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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -  
Contribution from Mexico**

**- Session III -**

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More documentation related to this discussion can be found at: [oe.cd/pcnca](https://oe.cd/pcnca).

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## *The Promotion of Competitive Neutrality by Competition Authorities*

### **– Contribution from Mexico –**

#### **Contribution by the Mexican Federal Economic Competition Commission (COFECE or the Commission)**

##### **1. Introduction**

1. Since 2013, Mexico elevated the right to competition in markets to constitutional status and made its principles cross-cutting to the actions of the entire government. Among other aspects, this reform introduced competition in the electricity and hydrocarbon sectors. In addition, the Constitution mandates that procurement must be governed by certain principles of efficiency to be achieved through competition. For both of the latter, competitive neutrality is a necessary condition, as it allows and motivates participation both in energy markets and procurement procedures. However, since 2019 there has been a significant swift away from competition principles in these sectors.

2. In the energy sector, there has been a tendency to not apply the existing regulation that enables competition and ensures competitive neutrality between *State-Owned Enterprises* [SOEs] and private parties, as well as a recurrent effort to put in place regulations that dismantle it. Regarding public procurement, the percentage of purchases acquired by public tenders has considerably decreased and amendments to the legal framework favoured national suppliers over foreign competitors; furthermore, recurrent obstacles persist in federal and state regulations that give preference to some suppliers.

3. Pursuant to its mandate, in its role as competition *ombudsperson*, the Federal Economic Competition Commission (COFECE or Commission) has carried out diverse advocacy actions to promote and defend competition and competitive neutrality in these activities. From formal opinions on anticompetitive regulations to constitutional controversies before the Supreme Court, the competition authority has played an important part in preventing the dismantling of the competition regime considered in the Constitution and the legal framework of these sectors.

4. This contribution describes some of the most relevant advocacy endeavours undertaken by COFECE in the defence of competition in the energy and the public procurement sectors and some of their results. The first section provides a brief account of the shift away from competition that has been taken place since 2019 in these activities. The second part describes some of COFECE's most relevant interventions to counteract regulatory interventions with negative effects in the energy sector (electricity and hydrocarbons industries) that have raised competitive neutrality concerns with respect to CFE and PEMEX. The third section describes the Commission's advocacy efforts to address the distortionary effects of the Mexican public procurement regulatory framework that favours some firms over others.

5. Ensuring competitive neutrality in newly open sectors (such as energy) and sectors prone to protectionism (such as procurement) requires efficient regulation and its effective non-discriminatory implementation. COFECE will continue to advocate for these two elements, in these, and other sectors.

## 2. The shift away from competitive neutrality in Mexico: the case of the energy and public procurement sectors.

6. In 2013, Mexico carried out a comprehensive constitutional and legal energy reforms to introduce competition into two important sectors: hydrocarbons and electricity. These changes conveyed guiding principles, public policy objectives, rules and an innovative institutional design which sought to facilitate the transition, in relatively few years, from a vertically integrated state monopoly model to one of competitive markets. One of the goals of the energy reform was to increase the industry's competitiveness in order to capture -through competition- efficiencies in the value chains of fuels and electricity. In order to guarantee competitive neutrality, the legal, institutional and regulatory frameworks designed included several provisions to ensure a level playing field between the SOEs and private enterprises; this framework was essential to effectively enable competition in the markets where private participation was being introduced.

7. To do so, on the one hand, the reform transformed the two former parastatals (*Petróleos Mexicanos* [PEMEX]<sup>1</sup> and the *Comisión Federal de Electricidad* [CFE]<sup>2</sup>) into the figure of SOEs in order to grant them with the flexibility and the ability to participate, on equal terms, alongside other private companies. On the other hand, asymmetric regulation was introduced to guide CFE's and PEMEX's conduct as they were -until the reform- practically the only participants in the market, holding substantial market power.

8. For PEMEX, mainly, the transitional regime established a series of conditions for the transparency and non-discrimination in prices of the first-hand sales market (VPM for its acronym in Spanish) and open access obligations to pipeline transport infrastructure and storage terminals. In the case of CFE, among others, the mandatory vertical and horizontal separation was introduced as well as open and non-discriminatory access obligations to the transmission networks enforced by an independent body, the National Energy Control Centre (CENACE, for its acronym in Spanish), who is also responsible of the “*economic electricity dispatch*” consisting on getting in dispatching the energy generated by the cheapest plants first, motivating cost-reduction based competition. These regulatory measures sought to allow private companies to compete in the national electricity and hydrocarbons sectors under equal opportunities.

9. However, in recent years there has been a clear shift to reverse and not apply this regulation. For instance, in the hydrocarbons sector: (i) the issuing of the permits required to participate in several activities (such as imports, transport, storage and wholesale) has been delayed for private firms in comparison with PEMEX, granting the later with an artificial advantage; (ii) imports of gasoline and other fuels have been actively hindered through many regulatory measures, allowing PEMEX to retain its market power in the wholesale market of these products; and (iii) the Hydrocarbons Law (HL) has been

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<sup>1</sup> *Petróleos Mexicanos* (PEMEX): Since 1971, PEMEX was considered a decentralised body of the Federal Public Administration. Naturally, the federal executive retained control and absolute discretion over the most important positions. The New Law of PEMEX that arose as a result of the 2013 energy reform establishes the new regime applicable to PEMEX as the exclusive property of the federal government, with legal personality, its own assets and technical, operational and managerial autonomy.

