

Unclassified

English - Or. English

14 May 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Consumer data rights and competition – Note by Mexico (IFT)

12 June 2020

This document reproduces a written contribution from Mexico (IFT) submitted for Item 3 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

Please contact Ms Anna BARKER if you have questions about this document.
[Email: Anna.BARKER@oecd.org]

JT03461724

Mexico (IFT)

1. Data in the telecommunications sector in Mexico

1. In Mexico, telecommunications services¹ are public services of general interest, so the State will guarantee the efficient provision of these services and, for this purpose, it will establish conditions of effective competition in its provision.

2. In this sense, the Federal Telecommunications Institute (IFT, by its acronym in Spanish), is responsible for the regulation, promotion and the oversight the use, development and operation of the radio spectrum, satellite orbits, satellite services, public telecommunications networks and the provision of telecommunications services, as well as the access to active and passive infrastructure and other essential inputs.

3. Likewise, the IFT, as the exclusive competition authority for the telecommunications sector, guarantees competition and free market access, while preventing, investigating and fighting monopolies, monopolistic practices, concentrations and any other restrictions on the efficient functioning of markets.

4. Particularly with regard to *consumer data*, like any other sectors of the economy, in telecommunications there is a large amount of information that can be valuable for companies, whether they are directly or indirectly involved. In this regard, the Federal Telecommunications and Broadcasting Law (LFTR, by its acronym in Spanish), contemplates a series of provisions regarding data. Some of these references relate to the user's name, address, telephone number, geographic location, type of mobile communications equipment, among others.

5. Additionally to the LFTR, there are other laws that protect personal data, namely: the Federal Law on the Protection of Personal Data in Possession of Private Parties and the General Law for Protection of Personal Data in Possession of Obligated Subjects², whose observance and supervision corresponds to the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI, by its acronym in Spanish).

2. User's rights and their protection mechanism

6. The LFTR recognises a series of rights for users of telecommunications services³ including, among others, the protection of their personal data, and free portability of their telephone number.

7. Regarding the right of personal data protection, all users have the right to the safeguarding and protection of their personal information, by the service provider, such as their name, address, email, telephone number and others. Likewise, providers have the obligation to inform the user which data they will collect and for what purposes they will

¹ Although telecommunications and broadcasting are public services of general interest, this document refers only to telecommunications services because broadcasting services are provided in a unidirectional manner, that is, there is no exchange of information between audiences and service providers.

² The IFT, in terms of article 1, fifth paragraph of this law, is an obligated subject, so the provisions of said legislation regarding the treatment of personal data in possession of the IFT must be observed.

³ Article 191 of the LFTR.

use it, through a privacy notice. Users have the right to authorize that their data is used only for the purposes they approve and at all times users have the right to the security of safeguarding them.⁴

8. In any case, the user can Access, Rectify, Cancel their information and Oppose to its use, which is commonly referred to as “ARCO rights”.⁵

9. Additionally, the user has the right to have the provider safeguard and protect their communications, as well as the data that identifies it, such as the date, time and duration of calls, messages or data that identify the origin and destination of these, among others, guaranteeing its confidentiality and privacy.⁶

10. Regarding the right of number portability, which means, in terms of the provisions of the LFTR, that users have the right to change to another company for free, keeping their same phone number, as many times as they decide, going to the new company they wish, in order to contract their service. The new company must carry out the portability during 24 hours after the request, or the user can decide on the date on which he/she wants the portability to start, as long as it does not exceed five business days from the date the request is submitted.⁷

11. Thus, number portability facilitates the user’s decision regarding the dealership that they want their service provided and its decision is oriented to the evaluation of quality and price conditions, without the risk of losing their telephone number when changing service providers.

12. As established in the Number Portability Rules, it is important to emphasize that public and private sectors, both residential and commercial, depend significantly on access to telecommunications. Economic activities occur through the global telecommunications network, where individuals and companies are often recognised by their phone number. Changing the phone number may have implications for business activities or may create communication limitations for organizations and individuals by having them inform to every contact about their new phone number.

