non-profit non-government organizations.

As regards to specific content obligations, Pay TV operators should include at least one channel that transmits Brazilian cinematograph or broadcasting productions.

Until recently, Brazil had regulated Pay TV services depending on the technological platform: cable, MMDS, and satellite. As all telecommunications platforms started converging, this type of regulation became obsolete. It was recognized around 2005 that a new regime for

[6] Australian Government, Department of Broadband, Communications and the Digital Economy, *Convergence Review* (March 2012).

[7] Must-carry rules are not applicable to MMDS and to DTH, other Pay TV platforms.

audiovisual services was necessary, but the discussion quickly became political, as many different parties raised a large number of issues. Among them, legislators, as well as the executive branch, wanted to promote the development of local content; the discussion of this matter got entangled into restrictions, protectionist measures, and subsidies.

Another crucial issue was the foreign ownership restriction that existed on Pay TV carriers. At the beginning of the decade, Telmex (now America Movil) had bought a minority stake in Net—a subsidiary of Globo providing cable TV services—that was in financial difficulty. Net's acquisition was relevant, as it allowed Embratel, the long distance incumbent that was also controlled by Telmex, to get into the wireline last-mile market. Lifting the ownership restriction would allow Telmex to increase its stake, make bundled offers, and realize synergies and, thus, increase competition; most telecommunications service providers, realizing this fact, adamantly opposed this change.

Lastly, not all platforms were carrying all the local channels; the selection of channels was somewhat arbitrary and, in a way, discriminatory. It was deemed necessary by the government and legislators that most signals were to be made available to Pay TV customers.

After several years of discussions, Congress approved the Conditional Access Service Law ("SEAC") in 2011;[8] a few months later, Anatel, the regulator, published the regulations to complement the law.

These regulations clearly impose must-carry obligations for local-into-local transmissions, independently of the technological platform used. This was somewhat onerous to MMDS players, but these platforms have become obsolete and have mostly disappeared, especially after the acquisition of TVA (Televisão Abril) by Telefónica in 2006, which was deemed valuable because of its spectrum holdings (in certain places, 190 MHz in the 2.5 GHz band).

The new legislation allows telecom providers to offer Pay TV. New licenses, which were auctioned in the past, are now offered for only R$ 9,000 (around U.S. $4,000), with no restrictions on the technological platform; they are valid nationally, as opposed to a predetermined local area. Minimum size is not imposed; so, at least theoretically, any given company can provide services only locally (e.g., a neighborhood) or cherry pick subscribers in a larger area.

A very controversial issue is the obligation to carry local content: 3.5 hours per week on prime time (18-22 hours). For bundles, at least a third of the channels must be Brazilian; half of this quota has to be developed by independent producers not linked to broadcasting groups.

Cable and other fiber operators have had no trouble adjusting to the new legislation, offering all FTA channels on their platform, as well as all the additional must-carry obligations (Congress, educational, etc.). By contrast, satellite operators have had significant trouble complying with the new regulation and have applied for exemptions or extensions, which were contemplated in the law. In July 2013, GVT, a DTH (Direct-to-Home) operator, announced it was missing 9 out 14 FTA channels and started negotiating with Anatel. The main reason for not being able to meet its obligations was the failure of Intelsat 27, which would have given GVT the

[8] Lei 12.485 de 12 setembro 2011, Lei do Serviço de Acesso Condicionado.

capacity required. In October 2013, Sky Brasil, owned by News Corp, also applied for an exemption of the rule, as they did not have the required capacity to carry the more than 500 analogue channels generated in different regions ("local into local," for an operator with national footprint).

D. Canada

All Canadian cable television systems and wireless systems (e.g. MMDS) must provide all of its subscribers a standard package of services consisting of a number of mandatory ("priority") Canadian programming services, including the CBC English and French network services, local and regional stations, and educational services. As for Canadian DTH satellite distributors, they are required to distribute the CBC English and French network services and the programming of at least one affiliate of each national television network licensed on a national basis (e.g. CTV).

In April 1996, the CRTC announced new rules designed to ensure that there was fair and equitable access to television broadcasting services. Under these access rules, cable television systems with 6,000 or more subscribers, as well as DTH satellite distributors and major wireless systems (e.g. MDS), must generally distribute, in addition to priority television signals, all Canadian specialty and pay television services appropriate for their markets, such as those in the predominant official language of that market. These rules will be revised by the CRTC this coming fall.

Foreign satellite services can be distributed on a discretionary basis, in a package with Canadian specialty and/or pay television services. Canadian pay television services can be offered in a package with up to five channels allocated to foreign satellite services. Each Canadian specialty service within a discretionary tier may be linked with no more than one channel allocated to foreign satellite services. These linkage rules are designed to give Canadian cable subscribers access to the most popular foreign services and to ensure the maximum exposure of Canadian specialty services.

E. Chile

In August 2012, Chile made modifications to its treatment of digital terrestrial television, with regards to consensual retransmission to cable operators of content from open television.

With the new regulation, cable operators are able to issue or retransmit signals from FTA channels when their coverage does not exceed 85 percent of the population in a particular region. Once coverage surpasses that percentage, open television channels and cable operators can negotiate some kind of economic compensation.

Must-carry obligations were imposed: cable operators have to incorporate in their programming, when technically possible, at least four local, community, or regional channels.

The intention of the must-carry obligations is to enhance regional broadcasts. In case there are more than four channels, the promotion of education and culture should become the main decision criterion.

F. The European Union

All 28 member states must abide by legislation on must-carry as was initially set out in a 2002 European Union Directive,[9] which was essentially unchanged on revision in 2009. Each Member State can choose how to implement the directive taking into consideration its own conditions. In the case of Belgium, the European Commission has taken enforcement action to ensure that the provisions are implemented properly.

The Directive gave Member States the right to impose reasonable obligations where a significant number of end users of such services used them as their principal means of receiving broadcasts. The obligations should be in the interest of legitimate public policy considerations and should only be imposed where they are necessary to meet clearly defined general interest considerations. Such obligations should be transparent and proportionate.