<sup>2</sup> *Comisión Federal de Electricidad* (CFE): From its creation on 14 August 1937, had the purpose of organising and directing a national system for the generation, transmission and distribution of electricity. The commission was given the status of an official agency and was made up of three members, including the Minister of the Economy as president, an executive member and a secretary member appointed by the federal executive. The above is evidence of the tight control that the federal government has had over the commission since its inception, despite the fact that it was given certain powers which gave it the flexibility to carry out all kinds of operations related to the fulfilment of its purpose.

reformed introducing broad legal uncertainty that inhibits investment in transport and storage infrastructure, and therefore reduces the future ability of private firms to compete in the industry. In the electricity sector, for example: (i) the vertical and horizontal separation of CFE has been relaxed, enabling cross-subsidies across different firms of the SOE, that could result in anticompetitive displacement of private participants; (ii) the “economic electricity dispatch” has been repeatedly compromised by diverse regulatory actions; and (iii) the Electricity Industry Law (EIL) has been reformed to dismantle competition in the generation and wholesale markets.

10. The 2013 reform elevate to a constitutional rank the right to free market competition, implying that it should guide the actions of *all* authorities of the Mexican State. In this line, article 134 of the Constitution mandates all public branches and levels of government that the economic resources available to the Federation shall be administered with efficiency, effectiveness, economy, transparency and honesty in order to satisfy the objectives for which they are intended.<sup>3</sup> To this end, the Constitution and the procurement law convey the obligation to ensure competition and competitive neutrality in procurement processes as a means to comply with these principles.

11. However, in recent years the percentage of public contracts awarded through non-competitive procedures has increased: in 2020, 46% of the amount destined to public procurement was awarded by methods other than a public tender (mainly direct awards or through limited participation procedures).<sup>4</sup> Moreover, amendments to the Law have been made as to except purchases of the health sector from the Law, allowing for non-neutral procedure design. In addition, state laws often contain provisions that favour certain bidders (e.g., local firms) compromising competitive neutrality.

12. In this context, COFECE has actively used its advocacy powers as to promote competition neutrality both in the energy and the public procurement sectors. In the energy sector, since 2018, it has issued 8 opinion letters,<sup>5</sup> presented two constitutional controversies before the Supreme Court, and published a comprehensive regulatory analysis document. Regarding public purchases, it has published two advocacy documents and -along other civil society organizations- drafted a proposal for a new procurement law that was presented before Congress. These actions and their impact are described in the following sections.

### 3. Efforts to promote competition neutrality in the energy sector

13. As described, in recent years, the Mexican Federal Government has showed a clear shift away from competition in the hydrocarbons and electricity industries. This tendency has implied the issuing of clearly anti-competitive regulation and the delay in the application of rules that ensure competitive neutrality, compromising the ability of private firms to compete effectively under equal opportunities, therefore, negatively impacting purchasing conditions for final users. As a response, in order to point out the possible

<sup>3</sup> Art. 134, Constitución Política de los Estados Unidos Mexicanos, available at: [http://www.diputados.gob.mx/LeyesBiblio/pdf\\_mov/Constitucion\\_Politica.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf)

<sup>4</sup> IMCO, Centro de investigación de política pública, available at: <https://imco.org.mx/43-de-las-compras-publicas-fueron-por-adjudicacion-directa-en-2020/>

<sup>5</sup> OPN-002-2018; OPN-003-2019; OPN-003-2020; OPN-006-2020; OPN-007-2020; OPN-011-2020; OPN-001-2021; OPN-002-2021, available at: <https://www.cofece.mx/conocenos/pleno/resoluciones-y-opiniones/>

negative effects of eliminating competition in these sectors, COFECE has intervened in diverse ways.

### 3.1. Efforts in the hydrocarbons industry

14. Since the liberalization of the hydrocarbons industry, COFECE has been committed to promoting competition along the whole supply chain, as the prices paid by final consumers reflect the sum of costs in each link. With its work, the Commission aims to foster competitive neutrality as a necessary condition to maximize the number of participants in the industry and the competitive pressure they exert on each other.

15. First, in 2019, the Commission issued the document “*Transition to Competitive Energy Markets: Gasolines and Diesel*”<sup>6</sup> which offered a preliminary diagnosis of the state of competition after two years of liberalization and identified the pending agenda to truly complete the transition and achieve competitive neutrality between PEMEX and all other participants. Based on that diagnosis the document presents several recommendations.<sup>7</sup> This document was based on previous versions of similar work published in 2016 and 2017.

16. The Commission identified several restrictions to competition. Some worth mentioning: (i) in the wholesale market PEMEX smoothed gasoline and diesel prices and offered discounts under conditions that could have obstructed competition; (ii) in the transport and storage markets, non-strict vertical separation of PEMEX and delays on implementation of the obligations of open access to transport infrastructure could have harmed the ability of private firms to compete; and (iii) in the retail market several local regulations hinder the installation of a higher number of gasoline stations, allowing for higher mark-ups.

