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Competition Enforcement and Regulatory Alternatives – Note by Mexico

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More documents related to this discussion can be found at
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Federal Economic Competition Commission (COFECE)

1. Introduction

1. This contribution explains the enforcement mechanisms provided in the Federal Economic Competition Law (LFCE for its acronym in Spanish) that can impact price and/or access regulation, which are established in Articles 94 and 96. It includes examples of their use by the Federal Economic Competition Commission (COFECE or Commission) in the railway freight and maritime passenger transport services. In the case of Article 94 it describes its possible use in digital markets.

2. The document also describes other forms of interaction between competition law and economic regulation in the hydrocarbons industry in Mexico, which was liberalized in 2013. Asymmetric regulation was incorporated into the liberalization process to control the monopoly power of state-owned oil enterprise, Petroleos Mexicanos (PEMEX), to avoid certain conducts, to make prices of the hydrocarbons' markets more transparent, to allow the entry of new competitors using PEMEX infrastructure, among others. Recently, asymmetric regulation has been removed. This experience highlights the increased need for a competition authority to act in regulated sectors where regulatory modifications increase the likelihood of collusion and abuse of dominance.

2. Competition Enforcement and its Interaction with Economic Regulation

2.1. Enforcement actions with possible regulatory consequences

3. The LFCE provides competition enforcement mechanisms that can impact economic regulation. These are established in Articles 94 and 96 of the law. Both provisions are explained in the following sections.

2.1.1. Article 94: Market investigations

4. Article 94 was introduced in the 2013 constitutional reform and was introduced in a new LFCE in 2014 with the purpose of identifying and remedying barriers to competition and essential facilities. This provision allows the Commission to analyze a specific market when certain indications may lead the authority to believe that there are distortions that affect the competition process which do not necessarily stem from the conduct of a specific economic agent, but may be the result of structures, market conditions or regulations. Therefore, the procedure established in this article is not intended to sanction anticompetitive conducts carried out by economic agents, but rather to identify structural problems through an investigation of a specific market, to order their correction through various remedies (described in the proceeding paragraphs of this section of the contribution).

5. The LFCE defines barriers to competition as any structural characteristic, fact or act of economic agents that prevents access to competitors, limits their ability to compete

in the markets or prevents or distorts competition, as well as legal provisions that unduly produce such adverse effects to the competitive process.¹

6. To eliminate such barriers to competition, Article 94 empowers the Commission to impose two types of remedies:

- behavioral, which oblige economic agents to act in a specific manner or cease performing acts that distort the competitive process; and
- structural, which allow modifying the structure of a market, including the possibility of divestiture of assets, rights or social parts, with the objective of generating or restoring competitive conditions in the markets.

7. In addition, COFECE may issue recommendations to authorities at any level of government to eliminate the regulatory barriers detected.

8. Essential facilities are considered to be the set of elements (such as goods, infrastructure, rights, among others) which do not have close substitutes and whose reproduction is not feasible from a technical, legal or economic point of view by another economic agent, that are controlled by one or several economic agents with substantial market power, and whose access by other economic agents is indispensable for the provision of goods or services in one or more markets.² Through the procedure of Article 94 the Commission may determine their existence and establish the rules for their access and use by other economic agents.

9. Hence, Article 94 is considered a "hybrid regulatory" tool that, on the one hand, has the rigor of an investigation and complies with the essential formalities of this proceeding, and on the other hand, allows the application of regulatory remedies.

10. When using this tool, the Commission has all the investigative powers and tools it uses to detect anticompetitive conducts, including information requests, on-site searches, hearings, forensic analysis and screenings. In addition, this article provides a post-investigation stage similar to the trial-like procedure of monopolistic practices, where the economic agents involved have the opportunity to present arguments and offer evidence to defend themselves from wrongdoing which will be assessed by the Board of Commissioners before a final decision is reached.

COFECE experience with the use of Article 94

11. Since 2014, the Commission has used Article 94 in eight market investigations.³

¹ Article 3, section IV of the LFCE.

² Article 60, section IV of the LFCE.

³ Provision of air transportation services used by the Mexico City International Airport (AICM) for its landing and/or take-off services (slots), as well as the market for airport services offered by the AICM, necessary for landing and/or take-off procedures (IEBC-001-2015); Public service of freight transportation in each of the eighteen municipalities of the state of Sinaloa, used for the transportation of: construction or stone materials, agricultural inputs and products, their derivatives and freight in general (IEBC-002-2015); The production, distribution and commercialization of malting barley seed and grain for beer production (IEBC-001-2016); Port, maritime and land transportation services for the commercialization of agricultural bulk and general freight in the port of Progreso, in the state of Yucatan (IEBC-002-2016); Production, distribution and/or commercialization of bovine raw milk for industrial use with origin and/or destination in the state of Chihuahua (IEBC-002-2017); Accreditation, conformity assessment and standardization services in the national territory (IEBC-003-2017); Card payment systems whose processing involves a

12. The most relevant lesson in the use of Article 94 derived from the determination of slots at Mexico City International Airport (AICM for its acronym in Spanish) as essential facilities. In this case, the Commission issued a decision determining that the AICM runway and related infrastructure constituted an essential facility and that its management was generating anticompetitive effects in the market of air passenger transportation. Therefore, COFECE ordered a set of procompetitive rules to be put implemented by AICM and the sectoral regulator, the Ministry of Public Transport (SCT for its acronym in Spanish), including an auction for the allocation of slots.⁴ After this decision, one of the affected airlines filed an appeal challenging the Commission's decision.⁵ The specialized court that reviewed the case ruled that COFECE's powers to regulate access to essential facilities are limited in the presence of a sector regulator that is granted the power to regulate operational and technical matters and that slot allocation is a matter of technical and public policy consideration pertaining to SCT.⁶ On the other hand, SCT issued regulation contrary to COFECE's resolution, against which the Commission filed a constitutional controversy before the Supreme Court. The Supreme Court dismissed COFECE's controversy.⁷

13. This experience generated an isolated judicial criterion related to the scope of the Commission's powers to regulate access to an essential input when a sector regulator exists. From this experience, it is possible to conclude that the Commission may exercise its regulatory powers on essential facilities in the absence of a sectoral regulator.