The years since 2002 have seen a variety of cases before the European and national courts clarifying the nature of the must-carry provisions in relation to cable systems and to IPTV. Surveys of recent or current application of the rules can be found in several publications.[10]

1. Ireland

In Ireland, must-carry and must-offer obligations are regulated in the Broadcasting Act of 2009, in its Article 77, which applies to specific signals or channels. For instance, in subsection (3) it determines that "when the network is a digital system, the appropriate network provider shall ensure the re-transmission, by or through its appropriate network, of the Houses of the Oireachtas Channel and the Irish Film Channel."

Subsection (4) states that "an appropriate network provider shall ensure the re-transmission, by or through his or her appropriate network, of each free-to-air television service provided for the time being by RTÉ, TG4 and the free-to-air service provided under *section 70* by the television service program contractor which that body or contractor requests the appropriate network provider to so re-transmit."

Regarding carriage fees, subsection (7) states that "The appropriate network provider shall not impose a charge or allow a charge to be imposed in relation to the making available to a person of any service referred to in *subsection (3), (4)*, *(5)* or *(6)* if he or she imposes a charge or allows a charge to be imposed on that person in relation to the making available of any other service to that person by means of the appropriate network concerned."

Moreover, regarding must-offer obligations, subsection (11) states that "RTÉ, TG4 and the television service program contractor shall ensure that their must offer services are at all times offered for re-transmission by means of any appropriate network that is available for reception in an intelligible form by members of the public in the whole of or in part of the State." Additionally, subsection (12) states that "RTÉ, TG4 and the television service program contractor

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[9] Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications services (Universal Services Directive) Article 31.

[10] Deirdre Kervin, Must-Carry Rules: Valuable Tool or Sacred Cow, EPRA/2008/06. Andrew Katolo, *Must carry and must offer in Europe*, SCREEN DIGEST (16/12/2011).

shall ensure that their must-offer services are at all times offered for broadcast or re-transmission by means of every satellite television service."

2. United Kingdom

In the United Kingdom, all the main FTA network services have public service broadcasting ("PSB") requirements, including universality obligations, and they only have limited copyright protections. Significant access fees are paid by the main FTA networks to platforms for re-transmission; broadcasters have to meet their own satellite retransmission costs.

While all the main PSB FTA networks in the United Kingdom must comply with a must-offer obligation across all distribution systems, the BSkyB satellite platform has no must-carry obligation and the FTA networks enjoy no copyright protection when being retransmitted by U.K. cable systems.[11]

All PSB networks in the United Kingdom have universality requirements (in exchange of the benefits they receive) and a specific must-offer requirement within their terrestrial licenses. All the PSB networks also have additionally strong incentives to secure carriage on all platforms. For the BBC, acceptance of household license fee funding is underpinned by universal access to the services financed by that mandatory license fee. For commercially funded PSB networks, the loss of effective access to even small proportions of the available audience can harm their unique proposition to advertisers.

On the other hand, cable systems in the United Kingdom do have a must-carry obligation for PSB networks. However, because cable systems have been exempted from copyright-based retransmission payment obligations, certain players, such as Virgin Media, can effectively re-transmit the main PSB networks without being obliged to pay the PSB networks any money. There is no mechanism for the networks to deny the cable systems their signal and demand a charge for providing it. In practice, this has meant that there has never been a need to enforce existing must-carry obligations.

BSkyB has no must-carry obligations in the United Kingdom. As an "open system," the regulations implicitly assume that PSB networks can go directly to DSAT households and receiver dishes without the need to go through the BSkyB set-top box access system if they wish.

G. India

In India, must-carry and must-provide conditions are regulated in The Telecommunications (Broadcasting and Cable Services) Interconnection Regulation of 2004.

This regulation attempts to deal with the high cost involved in the distribution of TV channels if the market is fragmented. To reduce distribution costs, broadcasters and multisystem operators should be free to provide access in the manner they think is beneficial for them. The "must provide" of signals should be seen in the context that each operator shall have the right to obtain the signals on a non-discriminatory basis; but how these are provided—directly or through the designated agent or distributor—is a decision to be taken by the broadcasters and multisystem operators. Thus, the broadcaster or multisystem operator has to ensure that the

[11] The cable TV systems are specifically exempted from copyright obligations in this respect by Section 73 of the copyright, Designs and Patent Act of 1988.

signals are provided either directly or through a particular designated agent, distributor, or any other intermediary. On the other hand, must-carry provisions are not mandatory.

These provisions were still under analysis when it was published the Notification from the Telecom Regulatory Authority of India. Such notification stated that:

> The majority of the broadcasters are in favor of mandating must carry provisions to balance out the 'must provide' clause prescribed in the existing interconnect regulations. They have suggested that the manner of offering network access should be on a non-discriminatory basis and the qualifying conditions may include openness to audit and transparency, non-discriminatory listing of channels and all channels should feature genre-wise in the EPG of MSO. One broadcaster has also suggested that the 'must carry' provisions need not be mandated.[12]

In addition to the question of whether or not to regulate must-carry provisions, the determination of the carriage fee has become a controversial issue. The News Broadcaster Association is of the view that carriage fees should be regulated. They argue that if must-carry is mandated, the question of a carriage fee does not arise. However, the majority of the broadcasters and one association of broadcasters are not in favor of regulating the carriage fee and have suggested that it should be based on the mutual negotiation between the broadcaster and MSO. Some parties have suggested that the parameters to be used could be the subscriber base of the MSO or the number of STB installed. One of the broadcasters suggested that carriage fees should not exceed 10 percent of the subscription fee collected for the channels not covered under the must-carry mandatory clause.

H. Mexico

The need for this type of regulation arises from competition concerns identified in merger reviews by the Competition Commission in two specific cases: (i) the merger between Televisa, the largest FTA broadcaster in the country, and a cable operator in the third largest city in Mexico (Televisa (CVG)/TVI),[13] and (ii) Televisa's purchase of Cablemas, another cable system with presence in the center and southern regions of the country (Televisa (Paxia) and Cablemas).[14]

As a condition to allowing the first merger, notified in 2006, the competition authority imposed the following conditions to offset potential competition problems:

a) Grupo Televisa would have to divest its participation in the restricted audio and television service provided by SKY® in the geographic areas where TVI had a presence. It would also have to use a mechanism that guaranteed the permanence and viability of SKY® as a competitor in those geographic areas.
b) TVI and its stockholders would no longer be able to participate directly or indirectly as partners in the buying club, PCTV.

