

Proposals on economic competition to support the recovery of the Mexican economy

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With the objective of promoting competition and free market access, the Federal Economic Competition Commission (COFECE) publishes this document pursuant to article 12, subsections XXI and XXIII, of the Federal Economic Competition Law (LFCE).

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PROPOSALS ON ECONOMIC COMPETITION TO SUPPORT THE RECOVERY OF THE MEXICAN ECONOMY

The health emergency caused by the COVID-19 virus forced countries around the world to partially or totally close several economic activities. Inevitably, this event has caused important drops in the production of virtually all economies. In Mexico, a contraction by 9.9% in the Gross Domestic Product is expected for 2020.¹

Company closures and the related jobs losses are manifestations of the reduction of economic activity which mostly affects small and micro enterprises because they do not generally have the ability to cope with temporary closures or drastic changes in the demand. In contrast, companies with greater capital are more likely to remain in the markets.

As a consequence, in several activities a lower number of companies is observed and that those that can remain have a greater market share.

In this economic context, public policy actions and decisions taken should be aimed at promoting the participation of a greater number of companies, with the purpose of guaranteeing free market access in the future. They must also guarantee equal opportunities to compete, that is, in order to promote recovery, favoring certain agents in the detriment of others must be avoided.

This is relevant since economic recovery will be more sustainable when it is based on the participation of a greater range of economic agents, whose ability to enter and remain in the market is provided by their capacity to act, innovate and adapt to the needs, tastes and possibilities of consumers, and not for being favored in a particular way by a decision, measure or policy of some authority. Guaranteeing the inclusion and permanence of the largest number of companies according to their ability to compete in the markets can contribute to a better performance of the markets, today and in the future, for the benefit of consumers.

Thanks to competition, companies – primarily small and micro ones – have better access conditions to production inputs, capital, technology and infrastructure for entrepreneurship, innovation, growth, job creation and for satisfying consumer demand.² Likewise, it is because of competition that prices tend fall and the budget of households to increase, which positively impacts their welfare, especially in lower income households.

1. Source: BANXICO <https://www.banxico.org.mx/publicaciones-y-prensa/encuestas-sobre-las-expectativas-de-los-especialistas/%7B6AA0E79F-78BD-5AA3-7ADA-137C44BC2E84%7D.pdf>

2. COFECE (2018) Economic Competition. A Platform for Growth. 2018-2024. <https://www.cofece.mx/wp-content/uploads/2018/03/plataformaeconomica-EN-web2.pdf>

In this context, the Federal Economic Competition Commission (COFECE or Commission) presents this document with proposals for promoting competition in several markets which are relevant for the national economy due to their cross impact (i.e. energy, transport or financial) and/or for being related to generalized consumption goods, whose price have a direct effect in the spending of Mexican families (e.g., medicines or passenger transportation).

These proposals are originated in several market studies and opinions issued by COFECE, and given the current context of economic slowdown are more significant and timely due for their potential to contribute to economic recovery and social welfare.

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1. Facilitate credit assessment for a wider base of the population through the flow of information in custody of the Government to the financial sector, including both traditional banking and Fintech³

Problem

Information on credit behavior of natural persons and legal entities plays an important role for the efficient development of credit markets. The grantor of a credit needs the greatest possible amount of quality information about the borrower in order to decide whether to grant a loan and, if applicable, under what sort of conditions.⁴

The availability of quality credit information for credit grantors when assessing the risk influences: (i) a greater supply of credit, by allowing the evaluation of potential recipients that would otherwise be very costly to assess, and (ii) the reduction of interest rates, by improving the efficiency in the allocation of credit and risk management.⁵

Generally, customer credit information is in the hands of financial institutions. However, the government also has information on the payment history of population who use utilities and services supplied by government entities (such as electricity, water, credits granted by social housing institutions, among others), specially that pertaining to segments of the population who remain unbanked or have never obtained a credit. By providing this information to the financial system, including Financial Technology Institutions (Fintech), the obstacles that this population faces to receive credits could be reduced.

This measure would also allow to use credit as a complement to social programs or governmental measures which aim to mitigate the crisis (such as the “Loans to family-run businesses for reactivating the economy”^{*}).

Proposal

- Create a public credit bureau, in which all interested parties may access in a non-unduly discriminatory way, with information on public utilities such as electricity, water, credits from social housing institutions, and any other information in custody of the government that contributes to assess credit risk of unbanked sectors of the population.

3. COFECE (2017) OPN-007-2017 available at <https://www.cofece.mx/cfresoluciones/docs/Opiniones/V20/6/3953499.pdf>

4. Negrín, José Luis. (2000). Mecanismos para compartir información crediticia evidencia internacional y la experiencia mexicana [Mechanisms for sharing credit information. International evidence and the Mexican experience]. Bank of Mexico. Available in Spanish at: <https://bit.ly/2RWZqIH>

5. COFECE (2014) Study and Recommendations on the competition conditions of the financial sector and its markets. Page 32. Full document available, in Spanish, at: https://www.cofece.mx/cofece/images/Estudios/COFECE_trabajo_investigacion_prot.pdf#pdf

^{*}Federal government financial support, known in Mexico as “*Créditos a la palabra*”, which consists of distributing one million loans of \$25,000 pesos to micro-family businesses to help them during the coronavirus pandemic.

2. Expedite the entry of generic drugs into the market in order to increase the purchase options of Mexican families at better prices⁶

Problem

When a patent expires, it is possible that more than one company may commercialize a generic medicine. The entry of generics into the market allows for a greater amount of medicines to be available to the public at lower prices.

However, in Mexico, on average, more than two years go by after the expiration of a patent for the launch of the first generic. In the United States, the launch is immediate, and in Europe the period is of seven months. Mexican families would save around of 2 thousand 552 million pesos annually if the conditions for entry into the generics market were similar to those of other countries.

Likewise, for those drugs that do face competition from generics, competitive pressure is not enough: six months after the entry into the market of a generic, its price is 20% lower than the original drug, and 28.6% lower after 24 months. In Europe, the price reduction is of 40% after 24 months.

While the recent reforms to the Industrial Property Law⁷ and actions of the Federal Commission for the Protection against Sanitary Risks (COFEPRIS)⁸ contribute to expedite the entry of generic drugs, certain procedures persist that unnecessarily extend the time for their approval. For example, COFEPRIS generally consults the Mexican Institute of Industrial Property (IMPI) about the patents for a drug valid during the health authorization process for a generic. This consultation is not very transparent, and additionally consumes time and resources. The lack of transparency in this consultation gives way for strategic litigation related to the patents, or with the issuance of the sanitary registration in order to delay the entry of generics into the drug market.