14. In two other cases (freight transportation services in Sinaloa and milk in Chihuahua), the Commission determined that the competitive process was flawed by the existence of regulatory barriers and issued the non-binding recommendations provided by Article 94. From these cases, COFECE learned that the potential impact on the modification of anticompetitive provisions in the regulation of Article 94 is similar to that of non-binding opinions.

Possible use of Article 94 in digital markets

15. The Commission's experience with market investigations has contributed to identify Article 94 as a possible tool to analyze digital markets and the problems that arise in them. For example, Article 94 allows analyzing and correcting behavioral barriers undertaken by economic agents who, despite not having substantial market power, may perform behaviors that accelerate the market "tipping point" and affect the competition process. In this regard, international discussion has warned that the intervention of the competition authorities through traditional tools may occur late, when the rest of the potential entrants can no longer compete with the platforms that have consolidated. Thus, Article 94 would allow the Commission to intervene at an earlier stage to, if necessary, establish remedies to counteract a potential anticompetitive effect within the market.

clearinghouse (IEBC-005-2018); and Aircraft fuels, which includes production, storage, transportation, distribution, commercialization, retail and related services (IEBC-002-2019) .

⁴ Case analysis COFECE August 2017, available in Spanish at: <https://www.cofece.mx/cofece/images/Promocion/Historias/SlotsVer-final-la-buena.pdf>

⁵ Press Release COFECE-030-2019, available at: <https://www.cofece.mx/wp-content/uploads/2019/05/COFECE-030-2019-English.pdf>

⁶ First Collegiate Tribunal Specialized on Competition. R.A. 142/2018.

⁷ Supreme Court's ruling of November 2019, available in Spanish at: <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2019-11-29/26112019%20PO.pdf>

16. Article 94 could allow, for example, for the imposition of behavioral remedies that have been the subject of international discussion as possible solutions to the lack of competition in these markets, which include: (i) the establishment of codes of conduct applicable to dominant platforms in the interest of prohibiting certain conducts; (ii) the prohibition of self-preferential or differential treatment measures; (iii) data and protocol interoperability; (iv) data portability, to allow the migration of user data from one platform to another; and (v) divestiture and functional separation of digital platforms that have the ability to exercise market power and distort the competitive process.

2.1.2. Article 96: Effective Competition Conditions

17. Article 96 of the LFCE empowers the Commission to investigate and, if appropriate, decide on effective competition conditions (or lack thereof) in a specific market. In the absence of effective competition conditions, the sector regulator may issue measures to improve competition in the affected market.

18. These types of decisions are issued when foreseen by a sectoral regulation or by decree of the Federal Executive. The following sectoral regulations establish the participation of COFECE through the procedure of Article 96:⁸

- Transportation sector
 - *Railway Service Regulatory Law* – in order to i) establish rights of transit between concessionaires; and ii) establish tariff regulation for the public railway transportation service.
 - *Airports Law* - in order to establish tariff regulations for airport services, as well as for the leasing and payment for complementary services.
 - *Civil Aviation Law* – in order to establish tariff regulation for air transportation services.
 - *Roads, Bridges and Federal Freight Transportation Law* – in order to establish tariff regulation for federal freight transportation service tariffs in any route or routes.
 - *Ports Law* – in order to establish tariff regulations when there is only one terminal or service provider for certain cargo in a port.
 - *Maritime Navigation and Trade Law* – in order to: i) establish tariff regulation in the provision of maritime services, both for cargo and passengers, i) establish tariff regulation in the provision of transport towing services, and iii) reserve the provision of certain international transport of deep-sea cargo or cabotage to be performed only by Mexican shipowners.
- Energy sector
 - *Electricity Industry Law* establishes that when the Ministry of Energy, the Energy Regulatory Commission (CRE for its acronym in Spanish), the National Energy Control Center or any other person considers that there are no effective competition conditions in any market of the industry, it will request COFECE to perform the corresponding assessment.
 - *Hydrocarbons Law* – in order for CRE to: i) eliminate tariff regulation and ii) determine whether franchise conditions or supply limitations may be

⁸ Up to May 2021.

established in gasoline and diesel contracts entered into by PEMEX, its subsidiary productive companies or its affiliated companies.

- *Regulation of the Activities* referred to in *Title Three of the Hydrocarbons Law* provides that CRE may establish tariff regulations for the non-pipeline distribution of LP gas and other petroleum products when COFECE determines there are no conditions of effective competition.
- Financial sector
 - The *Transparency and Regulation of Financial Services Law* establishes that COFECE may issue an opinion on the existence of competition conditions with respect to passive, active and service operations performed by Financial Institutions, and may determine whether inflation exists as well as the corresponding relevant markets, in order for the Central Bank to establish regulation.

19. The investigation procedure of Article 96 may be initiated: i) ex officio; ii) by request of the sectoral regulator; iii) by request of an affected party; or iv) by request of the Federal Executive (by its own accord or through the Ministry of Economy). Also, as in the case of Article 94, when the investigation is concluded, and a preliminary investigative opinion is issued, and a post-investigation stage similar to the trial-like procedure will be initiated.