17. To handle these problems, COFECE mainly recommended: (i) to effectively enforce the asymmetric regulation regarding PEMEX’s wholesale prices and discounts and accordingly apply sanctions; (ii) to ensure open access to all PEMEX’s idle infrastructure and accelerate the development of transport and storage projects; and (iii) to eliminate local regulatory restrictions to the installation and operation of new gasoline station, such as minimum distance requirements.

18. In July 2020, COFECE issued an opinion noting the implementation of regulation showed discriminatory treatment for private firms. For example, since 2018, no 20-year fuel import permits had been granted, which is relevant as these are the ones that allow for infrastructure investments.<sup>8</sup> Also, since 2019, the time taken to resolve applications for new permits for private service stations considerably increased from 21 to 75 working days on average, with this increase in time being 18 days longer for brands other than PEMEX. The most notorious measure was the elimination of asymmetric regulation for this SOE in the wholesale market that was a necessary condition to counteract PEMEX's dominant power.

<sup>6</sup> Transición hacia Mercados Competidos de Energía: Gasolinas y Diésel, 2019, COFECE, available in Spanish at: <https://www.cofece.mx/cuadernos-de-promocion-de-la-competencia-transicion-hacia-mercados-competidos-de-energia-gasolinas-y-diesel/>

<sup>7</sup> Transición hacia mercados competidos de energía: Los Certificados de Energías Limpias en la industria eléctrica mexicana, 2021, COFECE, available at: <https://www.cofece.mx/transicion-hacia-mercados-competidos-de-energia-los-certificados-de-energias-limpias-en-la-industria-electrica-mexicana/>

<sup>8</sup> This is important because it is motivating for companies to have a long-term or 20-year permit to invest in storage terminals and pipelines or other means of transport, because they will have the certainty that they will be able to operate for the next 20 years and recover that investment. On the contrary, when companies only receive permits for a shorter period, as was happening, they do not see in the market the certainty to invest in infrastructure for a business that they do not know if they will be able to continue running in the medium term.

In that sense, the cancellation of the asymmetric rules contained the withdrawal of a series of obligations on PEMEX, such as submitting its contracts for review to the CRE, publishing its wholesale prices and the prohibition to tie its sales. CPFECE also noted that local restrictions in the retail market, mentioned above, were still in place.

19. Therefore, the Commission first and foremost recommended: (i) to expedite the issuing of 20-year import permits and avoid revoking under unjustified basis; (ii) to ensure that regulations associated with the processing and resolution of applications for new dispensing permits, transfers or upgrades are applied in a neutral and expeditious manner and that at no time does the authority discriminate on the basis of associated brands or specific sources of supply; (iii) to make transparent and timely disclose information on the number of applications for petroleum product permits submitted to the CRE, their procedural stage and status; and (iv) to issue as soon as possible a federal guideline for state governments<sup>9</sup> to remove from their regulations unjustified regulatory obstacles that hinder the establishment of new service stations.

20. Later in 2020, COFECE issued another opinion on the “Preliminary draft Agreement *establishing the goods whose import and export is subject to regulation by the Ministry of Energy*”<sup>10</sup> as it could seriously impact competition in the fuel production chain. The reasons are that the Agreement eliminated 20-year fuel import permits, reducing certainty about the permanence of importers in the long term and the incentives to invest in transport and storage infrastructure. It also allowed for discretionary adjustments to the imported volumes contemplated in the permits, which could reduce the supply. Moreover, it established a fictitious refusal in the processing of permits, which reduces the authority's incentives to resolve applications expeditiously and eliminates the need to justify and explain to the applicant the reasons for denying applications. Finally, it tied the import permit regime to the achievement other public policy objectives, which could result in non-tariff restrictions to trade. It should be pointed out that the agreement was not notified to COFECE under the agreement between COFECE and the National Commission for Regulatory Improvement (CONAMER for its acronym in Spanish), so that the former could analyse its impact on competition.<sup>11</sup>

21. Because of all this, COFECE recommended not issuing the Agreement project in the terms it was proposed and urged CONAMER to notify all the preliminary projects that have an impact on competition for the pertinent analysis thereof. The Commission also voted against the publication of the Agreement in the Foreign Trade Commission (COCEX for its acronym in Spanish). However, the agreement was published in the official gazette without considering COFECE's recommendations.<sup>12</sup>

22. More recently, in 2021 COFECE issued an opinion on an initiative to reform and add various provisions to the hydrocarbons law presented by the President before Congress. The initiative added an article granting regulators with new powers for temporary revocation of permits on the grounds of imminent danger to national security, energy security or the national economy. The initiative does not define criteria for the application of these concepts, nor does it define the conditions that will determine the temporary duration of suspensions. It also contemplated making the granting of permits conditional

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<sup>9</sup> The National Commission for Regulatory Improvement (CONAMER) has the power to issue such a guideline and, even when it is not mandatory for state governments to implement the recommendations, they have to at least justify why not doing so.

<sup>10</sup> Available at: <http://187.191.71.192/expedientes/25282>

<sup>11</sup> File available at: <http://187.191.71.192/expedientes/25282>

<sup>12</sup> DOF: 04/05/2021, available at: [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5617453&fecha=04/05/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5617453&fecha=04/05/2021)

on the interested party demonstrating that it has the storage infrastructure determined by the regulator. In addition, it contemplated revoking permits to those participants that fail to comply with this storage requirement. Finally, the initiative established a fictitious refusal in the processing of all permits in the industry.