13. Portability implementation is a tool that has encouraged the offer of new telecommunications services that take advantage of technology and convergence of services, in an environment that strengthens the process of competition and free market access in the telecommunications sector; contribute in the exercise of the right to the expression of ideas, the right to plural and timely information, and the right to access to information and communication technologies; among others.⁸

14. It is important to highlight that, as considered in the Number Portability Rules, number portability in the country has contributed to a substantial improvement in the quality of services, a greater offer of products and a reduction in rates, due to the fact that competition has been strengthened and service providers have had to strive to retain and attract users.

⁴ Article 16 and 19 of the Federal Law on the Protection of Personal Data in Possession of Private Parties.

⁵ Article 22 of the Federal Law on the Protection of Personal Data in Possession of Private Parties.

⁶ See Section 3 of this document.

⁷ Article 191, subsection III of the LFTR and Rule 13, and subsection IV of the Number Portability Rules available in Spanish at: <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/dofpiftext061114213.pdf>.

⁸ Articles 6, 7, 27 and 28 of the Mexican Constitution.

15. Also, number portability benefits not only the users that carry their number, but also those who remain with their service provider, since the possibility of the subscriber choosing a competitor encourages the provider to offer of better quality conditions, diversity and price.

16. Based on the foregoing, there is no doubt that strengthening the right of users to keep their telephone number when they change their service provider, constitutes a fundamental measure for their benefit, since this guarantees the right protected in article 191 subsection IV of the LFTR, that grants users the right to freely choose their service provider.

3. Data conservation in matters of security and justice collaboration

17. One of the ways in which telecommunications concessionaires, authorised dealers, and service providers of applications and content are collecting data from users, refers to the obligation established by the LFTR in terms of justice and security.

18. This collaboration compels them, among other obligations; to keep records and controls of any communication made from any type of line with owned or leased numbering, in any form, to accurately identify the following information:

- the subscriber's name, corporate name, and address;
- the type of communication (voice, voice mail, conferencing, data), supplementary services (including call forwarding or transfers) or the multimedia or messaging services employed (including short message services, multimedia, and advanced services);
- the necessary information to trace and identify the source and destination of mobile telephone communications, including the destination number, and type of line (contract or rate plan and prepaid);
- the necessary information to determine the date, time and duration of communications, as well as messaging or multimedia services;
- in addition, they must retain the date and time of the initial activation of the service and the location label (Cell ID) where the service was activated;
- where appropriate, identification and technical features of the devices, including, international manufacturing identity codes and the subscriber's equipment, among others;
- the location of the geographic positioning of digital telephone lines; and
- their obligation to retain the information shall commence from the date on which the communication was made.

19. Accordingly, the concessionaire must store the information referred above during the first 12 months, on systems that allow querying and delivery in real time to the competent authorities through electronic means. Once this period is over, the concessionaire shall retain such information in electronic storage systems for another 12 months.

20. Telecommunications concessionaires and authorised dealers shall take the necessary technical measures regarding the information that has to be conserved, to ensure its safekeeping, care, protection, and avoid its manipulation or unauthorised access,

destruction, alteration or cancellation, as well as determining the personnel authorised for its management and control.

21. Without prejudice to the provisions of the LFTR on protection, handling, and control of personal information held by concessionaires or authorised dealers, the provisions outlined in the Federal Law on the Protection of Personal Data in Possession of Private Parties shall apply.

22. There is an obligation to collaborate against any criminal conduct. The LFTR expressly establishes the prohibition that prevent companies to use such data for purposes other than those related to collaborate in matters of security and justice by indicating that any different use will be sanctioned by the competent authorities in administrative and criminal terms.

4. Data in possession of the preponderant economic agent in the telecommunications sector in favor of competition

23. In Mexico, the telecommunications sector before the 2013 Constitutional Amendment Decree was highly concentrated, allowing the incumbent economic agent to affect competition conditions coupled with a lack of a regulatory framework and an autonomous competition authority that enforced the legislation in benefit of users. For these reasons, the amendment identified the need to declare a preponderant economic agent in the telecommunications sector and to establish *ex ante* measures that allowed much more equitable conditions for competitors.

24. In this regard, anyone who has, directly or indirectly, over 50% of national participation in the provision of telecommunications services will be considered as a preponderant economic agent (AEP, by its acronym in Spanish). This percentage is measured either by the number of users, subscribers or audiences, by the traffic on their networks or by the capacity used, according to the data available to the IFT.