20. Once COFECE issues a final decision on the existence effective competition conditions, (or lack thereof) the corresponding authority is responsible for implementing the measures provided by its regulation in order to establish conditions for effective competition to prevail and thus promote the efficient operation of that market. Some of these measures could be, for example: the imposition of maximum prices, the regulation of service tariffs or the adoption of rules of access into the market. The following section provides examples of the exercise of this power.

COFECE's experience with the use of Article 96

21. In February 2020, the Board of Commissioners determined the lack of effective competition in 20 routes of the public freight railway transportation service of petrochemicals originating in the southern region of the state of Veracruz.⁹

22. The state of Veracruz represents 11% of the national chemical industry and 48% of the Mexican petrochemical industry. It is the location of 4 out of 7 of PEMEX's (the Mexican oil SOE) petrochemical complexes. Particularly, chlorine, ethylene oxide, anhydrous ammonia and caustic soda are inputs for over 50% of processes in the pharmaceutical, fertilizers, food-processing, cleaning and personal care, automotive, construction and other industries in the manufacturing sector. Transport of these raw materials requires diminishing risks for the population and the environment, rendering rail as the only technically feasible means of transport.

23. The Commission found that these routes are entirely operated by only two companies which can impose conditions on users of this service in their respective routes, and users cannot substitute these services with other means of transport. Thus, COFECE formally declared the lack of effective competition conditions and noted that the sectoral regulator could regulate rates or determine new trackage rights to open new transport alternatives if it deemed necessary.

⁹ Press Release COFECE-004-2020, available at: <https://www.cofece.mx/wp-content/uploads/2020/02/COFECE-004-2020.pdf>

24. Consequently, and in accordance with COFECE's resolution, the LFCE and Articles 36 and 47 of the *Railway Service Regulatory Law*, in August 2020 the sectoral regulator, the Regulatory Agency of Rail Transport, enacted tariff regulation on those routes, consisting in the establishment of maximum tariff per ton-km for each portion of the route and product combination. This is the first time that the sectoral regulator was able use its powers to regulate based on a Commission's resolution.

25. In July 2020, the Commission initiated a procedure to determine the existence of effective competition conditions in the services for maritime passenger transport services in routes with origin or destination in the northern zone of the state of Quintana Roo and in related services. In February 2021, the Commission issued a preliminary investigative opinion concluding that one supplier has a high market participation and the capacity to fix fees, without any other competitor being able to counteract this power. The current stage in the process allows interested parties to present arguments and offer evidence which will be assessed by the Board of Commissioners before a final resolution is made. If the sense of this preliminary document is confirmed, the transport regulator will be able to establish fee regulation for these services.

3. Other forms of interaction between the competition law and economic regulation

26. Economic regulation has the purpose of promoting and protecting important public policy goals. However, attaining these goals can be done in multiple ways, some of which may limit or favor anticompetitive conducts.

27. This section describes the interaction between potential enforcement of the LFCE and the sectoral regulation of the energy sector, which was liberalized in 2013 through a constitutional reform. The reform implied a transition from a model with monopoly state-owned enterprises (SOEs) in the energy sector to one open to competition in several markets within these sectors.

28. In the liberalization process asymmetric regulation was put in place to control the monopoly power of SOEs by proscribing certain conducts, making prices transparent, to allow the entry of new competitors using the SOE's infrastructure, among others. However, recent regulatory reforms eliminating asymmetric regulation increase the possibility of said SOEs breaching the LFCE by engaging in anticompetitive conduct, and therefore imply a greater likelihood of enforcement actions by the competition authority.

29. This contribution will present the recent regulatory modifications of the hydrocarbons industry, which are described in the following section.

3.1. Hydrocarbons industry¹⁰

30. After the constitutional reform of 2013, a Hydrocarbons Law was enacted in 2014,¹¹ which included precepts to deal with the implications that PEMEX's market power could have on the market's competitive dynamic. It established that the Energy Regulation Commission (CRE per its acronym in Spanish) would subject PEMEX's wholesale or

¹⁰ Available in Spanish at <https://legislacion.scjn.gob.mx/Buscador/Paginas/AbrirDocReforma.aspx?q=u+uol4XmeVVQSBV20oBZUwKbL6CZoOyjjSPRLBogj1bkoQYkAFYi1cm0NrdziJ/TCZhoLoX/u5LNk0at/CgAU3GSidnd3lyH0lozkzBhF8IbuDam4qfLSjeFUBO/SD5d>

¹¹ Thirteenth Transitory of the Hydrocarbons Law of 2014.

“first-hand” sales (VPM for its acronym in Spanish) of hydrocarbons, petroleum products or petrochemicals to asymmetric regulation principles.¹²

31. This asymmetric regulation had the purpose of limiting PEMEX's dominant position in wholesale market, which could allow it not only to determine market prices but to impose disadvantageous conditions on those retail stations purchasing from the SOE in this market. This regulation would help achieve greater participation of economic agents in the wholesale market, promoting its competitive development.

32. For example, among others measures PEMEX:

- Could not tie the use of its franchise brand in service stations and wholesale activities.
- Could not establish exclusivities in its wholesale activities, in order to allow new private entrants to access supply of gasoline and diesel through a wholesaler other than PEMEX.
- Must report to CRE and make public the information related to discounts and the criteria to award these so that they are not granted in a discriminatory manner.
- Must submit its commercialization contract models to be evaluated by CRE.
- Must report to CRE the breakdown of the calculation of gasoline and diesel wholesale prices

33. Such measures are particularly important considering that PEMEX, at that moment, was the only wholesaler. As of today, it still is the main participant in the wholesale market, supplying 83% of the national gasoline market and 73% of diesel in 2020.¹³

34. In May 2021 the Hydrocarbons Law was amended to eliminate this asymmetric regulation including the requirements of VPM and commercialization contracts, the publication of information, the breakdown of invoices, and prohibitions such as conditioning, denying and/or discriminating in the sale of gasoline and diesel, among others.