6. COFECE (2017). *Study on free market access and competition in the expired-patent drug markets in Mexico*. Available at: https://www.cofece.mx/wp-content/uploads/2017/11/Studies-drug-markets_vF-BAJA.pdf

7. On July 1st, 2020, the new Federal Law for the Protection of Industrial Property was published, which, among other modifications, specifies the basic requirements that a patent must have, specifying the cases in which it shall not be considered an invention. In addition, the new Law includes the semi-annual publication of the list of patents related to inventions susceptible to be used in allopathic medications, which was included in the Law Bylaw still in force. Source: <https://www.basham.com.mx/nueva-ley-federal-para-la-proteccion-de-la-propiedad-industrial/>

8. On August 27, 2020, COFEPRIS reported that the Integral Service Center (CIS) of COFEPRIS will have a special counter so that the pharmaceutical industry that produces generics can quickly carry out their registry procedures so they can start on the day following the granting of the patent for the innovative drug. Source: <https://www.gob.mx/cofepris/es/articulos/cofepris-elimina-barreras-para-la-produccion-de-medicamentos-genericos?idiom=es>

Finally, on the consumer's side, the weak response of the demand for generic drugs is due in part to the fact that the doctor (who does not exactly have the same interest as the patient in purchasing the lower cost medicine) tends to prescribe medicines of a certain brand.

In this regard, the Organisation for Economic Co-operation and Development (OECD) has identified as a problem the fact that doctors can prescribe jointly, the generic name and the brand name, which refers to a mixture of denominations. Thus, when doctors prescribe a brand name, pharmacy employees must comply with such designation, as the drug can only be substituted if the doctor expressly authorizes it. To address this problem, the OECD recommended to oblige pharmacy employees to inform patients about the generic that is available and allow the substitution of medications prescribed for the lower priced available generic when accepted by the patient, unless that the prescription specifically prohibits substitution. It also recommended obliging doctors to prescribe only medications under the active substance without the brand name of the drug.⁹

Proposal

- Make the intergovernmental consultation between IMPI and COFEPRIS transparent, so that laboratories or the general public know about the information contained therein.
- For COFEPRIS to specify in the list of approved reference drugs, the patents that protect the drug and their date of expiration, with the aim of providing transparency to the system of patent binding and protection.
- Assess, in accordance with some international practices, the convenience of including in the Industrial Property Law Bylaw restrictions on the granting of patents which are prone to be used abusively by their holders to block the access for competitors (for example, patents on new uses or incremental innovations).
- Establish that the doctor is obliged to write the generic denomination of the drug in the prescription, to promote demand for generic drugs.

9. OECD (2018). *OECD Competition Assessment Reviews: Mexico*, Éditions OCDE, Paris, pp. 194-195.

3. Guarantee compliance with the legal framework in force regarding the economic dispatch of electricity and the non-unduly discriminatory access to the transmission and distribution grids¹⁰

Problem

Electricity is an input used by all companies and practically all households. Therefore, access to it at the best possible prices improves the competitiveness of the national industry, the purchasing power and the quality of life of families. Mexico, as other countries, has joined several international agreements to reduce the emission of greenhouse gases. To this end, Mexican legislation considers competition as a means to motivate the reduction of electricity generation costs through the investment in cleaner and more efficient technologies and thus generate a multiplier effect that benefits all productive activities and Mexican households.

To allow competition in the generation and supply of electricity, the current legal framework considers two key elements that the Energy Regulatory Commission (CRE, per its initials in Spanish) and the National Center for Energy Control (CENACE, per its initials in Spanish) must guarantee: (i) open and non-discriminatory access by any power plant to the distribution and transmission grids, which remain under control of the Federal Electricity Commission (CFE, per its initials in Spanish), since they represent a necessary input to compete with equal opportunities and have the characteristics of a natural monopoly; and (ii) the economic dispatch criterion of power plants — to take first the electricity bids from the cheapest plant and so on until the demand is satisfied — encouraging competition by reducing electricity generation costs.

On the one hand, preventing open and non-unduly discriminatory access to the National Transmission Network (RNT, per its initials in Spanish) and the General Distribution Networks (RGD, per its initial in Spanish) eliminates the possibility of competing from the market for generation, since these grids are an essential input for bringing electricity from generation plants to users and final consumers.

10. COFECE (2020). OPN-006-2020. Available in Spanish at: <https://www.cofece.mx/CFEResoluciones/docs/Opiniones/V132/28/5125826.pdf>

On the other hand, eliminating or restricting the economic dispatch would mean that the electricity from the plants is taken based in criteria other than the costs for generation. This would imply that power plants with greater generation costs — whose electricity would not otherwise be taken by the CENACE — are dispatched, while other more efficient ones are not. Thus, as the price for electricity is given by the cost of the last plant from which electricity is taken where demand is met, not respecting the economic dispatch would imply that the energy from plants with the highest costs is taken, and therefore, that the price of electricity is higher over time.

Although the Ministry of Energy (SENER, per its initials in Spanish) is empowered to ensure the stability and reliability of the National Electric System (SEN, per its initials in Spanish), non-unduly discriminatory access to the RNT and the RGD and the economic dispatch considered in the Electricity Industry Law (LIE, per its initials in Spanish) must also be guaranteed.¹¹ Therefore, any measure aimed at ensuring the stability and reliability of the SEN must comply with these two requirements. Furthermore, the LIE and the Wholesale Electricity Market Rules foresee several mechanisms that CENACE can and must use to ensure the reliability of the system; for example, the allocation of Related Services, the market for Output Balance, contracting Output by reliability, compliance with the Network Code.¹²

Proposal

- Guarantee economic dispatch and open and non-unduly discriminatory access to the RNT and the RGD. Any rule regarding the reliability or stability of the system must employ mechanisms that do not compromise these objectives in accordance with best international practices.

11. To this end, the CRE and CENACE, pursuant to the powers granted to them in the LIE, have issued instruments and have tools to guarantee that the supply of electricity to users is provided under conditions of safety, quality and continuity. Currently, there are mechanisms that CENACE can and should use to ensure the reliability of the system, such as the allocation of Related Services, the market for Output Balance, contracting Output by reliability, compliance with the Grid Code, among others.

12. These mechanisms are available to CENACE in the following regulations: i) Grid Code (in its chapters on Assignment of Power Plant Units out of merit to maintain Reliability and in the Security and Reliability Criteria), available in Spanish at: <https://bit.ly/3gOjVOP>; ii) Short-Term Energy Market Manual, (for example, regarding Related Services Section 2.2.2. (V)), available in Spanish at: <https://bit.ly/31I2rgf>; iii) Output Balance Manual (for example, the chapter on Reliability Policy), available in Spanish at: <https://bit.ly/30KnyDU>; and iv) Manual for the Interconnection of Power Plants and Connection of Load Centers, (for example, regarding the Remedial Action Schemes and Minimum Interconnection Criteria) available at: <https://bit.ly/3ahEHnj>.

