

Mexico adopts some of the strongest net neutrality rules

Following the publication of the Federal Telecommunications and Broadcasting Law in Mexico in July 2014, which includes provisions regarding net neutrality, Mexico's newly created Federal Institute of Telecommunications is now set to issue Guidelines that will further expand on the regulation of net neutrality. These guidelines will, it is expected, be published in 2015. Federico Hernández Arroyo of Hogan Lovells BSTL, S.C. discusses what we can expect from the forthcoming Guidelines and the impact on ISPs and the e-commerce sector.

A historic constitutional reform in telecommunications was published in June 2013¹. Among other amendments, the reform introduced as human rights access to (i) information and communication technologies, (ii) internet and (iii) broadband. Additionally, telecommunications services were expressly acknowledged as public services. As a consequence of the constitutional changes, a new Federal Telecommunications and Broadcasting Law (the 'Law') was published in July 2014².

The Law included several new concepts, such as net neutrality, which have not been regulated previously in Mexico. Although there are only two articles in the Law that set forth the principles of net neutrality, these order the new Federal Institute of Telecommunications (the 'Institute') to issue general guidelines to further regulate net neutrality (the 'Guidelines'). Even though there is no deadline, it is expected that the Institute will issue the Guidelines within the

course of 2015.

ISPs

According to the Law, net neutrality applies to concessionaries of public telecommunications services (i.e., carriers) and to authorised entities that commercialise telecommunications services (e.g., MVNOs). Both are considered internet services providers ('ISPs'). In general terms, ISPs shall provide internet access services in accordance with the capacity, speed and quality subscribed by the users, regardless of the content, origin, destination, equipment or application used, as well as of the services provided through the internet.

Net neutrality principles

In particular, ISPs shall comply with the following seven principles detailed in the Law that could be considered as some of the strongest in relation to net neutrality that have recently been approved in the world (the 'Net Neutrality Principles'):

- (i) Free choice: Internet users shall be able to access any content, application or service offered by ISPs without being limited, degraded, restricted or discriminated on its access and with the possibility of using any kind of instruments, equipment or devices able to connect to the network ('technological neutrality');
- (ii) Non-discrimination: ISPs are prohibited from obstructing, interfering, inspecting, filtering or discriminating with/against any kind of content, application or service;
- (iii) Privacy: ISPs shall protect users' privacy and the security of the network;
- (iv) Transparency: ISPs shall publish on their websites information concerning the

characteristics of the service provided, including the policies applicable to traffic management, network management authorised by the Institute, speed, quality and guarantee of the services;

(v) Traffic management: ISPs shall ensure the speed or quality of the service subscribed to by the user, provided that the foregoing does not constitute a practice contrary to efficient competition and free participation;

(vi) Quality: ISPs shall maintain the minimum quality standards established for that purpose in the Guidelines; and

(vii) Sustained infrastructure development: ISPs shall comply with the Guidelines regarding the promotion of the sustained growth of the telecommunications infrastructure.

Penalties

The Law provides that failure to comply with the Net Neutrality Principles, such as by blocking, interfering, discriminating, delaying or unfairly restricting the right of access to the internet of any user, will mean that an ISP is subject to a sanction between 1% and up to 3% of its revenues.

Guidelines

As mentioned, the Institute shall draft the Guidelines in order to provide detail on and expand upon the Net Neutrality Principles provided in the Law. As in other recent regulations, it is foreseeable that the Institute will publish the draft of the Guidelines for public consultation. Although the consultation is non-binding, it opens the possibility for all interested parties to provide comments and feedback in order to address any concerns.

In principle, the Guidelines must follow and be consistent with the Net Neutrality Principles that clearly promote net neutrality

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without restriction. However, the success or failure of net neutrality in Mexico will depend on the details to be included in the Guidelines and their implementation by the Institute.

Impact on ISPs and e-commerce

Considering the Net Neutrality Principles, in essence ISPs are obliged to provide the same treatment to all internet traffic without discrimination of content, applications, services or devices.

In principle, it appears that ISPs are not able to charge additional fees to prioritise communications to content providers such as over-the-top content ("OTT") providers, which is one of the main topics of debate in other jurisdictions such as in the United States as part of the discussions regarding the Open Internet Notice of Proposed Rulemaking published by the Federal Communications Commission¹.

On the other hand, the quality and speed for final users could vary depending on the different offers of the ISPs and the plan subscribed to, as is currently the case. For example, according to Netflix, within the month of November 2014, Axtel (a Mexican fix carrier) was the best ISP with a speed of 3.36 Mbps under its best plan, but also the lowest speed provider with 0.76 Mbps under its most basic plan⁴. However, it is possible that the foregoing will impact the prices of internet access for the final users.

In any case, it shall be understood that the Guidelines shall provide minimum quality standards that ISPs shall comply with and we expect that the Institute should set

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a reasonable minimum level of speed that should be improved from time to time. In addition, although ISPs are able to take the necessary measures regarding traffic management and network administration, such measures shall not affect the competition process.

Taking into account that the Net Neutrality Principles limit ISPs' ability to charge companies or services (e.g., OTT) for faster network access, all e-commerce businesses, regardless of size or economic position, would be in the same position with respect to access to their websites and to their content as well as to the flow of their traffic. This benefits e-commerce, since all companies will be able to compete for the provision of services and products with the same quality and speed.

The foregoing will also promote innovation, expression and freedom of speech on the internet. This is consistent with the telecommunications constitutional reform in Mexico since access to the internet is now a human right and therefore net neutrality would likely be protected similarly and that should be applicable not only in favour of final users but also to all parties that participate in the internet, including e-commerce businesses.

However, the Guidelines should also stimulate the sustained growth of telecommunications infrastructure in order to increase broadband subscriptions in Mexico (including in poor and rural communities), which in 2011 was ranked 33rd out of the 34 countries that are members of the OECD⁵, and improve the quality

and speed in the provision of broadband services, which is also a human right.

The Institute has a complex goal in drafting the Guidelines since on the one hand it will oblige ISPs to observe the Net Neutrality Principles and expand its regulation in this regard and on the other hand it shall promote the development of telecommunications networks to cope with the demand for more and better broadband services. At least it is clear that the Institute is the sole authority in regulating net neutrality.

The Guidelines are key for the success of net neutrality in Mexico and to guarantee the right of internet access and services. In addition, the implementation of the Guidelines will also be important, and this will probably be subject to discussion, interpretation and litigation, similar to what other jurisdictions are currently experiencing, including the United States and in Europe.

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1. An English version of the constitutional reform in telecommunications is available at: http://www.sct.gob.mx/fileadmin/Comunicaciones/Red_Compartida/Ing/Legislation/telecomm-reformm.pdf

2 An English version of the Law is available at: http://www.sct.gob.mx/fileadmin/Comunicaciones/Red_Compartida/Ing/Legislation/telecomm-law.pdf

3 See: <http://www.fcc.gov/openinternet>

4 See: <http://ispspeedindex.netflix.com/mexico>

5 See: <http://www.oecd.org/statistics/>

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