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[12] Notification. Telecom Regulatory Authority of India. April 30th, 2012, pp. 39.

[13] Case number CNT-048-2006.

[14] Case number CNT-018-2007.

c) Grupo Televisa, its subsidiaries and affiliates, would have to supply, in a non-discriminatory manner, all of its FTA signals restricted to any audio and television operator in TVI's geographic area of operation (*must offer*).
d) Grupo Televisa, its subsidiaries and affiliates, including TVI, would have to provide transmission services of any FTA television channels that requested services in the areas where TVI operated (*must carry*).
e) Members of the Board of Directors or any other parties to decisions in the Board of Grupo Televisa, its subsidiaries or affiliates, would not be able to influence Boards of companies that were offering or could potentially offer the service of restricted audio and television (*no Interlocking Directorates condition*).

Conditions that allowed Televisa to purchase Cablemas in 2007, while seeking to address potential competition problems (including Cablemas's preferential access to content) were:

a) Grupo Televisa had to demonstrate that it was following up on cable operators' complaints regarding discriminatory treatment in content sales within 90 days of having received the Commission's decision (*no discrimination*).
b) Grupo Televisa had to make transparent its content offering for cable operators, and make available to the Commission its contract terms for content provision to cable operators (*regulation of contract terms for content*).
c) Cablemas and its stockholders could no longer participate as partners in the buyers club for paid content, PCTV.
d) Grupo Televisa had to agree to must-offer and must-carry conditions and not undertake anticompetitive conducts listed in the resolution (similar to those included in the law). These conditions were limited, however, to the size and transmission mechanisms of the operator requesting the signals.[15]
e) A no interlocking directorates condition was also included.

I. Peru

EGEDA (Entidad de Gestión para los Productores Audiovisualres)[16] is in charge of issuing licenses, establishing rates and tariffs, and regulating re-transmission of FTA signals. In addition, it regulates specific communication and broadcasting shows that are massive and have difficult individual control, such as retransmission acts and communications in open spaces with free access.

On the one hand, tariffs for cable retransmission are set by EGEDA considering the total number of subscribers of each operator. On the other hand, tariffs for retransmission in open spaces with free access are set by EGEDA considering the category and capacity of the site. EGEDA does not differentiate whether the signals are retransmitted voluntarily or under enforcement of federal legislation.

[15] This condition is generally interpreted as foreseeing the potential entry of a competitor such as Telmex, who would not benefit from the must carry and must offer conditions imposed by the CFC.

[16] http://www.egeda.com.pe/EPe_Licencias.asp.

J. United States of America

In the United States, the issues of the relationship between pay TV operators and broadcasters appeared more than 30 years ago; since then, the Federal Communications Commission ("FCC") and legislators have dedicated important efforts to address them. Initially, pay TV operators refused to carry FTA signals, so legislation has concentrated on must-carry issues. Must-offer is mostly legislated by the Copyright Act (U.S. Code, Title 17), which imposes statutory licensing and establishes the rule for payments to the owners of the copyright. The Telecommunications Act of 1934 and further amendments, including its overhaul in 1996 (U.S. Code, Title 47) impose, with significant restrictions, must –carry provisions.

Section 614 [47 U.S.C. 534] (*Carriage of Local Commercial Television Signals*) of the Telecommunications Act establishes that all local signals (defined as those that have a broadcasting signal in a given area) must be carried by cable TV operators. Some exceptions are allowed when the transmission capacity is limited. As cable TV is now mostly digital, there are no significant capacity issues and these exceptions are of no real relevance. This section also imposes the condition that the pay TV operator cannot receive compensation for its duty to carry the signal. Legislation is based on the principle of "localism," putting local interests ahead of all others. Must-offer rules are addressed in Section 325 [47 U.S.C. 312] (*False Distress Signals; Rebroadcasting; Studios of Foreign Stations*), in compliance with the *Cable Television Consumer Protections and Competitions Act of 1992*.

Section 335 (SEC. 335. [47 U.C.S. 335] *Direct Broadcast Satellite Service*) mandates that specific rules have to be written for satellite TV providers. These rules have been reviewed periodically (*Satellite Home Viewer Act of 1988*, *Satellite Home Viewer Improvement of 1999* ("SHVIA"), *Satellite Home Viewer Extension and Reauthorization Act of 2004* ("SHVERA") y *Satellite Television Extension and Localism Act of 2010* ("STELA")); all of them have suffered minor changes through their lifetime.

The *Satellite Home Viewer Act* of 1999 allowed satellite TV operators to carry FTA signals only to those consumers who could not receive the FTA signal through an antenna and who were not subscribed to a cable TV service that carried them. This was modified by the SHVIA in 1999, which allowed, but not mandated, satellite TV operators to transport local signals. Consumers could only receive their local signal, not those destined to other local areas; for example, a consumer in New York could receive any of the signals of the four FTA providers (ABC, NBC, CBS, and FOX) that aired in the city, but they could not receive the signal from any other area. This is the concept of "local-into-local." Local areas, 210 in total, are labeled as "Designated Market Areas" (DMAs) and are defined by Nielsen media Research.

The Act also established that signal owners have the right to receive payment and the satellite provider could charge customers for providing service. Additionally, starting in 2002, a satellite TV provider that had decided to retransmit a given signal had to carry all the FTA signals within a given DMA that requested such service. This rule is known as "carry-one, carry-all." The only way of receiving the signal from another DMA ("distant-into-local") was for those households that were classified as "unserved," (certain exceptions were allowed during the transition period). By the end of 2000, the two main satellite TV providers had announced that

they would be providing these services in DMAs covering over 50 percent of the population. By the end of 2005, one of them provided "local-into-local" service in 133 DMAs; the other carrier covered 160.

The SHVERA of 2004, added the possibility of receiving, through the satellite platform, non-local FTA signals if these were considered "significantly viewed" in a given community,[17] and also incorporated provisions for the transition to digital television. With few exceptions, the rules did not allow for "distant-into-local" transmissions.