4. Grant in an expedite and non-unduly discriminatory way permits for the import and retail of gasoline and diesel.¹³

Problem

The final price of gasoline reflects competition or its absence in the links of the value chain, from the production/import through to its retail to the public, passing through the wholesale market. Therefore, it is important to ensure that the regulation and its enforcement guarantee competition conditions. In this regard, certain requirements for gasoline import permits, and the increase in the time of resolution of applications for new retail and transfer permits, complicate the participation of private parties in these markets, and therefore obstruct the decrease of fuel prices.

Regarding imports, since November 2018, SENER has not granted new long-term import permits (20 years), which are the ones that actually work to ensure the necessary investments to expand the storage and transportation infrastructure. In addition, for one-year import permits, since 2019 applicants are required to indicate the means by which the goods to be imported will be transported and the physical location of the storage facilities or equipment where they will be received. In turn, since 2018, the open seasons that allow private access to the idle infrastructure of Pemex have been suspended. All of this implies a vicious circle between not having an import permit that supports investment in infrastructure and not having the possibility of importing in order to secure the infrastructure required to obtain it.

Furthermore, since March 25, 2020, SENER suspended its timeframes and legal terms for handling the procedures under its charge as a measure to prevent and combat the spread of the COVID-19 coronavirus, without having been resumed them so far. Indeed, agents interested in renewing their permits are able to enter their applications at the Foreign Trade Desk. However, due to the fact that legal terms and deadlines of SENER to attend to this and other procedures are still suspended, de facto renewal of import permits for one year is halted, hindering the possibility of competition in the wholesale market of fuels.¹⁴

13. COFECE (2020). OPN-007-2020. Available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/V161/2/5192301.pdf>

14. Currently, there are 82 valid gasoline import permits. Of these, 23 are for 20 years (three were granted in 2016 and the remaining 20 in 2018) and 59 for one year. In other words, 28% of the total import permits in force are for 20 years. Regarding one-year gasoline import permits, at the beginning of 2020 there were 80 in force. Of these, 21 have expired without being renewed (26% of the total one-year permits) and 27 more permits (33.75% of the total of one-year permits) will expire in the remainder of 2020. If the renewal procedures of permits are not resumed, at the end of 2020 only 32 one-year permits will remain in force, a reduction of 60% compared to the beginning of the year. Source: https://www.gob.mx/cms/uploads/attachment/file/544889/20200331_Total_de_permisos_de_importacion_vigentes_GASOLINA.pdf

Likewise, a second circumstance that prevents the development of a competed wholesale market is the considerable increase in the resolution time for the granting of new retail permits and their transfer, especially for brands other than Pemex. Since 2018, the resolution time increased by 45 days for Pemex brand permits and 64 days for brands other than Pemex. In addition, according to information provided to COFECE, there are more than 200 requests for transfer, update or new permits related to brands other than Pemex that have not been resolved.¹⁵

The foregoing could partly explain why even though there is the possibility of private participation in the wholesale gasoline market, Pemex supplies 87% of the gasoline. The resolution of applications for the transfer of permits (which allow third parties to acquire stations that were already in operation and change their brand) sometimes takes more than the period of 90 calendar days provided in the Hydrocarbons Law (LH, per its initials in Spanish), without the CRE applying the *afirmativa ficta* (authorization by default) rule before the expiration of said period. As a consequence, there are numerous requests related to brands other than Pemex which have not been resolved yet have not been granted as foreseen by law.

In this sense, it is necessary for the regulation related to the gasoline value chain to be applied promptly and without discriminatory biases, so market participants maintain the incentives and the capacity to compete. This with the objective of fostering more supply and that the final prices paid by Mexican consumers at the service stations are as low as possible.

Proposals

- Eliminate the verification requirement for the means of transport and storage for one-year import permits, and ensure that the granting of import permits for 20 years is carried out expeditiously, avoiding interpreting as grounds for revocation or expiration date that they had not been used due to delays in infrastructure investment projects.
- Ensure that the regulation associated with the processing and resolution of applications for new retail permits, transfers or updates are applied in a neutral and expeditious manner; likewise, that at no time should the authority discriminate in the granting of these permits based on associated brands or specific sources of supply.

15. COFECE (2020). OPN-007-2020, p. 13. Available in Spanish at: <https://www.COFECE.mx/CFCEResoluciones/docs/Opiniones/V161/2/5192301.pdf>

- Make transparent and publish in a timely manner the information on the number of applications for permits for the retail of petroleum products submitted to the CRE, their procedural stage and status; the foregoing should include the transfer procedures, so that cases where the 90-day period provided for in article 53 of the LH has expired can be accessed.
- As long as timeframes and terms do not resume, SENER should take the permits as extended, given the impossibility of applying for their renewal.

5. Include provisions for maximizing competition and free market access in the procedures in the Acquisitions Law, to foster a better use of public resources¹⁶

Problem

The main objective of public procurement is to provide the State with better inputs to carry out its constitutional and legal functions. Therefore, public procurement regulation must lay the foundations to achieve the best conditions for the State in the acquisition of goods and services. Competition in procurement procedures is an ally in complying with the principles of efficiency, effectiveness, economy, transparency and honesty provided for in the Constitution for the use of public resources.

The lack of competition and free market access in procurement procedures has serious repercussions, as it results in an inefficient allocation of public resources to the detriment of society; overprices paid by the government diminish its ability to offer more and better public services. Likewise, these overprices contribute to companies financing possible gifts or bribes to public officials, thus generating a vicious cycle between corruption and lack of competition.¹⁷

Corruption can generate a permanent situation of lack of competition in a market beyond mere public procurement. If the growth of a company is given by its ability to be awarded contracts through acts of corruption and not because of its efficiency, the permanence of other competing companies, even if they are more efficient, could also be put at risk and the may have to exit the market because they do not manage to sell

16. COFECE (2020). Draft General Law on Acquisitions, Leases and Services of the Public Sector [Proyecto de Ley General de Adquisiciones, Arrendamientos y Servicios del Sector Público], available in Spanish at: <https://www.cofece.mx/proyecto-de-ley-general-de-adquisiciones-arrendamientos-y-servicios-del-sector-publico/>

17. COFECE (2016). Recomendaciones para promover la competencia y libre concurrencia en la contratación pública, [Recommendations to Promote Competition and Free Market Access in Public Procurement, p. 25. Available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2017/11/RecomendacionesContratacionPublica-v2.pdf#pdf>

enough to remain in it. Over time, the company which grew by selling dishonestly to the government obtains the power to increase its prices for all its clients, public and private, as it no longer faces competition.¹⁸

Similarly, in times of economic crisis, government procurement through tenders can be a recovery mechanism for companies that do not find room to sell in private markets; but this can only materialize if procurement is truly open and competitive.