23. For those reasons, COFECE issued an opinion recommending the initiative not to be approved, as it would affect the process of competition along the hydrocarbons, petroleum products and petrochemicals chain of value, by generating legal uncertainty regarding the entry of new participants, as well as the participation of agents already operating in the markets, in addition to enabling the artificial restriction of the supply of these products and services. Nonetheless, the reform was approved in Congress and published on April 22<sup>nd</sup>, 2021. It is worth mentioning that several *amparo* lawsuits<sup>13</sup> have been filed before the judiciary power by the affected agents, in which the Commission has participated with its technical opinion, that have resulted in the suspension of the implementation of the reform.

24. Finally, in June 2021, COFECE requested COCEX to justify a modification in the foreign trade rules that implied that only PEMEX can import at unauthorised points of entry or fuel terminals.<sup>14</sup> This could have negative implications for the competitive neutrality of the sector as it would clearly grant preferential treatment to SOEs, as they would be the only ones that could bring in or take out products through places other than those authorised, eliminating this possibility for their competitors. This modification artificially grants SOEs greater efficiency and ease of importing or exporting their products, which could allow them to sell them faster and give them an advantage over other competitors who would be denied this possibility. However, the modification for the rules has not been discussed in COCEX.<sup>15</sup>

25. In addition to these advocacy efforts, in 2015, PEMEX was accused<sup>16</sup> before COFECE for not giving the same conditions of supply and first-hand sale of special marine diesel to distributors of this fuel who were in equal circumstances in the market. Later, before the Investigating Authority held PEMEX liable for the possible offences, the company requested the benefit of the waiver granted by Competition Law to those who are subject to an investigation procedure for a relative monopolistic practice, as long as they prove to the Commission that the commitments suspend, correct, suppress or render ineffective the

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<sup>13</sup> “In Mexico these appeals proceedings are similar to the *habeas corpus* figure in other countries. They are established by the Constitution, to grant all persons protection against acts of government. These can be brought by any party based on wide-ranging grounds, including that a law is unconstitutional or that any government action is not supported by substantial evidence or founded on reasoning that is illogical or contrary to general principle of the law” in OECD (2016), The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences, available at: <https://www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf>

<sup>14</sup> SÉPTIMA Resolución de Modificaciones a las Reglas Generales de Comercio Exterior para 2020, DOF, available at: [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5620954&fecha=11/06/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5620954&fecha=11/06/2021)

<sup>15</sup> On 26 October 2021, a draft of the Ninth Resolution of modifications to the general foreign trade rules for 2020 (Second anticipated version) was published on the website of the Tax Administration System (SAT), which reverses the modifications originally contemplated regarding terminals other than those authorised.

In this second version, the permit for all private companies to enter the country with hydrocarbons, gasoline, diesel, refined products and petrochemicals, among others, through places other than the authorised (LDA), is enabled once again. See the draft available at: <https://www.sat.gob.mx/normatividad/74235/versiones-anticipadas-de-las-rgce>

<sup>16</sup> COFECE-051-2016, available at: [https://www.cofece.mx/cofece/ingles/images/ingles/press\\_release/COFECE-051-2016.pdf](https://www.cofece.mx/cofece/ingles/images/ingles/press_release/COFECE-051-2016.pdf)

relative monopolistic practice that is the object of the investigation. Therefore, COFECE decided that in order to reduce the possibility of PEMEX carrying out any act that could be interpreted as a discriminatory practice, it must make transparent the different benefits that the company grants in the wholesale of its petroleum products. These measures, in addition to applying to the wholesale of special marine diesel, will also be extended to liquefied petroleum gas, gasoline, turbosine, diesel, intermediate fuel oil and fuel oil.

### 3.2. Efforts in the electricity industry

26. After the deregulation process of the industry, the Commission started a process to familiarize itself with the industry and its rules. The first action taken was on late 2017, when COFECE held a discussion forum with sectoral regulators, CFE and private participants of this industry, with the objective of understanding the pending agenda to achieve a full transition to market competition in the generation and final supply of electricity. Later in 2018, COFECE drafted an internal study that identified possible obstacles to competition stemming from legal precepts.

27. In May 2019, COFECE issued an opinion on the “*Agreement modifying the terms for the strict legal separation of the Federal Electricity Commission*” pointing out the importance of maintaining this separation in order to prevent, among others, cross-subsidies, or exercise of market power by CFE to displace competitors.<sup>17</sup> Nonetheless, this relaxation was enforced.

28. Later, in April 2020 COFECE issued an opinion pointing out several elements of the “*Agreement with new dispatch and interconnection guidelines that indefinitely suspended new interconnection permits for wind and solar power plants in the COVID context*” issued by the CENACE.<sup>18</sup> According to its analysis, the agreement could harm competition and compromised competitive neutrality in the electricity generation market, mainly because: (i) it prevented the participation of new wind and solar plants indefinitely, by suspending the pre-operational tests required for them to enter into operation; (ii) it generated uncertainty about the dispatch of wind and solar plants that already operate in the market and that usually have lower production costs than conventional plants; (iii) it displaced, even temporarily, the most efficient generators without such a measure being justified by criteria strictly related to system instability, which may lead to higher generation costs.