In 2006, still under SHVERA legislation, the Eleventh Circuit of the Florida Middle District Court banned Dish (originally Echostar) of retransmitting distant signals, after constant and deliberate violations of Section 119 [U.S.C. 17] of the Copyright Act. Echostar had been retransmitting New York and Los Angeles signals to thousands of households that were being served by local broadcasters. On appeal, the Eleventh Circuit of Appeals confirmed the decision; Dish was found to have engaged in such practice by improperly transmitting local signals to ineligible households. It was enjoined from providing distant-into-local transmissions, including "unserved households."

This enjoinment was modified by the STELA Act in 2010, which updated these rules and extended the validity of licenses covered by Section 119 of the Copyright Act for an additional five years. A significant part of STELA is dedicated to rules for multiplexing, as the market had fully transitioned to digital TV. All payments from pay TV providers to broadcasters were updated, including a glide path for the following five years (ending in 2014). For satellite TV, the 2010 monthly fee would be 25 and 50 cents per residential and commercial subscriber, respectively, with annual increases linked to inflation. The definitions of "local area service" and "unserved household" were marginally modified.

Dish reacted positively to STELA's enactment,[18] as the new regulations allowed it to offer FTA signals. The restriction enforced by the Eleventh Court would be lifted when it could offer "local-into-local" services in all 210 DMAs. Dish started the process in June 2010[19] and completed the transition soon thereafter.

Chapter 1, Sections 111, 110, and 122 of the Copyright Act (Title 17) cover the rules for must-offer. Section 111 addresses retransmission by cable TV providers, Section 119 establishes the rules for transmitting distant signals ("distant television"), and Section 122 sets the rules for satellite providers.

Broadly speaking, the rules impose must-offer obligations, with certain restrictions, to all platforms through statutory licensing. The owners of the signals have the right to receive payment, subject to prices and conditions determined by regulation, though in principle they could be negotiated.

Section 111 lists the exceptions to copyright violations when the retransmission is carried by a cable TV provider. It explicitly prohibits carriers from modifying the signals. It also sets the

[17] A complete list can be found in http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-187A2.doc.

[18] *See* press release in http://about.dish.com/press-release/corporate/dish-network-statement-passage-satellite-television-extension-and-localism-a.

[19] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-1036A1.doc.

fee to be paid to the owner of the signal as a function of the carrier's gross revenues paid by subscribers. It also restricts the must-carry concept to the local area where the signal is broadcast; that is, a given signal cannot appeal and ask to be carried outside its local area.

Section 119 addresses "statutory licensing" conditions for "distant-into-local" transmissions by satellite TV operators. For network stations, which are defined as the signals with national presence (currently, ABC, CBS, FOX, and NBC), such licensing exists as long as the operator complies with FCC rules and subscribers are charged, either directly or indirectly, for the retransmission. Additional rules apply to unserved households, as well as rules for automatic licensing of local-into-local service.

The sections explicitly ban the retransmission of signals by satellite providers to consumers that do not have the right to receive it; this refers to the transmission of distant signals. Section 119 (a)(6)(B) imposes a total ban of retransmission of local signals to any company that violates this clause. In all cases, fees for retransmitting the signals, as well as payment mechanisms, are established. The fees were published in Vol. 75, No. 168 of the Federal Register (Part 386) (August 31, 2010).

Section 122 addresses statutory licensing for satellite retransmissions and incorporates the concept of "significantly viewed." It also sets rules for those cases where coverage is not 100 percent of any given county. Fees applicable are the same as for the retransmissions described in Section 119.

K. Conclusions from International Experience

In the countries under analysis, we see numerous different examples of how to implement must-carry and must-offer regulations. Besides those differences, however, we also found common factors that determine which of the regulations are going to be used—must-carry, must-offer, both, or none. Decisions relating to regulation choice are mainly related to: (i) dominance by FTA broadcasters, (ii) dominance by Pay TV operators, (iii) cultural or local, regional, or national content objectives and/or (iv) copyright protection. In all cases, these regulations seem to be applied when the must-carry or must-offer restrictions are operative. Notice that there is no sense in regulating a must-offer obligation when all FTA broadcasters offer their products to all networks.

When we consider (i) (the case in which there is dominance on the side of FTA broadcasters), must-offer regulations are imposed to undermine possible abuse of dominance from broadcasters. This seems the case in (a) India, where the "must provide" condition of signals should be seen in the context that each operator shall have the right to obtain the signals on a non-discriminatory basis; (b) Ireland, which in its Broadcasting Act subsection (11) states that "RTÉ, TG4 and the television service programme contractor shall ensure that their must offer services are at all times offered for re-transmission […]" and (c) the United Kingdom, in which must-offer regulations were imposed to achieve universality objectives.

In the case of (ii) (where there is dominance on the side of Pay TV networks), must-carry regulations are imposed to undermine possible abuse of dominance by those operators. This is also the case of (a) India, where must-carry obligations are being discussed so as to "balance out the must-provide clause;" (b) Ireland, where signals from "RTÉ, TG4 and the free-to-air service provided under *section 70* by the television service programme contractor […]" should be re-

transmitted; (c) Peru, where must-carry obligations and carriage fees are determined by a public entity; (d) Argentina, where non-satellite subscription television services shall include unencoded signals generated by the originating open television services, and (e) the United States, where the rules regarding competence sought to resolve the refusal of restricted TV operators to open up their signals to broadcast TV operators.

In other cases, the problem to resolve was related to (iii) (specific cultural content or local, regional, or national content). To solve this problem, regulation usually imposed must-carry obligations. This is the case of (a) Brazil, with must-carry obligations imposed for community and university channels; (b) Canada, with must-carry obligations for national content channels, such as the CBC English and French network services, local and regional stations, and educational services; (c) Chile, where cable operators have to incorporate in their programming, when technically possible, at least four local, community, or regional channels, and (d) Ireland, where they regulate that networks should re-transmit the Houses of the Oireachtas Channel and the Irish Film Channel.

For last, in (iv) we consider the case where the important issue is to protect the copyrights of content generators, so must-offer regulations are not considered to either (a) not infringe copyrights or (b) not provide a scheme of mandatory licensing. This is the case of Australia and the United States.