To promote greater participation of bidders, the design of the tender rules is essential. On the one hand, these could be fashioned to favor a specific company or, on the contrary, be aimed at the choosing the best possible supplier. In addition, to avoid collusion between participants, it is necessary that the tender rules encourage the presentation of aggressive price bids and make coordination between them difficult.

Direct awards and tenders aimed at a specific winner largely stem from the fact that the current regulatory framework gives a broad discretion to procuring entities to use mechanisms other than open bidding, establish ad hoc requirements, among others.

Proposals

Incorporate into the Procurement Law the following competition-related issues:

- A National Public Procurement Platform, which differs from Compra-Net mainly in that it would be entirely transactional and mandatory throughout the whole procurement process.
- Facilitate international bidding procedures so that procuring units can actually use them, especially in markets where there are few national suppliers.
- Limit the causes for exception for public bidding so that the exception must be based on market research and have authorization from the Head of Administration (except in some justified cases).
- Include as a case of temporary disqualification to participate in procurement procedures, or to enter into contracts, having been investigated and sanctioned for Absolute Monopolistic Practices (collusion) in accordance with the LFCE.¹⁹

18. COFECE (2018). A Competition Agenda towards Integrity in Public Procurement. Available at: <https://www.cofece.mx/wp-content/uploads/2019/06/Public-Procurement-comp-agenda-final-ENGLISH.pdf>

19. Currently, article 60 of the Law of Acquisitions, Leases and Services of the Public Sector considers several assumptions for disqualification by the Ministry of Public Administration, among which collusion is proposed to be included.

- Require a Certificate of Independent Bid Determination, of membership to an Economic Interest Group and the intention to outsource.
- Include the category of “large scale” procurement, for which COFECE must issue a binding opinion on the tender’s guidelines and related documents, prior to the beginning of the procedure.
- Strengthen market research through the issuance of guidelines for its execution.
- Consider mechanisms for prior registration and verification of the existence, legal and administrative capacity of the interested companies.

6. Modernize the regulation for interurban passenger transportation to reduce the concentration of suppliers and allow the population access to better prices and higher quality²⁰

Problem

Federal passenger transportation by bus is the main means of transport between cities in Mexico. In 2017, it mobilized 95.8% of the passengers, which represents 3.7 million trips.²¹

In Mexico, four economic interest groups dominate 95.2% of the routes and control 218 of the 820 terminals, which represent 53.3% of the bus schedules and 50.2% of the passengers mobilized. Furthermore, these four economic interest groups do not compete with each other, since they focus their operations on different regions and routes: 76.8% of the routes are served by one operator; and, when they overlap on a route, they offer different services (for example, one provides a first class service and the other an economy service).

Compared to other countries, prices per kilometer are relatively high, as a consequence of market concentration and little competition in routes. For example, the Mexicali-Tijuana route costs 2.03 pesos per kilometer, while the Amsterdam-Paris route costs 88 cents.²²

According to COFECE’s calculations, the entry of a new competitor in routes previously served by only one supplier could result in a 40% decrease in the average price per kilometer.²³

20. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], p. 9. Available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2019/04/Estudiocompetenciaautotransportefederalpasajeros.pdf>

21. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], p. 79

22. It is worth mentioning that this comparison does not take into account the differences in quality nor inter and intramodal competition levels in the selected countries. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], p. 17.

23. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], pp. 7.

The sector presents regulatory obstacles that limit the entry of new participants in routes, such as undefined criteria that grant discretion to the federal or state authority, lack of clarity in the scope of the permits, or the lack of an *afirmativa ficta* (authorization by default) when non-compliance by the authority of the resolution times of the applications occurs.²⁴ Removing these obstacles would allow a greater number of participants, with more options and better prices for users.

Finally, given that the concessionaires that operate public terminals generally also offer the transportation service, they may have incentives to deny access to the terminal to other operators, or to grant them a less favorable treatment in order to prevent them from competing in the transportation service. Therefore, concessioned terminals could represent a barrier to entry because companies that want to enter the market have to cover the cost of investing in their own terminal, while companies that already provide service in concessioned terminals did incur in such cost.²⁵

Proposals

- Regarding terminals with concessions that have expired or that are about to expire, for example, Central del Norte CDMX (2019) and Querétaro (2020),²⁶ re-tender them and, under the terms of the concession, force open and not unduly discriminatory access to them.
- For the rest of the public terminals, oblige operators to publish transparent and non-discretionary rules of access to said terminals.²⁷
- In addition to publishing the access rules, it will be necessary to empower the Ministry of Communications and Transport (SCT, per its initials in Spanish) to settle disputes between access applicants and administrators of a terminal, establishing expeditious means for the adoption of the measures derived from the resolution of the SCT.
- Ease the obligation of having origin and destination terminals as a requirement to obtain authorization by the SCT for the provision of the federal passenger transportation service, so as to facilitate the options to offer the service to and from different points in cities through waystations or stops on public roads; which will be authorized by the local

24. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], pp. 26-31.

25. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], pp. 21-23.

26. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], pp. 24.

27. The elements must include, at least: (i) the procedure and format of the application for access to the terminal; (ii) the criteria for allocating the use of platforms and spaces; (iii) the terms of the contract between the users and the concessionaires of the terminal; (iv) the rates for access to the terminal and additional services, as well as the collection and billing procedure, (v) regarding the technical operation, the conditions of use of the terminal; (vi) matters relating to the protection of users, punctuality obligations and penalties in the event of delay or cancellation of the service.

authorities, who will also be in charge of monitoring road conditions and user safety. In the case that regulations are established for such purposes, the National Commission for Regulatory Improvement (CONAMER) could issue a guideline to ensure regulatory convergence and one that is neutral to competition.

- Assess the relevance of eliminating the obligation to notify the SCT 30 days in advance regarding route modifications or cancellations, and establish as an obligation that the notice to users is made in advance.
- Do not tie the operation permit of a bus to a specific route and continue to monitor the operation of services, which can be done, for example, through positioning systems such as GPS.
- For the SCT to publish disaggregated information on applications for permits for the operation and exploitation of federal passenger transportation, and also the resolutions when the application is rejected. Include in the regulation a practical and effective procedure to adopt an *afirmativa ficta* (authorization by default) in case the time of the SCT to resolve regarding the authorization of the service expires.