29. Therefore, the Commission recommended: (i) that the measures adopted by CENACE, regarding wind and solar plants in operation be based on technical criteria related to the reliability, continuity and stability of the National Electricity System (SEN); (ii) not to grant undue discriminatory treatment to certain power plants and to guarantee the dispatch of plants according to their costs, from lowest to highest; (iii) to define the criteria on the basis of which the implementation of the measures considered will be suspended; (iv) to apply the interventions considered in the agreement only to the extent that they are strictly necessary to ensure the stability of the SEN and that there are less restrictive alternatives to competition are not possible, and; v) to undertake with all sector participants, the analysis of the actions or regulations required so that, in the short term, the

<sup>17</sup> OPN-003-2019, COFECE, available at: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/V112/4/4791684.pdf>

<sup>18</sup> Agreement, available at: [https://www.cenace.gob.mx/Docs/16\\_MARCOREGULATORIO/SENyMEM/\(Acuerdo%202020-05-01%20CENACE\)%20Acuerdo%20para%20garantizar%20la%20eficiencia,%20Calidad,%20Confiabilidad,%20Continuidad%20y%20seguridad.pdf](https://www.cenace.gob.mx/Docs/16_MARCOREGULATORIO/SENyMEM/(Acuerdo%202020-05-01%20CENACE)%20Acuerdo%20para%20garantizar%20la%20eficiencia,%20Calidad,%20Confiabilidad,%20Continuidad%20y%20seguridad.pdf)

effects on the SEN are addressed and, in the medium term, a stable system is created. Despite COFECE's opinion, the Agreement was not amended nor revoked.

30. After a large number of market participants (and other stakeholders such as NGOs) filed appeals before the judiciary against the Agreement, the courts resolved to suspend the application of said instrument in several cases, based on COFECE's recommendations. However, stemming from these suspensions, the Ministry of Energy then issued the "Reliability and Stability of the electrical System Policy" in which many of the Agreement's measures were made permanent.

31. In response, in June 2020, COFECE filed a constitutional controversy<sup>19</sup> before the Supreme Court, against said Policy", which contained the main anticompetitive precepts of the aforementioned Agreement. The controversy was based on the grounds that the Policy would block the Commission's ability to promote and protect free competition in the electricity markets as well as violate the neutrality that competition demands as it: i) relaxed the competition-based mechanism consisting on dispatching the cheapest electricity first, which eliminated the incentives and possibility to compete through cost-reduction; ii) violated the principle of open and non-discriminatory access to the grid, which constitutes an essential facility to compete in the generation market; and, iii) violated the competition neutrality between CFE (the state-owned enterprise) and the rest of the competitors by granting the first with certain regulatory authority to issue guidelines for the market. The Court ruled in favour of the Commission's arguments and suspended the main anticompetitive provisions of the Policy. As a consequence, the Ministry of Energy revoked it.<sup>20</sup> The reason why COFECE filed a constitutional controversy without having issued an opinion was that the Policy was exempted from the Regulatory Impact Assessment (RIA) annulling the chance to speak out on its implications.

32. Shortly after, in April 2021, COFECE issued another opinion on a bill presented by the President to reform the EIL, which contained the same anticompetitive precepts of the previously mentioned Polity that the Supreme Court had already ruled as unconstitutional. According to the analysis the reform would violate competition neutrality as it granted CFE with certain artificial advantages. Mainly, it would: (i) compromise open and not unduly discriminatory access to the transmission network, allowing CFE to favour its own firms; (ii) eliminate the economic dispatch mechanism, enabling the preferential dispatch of CFE's plants; (iii) allow CFE to acquire energy through non-competitive methods; and (iv) grant broad discretion to the regulator to revoke and deny permissions.

33. For these reasons, COFECE recommended the Congress not to pass the bill on the grounds that it could contravene the constitutional regime that currently governs the national electricity industry, which is based on competition as the driving force to promote its efficiency, resulting in the loss of competitive neutrality and, most likely, a possible increase in the prices paid by consumers.<sup>21</sup> However, the reform was passed and enacted.<sup>22</sup>

<sup>19</sup> COFECE-023-2020, available at: <https://www.cofece.mx/cofece-interpone-controversia-constitucional-contra-la-emision-de-la-politica-de-confiabilidad-seguridad-continuidad-y-calidad-en-el-sistema-electrico-nacional/>

<sup>20</sup> Incidente de suspensión, SCJN, available at: [https://www.scjn.gob.mx/sites/default/files/acuerdos\\_controversias\\_constit/documento/2020-07-27/MI\\_IncSuspContConst-99-2020.pdf](https://www.scjn.gob.mx/sites/default/files/acuerdos_controversias_constit/documento/2020-07-27/MI_IncSuspContConst-99-2020.pdf)

<sup>21</sup> OPN-001-2021, COFECE, available at: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/V173/9/5363212.pdf>

<sup>22</sup> DOF: 09/03/2021, available at: [http://dof.gob.mx/nota\\_detalle.php?codigo=5613245&fecha=09/03/2021](http://dof.gob.mx/nota_detalle.php?codigo=5613245&fecha=09/03/2021)

34. Therefore, COFECE filed a constitutional controversy before the Supreme Court against the reformed law because, in its view, it was contrary to the Constitution and eliminates the necessary conditions for a dynamic of competition in the electricity market, which would result in a disruption in the conditions of electricity supply, as well as harm to the consumer and the economy in general.<sup>23</sup> This controversy is yet to be resolved. In addition, numerous *amparo* lawsuits were presented by private agents before the judiciary power, resulting in its suspension.