Table 1 below in Section VI, summarizes some of the key policy objectives included in MCMO regulation in the countries we have reviewed before.

V. ARE THERE BEST PRACTICES IN THE REGULATION OF MCMO CONDITIONS?

The recent public consultation, carried out by the IFT with respect to the scope of the Constitutional reform related to MCMO obligations, represents an unprecedented opportunity to provide technical recommendations to the new Mexican regulatory authority regarding how to best instill the broadcasting sector with much-needed competition. Based on the review we presented before, we believe that other countries' experiences may prove useful to the IFT in its drafting of MCMO regulations.

Common elements and mechanisms used by different agencies pursuing regulatory objectives in broadcasting that constitute best practices in the application and enforcement of MCMO regulation include:

a) There needs to be some intrinsic characteristics of the telecommunication and broadcasting sectors that explain why regulation is needed. For example, the number of operators tends to be small, with strong incentives to vertically integrate. Or, second, consumers tend to benefit from having other users consuming similar services and these consumption patterns tend to persist.

b) The multi-sidedness characteristic of telecommunication and broadcasting markets. Multi-sided platforms serve two or more groups of interdependent users (users, subscribers, audiences, advertisers, and content providers/producers), which means that any analysis that omits consideration of all sides will lead to biased results. Also, this is a sector in which fast technological innovations open up potential niches for competition in an environment of digital convergence.

c) A recognition that the ultimate goal of regulation in broadcasting is to allow audiences access to a sufficient variety of service options that meets their preferences within a competitive environment in terms of variety, price and quality. Therefore, they need to facilitate different generators of content and their advertisers to provide information and entertainment services to their desired audiences.

d) A collection of general regulatory principles that include: clarity, transparency, network interconnectivity, technological convergence, competition, and plurality to promote efficiency and economic welfare. Using the logic of a multi-sided market platform that characterizes this sector, the ultimate goal of regulation in broadcasting is to allow audiences access to a sufficient variety of service options that meets their preferences within a competitive environment in terms of variety, price and quality, and to facilitate different generators of content and their advertisers to provide information and entertainment services to their desired audiences.

e) A recognition that the purpose of imposing MCMO obligations comes from three possible adverse effects on viewers: The first adverse effect comes from the abuse of market power that is conferred by the TV premium content to its owner or acquirer because of its irreproducibility. So a must-offer obligation may be needed on popular FTA programming. The second comes from the idea that certain types of programming need to be available to as wide an audience as possible. Hence must-carry obligations may need to be imposed on Pay TV platforms. The third comes from the idea that it is desirable that viewers have access to local programs dealing with important issues in their own communities. Here, again, Pay TV broadcasters are required to retransmit local channels. Again, must-carry obligations may need to be imposed on Pay TV platforms.

f) Understanding that, although FTA and Pay TV operators compete for audiences, the first type of operator gets most of its revenues directly from advertisers while the latter derives its revenues from both subscribers and advertisers. On the other hand, both types of operators maintain a vertical relationship, as FTA TV operators are able to get more outlets for their programs by offering their signal through Pay TV, and Pay TV gets benefits by increasing the variety of content provided by the FTA TV broadcasters.

By contrast to much of the above, the proposed Mexican regulations began by making a distinction between those who provide cable Pay TV services and those who provide satellite Pay TV services. Although the cable Pay TV operators are requested to provide the local signal into the local area, the satellite Pay TV operator is allowed to retransmit any signal that covers 50 percent of the Mexican territory. This asymmetric regulation does not ensure that services meet the preferences for the two main groups of consumers: audiences and advertisers. In this way adverse effects related to a lack of localism arises among viewers and advertisers.

After analyzing the MCMO regulations across countries, we found the following common characteristics:

a) We found common factors that determine which of the regulations ought to be used: either must carry, must offer, both, or none. Those factors are related to: a) the dominance of a FTA broadcaster; b) the dominance of a Pay TV operator; c) cultural, local, regional or national content objectives; and/or d) copyright protections.

b) In our review we also found eight regulatory elements around which MCMO obligations can be organized: a) no-fee exceptions, b) the prevalence of interconnection fees, c) copyrights considerations, d) local-into-local requirements, e) independent content requirements, f) national/public content requirements, g) regional content requirements and, finally, h) public interest rules in content requirements.

c) It is interesting to note that most of these regulations have been dominated: first, by public interest rules in content requirements; second, by copyright considerations; third, local-into-local requirements; and fourth, national and regional content requirements.

d) From our perspective, Mexico's proposed regulation has been driven mainly by national/public content requirements, with a lack of consideration for the copyright and local-into-local requirements. It has also focused on a determination of the scope of mandated access with an asymmetric treatment of satellite vs. other pay TV operators. This is unique within the international context we've described.

We make the following recommendations:

a) The new regulations need to explicitly consider the rights of two types of consumers in this sector—the consumers and the advertisers—in keeping with the multi-sided nature of this market. Both types of consumers are relevant to the development of open and restricted broadcasting and all interested parties ought to be heard, including local and national advertisers (such as private and public entities, as well as political parties).

b) It is important to incorporate similar considerations to the concept of "localism" that other jurisdictions have incorporated (we include here the example of the United States, but there may be others). Audiences must have access not only to a greater variety of information, but also to relevant information that preserves and promotes plurality and addresses the specific needs of a community and enables it to maintain its own identity.

c) It is also important to preserve the right of advertisers to access niche audiences, enabling them to make themselves known to consumer groups whom they seek to inform. We must remember that, as has been established for decades in economic theory, advertising plays an important economic role that promotes efficiency.

d) It is vital that the need to establish clear rules for operators involved in restricted satellite TV not create distortions for other agents in this sector. The need to make sense of the term "national content" coming in the Eighth Transitory Article, Section I of the decree cannot ignore the rights of audiences (under Article 6. from the Constitution), advertisers, and other operators in the sector.

e) Also, the regulator should clarify considerations in addition to those made on the companies that provide restricted service using satellite platforms (vs. those using local infrastructure such as cable or spectrum). The inclusion of these considerations will make the industry run more smoothly and efficiently for all who participate in it, in compliance with the fundamental principles established in the first point of this recommendation. These considerations state that the existence of two groups of consumers must be recognized: the audience as well as national advertisers. And, in addition, it's important to recognize local authorities, including private, public, and/or political parties.

f) Finally, the regulator should not forget the importance of preserving copyright principles.