7. Issue guidelines through the National Council for Regulatory Improvement for state and municipal governments to eliminate restrictions to competition in relevant sectors of the economy^{28 29 30}

Problem

Regulation must always be aimed at achieving legitimate public policy objectives, such as security or health. A “good regulation” seeks the best means to achieve these objectives, generates certainty and can contribute to building a favorable environment for business and investments. On the other hand, when regulation unnecessarily restricts the efficient functioning of markets, for example, by limiting entry or by granting privileges to certain economic agents, it generates prices, supply, quality and availability shocks, all to the detriment of the consumer. In recent years, COFECE has identified and proposed the removal of several undue regulatory obstacles to competition in key markets for the Mexican economy, present in state regulations. Some examples are:

28. COFECE y CONAMER (2019). Propuestas de agenda regulatoria subnacional para autotransporte de carga [Proposals for a subnational regulatory agenda for land freight transportation]. Available in Spanish at: <https://www.cofece.mx/propuestas-de-agenda-regulatoria-subnacional-para-autotransporte-de-carga/>

29. 9. COFECE (2018). Transición hacia mercados competidos de energía: Gas L.P [Transition towards competitive energy markets: LP Gas]. Available in Spanish at: https://www.cofece.mx/wp-content/uploads/2018/06/libro-gaslp_web.pdf

30. COFECE (2016). OPN-012-2016. Available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/V16/4/3673619.pdf>

- **LP Gas:** the requirement of municipal permits for the retail sale of LP gas at self-service stores, which the CRE already issues at the federal level.
- **Gasoline service stations:** (i) restrictions to the number of service stations for the retail of fuels, which derive from minimum distances for the establishment of new gasoline stations in urban and rural areas; (ii) requirement for minimum surface of properties to build services stations; (iii) more onerous requirements in environmental and security matters than those considered by the federal norm; or (iv) requirements inherited from contract models for a PEMEX franchise.
- **Freight transportation:**³¹ (i) limit to the number of concessions per person or limit to the number of permits per concession; (ii) setting of tariffs by the authority when reasonable degrees of competition exist; or (iii) zone permits that restrict the provision of the service to a determined area within the entity.

Likewise, in several sectors the existence of pipeline or network infrastructure is needed in order for new entrants to compete. Thus, it is relevant to, for example, enable rights of way and grant permits for the installation of natural gas pipelines, which in certain areas represent an alternative to LP gas, as well as for the construction of new gas stations, petroleum derivatives storage terminals, among others. However, local authorities often carry out bad administrative practices that hinder relevant infrastructure projects.³²

These regulatory failures translate into significant increases in costs for businesses. For example, according to COFECE's calculations, in Sinaloa, obstacles to freight transport have the consequence that users of this service pay an overprice of between 10% and 40%.³³

Pursuant to the General Law of Regulatory Improvement (LGMR, per its initials in Spanish), the National Council of Regulatory Improvement (Council), chaired by the Ministry of Economy, has the power to establish mandatory compliance guidelines for subjects bound by the LGMR, among others, the states. The guidelines figure allows to, in a coordinated manner, point out and eliminate systematic or recurrent regulatory errors, facilitating regulatory improvement and the elimination of regulatory obstacles to competition, especially at the local level. In this sense, the addressees of the guidelines are bound to report to the Council and publish the actions for their implementation.³⁴

31. COFECE (2017). Resolution to File IEBC-002-2015. Available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V214/1/3724988.pdf>

32. According to the OECD, municipal construction permits are the greater obstacle to build new oil pipelines, as municipal governments usually deny or significantly delay the building permits for companies that already possess a federal permit from the CRE for the transport of natural gas through pipelines. Source: OECD (2019). OECD Competition Assessment Reviews: Mexico 2019, p. 30. Available at: <http://www.oecd.org/daf/competition/competition-assessment-mexico-2019-web-eng.pdf>

33. COFECE (2017). Resolution to File IEBC-002-2015, p. 154. Available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V214/1/3724988.pdf>

34. Articles 17 and 18 of the LGMR.

In this regard, since the first sessions of the Council, inter-institutional groups have been formed which have worked on guidelines for the gasoline markets, on which there is a certain consensus amongst its members. In addition, in 2019 COFECE and CONAMER jointly published a document with proposals to remove regulatory obstacles to freight transport in the states of the Federation.³⁵

Proposals

That through CONAMER, the Council promptly issues guidelines for local governments to reform their state laws, at least in the fuel and freight transport markets where there is already consensus on the obstacles and their consequences, with the aim of removing anti-competitive regulatory obstacles. For this purpose, the following could be considered:

For gasolines and diesel

- Eliminate provisions that foresee minimum distances between service stations and eliminate minimum social safeguarding distances, provided that the latter are more demanding than what is established in the NOM-005-ASEA-2016 federal standard.
- Eliminate the provisions that establish minimum surfaces and main fronts that the properties must have to build service stations, since these requirements are not considered in the NOM-005-ASEA-2016 federal standard.
- Adapt or refer technical requirements for the establishment of service stations to those provided for in federal regulations, for example, the NOM-005-ASEA-2016 standard. In any case, refer to coordination actions with federal authorities to streamline procedures for the construction and operation of service stations.
- Adjust the regulations and/or normative provisions that establish the requirement for a state and/or municipal environmental impact statement, opinion or equivalent for any procedure, process or service related with the establishment of service stations or the requirements foreseen in the federal regulatory framework on the matter.
- Eliminate any reference to the authorizations or specifications established by any economic agent that participates in the market for service stations, for example, references to requirements contained in the model contract of Pemex.
- Define and publish the formats, processes, criteria and procedures to resolve applications for authorizations, licenses or permits to build and operate service stations. For example, on the websites of

35. Available in Spanish at: <https://www.cofece.mx/propuestas-de-agenda-regulatoria-subnacional-para-autotransporte-de-carga/>

local authorities.

- Establish response deadlines to applications, considering an *afirmativa ficta* (authorization by default) in the event of the omission of response within said deadlines.

For freight transport

- Replace the concessions regime with one of permits for freight transport service.
- Establish that freight transport is ruled by the principle of tariff freedom, and that any control may only be established in an exceptional way in the absence of competition conditions.
- Eliminate the concepts of unfair competition, ruinous competition and other similar concepts, as grounds for settlement between economic agents.
- Eliminate the requirement of zone-based operation permits and establish a permit to operate across the state.
- Eliminate a maximum number of concessions or permits that an economic agent can hold.
- Eliminate the requirement of obtaining an additional permit from the local authority for the entry of federal transportation.
- Include the possibility of obtaining a permit for freight transport at any moment without a declaration of necessity.
- Repeal the articles related to the preferences for seniority in the sector to obtain permits or concessions.

