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**COMPETITION LAW AND STATE-OWNED ENTERPRISES – Contribution
from Mexico (COFECE)**

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Competition Law and State-Owned Enterprises

- Contribution from Mexico (COFECE) -

1. State-Owned Enterprises in Mexico: Historical Context

1. Most prosperous and advanced economies in the world promote open and competitive markets, through sound normative and institutional frameworks. This allows them to foster a degree of economic complexity that makes them – predictably and measurably – more resilient to external economic turbulences and prone to economic growth and development.¹
2. However, some countries opt for the creation of State-Owned Enterprises (SOEs) to meet different objectives. Rationalization of governments to promote SOEs in a given economy vary widely from industrial policy objectives, regional development, the supply of public goods, as well as the existence of so called “natural” monopolies where competition is not deemed feasible.²
3. In Mexico, the political, economic and social environment experienced at the beginning of the 20th century led the government to promote the creation of several SOEs in order to meet different public policy objectives, such as industrial development, harnessing strategic sectors and provision of certain goods and services. However, over the decades the Mexican government had acquired or created over 1000 companies, many of which did not fulfill any public policy purpose and that frequently operated at a loss.³
4. In the mid-1980s, Mexico began the transition towards international openness and the entry of new market competitors through the design of horizontal policies to eliminate barriers to trade, intellectual and industrial property, and promotion of investment through standardization, and fostering entrepreneurship and innovation.
5. This was achieved, by joining the GATT (1986) and, subsequently, by negotiating free trade agreements. This paradigm-shift also reduced governmental support towards SOEs.

2. State-Owned Enterprises and Competition Policy in Mexico

6. In order to find a productive balance along with the newly-found trade openness, an institutional redesign through the creation and strengthening of effective regulatory agencies was key to enact guidelines to gauge the benefits of such processes. See Table 1 for a (non-exhaustive) list of sectoral and horizontal regulators throughout the 1990’s and 2000’s.

¹ César A. Hidalgo and Ricardo Hausmann, *The building blocks of economic complexity*, 2009. Available at: <https://goo.gl/1qRiTm>.

² OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, 2015. Available at: <https://goo.gl/TfnDoV>.

³ The Associated Press, *Mexico Pruning List of State-Owned Firms*, Published at Los Angeles Times in 1985. Available online at: <https://goo.gl/vavpi8>.

Table 1. Creation of Regulatory Bodies in Mexico

Sectoral	Horizontal
National Insurance and Bonding Commission (CNSF)	
Energy Regulatory Commission (CRE)	Federal Competition Commission (CFC)
National Commission of the Savings for Retirement System (CONSAR)	
National Banking and Securities Commission (CNBV)	
Federal Telecommunications Commission (COFETEL)	Federal Commission for Regulatory Improvement (COFEMER)
	Federal Institute of Information Access (IFAI)

Note: The former Federal Institute of Information Access (current Federal Institute of Access to Public Information, or INAI), while not an economic regulator, has contributed to economic policy by increasing transparency in regulators' decisions thus playing an important role in disciplining them. The Federal Law on Protection of Personal Data Held by Private Parties is available at: <https://goo.gl/U2e5ut>

7. As displayed in Table 1, the former Federal Competition Commission (CFC) was created in 1993 after the Federal Competition Law was enacted in 1992. The CFC was the first regulatory agency entrusted with overseeing the competition processes in Mexico. Its main challenges were the elimination of failures in regulated markets that limited access to products and services, mainly in telecommunications, energy and transport. However, due to various regulatory provisions, institutional design and the prevalence of some state monopolies, the CFC faced significant obstacles when challenging SOEs' conduct.⁴

8. For example, Telecommunications was the first infrastructure sector to be liberalized in Mexico. Because the privatization process of the telephony state-monopoly (Telmex)⁵ preceded the sectoral law and the creation of the CFC, it missed competition considerations in its design and execution. The main concerns were a lack of effective mechanisms to control the exercise of the Telmex's market power in the regulatory framework.⁶ Regulatory delays presumably favored the permanence of Telmex's market position in telephony markets until the 2012-2013 reforms.