VI. TABLE 1

	Australia	Argentina	Brazil	Canada	Chile	India	Ireland	Mexico	Peru	United Kingdom	United States
No-fee exceptions	✗	✗	✗[i]	✓[ii]	✗	✓[iii]	✓[iv]	✗	✗	✗	✓[v]
Interconnection fee	✓[vi]	✗	✗[vii]	✗[viii]	✗	✓[ix]	✗	✗	✓[x]	✓[xi]	✓[xii]
Copyright considerations	✓[xiii]	✗	✗	✓[xiv]	✗	✓[xv]	✓[xvi]	✓[xvii]	✓[xviii]	✓[xix]	✓[xx]
Local-to-local requirements	✓[xxi]	✓[xxii]	✗	✓[xxiii]	✓[xxiv]	✗	✓[xxv]	✗	✗	✓[xxvi]	✓[xxvii]
Independent content requirements	✗	✓[xxviii]	✓[xxix]	✓[xxx]	✗	✗	✓[xxxi]	✗	✗	✓[xxxii]	✓[xxxiii]
National/Public content requirements	✓[xxxiv]	✓[xxxv]	✓[xxxvi]	✓[xxxvii]	✗	✓[xxxviii]	✓[xxxix]	✓[xl]	✓[xli]	✗	✗
Regional content requirements	✓	✓[xlii]	✗	✗	✓[xliii]	✓[xliv]	✓[xlv]	✗	✓[xlvi]	✓[xlvii]	✗
Public interest rules in content requirements	✓[xlviii]	✓[xlix]	✓[l]	✓[li]	✓[lii]	✓[liii]	✓[liv]	✗	✓[lv]	✓[lvi]	✓[lvii]

[i] There is no basis if must-carry obligations are exempted of fees or if there are interconnection fees.

[ii] Prior a ruling of the Supreme Court of Canada, Canadian Radio-Television and Telecommunications Commission (CRTC) had determined that pay TV signals should negotiate carriage fees with broadcasters. In Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, Supreme Court ruled that "the provisions of the Broadcasting Act, considered in their entire context, may not be interpreted as authorizing CRTC to implement the proposed value for signal regime" and ruled that over-the-air TV should remain free for TV viewers. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12767/index.do

[iii] Article 8 of Broadcasting Services Regulation of 2007, in its subsection (i) states that "every cable operator shall re-transmit channels operated by or on behalf of Parliament in the manner and name as may be specified by the Central Government by notification in the Official Gazette."
http://www.prsindia.org/uploads/media/vikas_doc/docs/1241499927~~Broadcasting_Services_Regulation_Bill_2007.pdf

[iv] Subsection (4) of Article 77 of the Broadcasting Act of 2009, states that "an appropriate network provider shall ensure the re-transmission, by or through his or her appropriate network, of each free-to-air television service provided for the time being by RTÉ, TG4 and the free-to-air service provided under *section 70* by the television

service programme contractor which that body or contractor requests the appropriate network provider to so re-transmit." Regarding carriage fees, subsections (7) states that "The appropriate network provider shall not impose a charge or allow a charge to be imposed in relation to the making available to a person of any service referred to in *subsection (3), (4), (5)* or *(6)* if he or she imposes a charge or allows a charge to be imposed on that person in relation to the making available of any other service to that person by means of the appropriate network concerned." http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[v] According to Section 614 [47 U.S.C. 534], Subsection 10, regarding compensation for carriage, "a cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section." http://www.law.cornell.edu/uscode/text/47/534

[vi] The Copyright Act of 1968 provides a statutory licensing scheme for re-transmission of free-to-air broadcast, as long as written notice is provided and remuneration is paid to the relevant collecting society.

[vii] There are no basis if must carry obligations are exempted of fees or if there are interconnection fees.

[viii] Idem.

[ix] Carriage fees are charged by cable operators in Indian broadcasting. http://www.afaqs.com/media/story/35716_Broadcasters-agree-to-reasonable-carriage-fees

[x] EGEDA is in charge of determining retransmission fees. http://www.egeda.com.pe/EPe_EGEDAPeru7.asp

[xi] In Schedule 9 of the Broadcasting Act of 1996 there is an amendment of Copyrights, Designs and Patents Act of 1988 relating to Cable Programme Services. In Section 73A it is stated that "An application to settle the royalty or other sum payable in pursuance of subsection (4) of Section 73 (reception and re-transmission of broadcast in cable programme service) may be made to the Copyright Tribunal by the copyright owner of the person making the broadcast." http://www.legislation.gov.uk/ukpga/1996/55

[xii] According to Section 614 [47 U.S.C. 534], Subsection 10, regarding compensation for carriage, "(b) a cable operator may accept payments from stations which would be considered distant signals under section 111 of Title 17 as indemnification for any increased copyright liability resulting from carriage of such signal, and (c) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior June 26, 1990."

[xiii] The Copyright Act of 1968 states that the maker of a television broadcast is the owner of any copyright subsisting in the broadcast (Division 5, Subdivision A, 99).