8. Avoid the imposition of restrictive measures on foreign trade without a previous analysis of consumer harm, so that Mexicans may enjoy more purchase options through trade³⁶

Problem

In general terms, international trade increases the welfare of families by granting them access to more varied products of different qualities and prices, triggers internal productivity, attracts foreign direct investment and causes price reductions for the benefit of consumers.

³⁶. COFECE (2017). Trade policy with a competition perspective. Available at: <https://www.cofece.mx/wp-content/uploads/2018/01/TradePolicywithaCompetitionPerspective.pdf#pdf>

While Free Trade Agreements (FTA) signed by Mexico and the unilateral trade aperture implemented in the last decade guarantee preferential access to a wide range of products, regulatory barriers that limit the entry of goods and services from abroad persist, leading to the inefficiency of national companies that enjoy protection.

There are sectors such as footwear, clothing and steel, in which various tariff and non-tariff measures have been implemented that make imports of these goods from countries without an FTA more expensive and eliminate more favorable options for the consumer. In the case of footwear, for example, COFECE estimates that consumers pay between an additional 6% and 8% to the import tariff — which is already very high — as a result of the estimated price scheme.³⁷

In addition, the Mexican legal framework, as in other countries, allows the use of measures such as tariffs, antidumping duties, quotas and technical regulations, among others. These instruments should be only used when there is a justification and always respond to the public interest of the majority of the population avoiding the protection of some national industries in detriment of all Mexican consumers, including the companies which use imports as inputs. Application of such measures must be done in the least distorting manner for competition.

However, among the members of the World Trade Organization, Mexico ranked eleventh in the number of investigations initiated for establishing countervailing duties, between 1995 and 2014. Thus, until October 2016, there were 9 duties with more than 5 years of validity, 16 with more than 10 years, 5 with more than 15 and another 5 duties with more than 20 years; all of them maintained the countervailing duty level determined by the original resolution for that time. Furthermore, in the last two years, out of 24 validity examinations concluded, only in three of them, the elimination of the corresponding countervailing duty has been resolved and in 21 cases it has been extended.³⁸ Also, in 2015, most of the quotas used (73%) were granted on a “first come, first served” basis, while 24% was awarded directly and only 1.5 of the quotas used were granted by public tender.³⁹

37. COFECE (2017). Trade policy with a competition perspective, p. 41. Available at: <https://www.cofece.mx/wp-content/uploads/2018/01/TradePolicywithaCompetitionPerspective.pdf#pdf>

38. COFECE (2017). Trade policy with a competition perspective, pp. 46-47. Available at: <https://www.cofece.mx/wp-content/uploads/2018/01/TradePolicywithaCompetitionPerspective.pdf#pdf>

39. COFECE (2017). Trade policy with a competition perspective, p. 52. Available at: <https://www.cofece.mx/wp-content/uploads/2018/01/TradePolicywithaCompetitionPerspective.pdf#pdf>

Proposals

- Whenever the demand for quotas exceeds the supply, favor public bidding as a means for allocating import quotas and, in the case that this is not the most efficient mechanism (for example, when the amount or volume available is too high), establish transparent procedures and allocation criteria; as well as a justification of why an allocation mechanism other than the tender was used. On the other hand, it is desirable that the beneficiaries of the quotas are made public in a timely manner.⁴⁰
- Establish and make transparent the methodologies and technical criteria for calculating the dumping margin, the harm and causality assessment to provide certainty about the analysis and effects of the measures to those who request them and to those affected by them.
- Implement a lesser duty rule when anti-dumping duties are applied, that is, the fee is only for the percentage necessary to correct the harm.
- That countervailing dumping duties are applied only if it is proved that they are not contrary to the general public interest, considering the relevance of taking into account, as interested parties in the investigation, the industrial users of the imports and the consumers.
- That the Ministry of Economy more actively initiates ex officio, pursuant article 68 of the Foreign Trade Law, procedures for the review of countervailing duties; this would allow assessing their relevance in shorter terms than that foreseen in the validity tests.
- Avoid that different trade measures are imposed simultaneously in a sector, as happens with steel, footwear and textile.
- Review the functioning of the Foreign Trade Commission to ensure that: (i) its composition is more balanced, incorporating an agency that represents the interests of consumers, for example, the Federal Consumer Prosecutor's Office (PROFECO); (ii) the position of the representatives of the parties affected by a specific measure is heard; (iii) the stenographic versions of the sessions are made transparent and public; and (iv) the information that is prepared for the decision-making of its members makes it possible to assess the potential costs and benefits of the proposed measure, with emphasis on the consumer. Some of these measures may require an amendment to the Foreign Trade Law.

40. According to the study Trade policy with a competition perspective, COFECE identified that, until May 2017, there were few beneficiaries for quotas in 2016 that are available in the Comprehensive System of Foreign Trade Information (SIICEX, per its initials in Spanish). COFECE (2017). Trade policy with a competition perspective, p. 53. Available at: <https://www.cofece.mx/wp-content/uploads/2018/01/TradePolicywithaCompetitionPerspective.pdf#pdf>

9. Retrieve public goods and services whose concessions are about to expire and grant new ones through tenders⁴¹

Problem

The Federal Government has the power to grant concessions to private parties for providing public services or to exploit natural resources, pursuant to the rules and conditions established by the laws relating to the sector and the concession title. Concessions do not create permanent rights or transfer ownership, but merely enable the concessionaire to provide the service or exploit the asset in question in exchange for a fee paid to the State. In general, the legislation determines that these concessions, for example, for the operation of air terminals,⁴² land passenger terminals,⁴³ the operation of railways⁴⁴ and seaports,⁴⁵ among others, will be granted for a certain period, in such a way that the concessionaire can recover its investment and obtain a reasonable profit margin.

At the end of its validity, the corresponding authority may extend the concession, provided that the conditions have been met under the terms foreseen on the law. For example, in the case of railways, extensions to the concession are allowed when the facilities and the quality of the services provided have improved during the term of the concession.⁴⁶ In this regard, it would be necessary to have clear, objective and transparent criteria in case of granting said extensions.⁴⁷

In the case that the extension of a concession is not appropriate or convenient, the State may retrieve the assets that were the subjected to it, or, where appropriate, grant a new one. Above all, for the case of public services where competition is “for the market”, the use of public bidding should be privileged so that the State obtains the best conditions, which allows maximizing the income received from the concession and ensuring that the agent that obtains it is the most qualified to provide the service in question under the conditions and terms that are most convenient for final users.