25. The effects of the obligations imposed to the AEP will be extinguished, in accordance with the law, following a declaration of the IFT, once there are conditions of effective competition in the market in question. In this sense, the LFTR establishes a series of obligations for the AEP in matters of data and information, which the IFT can enforce. These obligations, among others, consist of:

1. annual submission of information about:
 - its wired and wireless network topology and broadband, including its modernization or growth plans; and
 - its plants and other infrastructure elements, determined by the IFT, for which it must provide a detailed description of the physical and logical elements, among others, with their location using georeferenced coordinates, technical and hierarchal specifications, features and capabilities;
2. nondiscrimination between traffic on its own network and traffic from other public telecommunications network concessionaires;
3. not imposing conditions that inhibit number portability; therefore, any time it receives a request from the user, if other goods and services are sold, they must be individually itemized and billed separately;
4. acting on a nondiscriminatory basis when providing commercial information about its subscribers to affiliates, subsidiaries or third parties, subject to the provisions

established by the Federal Law on the Protection of Personal Data in Possession of Private Parties.

5. allowing other public telecommunications network concessionaires to access physical means including, among others, optical fiber, technical and logical means from the local public telecommunication network belonging to the AEP, in conformity with the measures imposed on them by the IFT to ensure the effectiveness of such access. These measures must consider all the elements needed to effectively unbundle the local network as an essential input. In particular, concessionaires may choose the local network elements and the access point required from the AEP. Such measures could include regulation of rates and prices, quality, and technical conditions, and the implementation of a schedule to ensure universal coverage and increased penetration of telecommunication services.
6. allowing access to other public telecommunications network concessionaires to the essential network resources, based on the cost model determined by the IFT, which must promote effective competition and consider international best practices, natural network asymmetries, and participation in each concessionaire's sector. The AEP may not impose on other concessionaires of such public networks terms and conditions less favorable than those it offers to itself, its affiliates and subsidiaries, and companies that are part of its economic interest group.

5. Courts vision regarding the handling of personal data between the authority and telecommunications operators

26. Notwithstanding the obligations set forth in the LFTR, there are precedents set by specialised courts regarding the importance of the information held by companies, as it may be relevant to the exercise of functions by the authority, particularly in the context of the regulatory state.⁹

27. In this sense, the specialised court assert that information asymmetry is a market failure that must be counteracted through the exercise of those powers that impose on individuals certain obligations to deliver information to regulatory bodies, in order to obtain information and create databases and public records for consultation, always under certain limitations.

28. As an example, article 28 of the Constitution establishes the obligation to keep a public registry of concessions; while Transitory article Third, subsection VII of the Constitutional Amendment Decree¹⁰ provide for the public registration of the minimum tariffs of the concessionaires for the emission of announcements, in order to avoid cross subsidies or preferential treatment; and Transitory article Eighth, subsection III provide for the measures related to information for the AEP.

29. Clearly, the Constitutional Amendment Decree had the purpose of creating a regulatory regime for the AEP that included specific information measures that would guarantee the achievement of its objectives. Specifically, the obligation to make available to the IFT the necessary information to ensure free competition and effective competition in the telecommunication sector, in order to allow access to third parties to the AEP infrastructure and any other elements and services to establish a level playing field.

⁹ Available in Spanish at: <https://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/2013/2013674.pdf>

¹⁰ Available in Spanish at: https://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013

6. Final remarks

30. In light of the legal framework for telecommunications, the IFT, as a sector regulator and competition authority for the telecommunications and broadcasting sectors, is an important ally in promoting and defending users' rights, including the right to the protection of users' personal data.

31. Likewise, the IFT is aware of the fact that information held by concessionaires has an increasing importance on issues of economic competition, including the information generated by users generate in their networks. Therefore, it seeks to maintain competition and free market access in these sectors, so that information asymmetries between operators do not represent advantages for a few in detriment of others.

32. The IFT will continue working, in collaboration with other authorities, local or foreign, to protect users' rights, toward the achievement of its constitutional mandate to guarantee free competition and market access, and preventing, investigating and fighting monopolies, monopolistic practices, concentrations and other restrictions on the efficient operation of markets in the telecommunications and broadcasting sectors.