[xiv] Section 31 of the Copyright Act considers re-transmission issues. It states that "It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work," only if certain conditions are accomplished, such as transmitting without alteration, etc. http://laws-lois.justice.gc.ca/eng/acts/C-42/page-32.html#h-43

[xv] In Section 31D of the Amendment of the Indian Copyright Act of 2012 states that "Any broadcasting organization desirous of communicating to the public by way of a broadcast of by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section." http://164.100.24.219/BillsTexts/RSBillTexts/PassedRajyaSabha/copy-E.pdf

[xvi] Article 183 of the Broadcasting Act of 2009 makes amendments to the Copyrights and Related Rights Act of 2000. Such Article describes the "digital terrestrial retransmission" as a reception and immediate retransmission on an encrypted basis without alteration by means of a multiplex of a broadcast or a cable program initially transmitted from another Member State of the EEA. http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[xvii] Article 11 of Law of Radio and Television states that Secretary of Public Education would have to intervene in radio or television to protect copyrights. http://www.diputados.gob.mx/LeyesBiblio/pdf/114.pdf

[xviii] The agency in charge of setting retransmission tariffs (EGEDA) is also in charge of setting compensations for copyrights infringements. http://www.egeda.com.pe/EPe_EGEDAPeru1.asp

[xix] In Schedule 9 of the Broadcasting Act of 1996 there is an amendment of Copyrights, Designs and Patents Act of 1988 relating to Cable Programme Services. In Section 73, regarding reception and re-transmission of broadcast in cable program service, it is stated that: "The copyright in the broadcast it is not infringed (a) if the inclusion in the pursuance of a relevant requirement, or (b) if and to the extent that the broadcast is made for reception in the area in

which the cable programme service is provided and forms part of a qualifying service." http://www.legislation.gov.uk/ukpga/1996/55

[xx] An entire section of the Copyrights Law and Related Laws contained in Title 17 of the United States Code is dedicated to copyright. There are some limits to exclusive rights in secondary transmissions of broadcast programming by cable. http://www.copyright.gov/title17/circ92.pdf

[xxi] Statutory requirements introduced in 2008 require that specified regional commercial television broadcasting licensees in Queensland, New South Wales, Victoria and Tasmania broadcast at least minimum amounts of material of local significance.

[xxii] Article 65 of the Law 26.522 of Audiovisual Media Services states that open television broadcasting services shall broadcast at least thirty per cent of own production, including local news programs. http://www.afsca.gob.ar/web/Varios/ley/AUDIOVISUAL-%20MEDIA-SERVICES.pdf

[xxiii] Regulation 2006-158 enacted by the CRTC in 2006 established local programming requirements of one third for competitive market FM stations as well as a case by case system for AM stations. Programming must include local news, weather and sports material "that originates with the station or is produced separately and exclusively for the station," while excluding, for example, "programming received from another station and rebroadcast simultaneously or at a later time"

[xxiv] Law 20,422, enacted in 2010, creates broadcasting community services with the intention of allowing each community to have high quality, local, social and community broadcasts. These licenses could be issued only to non-profit organizations, municipality foundations, universities with the intention of promoting the general interest. http://www.leychile.cl/Navegar?idNorma=1013004&idParte=0

[xxv] Article 77, subsection 8 of the Broadcasting Act of 2009, states that "the Authority may require an appropriate network provider to transmit as a broadcasting service, by means of specified appropriate network maintained by the appropriate network provider, the whole or part of the programme material supplied under one or more specified community content provision contracts the holders of which are members of the local community or community of interest that is served by the said appropriate network and who request the first-mentioned appropriate network provider to so transmit the whole or, as the case may be, part that programme material." http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[xxvi] Local radio stations are required to broadcast at least seven hours of local content as well as broadcasting local news, regularly refreshed and updated, at least hourly during weekday daytimes. http://consumers.ofcom.org.uk/2010/04/ofcom-deregulates-commercial-local-radio/

[xxvii] FCC requires all broadcast stations to provide news, public affairs and other programming that specifically addresses important issues facing the community.

[xxviii] In Article 65 of the Law 26.522 of Audiovisual Media Services there is an obligation for broadcasters owned by Provincial Governments, Buenos Aires City Government, municipalities and national universities that they shall broadcast educational, cultural or public interest programs equivalent to at least twenty per cent of total program contents. This obligation is not enforce to private and non-state broadcasters. http://www.afsca.gob.ar/web/Varios/ley/AUDIOVISUAL-%20MEDIA-SERVICES.pdf

[xxix] As part of a regulation in 1998, community radio broadcasting was regulated (community radio broadcasting was defined as low power and limited reach broadcasting stations directed by foundations and non-profit community associations. Additionally in the new law enacted in 2011, Law 12,485/11 it was established a minimum of 210 minutes of local content at primetime, half of which these minutes being produced by an independent Brazilian producer.

[xxx] Section 3 (1)(i)(v) of the Broadcasting Act of 1991 requires that broadcasting system as a whole to "include a significant contribution from the Canadian independent production sector." An independent production is defined as on in which a broadcasting licensee owns or controls, directly or indirectly, less than 30 percent of the equity.

[xxxi] Article 25, subsection 2 of the Broadcasting Act of 2009, states that "the authority […] shall stimulate the provision of high quality, diverse and innovative programming by commercial, community and public service broadcasters and independent producers. http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[xxxii] Section 277 of the Communications Act of 2003 requires all public service channels (that is, the six BBC channels plus the three commercial free to air national channels) to reserve at least 25% of their broadcast time to "a range and diversity of independent productions" http://www.legislation.gov.uk/ukpga/2003/21/contents

[xxxiii] Beginning in 1975, FCC may allow a combination between a newspaper and a TV station if at least eight independently owned major media voices (major newspaper and/or full power TV stations) would remain in the market following the transaction.

[xxxiv] Australian content is regulated by mandatory standards, the Australian Content Standard 2005 (ACS). The ACS requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6 am and midnight. In addition there are specific minimum annual sub-quotas for Australian (adult) drama, documentary and children´s programs.

[xxxv] Article 65 of Law 26.522 of Audiovisual Media Services states that audio broadcasters shall broadcast at least 70% of national production, while open television broadcaster shall broadcast at least 60% of national production. http://www.afsca.gob.ar/web/Varios/ley/AUDIOVISUAL-%20MEDIA-SERVICES.pdf

[xxxvi] Regarding the pay TV sector, Law 12,485/11 establishes a minimum of local content quota in order to promote national and regional culture, artistic and journalistic production, as well as stimulate independent production. This law allows the transmission of foreign programs, however, it impose a minimum of 210 minutes of local content at primetime. Additionally there is an obligation in Article 17 of the mentioned Law to include, in any subscription plan or package, one Brazilian channel for every two foreign channels offered. http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12485.htm

[xxxvii] The CRTC (Canadian Radio-Television Telecommunications Commission) enforces strict quotas for Canadian content. Private television stations must ensure that 60% of their total programming (including 50% of peak time programming) is Canadian.