COFECE has detected that some infrastructure concessions have expired, and will expire in the following years and that they will have to be assigned again, for example:

41. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation]. Available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2019/04/Estudiocompetenciaautotransportefederalpasajeros.pdf>

42. Article 10 of the Airports Law.

43. Article 53 of the Roads, Bridges and Federal Land Transportation Law.

44. Article 7 of the Regulatory Law of the Railway Service.

45. Article 5 of the Ports Law.

46. Article 11 of the Regulatory Law of the Railway Service.

47. COFECE (2019). OPN-008-2019, p. 15. Available in Spanish at: <https://www.COFECE.mx/CFCResoluciones/docs/Opiniones/V118/1/4961363.pdf>

i) Among the most important passenger transportation terminals in the country, two have an expired or soon to expire concession: Central del Norte CDMX [Northern Terminal of Mexico City] (2019) and Querétaro (2020).⁴⁸ In 2019, seven concessions ended.

ii) The titles for port facilities in Cabo San Lucas, in the state of Baja California Sur (2022) and the Huatulco Bays, in the state in Oaxaca (2004).

iii) The six concessions for providing public services of railway transportation will expire in 2027, 2028, 2029, 2032, 2035 and 2048.⁴⁹

Proposals

- That pursuant to article 70 of the General Law of Transparency and Access to Public Information, each corresponding authority complies with the obligation to publish information on the concession titles of passenger land transportation terminals, airports, highways, railway service and ports, among others, with the aim of making available to the public those concession titles that have expired and are about to expire.⁵⁰
- Determine that upon expiration of a concession, the corresponding authority must assess, in a transparent manner, the convenience of extending it and publish the corresponding justification. The deadlines for said extensions, within the maximum timeframes provided for in the General Law of National Assets, must correspond to the findings of the assessment already carried out and be strictly necessary.
- Whenever possible, grant new concessions through public tenders; the corresponding allocation criteria must be transparent, clear and objective, without generating undue advantages in favor of specific participants, including the former concessionaire.

48. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], p. 24.

49. COFECE (2019). Resolution to File DC-003-2018, p. 98. Available in Spanish at: https://www.cofece.mx/wp-content/uploads/2019/03/DC_003_2018_DictamenPreliminarVP.pdf

50. COFECE (2019). Estudio de competencia en el autotransporte federal de pasajeros [Study on Competition in Federal Passenger Transportation], p. 24. Article 70, subsection XXVII.

10. Reform the Ports Law to incorporate competition principles and facilitate tariff regulation when there is a sole supplier of maneuvering services in a port⁵¹

Problem

Mexican commercial ports are logistic nodes where maritime transport converges with railway and land transportation to connect production or import centers with consumption centers in the national territory. The movement of goods in ports is carried out through maneuvering services - loading and unloading, storage and handling, as well as delivery or reception – which are provided by third parties (assignees) who, according to the Ports Law, must – as a general rule through a bid (tender) – obtain a transfer contract from the respective Integral Port Administration (API, per its initials in Spanish).

From 2013 to date, COFECE has issued more than 100 opinions on the documents of these tenders and their respective participants. As a result of these actions, the Commission has observed that in several Mexican ports there are competition problems in maneuvering services, such as: exclusivities and advantages for certain assignees, direct awarding of contracts, delays in conducting tenders that do not allow entry of new participants, who could well offer the different logistics and maneuvering services in competitive conditions, ports with unique suppliers of maneuvering services for a type of cargo, as well as the absence of tariff regulation in cases in which there is no competition.

Examples of this are:

- In the port of Topolobampo, there is only one supplier specialized in maneuvering agricultural bulk, and the tender to award a contract for a second facility specialized in this type of cargo has been postponed indefinitely. Also, the tariffs for their services are not regulated.
- In the port of Veracruz, the assignee specialized in containers has a market share of 85%, which could increase once its new terminal in the expansion zone of the port begins operations.
- In the port of Lázaro Cárdenas a multi-purpose terminal is blocked from participating in automobile embarkation and disembarkation activities, which causes the operator specialized in vehicles to concentrate 100% of the market, without the tariff for the service being regulated.

51. COFECE (2019). OPN-008-2019. Available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/V118/1/4961363.pdf>

- In the port of Progreso a sole assignee is also found for agricultural bulk maneuvering and, in addition, it provides the non-specialized service for these products in the dock located in common-use areas (known as multi-propose terminal), without the tariff for the service being regulated.

To maximize the use of space and port infrastructure, and with the aim that the provision of maneuvering services is carried out at the best price and quality conditions, it is necessary to ensure that: (i) APIs award contracts for the partial transfer of rights through tenders; (ii) in cases where it is economically feasible and convenient, there are two or more terminals or facilities to serve the same type of cargo; and (iii) in cases where it is more efficient to have a single provider, establish tariff regulation that prevents abuses against users, and at the same time encourages investment and the efficiency of the service provider.

Proposals

- Modify article 126 of the LFCE to make explicit the fines and the amounts of the sanctions that may be imposed on APIs for not complying with COFECE's resolutions included in the opinions about the tender's documents. Likewise, assess the relevance of including in article 53 of the Ports Law breaches of measures issued by COFECE as a cause for the nullity of the tenders.
- Establish in the Ports Law that the assignees must obtain favorable opinion by COFECE prior to any modification to their contract.
- Modify the Ports Law to stipulate that the SCT must establish the basis for tariff regulation when the assumptions contained in articles 16, section VIII and 60 are met; that is, when: (i) in a port there is only one terminal for certain cargoes, or a single service provider; and (ii) there is no possibility of new entrants to the port or other ports or modes of transport that could function as an alternative.⁵² Said regulation will be maintained as long as the conditions that motivated it remain.
- That the SCT exercise its powers to establish tariff regulation in terms of articles 16, section VIII, and 60 of the Ports Law, in ports where it has been identified that said assumptions could currently be fulfilled.

52. This implies eliminating the ambiguities present in articles 16 section VIII, and 60 of the Ports Law, which do not establish a clear obligation on the part of SCT to regulate tariffs in the event that the assumptions are fulfilled.

- Incorporate into the Ports Law the obligation to implement tariff regulation when there is a resolution by COFECE that determines the inexistence of effective competition conditions, pursuant article 96 of the LFCE. This declaration could be requested by the SCT, the APIs or the affected users.
- Establish that prior to the expiration of the cession contracts, the authority must transparently assess the appropriateness of granting an extension or not and make public the justification for its decision.

11. Reform the Regulatory Law of the Railway Service to incorporate provisions on competition and promote the articulation of the network⁵³

Problem

The Public Railway Freight Transport Service (SPTFC per its initials in Spanish) is especially relevant for national development, since it allows the mobilization of high volumes of cargo over long distances and at relatively lower prices compared to other services such as road freight transport. In addition, its competitive functioning would contribute to the development of efficient national logistic chains, and has an impact in the lowering of prices of goods for consumers and producers, a necessary condition for regional development and national competitiveness.