35. Therefore, this amendment opens up opportunities for PEMEX to engage in abuse of dominance conducts foreseen in the LFCE such as imposing exclusivities or conditioning supply in wholesale activities, or even refusing access to its infrastructure – thus, increasing the need for vigilance and likelihood of investigations by COFECE into possible anticompetitive conducts.

¹² Press Release COFECE-011-2021, available at: https://www.cofece.mx/wp-content/uploads/2021/04/COFECE-011-2021_ENG.pdf

¹³ Data prepared by COFECE with data from the Energy Information System of the Ministry of Energy. available at <https://sie.energia.gob.mx/>

Federal Telecommunications Institute (IFT)

4. Introduction

36. In regulated sectors, the coordinated intervention of the competition authority and the sectoral regulator is essential to achieve common objectives through the protection and promotion of competition. However, divergences between these authorities could emerge because regulators may have specific objectives and tools according to their legal mandate or the context of the sector they regulate. In Mexico, this divergence does not exist in the telecommunications and broadcasting (T&B) sectors, since the Federal Telecommunications Institute (IFT) is both the regulator and the competition authority in those sectors.

37. In this document, the IFT presents an overview of its legal and institutional framework; it explores the impact of competition enforcement in economic regulation; and it shares some of the tools, case studies and its experience on competition enforcement and regulatory alternatives using such tools.

5. Legal and Institutional Framework

38. The IFT's primary objective is to regulate the use, development, and operation of the radio spectrum, the public telecommunications networks, access to active and passive infrastructure, satellite orbits, satellite communication, the provision of public T&B as services of general interest, their convergence, the rights of users and audiences, and the competition process in these sectors in order to contribute to the purpose and exercise of the rights established by Articles 6, 7, 27, and 28 of the Mexican Constitution.¹⁴ In addition, the IFT has to regulate and promote competition and the efficient development of T&B within the scope of the powers conferred upon it by the Mexican Constitution and the applicable laws.¹⁵

39. Therefore, the IFT has a double mandate and it is in charge of applying the Federal Telecommunications and Broadcasting Law (LFTR, by its acronym in Spanish) and the Federal Economic Competition Law (LFCE, by its acronym in Spanish), exclusively in these two sectors. As sectoral regulator, it has to protect and promote the process of competition as the Constitution and the LFTR establishes, which means that competition is in the IFT's DNA.

40. The application of competition law and sectoral regulation presents different advantages, depending on the specific case. For example, regulation can have advantages, as a preventive approach and the *ex ante* establishment of asymmetric obligations provides greater certainty to economic agents (undertakings) regarding the application of competition law; additionally, the interventions of the regulator can be applied and achieve its objectives more quickly than those of the competition authorities.¹⁶ Competition law can be more effective on investigating and punishing behaviors that have already been identified in the market, through *ex post* intervention in specific situations.

¹⁴ Article 1 of the LFTR.

¹⁵ Article 7 of the LFTR.

¹⁶ OCDE (2019). *Independent Sector Regulators- Background Note*, p. 7. Working Party No. 2 on Competition and Regulation. Available at: [https://one.oecd.org/document/DAF/COMP/WP2\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2019)3/en/pdf)

41. Thus, the coordinated and complementary action of both approaches allows achieving better results than single institutional action, in particular, when:

- The competition authority applies the law effectively and guides the regulator in the application of competition principles.
- The regulator uses its technical capacity and knowledge of the sector to promote competition through a pro-competitive regulatory framework and avoids creating unnecessary distortions through regulation.

42. The IFT's competition and regulatory functions have been highly complementary in practice. The integration of these functions in the same institution presents advantages in terms of the knowledge and the experience that it is capable of acquiring in relation to the operation of the sectors and the characteristics of the competition processes developing in them.

43. Some of the tools that the IFT holds on competition enforcement and regulatory alternatives, provided for in the LFCE and in the LFTR are the following:

1. To determine Preponderant Economic Agents (AEP, by its acronym in Spanish) in the T&B sectors and establish asymmetric regulation of said agents in order to eliminate barriers to competition and, thereby, avoid affecting end users; impose limits on national and regional frequency concentration, concession and cross-ownership that controls various media;¹⁷
2. To determine economic agents with Substantial Market Power (SMP) and, where appropriate, impose the corresponding regulation;¹⁸
3. To prevent, investigate and combat monopolies, monopolistic practices, mergers and other restrictions on the efficient functioning of markets, and impose sanctions derived from such conduct;¹⁹
4. To order measures to eliminate barriers to entry; determine the existence of essential facilities and regulate their access, and order the divestiture of assets, rights or social parts of economic agents in the proportions necessary to eliminate anti-competitive effects;²⁰ and
5. To declare the existence of effective competition conditions and, where appropriate, the extinction of obligations imposed on AEPs or undertakings with SMP.²¹

44. In this regard, the relevance and significance of regulatory activity in matters of economic competition, T&B, make it essential to have absolute autonomy in the exercise of their functions, subject to eminently technical criteria and unrelated to any other interest.

¹⁷ Article 28 of the Mexican Constitution, 16th paragraph; and articles 262 and 285 of the LFTR.

¹⁸ Articles 15, subsection XX, 264, 279, 280 and 284 of the LFTR provide for the IFT's powers to determine the existence of agents with SMP, which is carried out in accordance with the procedure established in the LFCE (article 96). The imposition of measures derived from said determination is provided for in articles 281 to 283 of the LFTR.