[xxxviii] Article 13 of the Broadcasting Services Regulation Bill enacted in 2007, states that the share of content produced in India shall be as prescribed by the Central Government and shall not be less tan 15% of the total content of a channel broadcast during every week. http://www.prsindia.org/uploads/media/vikas_doc/docs/1241499927~~Broadcasting_Services_Regulation_Bill_2007.pdf

[xxxix] In the Broadcasting Act of 2009, there is an entire Part of the Act dedicated to Public Service Broadcasting. It mainly determines the bodies that are going to be in charge of delivering public broadcasting. http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[xl] Article 21-A of Radio and Television Law, regarding objectives of public broadcasters, they should privilege national content. http://www.diputados.gob.mx/LeyesBiblio/pdf/114.pdf

[xli] Article 11 of the Ethics Code of the National Radio and Television Society, states that broadcastings between 5:00 and 24:00 should include a quota of weekly national programming of no less than 30% of the broadcasts. http://www.mtc.gob.pe/portal/comunicacion/concesion/radiodifusion/codigo_etica/sociedad_nacional_radio_tv.pdf

[xlii] Article 65 of the Law 26.522 of Audiovisual Media Services states stationary reception subscription television services: (i) shall include unencoded broadcasts and signals generated by Radio Television Argentina Sociedad del Estado, all public broadcasters and signals of the National State, and those in which the National State has an interest. Additionally, non-satellite subscription television services shall include at least one signal of own local production that satisfies the same requirements as for open television broadcasts. http://www.afsca.gob.ar/web/Varios/ley/AUDIOVISUAL-%20MEDIA-SERVICES.pdf

[xliii] Law 20,422, enacted in 2010, creates broadcasting community services with the intention of allowing each community to have high quality, local, social and community broadcasts. These licenses could be issued only to non-profit organizations, municipality foundations, universities with the intention of promoting the general interest.
http://www.leychile.cl/Navegar?idNorma=1013004&idParte=0

[xliv] Article 8 of Broadcasting Services Regulation Bill of 2007, in its subsection (ii) states that "at least two Doordashan terrestrial channels and one regional language cannel of a State in the Prime band, in satellite mode on frequencies other than those carrying terrestrial frequencies." http://www.prsindia.org/uploads/media/vikas_doc/docs/1241499927~~Broadcasting_Services_Regulation_Bill_2007.pdf

[xlv] Article 25, subsection 2 of the Broadcasting Act of 2009, states that "the authority […] shall stimulate the provision of high quality, diverse and innovative programming by commercial, community and public service broadcasters and independent producers. http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[xlvi] Article 13 of Radio and Television Law, states that the Government can hold at least one channel and one radio frequency to broadcast the different traditions and culture of certain area or region. https://www.mtc.gob.pe/portal/comunicacion/concesion/mlegal/leyes/leyrtv.pdf

[xlvii] Article 32 of the Broadcasting Act of 1996 states that "The Secretary of State may by order provide for the Commission to include in any multiplex license granted in respect of one frequency to which section 28 applies such conditions relating to the broadcasting of programmes in Gaelic for reception wholly or mainly in Scotland as may be specified in, or determined by them under, the order. http://www.legislation.gov.uk/ukpga/1996/55

[xlviii] The ACMA regulates the broadcasting of political and election matters and the content of electronic communications. Among the different regulations, access for all parties, blackout period for election advertising and keeping records of political matter broadcast at the request of another person are required.

[xlix] In Article 65 of the Law 26.522 of Audiovisual Media Services there is an obligation for broadcasters owned by Provincial Governments, Buenos Aires City Government, municipalities and national universities that they shall broadcast educational, cultural or public interest programs equivalent to at least twenty per cent of total program contents. This obligation is not enforce to private and non-state broadcasters.

[l] As part of Cable TV Law regulation in 1995, community and university television channels are obligatorily transmitted by cable TV providers. Additionally every pay TV operator has the obligation of transmit public legislative channels from municipalities, estates and from the Federation.

[li] The CRTC regulates advertising in election campaigns, assuring that voters are informed during election campaigns and making equitable on-air time during a campaign. http://www.crtc.gc.ca/eng/info_sht/b309.htm

[lii] Law 20,422, enacted in 2010, creates broadcasting community services with the intention of allowing each community to have high quality, local, social and community broadcasts. These licenses could be issued only to non-profit organizations, municipality foundations, universities with the intention of promoting the general interest. http://www.leychile.cl/Navegar?idNorma=1013004&idParte=0

[liii] Article 8 of Broadcasting Services Regulation Bill of 2007, in its subsection (ii) states that "at least two Doordashan terrestrial channels and one regional language cannel of a State in the Prime band, in satellite mode on frequencies other than those carrying terrestrial frequencies." http://www.prsindia.org/uploads/media/vikas_doc/docs/1241499927~~Broadcasting_Services_Regulation_Bill_2007.pdf

[liv] In Article 77, subsection 3 of the Broadcasting Act of 2009, it is stated that "when the network is a digital system, the appropriate network provider shall ensure the re-transmission, by or through his or her appropriate network, of the Houses of the Oireachtas Channel and the Irish Film Channel." http://www.irishstatutebook.ie/2009/en/act/pub/0018/

[lv] Article 3 of the Radio and Television Law, states that the role of the State is to promote the development of broadcasting services, especially in country areas, prioritizing educational broadcasts. https://www.mtc.gob.pe/portal/comunicacion/concesion/mlegal/leyes/leyrtv.pdf

[lvi] There is a list of events, which according to Article 97 of the Broadcasting Act of 1996, are of national interest. In subsection 1 it is stated that "a listed event is a sporting or other event of national interest which is for the time being included in a list drawn up by the Secretary of State for the purposes of this Part." http://www.legislation.gov.uk/ukpga/1996/55

[lvii] Pursuant to Section 611 of the Communications Act, local franchising authorities may require cable operators to set aside channels for public, educational, or governmental use. PEG channels are not mandated by Federal Law, rather they are a right given to the franchising authority, which it may choose to exercise. http://www.publicaccess.org/cableact.html