9. An advocacy example is the opinion issued by the CFC in 2006 on a project by the Ministry of Energy aimed to amend the Liquefied Petroleum Gas (LPG) Regulations on first-hand sales, self-supply, operative reach of distribution plants, and foreign investment.⁷ The CFC considered that the condition which determined that first hand sales should take place at the processing centers of *Petróleos Mexicanos* (Pemex) – a SOE and back then, the sole economic agent in the energy sector – would impose logistic limits to distributors that could compete with the state enterprise. Furthermore, the bill included provisions that would diminish access to Pemex's pipelines, prohibit large users from storing LPG and would allocate geographic areas to each distributor.

⁴ ICN Unilateral Conduct Working Group, *Response of the CFC to the Questionnaire on Unilateral Conduct Framework*, 2006. Available at: <https://goo.gl/iTmT6S>.

⁵ Teléfonos de México, SA. The private firm kept the name after the privatization.

⁶ International Competition Network, Competition Policy Implementation Group, *Competition Advocacy in Regulated Sectors*. 2006. Available at: <https://goo.gl/m7vEQ4>.

⁷ Opinion issued by the CFC available in Spanish at: <https://goo.gl/gxxR2H>.

10. Following versions of the bill considered the CFC's recommendations, and in 2007 a more procompetitive regulation was published. However, remaining ideas of market intervention still prevailed among legislators and public officials, as well as among companies that benefited from the *status quo*. Several bills presented before Congress proposed the establishment of fixed prices of basic products such as corn tortilla, beans, rice, milk and so on.⁸

3. COFECE and State-Owned Enterprises

11. In 2012-2013, a series of Constitutional Amendments resulted in the creation of an autonomous competition authority with a functional separation between the investigation and decision-making processes, design that allows COFECE to carry out objective and evidence-based investigations that promote the correct functioning of the markets for the benefit of the overall population.⁹

12. The series of reforms also allowed – for the first time in over 80 years – private capital to undertake a role in the supply chains of the Mexican energy sector. Since then, Pemex is now considered as a productive company of the Mexican State, subject to its regulations and, among others, to the applicable competition legal framework.

13. In 2010, the former CFC opened an investigation and found that since then, Pemex-Refining (a subsidiary of Pemex) conditioned (tied) the sale of fuel to the gas stations, to the hiring of transport service operated by unionized Pemex staff. Pemex-Refining (a Pemex subsidiary) had the power to impose the transport method, due to its high participation in the market (69% of service stations and 64.5% of the annual average volume of cubic meters).

14. In 2013, COFECE fined Pemex-Refining for 651.6 million pesos and Pemex for 1.6 million pesos and ordered the anti-competitive practice to be stopped, given that there was no justification for efficiency gains in practice.

15. After judicial review by the Mexican Supreme Court of Justice, in 2017 they decided that the conducts for which Pemex was fined (tied sales) were part of an authorized constitutional monopoly, for which they were not punishable.¹⁰ However, it stated that with the energy reform of 2013, the company was no longer a constitutionally sanctioned monopoly, therefore, fuel transportation is no longer exclusive to State companies. COFECE accepted the Court's decision and stated that it would continue to monitor the hydrocarbons market and all the markets in which it has a mandate.

⁸ Eduardo Pérez-Motta, *Industrial Policy and Competition Law and Policy In Mexico*, Chapter 11. 2006. Available at: <https://goo.gl/L2be6S>.

⁹ From the 2012-2013 Constitutional Amendments and the publication and enactment of the Federal Economic Competition Law, COFECE has mandate in all Mexican markets, except for telecommunications, where the Federal Institute of Telecommunications (IFT) is responsible for monitoring the competition processes. The Federal Economic Competition Law is available in Spanish at <https://goo.gl/emv7py>.