¹⁹ Articles 10 and 12, subsection I, of the LFCE.

²⁰ Article 12, subsection II, of the LFCE.

²¹ Article 12, subsection XI of the LFCE and article 15, subsection XXI of the LFTR; the determination of economic agents with SMP will be carried out in accordance with the procedure established in the LFCE (article 96).

45. Moreover, the legal framework applicable to the T&B sectors in Mexico establishes a close and coherent relationship between regulation and the application of competition policy. In particular, the LFTR contains multiple provisions on asymmetric regulation for AEPs or undertakings with SMP, which depend on the assessment of competition conditions.

46. For example, the LFTR explicitly establishes that AEPs in the T&B sectors could be declared with SMP; in this case, the IFT could impose specific obligations, in accordance with the provisions of the LFTR. An AEP (determined in accordance with the sectoral regulation) in any of the sectors regulated by the IFT, can also be declared with SMP in a relevant market (the determination of the relevant market and SMP is carried out in accordance with the LFCE) and specific regulation can be imposed to avoid effects on competition, in accordance with the LFTR. We should keep in mind the fact that competition law enforcement is only one of the tools at the disposal of IFT and that the sectors under its jurisdiction include a large number of markets that exhibit economies, depending upon essential facilities and with dominant players, that demand complementarity and harmonization between sectoral and competition policies and laws.

6. Overlaps between Competition Law Enforcement and Economic Regulation

47. The IFT harmonizes the objectives pursued by both the LFTR and the LFCE in several documents that guide its actions and that permeate its entire organizational structure.

48. Some of them are briefly described below:

- *IFT's Annual Work Plan:*²² The IFT publishes the Annual Work Plan (PAT, by its acronym in Spanish), which is a short-term instrument that manages the activities it carries out annually. The PAT defines institutional strategic elements that are the mission, vision, objectives and strategies of the IFT. Within its institutional mission, the IFT, among other actions, promotes access to T&B technologies and services in the context of the digital ecosystem.
- *IFT's Regulatory Vision of Telecommunications and Broadcasting 2019-2023:*²³ The IFT is aware that regulatory and public policy objectives evolve over time, which is particularly true for telecommunications services that are essential for digital transformation and for the improvement of people's lives. For this reason, the IFT prepared a short and medium term document that guides the projects it carries out in accordance with its institutional mandate. In this sense, on September 18, 2018, the document "Regulatory Vision of Telecommunications and Broadcasting 2019-2023" was submitted to public consultation, raising the analysis of the issues that are considered to have a direct or indirect effect on the services of T&B, as well as in its regulation, given the technological evolution and new business models. Among the general topics proposed for the 2019-2023 period are:
 - Deployment and sharing of T&B infrastructure
 - Boost to economic competition and identification of essential inputs

²² PAT 2021. Available in Spanish at:

<http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/pat2021.pdf>

²³ IFT's Regulatory Vision 2019-2023. Available in Spanish at:

<http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/1vision19-23.pdf>

- Radio spectrum management
 - Net neutrality
 - IPv6
 - Big data and data exploitation
 - Digital economy
 - OTT services
 - Empowerment of users
 - Audiovisual content in T&B
- *IFT's Roadmap 2021-2025:*²⁴ This Roadmap establishes the strategic framework to facilitate the development of the digital ecosystem, from a holistic and collaborative perspective, in the short and medium term, which contributes to the socioeconomic development of Mexico, covering aspects that range from promoting the development, deployment and efficient use of T&B networks and infrastructure, competition and free competition, the development of the digital ecosystem and the adoption of new technologies and digital use cases. It sets strategies, regulatory action lines and tactical agendas that guide IFT's administrative units to develop specific projects that aim to help bridging the digital divide; assuring the quality, diversity and plurality of services; protecting users' and audiences' rights; and coordinating actions with stakeholders.
 - *Regulatory Impact Analysis:* The LFTR and the Guidelines of Public Consultation and Regulatory Impact Analysis of the IFT establish that all proposed policies, laws and regulations have to undergo a public consultation process and an ex ante Regulatory Impact Analysis (RIA). RIA is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives, and it includes a competition analysis. In general, the IFT identifies the possible effects on competition that the regulation proposal could generate when it enters into force, by asking the following questions referred to in the Guidelines:

(...) Identify the possible effects on competition that the regulation proposal might generate upon its entry into force.

Does it limit the number of suppliers of goods and services?

Does it limit the ability of service providers to compete?

Does it reduce the incentives of service providers to compete vigorously?

(...) Describe the obligations, behaviors or actions that must be fulfilled upon the entry into force of the regulatory proposal (regulatory action), including a justification on the need for them.

7. IFT's Experience and Case Studies Using Competition and Regulatory Tools

49. The cases presented below show:

²⁴ Available in Spanish at:

<http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/estrategia20202025.pdf>

1. The role of the IFT, as a competition authority, in the design of sectoral regulation, and
2. The interaction of different tools provided in the LFCE and in the LFTR to address competition problems.

7.1. Case study 1: Preponderance and AEPs in the T&B Sectors

50. The 2013 constitutional reform mandated the IFT with determining the AEPs in the T&B sectors, and imposing asymmetric regulation on those agents. This determination must be based on the national participation in the provision of T&B services, directly or indirectly, greater than 50% (fifty percent), whether measured by the number of users, subscribers, audience, by the traffic on their networks or by the capacity used in them.²⁵

51. Consequently, in March 2014, the IFT determined the existence of an AEP in the Telecommunications sector (AEPT)²⁶ and an AEP in the broadcasting sector (AEPR).²⁷ The IFT determined the group in which *América Móvil* takes part, as the AEPT and the group in which *Grupo Televisa* (GTV) takes part, as the AEPR. The IFT imposed asymmetric measures aimed at modulating their behavior on the markets in which they participate.

