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## **ELEMENTS OF REFERENCE TO IDENTIFY *EX ANTE* THE ECONOMIC AGENTS PREVENTED FROM INFLUENCING THE OPERATION OF THE WHOLESALE TELECOMMUNICATION NETWORK PROJECT<sup>1</sup>**

The Executive Order that amends and supplements several provisions of articles 6<sup>th</sup>, 7<sup>th</sup>, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States, in telecommunication matters (Executive Order of Constitutional Reform), published in the Federal Official Gazette on June 11, 2013, provides in article Sixteenth Transitory that the State, through the Executive Branch, in coordination with the Federal Telecommunications Institute, shall guarantee the installation of a public shared telecommunications network that encourages effective access of the population to broadband communication and telecommunication services, in accordance with the principles contained in article 6<sup>th</sup>, paragraph B, section II of said Executive Order and specific features. In particular, section IV of said provision sets forth that the State, through the Executive Branch, in coordination with the Federal Telecommunications Institute, shall ensure that no Telecommunication Service Provider shall have influence in the operation of the Wholesale Shared Network.

### **1. Definitions**

In order to apply this rule during the Competitive Bidding, the following terms shall have the following meanings:

**1.1. Telecommunication Service Provider:** The Economic Agent, up to its dimension of Economic Interest Group, holding a concession, permit or license that authorizes it to market telecommunication services in Mexican territory, subject to the Federal Telecommunications and Broadcasting Act.

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<sup>1</sup> This document adopts the terms defined in the First Chapter of the General Provisions of the Concession title for commercial use, granted by the Federal Telecommunications Institute for the wholesale telecommunication service shared network.

**1.2. Economic Interest Group:** Group of capable people with similar business and financial interests who coordinate their activities to participate in the market and in economic activities, through the control or decisive influence, direct or indirect, exercised by one of its members over the others.<sup>2</sup>

**1.3. Influence:** The capacity, by law or in fact, of a certain person to significantly participate or intervene, whether directly or indirectly, through any means, in certain decisions including but not limited to administration, definition of policies and goals or the management, direction and execution of the activities of other person(s).

The influence derives from the rights, contracts or other means that by themselves or together grant the above-mentioned capacity.

The existence of a relationship of influence of one person over another is determined on a case-by-case basis, pursuant to indicative criteria of general application.

The **purpose of** the analysis of influence over the Wholesale Shared Network is to identify *ex ante* if the participation of the Telecommunication Service Providers, by themselves or through third parties belonging to their Economic Interest Group, in the Operation of the Wholesale Shared Network, may have as purpose or effect to limit the incentives and the capacity of the Wholesale Shared Network to compete in an effective and independent manner in the provision of wholesale services.<sup>3</sup>

**1.4. Operation of the Wholesale Telecommunication Network:** Includes decision making over the rules to assign the use of capacity, infrastructure and/or telecommunication services and their marketing.

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<sup>2</sup> See, for example, Court Precedent 1.4°.A. J/66, with registry number 168,470, issued in the Ninth Epoch and published in the Federal Weekly Court Report and its Gazette (*Semanario Judicial de la Federación y su Gaceta*) (t. XXVIII), in November 2008, visible on page 1,244.

<sup>3</sup> In accordance with the purpose of the standard expressed in the Opinion of the United Commissions of the Senate of the Mexican Republic, number 2, pages 276 and 277.

## 2. Elements of Reference to identify Influence

In order to verify the performance of the constitutional standard, the Federal Telecommunications Institute issues the following ELEMENTS OF REFERENCE TO IDENTIFY EX ANTE THE ECONOMIC AGENTS PREVENTED FROM INFLUENCING THE OPERATION OF THE WHOLESALE TELECOMMUNICATION NETWORK (ELEMENTS OF REFERENCE).

The Elements of Reference listed below shall be used to identify if the participation that a Telecommunication Service Provider or its Economic Interest Group intends to have in the Competitive Bidding confers or may confer any influence thereto on the Operation of the Wholesale Shared Network.

- a) The capacity or the right to designate, appoint, ban or dismiss at least one of the members of the decision making boards, including but not limited to the administration, the definition of policies and goals or to the management, direction and execution of the activities of another person, or the consultants, directors, managers, administrators or similar;<sup>4</sup>
- b) To have a direct or indirect participation in the estate, even as a trustee, or in the shareholding or partnership structure of another person, when such participation grants its holder the capacity to have a level of representation equivalent to the one provided in paragraph a) above;
- c) Having executed agreements, contracts, covenants or any act that grants any person similar benefits to those provided in paragraphs a) and b) above, or the capacity to have such benefits. As part of this Element of Reference, the following may be evaluated:
  - The capacity or the right to direct or ban decision making, including but not limited to the administration, the definition of policies and goals or the management, direction and execution of the activities of another person;
  - When due to its relevance in sales, purchases, income, production, consumption, financing, loans or debts, a certain person may condition or

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<sup>4</sup> Any person who, due to his/her employment, title or commission in a legal entity or in the legal entities under his/her control or who are controlled thereby, adopt decisions that significantly transcend in the administrative, financial, operational or legal situation of the company or of its corporate group.

direct the decision of another person without just cause. For example, when a person granting a loan or financing to another conditions the provision of such funds to perform or abstain from performing its main economic activities, aside from those necessary to protect its investment, and

- Having rights of ownership or of use or usufruct or beneficiary rights of a significant part of the productive assets of another person.
- d) If there is a blood, affinity relationship or by adoption up to the fourth degree, spouses and concubinary, in the case of individuals<sup>5</sup> that fall into the scope of the assumptions set forth above, and
- e) When expressly acknowledged by the parties.

### **3. Participation of Telecommunication Service Providers and their Economic Interest Groups in the Competitive Bidding**

Telecommunication Service Providers, by themselves or through third parties belonging to their Economic Interest Groups, may not participate individually in the Competitive Bidding. They must do so in collaboration with other Economic Agents through a Joint Venture, so that if they result winners of the Competitive Bidding, their participation in the Joint Venture will not confer nor may confer any influence in the Operation of the Wholesale Shared Network.

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<sup>5</sup> Reference is made to the provisions in articles 292 to 300 of the Federal Civil Code. Family members included within the fourth degree of parentage and therefore within the corresponding legal restriction, are the following. **Blood relationship:** parents, grandparents, great-grandparents, great great-grandparents, sons, grandsons, great-grandsons, great great-grandsons, brothers, half-brothers, uncles and nephews, cousins and second uncles and nephews. **Relationship by affinity:** parents-in-law, step-parents, parents of parents-in-law, grandparents of parents-in-law, great-grandparents of parents-in-law, sons-in-law or daughters-in-law, step-children or dependents, brothers-in-law and step-brothers, nephews of the spouse, second uncles, cousins and second nephews of the spouse. **Relationship by adoption:** Pursuant to article 295 of the aforesaid Civil Code, relationship by adoption only derives from the adoption between adopters and adoptees, and therefore has no legal ties with the affinity or blood relatives of the adopter or the adoptee.