35. In line with said bill, last September 2021, the President presented before Congress a constitutional electricity reform to except the generation and commercialization of electricity from the competition regime. With this reform, competition neutrality between CFE and other actors will be annulled since it modifies the entire constitutional arrangements to go back to a model with a vertically integrated monopoly without any restrictions on its actions to ensure efficiency. On the contrary, CFE is granted with several regulatory attributions and advantages, such as, permanently enabling it to generate at least 54% of the electricity required in the country.

36. In May 2021, the Commission published the advocacy document “*Transition to competitive energy markets: Clean Energy Certificates in the Mexican electricity industry*”.<sup>24</sup> This study was elaborated as part of the evaluation process of the Clean Energy Certificates (CEL) market mandated in the Energetic Transition Law and presents a comprehensive analysis on the state of competition in the markets that affect the supply and demand of CEL. The analysis showed a lack of speed in the implementation of the legal framework in place; for example: (i) the failure to update the transmission tariff in line with CFE's costs could allow it to charge a higher tariff for this service; (ii) insufficient expansion of transmission and distribution networks hampers the interconnection of new projects, especially those using renewable sources, since they tend to be far from consumption centres and (iii) the delays in the granting of generation permits which in turn, delayed the entry into operation of the projects. As a conclusion, the document highlights that these delays, but above all, the recent modifications to the regulation -described above- will result in Mexico not reaching the 35% clean generation percentage committed to for 2024 (it is estimated that it will achieve only 29.8%).

37. It is also worth mentioning that, in addition to its advocacy interventions, last May, COFECE announced the beginning of an investigation for possible abuse of dominance in the market of generation, wholesale commercialisation and supply of electricity and associated products. If the constitutional reform were approved, it would eliminate the possibility to carry out new investigations into possible anticompetitive conducts carried out by SOEs, given that the existence of monopolies in the energy sector would then be allowed.<sup>25</sup>

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<sup>23</sup> COFECE-012-2021, available at: <https://www.cofece.mx/cofece-interpone-controversia-constitucional-contra-el-decreto-que-reforma-diversas-disposiciones-de-la-ley-de-la-industria-electrica/>

<sup>24</sup> Transición hacia mercados competidos de energía: Los Certificados de Energías Limpias en la industria eléctrica mexicana, COFECE, available at: <https://www.cofece.mx/transicion-hacia-mercados-competidos-de-energia-los-certificados-de-energias-limpas-en-la-industria-electrica-mexicana/>

<sup>25</sup> COFECE-014-2021, COFECE investiga posibles prácticas monopólicas relativas en el mercado de la generación, comercialización al mayoreo y suministro de energía eléctrica y productos asociados, available at: <https://www.cofece.mx/cofece-investiga-posibles-practicas-monopolicas-relativas-en-el-mercado-de-la-generacion-comercializacion-al-mayoreo-y-suministro-de-energia-electrica-y-productos-asociados/>

38. Today in Mexico there seems to be a tendency to favour PEMEX and CFE by delaying or not granting permits to private companies and hindering the import of petroleum products or by eliminating the dispatch method in the electric industry, among many others mentioned above. COFECE will continue to use its advocacy powers to point out these regulations that violate the naturalness of both sectors.

#### 4. Actions to foster competitive neutrality in public procurement

39. As mentioned, the Mexican constitutional regime establishes that the economic resources available to the Federation shall be administered with efficiency, effectiveness, economy, transparency and honesty in order to satisfy the objectives for which they are intended. To comply with these principles the Constitution provides that acquisitions of all types of goods shall be awarded or carried out through open public tenders in order to ensure the State the best available conditions in terms of price, quality, financing, opportunity and other relevant circumstances. It is then implied that competition and competition neutrality are considered to be the means to comply with this mandate.

40. However, since 2018 there has been an important decline on the percentage of purchases awarded through an open public tender: from 65% in 2017 to 40% in 2020.<sup>26</sup> Moreover, amendments to legislation that can contravene competition neutrality have been recently enacted. In addition, several provisions that grant certain providers (e.g., local firms) with artificial advantages in public procurement processes remain common in state-level regulation. In this context, the Commission has made several advocacy efforts to address distortionary effects of public procurement regulation that favours some economic agents over others, and to increase competition in tender design that can harm competitive neutrality, at the federal and local levels.

41. In early 2021, COFECE participated under the figure of *amicus curiae* in an Action of Unconstitutionality presented by some legislators before the Supreme Court on a reform to article 1 of the Procurement Law passed on August 2020. The reform completely exempted the purchases done through an international organization from the Mexican legislation, allowing for the unjustified use of non-competitive methods, or the inclusion of non-neutral requirements that favour some providers in comparison to others. Furthermore, among the arguments COFECE presented to the Court, it noted that the current regulatory framework for public procurement allows national bidders to exercise market power, violating competitive neutrality, because it includes additional requirements to open a procurement process to international participation compared to a bid limited to national suppliers; for example, demonstrating that the contractor first carried out a national tender and that it was declared void before launching an international process. This is a clear obstacle for international suppliers to participate.<sup>27</sup> Creating more exceptions to the procurement regulatory regime could derive in less competitive and accountable procedures; instead, it is necessary to comprehensively modify the Procurement Law as to incorporate competitive principles.