52. The figure of preponderance allows imposing asymmetric regulation without the need to resort to traditional competition tools, such as the declaration of SMP. In the case of the telecommunications sector it seeks to: i) guarantee access to wholesale services to competitors of the AEPT in non-discriminatory and competitive terms, ii) prevent the AEPT from engaging in improper (anti-competitive) conduct or practices in the provision of wholesale and retail services, and iii) provide better services and greater information to end users.

53. Since the creation of the IFT, the markets of fixed and mobile telecommunications have substantially reconfigured since the AEPT market share in telecommunications has decreased, more operators offer their services and the mobile broadband market grew more than 255%.

54. The following charts show the growth of the mobile and fixed broadband internet services.

²⁵ Articles 262 to 277 of the LFTR and Eighth Transitory Article, subsections III and IV of the Telecommunications Constitutional Reform, published in the Official Gazette of the Federation on June 11, 2013. Available in Spanish at:

https://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013

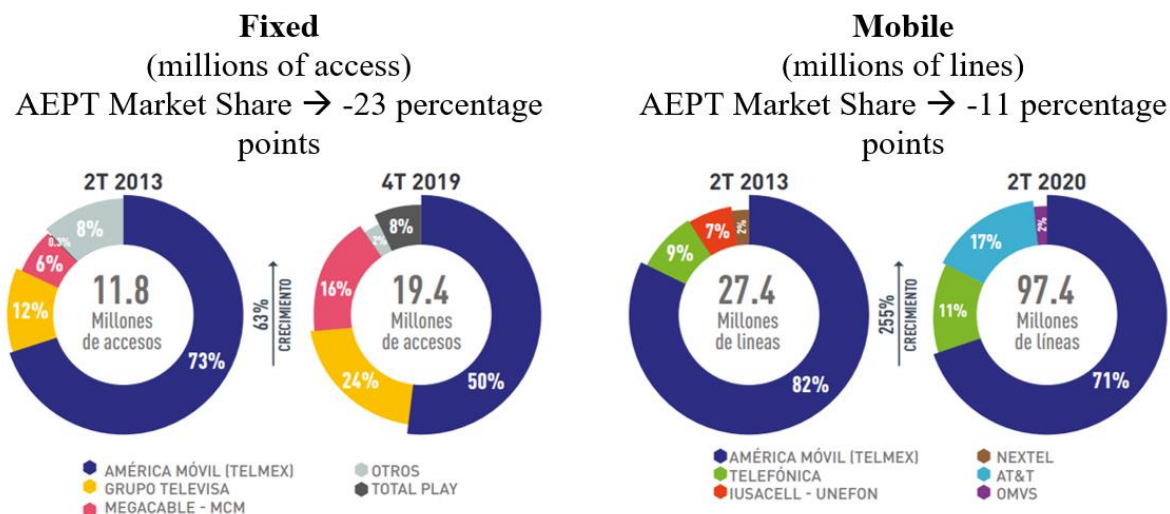
²⁶ IFT (2014). Resolution by which the IFT's Board determines the AEP in the telecommunications sector. P/IFT/EXT/060314/76 (March 6, 2014). Available in Spanish at:

http://www.ift.org.mx/sites/default/files/p_ift_ext_060314_76_version_publica_hoja.pdf

²⁷ IFT (2014). Resolution by which the IFT's Board determines the AEP in the broadcasting sector and imposes the necessary measures to prevent affectations to competition and free concurrence. P/IFT/EXT/060314/77 (March 6, 2014). Available in Spanish at:

http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_77.pdf

Figure 1. Broadband Internet Service



Source: IFT, with data provided by the telecommunications operators.

55. From the foregoing, it follows that from June 2013 to December 2019, the fixed broadband market grew 63%, from 11.8 to 19.4 million lines, and the mobile broadband market is the one with the largest growth experienced, going from 27.4 to 97.4 million lines, with a 255% growth.

56. To ensure the effectiveness of the preponderance measures, the IFT carries out every two years an evaluation of the impact on competition that the measures have had, in order to suppress, modify or, where appropriate, establish new measures according to the prevailing conditions in the sector. The last review of the preponderance measures for the telecommunications sector was carried out in 2019 and in 2020 the IFT published the corresponding modifications,²⁸ which focused on strengthening the free choice of users about their telecommunications service provider, the effective provision of wholesale services and IFT's supervision and verification mechanisms.

57. The obligations imposed on the preponderant economic agent will be extinguished in their effects by declaration of the IFT once, in accordance with the law, there are conditions of effective competition in the market in question.

58. This case shows how the IFT, as a competition authority, actively participates in the design, modification and elimination of the sectoral asymmetric regulation imposed on the AEP. This occurs based on identifying the suitability of the regulatory provisions that promote competition in the provision of telecommunications services in better price, coverage, quality and diversity conditions for the benefit of end users.