The Mexican Railway System (SFM) consists of three backbone networks operated by regional monopolies. In addition, two groups concentrate 95% of the cargo (Ferromex-Ferrosur with 61% and Kansas City Southern de México with 34%). Likewise, the cargo mobilized by railway is concentrated in a few points of origin and destination. Freight transfer between railroad and port decreased from 25.1% to 12.3% between 2007 and 2016.

Also, in 2016, 89.2% of the total cargo mobilized by this means had the sole intervention of one concessionaire and only 10.3% was for interline service involving two companies, while the interline traffic involving three companies represented the 0.4%.⁵⁴ In the same sense, the tariff per-kilometer charged by a concessionaire for completing 5% of a route is between 7.4 and 10.7 times greater than the tariff per kilometer of the concessionaire that serves 95% of the route, in the case of interlineal routes.⁵⁵

53. COFECE (2020). DC-003-2018. Available in Spanish at: <https://resoluciones.cofece.mx/CFCResoluciones/docs/Declaratorias/V116/1/5060375.pdf>

54. OCDE (2020). Regulatory Governance of the Rail Sector in Mexico. p .52. Available at: <https://doi.org/10.1787/c21203ee-en>.

55. File DC-002-2016 of the Commission.

One of the objectives of the Railway Service Law Bylaw (LRSF, per its initials in Spanish) is, among others, to guarantee the interconnection of railways, as well as to ensure the conditions of competition in the public railway transport service, to promote competition conditions between the different modes of transportation and operational efficiency in the provision of the public rail transport service.⁵⁶ In this sense, the efficient functioning of the SFM requires the effective implementation of a regulation that encourages: (i) the interconnection of the network; and (ii) the integration of the SFM with other logistical nodes, such as ports.

The difficulty in ensuring these two conditions is caused, at least in part, by the difficulty faced by the Railway Service Regulatory Agency (Agency) to exercise the powers granted by the LRSF to guarantee interconnection on the railways and establish the conditions and compensations when the concessionaires do not reach an agreement in the cases of haulage rights and of rights of way, as well as to monitor the service tariffs. This stems from the fact that it lacks powers to effectively monitor the performance of the railway system, for example, by not being able to sanction non-compliance of concessionaires to provide sufficient and timely information to operate the service, which makes its regulatory task difficult.

Also, the LRSF empowers the Agency to, by itself or at the request of the affected party (for example, users), establish tariff regulation or fix the conditions and considerations of the rights of way or establish new ones, after resolution of the absence of effective competition by COFECE. However, the procedure provided for such declarations in articles 36 and 47 of the LRSF requires a case-by-case analysis, that is, by route (origin/destination)⁵⁷ for each of the products that are mobilized in this section, which contradicts what is established in the LFCE, since COFECE is the only authority to define the relevant markets; thus rendering expeditious and effective actions in the SFM impossible in the short term.

Finally, as already mentioned, between 2027 and 2029 the exclusivities for the provision granted for the SPTFC to three backbone network holders and one on short lines will expire. This context presents an opportunity to assess the performance of the sector during the validity of the exclusivities, in order to evaluate whether the objectives originally set at the time of their granting were achieved.

56. Article 1 of the Railway Service Law Bylaw. Available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/209_240418.pdf.

57. Article 172 of the Railway Service Regulation.

Proposals

- Review the procedures established in the regulations for the determination of the compensations and conditions for the granting of rights of way and/or the tariff bases for the provision of the SPTFC and for the establishment of new rights of way, so that these are expedited.
- Eliminate from articles 36 Bis and 47 of the LRSF and the corresponding articles of the corresponding Bylaw any reference that interferes with the definition of the relevant market that COFECE makes pursuant the LFCE.
- Make a transparent exercise on the fulfillment of the concessionaires' commitments when extensions are requested on the exclusivity period to provide the SPTFC, or regarding the validity of the concession title.
- Incorporate into the LRSF the classification of infractions and fines for not delivering previously requested information to the Agency or delivering it incompletely or falsely.

12. Reform article 105 of the Constitution to grant COFECE the power to file actions of unconstitutionality on general regulations that violate competition principles⁵⁸

Problem

Regulation must be aimed at achieving legitimate public policy objectives. Unfortunately, it is common to find regulations or acts of authority that, far from following that path, erect undue barriers to entry, favor certain participants over others, or diminish the incentives to compete. All of this damages the economic dynamics and consumer welfare. In recent years, COFECE has identified and proposed the removal of various regulatory obstacles to competition in state and federal regulations.

Initiating actions of unconstitutionality when a regulation could be contrary to articles 28 and 117 of the Constitution would be a tool to strengthen the capacity of COFECE to pursue its constitutional mandate to promote and protect competition. Actions of unconstitutionality are a legal resource that is filed before the Supreme Court of Justice of the Nation (SCJN, per its initials in Spanish, or Court) by means of which a possible contradiction between the Constitution and a norm or general provision of a lower hierarchy, for example, a law or regulation, is

58. COFECE (2018). Economic Competition A Platform for Growth 2018-2024. Available at: <https://www.cofece.mx/wp-content/uploads/2018/03/plataformaeconomica-en-web2.pdf>.

denounced. However, COFECE is not enabled by the Constitution for this purpose, instead it can only bring it before the attention of the Office of the Attorney General of the Republic (FGR, per its initials in Spanish), so that the latter, if deemed appropriate, may file an action of unconstitutionality.

In relation to regulations previously analyzed by COFECE, where opinions have been issued arguing that they may have an impact on competition in the markets, the SCJN has admitted unconstitutionality actions lodged by the FGR on: (i) the Public Works Law and the Procurement Law of the state of Tabasco; (ii) the Human Settlements and Urban Development Law of the state of Coahuila; and (iii) the Mobility Law of the state of Sinaloa. Regarding the first matter, the Court recently invalidated several articles of the procurement and public works laws of Tabasco for contravening article 134 of the Constitution by allowing exceptions to tenders based on indeterminate and discretionary arguments.⁵⁹

It is worth noting that other autonomous bodies do have the power to directly present actions of unconstitutionality before the SCJN related to their respective areas of action: the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI, per its initials in Spanish) and the National Commission for Human Rights (CNDH, per its initials in Spanish).

Being endowed with the power to lodge actions of unconstitutionality would allow COFECE to effectively exercise its autonomy to further effectively protect competition in the markets, by being able to request the SCJN to discuss and, where appropriate, invalidate precepts contrary to the constitutional principles of competition and free market access, without depending on the consideration of the FGR. This would also imply a greater balance for legislative initiatives that could imply direct negative impacts on the population through the generation of barriers or other distortions to the competition process.

Proposal

- Reform article 105, sections I and II of the Constitution to grant COFECE the power to file actions of unconstitutionality against federal and local laws contrary to constitutional guarantee for competition and free market access.

59. See <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6163>.

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