<sup>26</sup> COMPRAS PÚBLICAS EN MÉXICO. COMPETENCIA: LA GRAN AUSENTE, IMCO, available at: <https://imco.org.mx/compras-publicas-en-mexico-competencia-la-gran-ausente/>

<sup>27</sup> Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, art. 28, fracc. III, available at: [http://www.diputados.gob.mx/LeyesBiblio/pdf/14\\_200521.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/14_200521.pdf)

42. In order to advance this necessary modification, in 2018, the Commission published the document "*Competition Agenda for an Integral Exercise in Public Procurement*",<sup>28</sup> which takes on COFECE's experience on past investigations into collusion in public procurement in order to propose improvements to the legal framework aiming at promoting competition. Some of these recommendations are: i) narrowing down the criteria which allow for contracting by procedures other than public tenders; ii) allowing other interested bidders to participate in restricted procedures; iii) create a General Law on Public Procurement, which is in line with international standards, among others.

43. Moreover, in 2020, COFECE, along with other civil society organizations and public institutions specialized in public procurement, joined efforts to propose a new General Law on Procurement.<sup>29</sup> In part, this proposal was triggered by the modification to article 1 of the procurement law mentioned above. Some of the competitive principles included in this proposed Law were: (i) include the banning of companies guilty of collusion in order to discourage it; (ii) limit the criteria to award contracts through exceptions to public tenders, and; (iii) require companies to declare their economic interest group in order to avoid simulated competition.

44. At the local level, COFECE has also conducted several efforts to improve procurement laws. Since 2016, the Commission published the "*Miscellaneous regulatory obstacles to competition: analysis of state regulation*" to promote pro-competitive legal frameworks at the local level. This study, through a systematic review of laws and regulations in the 32 states of the country, identifies regulatory obstacles that could affect competition in five different areas of great relevance for the economic activity: agriculture, public procurement, public transport, urban development and professional practice. Regarding public procurement this document found that 11 states have margins of preference in favour of local suppliers for the awarding of contracts. It also found that 15 state consider the figure of "state level tenders" in which only local firms can participate.

45. Later, in 2018, COFECE issued an opinion on a reform that had been passed by the congress of Tabasco -a southern state- to the local Acquisitions Law, as it granted broad discretion to directly award contracts.<sup>30</sup> The use of non-competitive methods may favour the award of contracts to companies that are not necessarily the most efficient. In addition to compromising the use of public resources, this could artificially facilitate the growth of these companies, compromising the permanence of more efficient competitors. This can generate a permanent situation of lack of competition in a market, beyond public procurement alone. For this reason, the Commission recommended the Governor not to issue the reform.<sup>31</sup> However, it was enacted. For this reason, using its powers COFECE requested the Federal Executive to initiate an action of non-constitutionality against the amendments to the Law. In July 2020, the Supreme Court invalidated several provisions. The court considered that

<sup>28</sup> Agenda de Competencia para un ejercicio íntegro en las Contrataciones Públicas, COFECE, available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2018/07/cpc-contratacionespublicas.pdf>

<sup>29</sup> PROYECTO DE LEY GENERAL DE ADQUISICIONES, ARRENDAMIENTOS Y SERVICIOS DEL SECTOR PÚBLICO, COFECE, available at: <https://www.cofece.mx/wp-content/uploads/2020/07/Iniciativa-de-Ley-Contrataciones-Publicas.pdf>

<sup>30</sup> Available at: <http://periodicos.tabasco.gob.mx/media/periodicos/7941SUPLEMENTO.pdf>

<sup>31</sup> OPN-009-2018: <https://www.cofece.mx/wp-content/uploads/2018/10/OPN-009-20181.pdf>

these provisions extended in an indeterminate manner the cases of exception to public bidding for the contracting of works, acquisitions, leases and services.<sup>32</sup>

46. COFECE has also used its enforcement experience to work side by side with government bodies as to promote a more competitive design of procurement processes. In 2017 the Commission opened an investigation for collusion on CFE's procurement of various types of wattmeters; however, in 2019 it was concluded without any sanctions. Nonetheless, based on the learnings of this investigation COFECE made some informal recommendations on how CFE could better design the procedures as to maximize the number of bidders and the intensity of competition between them. After this collaboration, CFE carried out a tender for the wattmeters including some of these recommendations.

47. Among the changes to the bases that brought about greater competition are: (i) an increase in the delivery period for meters, which was previously only 45 days, to a minimum of 90 days, which is relevant because companies have enough time to produce what they have committed to supply; (ii) technical requirements that were similar to the patented technology of a few were modified or eliminated to allow the entry of more companies; (iii) the figure of simultaneous supply was introduced, i.e. allocating 80% to the best economic offer and 20% to the second best to allow the development of suppliers other than the ones that always win so that in the future they can exert more competitive pressure; and (iv) the award mechanism was a subsequent electronic auction of discounts in which participants were able to bid discounts in several rounds allowing for more aggressive bidding; the previous year the auction was a closed envelope auction and this limited the bidding to a single discount offer on the base reference price.