²⁸ IFT (2020). Resolution by which the IFT's Board eliminates, modifies and amends the measures imposed to the AEP in the telecommunications sector through the Agreements P/IFT/EXT/060314/76 and P/IFT/EXT/270217/119. P/IFT/021220/488 (December 2, 3 and 4, 2020). Available in Spanish at: http://apps.ift.org.mx/publicdata/VP_021220_488.pdf, http://www.ift.org.mx/sites/default/files/21_02_22_bienal_2_vp_vf.pdf, http://www.ift.org.mx/sites/default/files/anexo_1_medidas_2014-2017-2020_telecom.pdf, and http://www.ift.org.mx/sites/default/files/anexo_3_medidas_2014-2017-2020_telecom.pdf

7.2. Case Study 2: Substantial Market Power in Pay TV Service

59. In 2020, the IFT determined that GTV²⁹ has SMP in 35 relevant markets of Pay TV Service (STAR)³⁰. This decision was reached in accordance with the following elements:

1. the high levels of GTV's market share, the high levels of the HHI and its stability over time;³¹
2. the rising price indexes of the STAR and the high profitability margins of GTV;
3. the existence of barriers that restrict the entry and positioning of new competitors;
4. the limited power and ability of current and potential GTV competitors to exert significant competitive pressures;
5. GTV's vertical integration (as content and STAR provider) and its position in the provision of the STAR; and
6. the existence of high switching costs that users may face, as a consequence of forced deadlines and penalties for early termination.

60. Currently, the IFT is in the process of evaluating the imposition of specific obligations on GTV, in order to protect and promote competition in the relevant markets.³² This procedure includes an opinion on economic competition³³ on the proposed measures.³⁴

61. This case reiterates that the IFT, in the exercise of its powers as a competition authority, participates in the design of asymmetric regulation.

²⁹ GTV includes as an economic interest group: *Grupo Televisa, S.A.B., Corporación de Radio y Televisión del Norte de México, S. de R.L. de C.V. (SKY), Cablemás, S.A. de C.V., Cablevisión Red, S.A. de C.V. (Telecable), Cablevisión, S.A. de C.V., FTTH de México, S.A. de C.V., Televisión Internacional, S.A. de C.V. (TVI) and TV Cable de Oriente, S.A. de C.V.*

³⁰ Provided through any technology (cable, IPTV o satellite) and in any modality of consumption (individual or in packages that include it). IFT (2020). Resolution by which the IFT resolves on the Preliminary Statement issued by the Investigative Authority in the File AI/DC-002-2019 that declared the existence of an economic interest group with substantial power in thirty five relevant markets corresponding to the provision of restricted television and audio services through satellite technology, cable and IPTV, offered individually or bundled with other fixed telecommunications services. P/IFT/181120/436. Available in Spanish at:

<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vp181120436.pdf>

³¹ GTV was the lead economic group in each of the 35 relevant markets and its positioning has not been counteracted by its competitors; furthermore, this was reinforced after the acquisition of 100% of the shares of *FTTH de México, S.A. de C.V.* (a subsidiary of Axtel).

³² Articles 281, 282 and 283 of the LFTR.

³³ Issued by the Economic Competition Unit of the IFT.

³⁴ The initiation of this SMP investigation derived from a merger notice in terms of the Ninth Transitory Article of the LFTR, which establishes an exception regime for merger control established in the LFCE. This regime applies as long as there is an AEP in the T&B sectors, if the AEP of the corresponding sector does not participate in the operation and certain requirements are met. This article establishes that once the operation has been carried out, the IFT will be notified and its Investigative Authority will investigate the existence of SMP, through the procedure established in the LFCE (article 96).

7.3. Case Study 3: Wholesale Unbundling Services

62. As part of the preponderance regulation, the AEPT must comply with measures regarding unbundled access to its entire local network in non-discriminatory terms.

63. In 2019, IFT's Investigative Authority started an investigation for a complaint, due to the probable commission of relative monopolistic practices in the provision of wholesale unbundling services of the local network of the AEPT market, in the national territory,³⁵ which is still under investigation.

64. This case illustrates that: i) there are no explicit or implicit limits to the simultaneous application of competition law and sectoral regulation in the T&B sectors in Mexico, and ii) the existence of regulation does not exclude, by itself, the possibility of applying the LFCE.

7.4. Case Study 4: Dark Fiber Leasing Service³⁶

65. In 2016, the IFT's Investigative Authority started an investigation on Telmex for the possible commission of relative monopolistic practices consisting of denying access to an input to Megacable (dark fiber) to offer telecommunications services.

66. In 2018, the IFT's Board decided to close the investigation because the conduct was not proven, according to the following elements:

1. Telmex (in terms of preponderance regulation) must share its passive infrastructure with other operators, but has the possibility to decide what type of access constitutes the best alternative, either: a) the access to high capacity optical channels for alternative operators to deploy their own fiber or b) the lease of their own optic fiber when on a given route there is no surplus capacity in a pipeline or alternative routes;
2. Telmex provided Megacable with access to capacity on its optical channels;
3. Telmex submitted to the IFT, for authorization, a reference offer containing the conditions for the sharing of its passive infrastructure, which was approved by the IFT; and
4. Megacable, against the provisions of the reference offer approved by the IFT, requested Telmex to lease its optic fiber.³⁷

³⁵ Proceedings File no. AI/DE-002-2019. Available in Spanish at:

<http://www.ift.org.mx/industria/autoridad-investigadora/informacion-de-las-investigaciones-a-cargo-de-la-autoridad-investigadora/practicas-por-probables-practicas#>

³⁶ IFT (2019). Resolution issued in file no. DE-002-2016, initiated by a complaint of relative monopolistic practices in the interconnection services; broadband Internet access; direct business internet; access and shared use of active and/or passive infrastructure, and dark fiber service, all in the national territory. Resolution P/IFT/230119/42. Available in Spanish at: http://apps.ift.org.mx/publicdata/P_IFT_230119_42_AccUAJ.pdf

³⁷ Prior to the aforementioned competition procedure, the IFT declared without subject matter the disagreement from the referred request, considering that the links requested by Megacable had to comply with the characteristics established in the authorized reference offer. Resolution available in Spanish at:

<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/pift140916489.pdf>.