¹⁰ Mexican Supreme Court of Justice. Press Release No. 011/2017, 2017. Available in Spanish at: <https://goo.gl/ZEd9jh>.

16. In 2015, *Pemex Transformación Industrial* (Pemex TRI), a new Pemex subsidiary was subject to a COFECE investigation for exercising dissimilar supply and first-hand-sale conditions of hydrocarbons to buyers in similar circumstances. However, before the Commission probed them, the company applied for an early close of the procedure, granted by the FECL to those economic agents who are under investigation, provided that they are able to prove before the Commission that the proposed commitments end the concerns on the conduct and potential damages under investigation.^{11,12}

17. COFECE accepted the terms proposed through the settlement, with some adjustments. Thus, it was decided that, to reduce the risk of Pemex engaging in any conduct that may be construed as a discriminatory practice, and to provide transparency concerning the benefits provided by the company in first-hand sales, Pemex TRI should comply with a series of commitments.¹³

18. In August 2018, COFECE decided to fine Pemex TRI, for 418 million 309 thousand Mexican pesos – over 21 million US dollars¹⁴ – for failing to comply with one of the commitments. The settlement included annual presentation of an external auditor's report on the conditions under which Pemex TRI grants benefits of first-hand sales and commercialization of all oil products. The report aimed to verify all competitors receive equal treatment by the company. The delivery should be conducted during the first quarter of each year, over a five-year period, as of 2017's first quarter.¹⁵

19. The first report was delivered almost one year after the first stipulated delivery date. The delayed presentation of the audit hinders COFECE's access to a fundamental requirement for verifying Pemex TRI's compliance with the commitments set forth. Therefore, COFECE deemed Pemex TRI breached the settlement, which merited the fine. The FECL grants Pemex Tri the right to bring the case before the Federal Judiciary Branch to analyze the procedure, and it is currently under judicial review.

4. Conclusions

20. Although there are different legitimate rationalities to promote the development of SOEs, the Mexican government recognizes that a modern economic development policy

¹¹ COFECE, Press Release COFECE-051-2016, 2016. Available at <https://goo.gl/fyhZjm>.

¹² COFECE, *Relative Monopolistic Practice Analysis: Tied sales of Pemex-Refining to Gas Stations*. 2015. Available in Spanish at: <https://goo.gl/jDZFk3>.

¹³ Commitments comprise in the resolution COMP-001-2016-I included not to grant benefits to buyers on discretionary basis, do not suspend first-hand sales to contractual users or commercialize oil products on a discretionary basis, to hire the services of an external auditor that submits a report to the Commission containing the conditions in which Pemex TRI provides benefits in first-hand sales and commercialization of oil products, to update first-hand sale contracts for different fuels to provide a clear and detailed description of the benefits that a purchaser of oil products may have and provide COFECE with data – every six months – on first-hand sales and commercialization of oil products; and publicize the listed commitments.

¹⁴ Exchange rate calculated at 1 USD = 19.18 MXN, consulted October 10, 2018.

¹⁵ COFECE, Press Release COFECE-033-2018, 2018. Available at: <https://goo.gl/HkBNZn>.

must include a transversal competition policy that treats SOEs as other economic agent in any given market, that is be subject to the regulatory framework.

21. COFECE, within its scope of action will continue to carry out competition advocacy and enforcement actions, with special attention to the sectors where SOEs prevail, in order to promote a competition culture and adherence to the applicable legal framework. The purpose is to deter and sanction practices contrary to competition principles that may harm markets and therefore the general public.¹⁶

¹⁶ According to Andrés Aradillas-López, in the COFECE document *Impact of market power on the welfare of Mexican families*, "The welfare loss in the presence of market power is four times higher in the 10% of the population with lower income, than in the 10% of the population with the highest income." Available in Spanish at: <https://goo.gl/DWXYGg>.