This was confirmed by the *amparo* lawsuits initiated by Megacable against the regulatory decision.

67. Megacable appealed the IFT's decision, but the competent Court concluded that the existence of the conduct was not proven, since Telmex provided access to capacity in the optical channels.

68. This case sets another example of the complementary and consistent use of the tools available to the IFT as a competition authority and sectoral regulator.

8. Competition Enforcement and its Impact on Economic Regulation

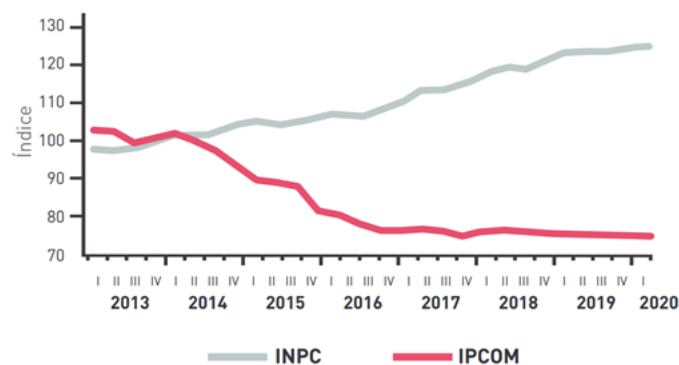
69. In order to highlight the benefits of having a convergent authority with competition and regulatory powers, some of the main improvements brought to the T&B markets following the 2013 constitutional reform are listed below.

8.1. Reduction in the Prices of Telecommunications Services

70. In Mexico, from June 2013 to April 2020, communications prices fell 27.4%, while inflation was 30.9%.

71. The price's index evolution (2013-2020) with respect to the national consumer price index (INPC, by its acronym in Spanish) and the communications price index (IPCOM, by its acronym in Spanish), are shown in the following chart:

Figure 2. Price Indexes Evolution



Source: IFT³⁸

72. In addition to the aforementioned, mobile phone prices fell 43.9% thanks to the elimination of the National Long Distance rates and the decrease in interconnection rates. This generated a drop in the price of International Long Distance of more than 40%.

8.2. Growth of the T&B market share in the GDP

73. The participation in the T&B sectors in the National GDP averaged 1.6% between 2011 and 2013. This participation increased to 3.1% by December 2019.

74. The following table shows the relationship between the evolutions of GDP with respect to the share of the T&B sectors in GDP from 2010 to 2019.

³⁸ "Evolution of the Telecommunications and Broadcasting Sectors", Available in Spanish at: http://www.ift.org.mx/sites/default/files/encarte_2021_actualizacion_80121_0.pdf

Figure 3. T&B Sectors Participation in National GDP



Source: IFT³⁹

75. The regulatory actions carried out by the IFT have resulted in a benefit for users of just over 540,000 million Mexican pesos (MXN) (approx. 26,945,000,000 USD)⁴⁰, this means that for each Mexican peso that the IFT exercises for its operation, profits amounting to 47 MXN are generated for Mexicans.

76. It is also worth mentioning that, at the end of 2013, the penetration of the broadband fixed service was 40% and by December 2019, 55% of households in Mexico had fixed Internet. And with regard to mobile broadband, in 2013, 23 out of 100 habitants had Internet on their mobile phone and by June 2020, 76 out of 100 habitants had this service, which means that mobile broadband tripled.

77. Likewise, the growth in telecommunications has been accompanied by greater private investment. Between 2013 and 2019, a total investment of 542,110 million MXN was generated by operators in this sector, of which 74% corresponds to infrastructure.

8.3. Availability of Market Studies and Other Tools

78. The LFCE provides tools to carry out market evaluations, one is the market study and the other are investigations also known as *ex officio* investigations.

79. The IFT enjoys some flexibility in terms of the duration of a market study and the resources it decides to invest in them. The LFCE grants the IFT the power to conduct and/or order market studies, research projects and formulate general reports, when risks to competition are detected, a competition problem is identified or when requested by another authority.

80. Market studies are considered a useful tool for the promotion of competition by regulatory authorities, Congress and general public opinion. Their findings can also help competition agencies to identify problems in markets where anti-competitive behavior or certain practices are suspected and may lead to the initiation of an *ex officio* investigation. The IFT, as regulator, can use the conclusions of a market study to identify areas that require regulatory intervention.

81. Besides market studies, the IFT has various useful tools. Some examples are:

³⁹ *Idem.*

⁴⁰ Estimated from an exchange rate of 1 USD = 20.0402 MXN. Source: <https://xe.com/>

1. The Telecommunication Information Bank (BIT, by its acronym in Spanish),⁴¹ that serves to consult, analyze, explore and download easily and timely statistical information from T&B sectors in Mexico. For its innovation, the BIT has been recognized by national and international organizations; and
2. The Calculator of adoption probabilities of ICT and internet uses in Mexico.⁴² This tool allows knowing, according to age, sex, level education, occupation, income and place of residence of each person, the probability they have of using computer, fix or mobile internet connections, mobile phone or from doing online activities, such as shopping, payments, banking operations or interacting with the government.

9. Final remarks

82. The institutional design of the IFT, as a convergent regulator and competition authority in the T&B sectors in Mexico, with specialized knowledge and experience on the competition processes in the T&B sectors, favors the objective of promoting competition in them, since both functions have been highly complementary in practice.

83. One of the greatest challenges the IFT faces is identifying and applying the best tool or combination of tools that allow the achievement of its objectives in the most efficient, transparent and legally certain way.

⁴¹ Available at: <https://bit.ift.org.mx/BitWebApp/>

⁴² Available at: <http://calculadoraprob.ift.org.mx/>