48. The results were positive: a greater participation of bidders was achieved, a greater number of companies were awarded with a contract, and savings of 18% were achieved. This is the first time that four companies have managed to sell wattmeters to CFE.

49. In this same line, in 2020, COFECE sanctioned 11 companies and 14 people for colluding in tenders for integrated services of laboratory and blood bank studies<sup>33</sup> that were launched by the two largest public health institutions in the country, the Mexican Social Security Institute (IMSS) and the Institute of Security and Social Services for State Workers (ISSSTE).

50. In addition, in the procurement procedures analysed, participants are generally requested to submit a Letter of Support from the manufacturers of medical supplies. According to the terms and conditions of the procedures, failure to comply with this requirement meant that their proposals were rejected. However, although manufacturers may grant Letters of Support to more than one participant, there are some medical supplies that are only provided by one or a few manufacturers. In these cases, the refusal of a manufacturer to grant Letters of Support may prevent the participation of certain companies, who have little or no alternative to obtain them.

51. For this reason, in order to encourage greater participation in public tenders for Integral Services, COFECE has recommended requesting the presentation of Letters of Support at the time of contract formalisation, after the adjudication of the procedures.

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<sup>32</sup> Comunicados de Prensa No. 120/2020, SCJN: <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6163>

<sup>33</sup> COFECE-031-2020, 10/08/2020, COFECE, available at: <https://www.cofece.mx/multa-cofece-a-empresas-por-coludirse-en-licitaciones-de-servicios-de-banco-de-sangre/>

52. To follow upon these efforts, since 2020 COFECE saw the need to create a space in which more public servants that design and carry out procurement processes could learn how to include competitive principles to them. That is why, the Commission designed an online course, directed to public servants, called “*Designing competitive procurement procedures and detecting collusion*”.<sup>34</sup> The course reviews some of the most relevant principles and concepts of competition policy in Mexico, as well as the relevance of considering these principles in public procurement procedures. Likewise, recommendations and best practices for the design and planning of pro-competitive procedures, collusive modalities and mechanisms and recommendations to detect them, and some of the most relevant actions of COFECE in public procurement are presented. By the end of 2021, 129 persons had enrolled. Also, as part of its advocacy efforts, since 2016 COFECE has organized more than 20 workshops for public officials from the federal and state level have, and since 2020 has trained 122 public servants in the design and planning of competitive public procurement in order to inject competition into tendering processes.

53. Competition is the most efficient tool to ensure the optimization of public resources spent by governments in the purchase of goods and services. In order to maximize the number of participants and the to obtain the best purchasing conditions, it is deemed necessary to ensure competitive neutrality among all participant firms: national vs. international, local vs. national, SOEs vs. privately own firms, incumbents vs. new firms, small vs. big firms and so on. Achieving such competition neutrality requires not only a proper design of the procedures, but more importantly a legal and regulatory framework that enables such design. That is why COFECE has and will continue to advocate for these two elements.

## 5. Final remark

54. Guaranteeing competitive neutrality in markets recently opened to competition, as is the case of energy in Mexico, as well as markets prone to protectionism, such as public procurement, requires proactive measures and effective regulation. However, recently in Mexico there has been a clear tendency to dismantle and not apply the measures contained in our constitutional and legal framework to achieve such neutrality.

55. As described in this document, in their role as advocates, competition agencies can play an important role in procuring and maintaining competitive neutrality. That is why, pursuant on its mandate, COFECE has actively undertaken several actions to contribute to this task, among others, in the energy and public procurement sectors and will continue to do so in the future.

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<sup>34</sup> Course available at: <https://cursos.cofece.mx/local/staticpage/view.php?page=diseño-de-procedimientos-de-contratacion-publica>

## Contribution by the Federal Telecommunications Institute (IFT)

### 1. Introduction

56. As stated in the Recommendation of the Council on Competitive Neutrality, Competitive Neutrality is a “principle according to which all Enterprises are provided a level playing field with respect to a State’s (including central, regional, federal, provincial, county, or municipal levels of the State) ownership, regulation or activity in the market.”<sup>35</sup>

57. In this contribution, the IFT describes the legal framework under which it assesses, monitors, fosters and enforces Competitive Neutrality, as well as recent<sup>36</sup> study cases: i) CFE Telecommunications an Internet Access for all (CFE-TEIT, by its acronym in Spanish), a State-Owned Enterprise (SOE); ii) Wholesale Broadband Shared Network (*Red Compartida*), and iii) the IFT’s economic opinion on access to poles and rights-of-way of the national electricity system.

### 2. Legal framework and tools

58. The IFT is the national competition and regulation authority for the telecommunications and broadcasting sectors.

59. Concurrently, to protect and promote competition and the efficient development of these, the IFT enforces two laws: the Federal Economic Competition Law (LFCE, by its acronym in Spanish) and the Federal Telecommunications and Broadcasting Law (LFTR, by its acronym in Spanish).

60. The LFCE applies to “all economic agents”<sup>37</sup> in “all sectors of economic activity” within the Mexican territory. The scope of application includes the State, its agencies, and all SOEs when acting as economic agents, i.e., when participating in any economic activity, except for the strategic activities established in the Mexican Constitution.<sup>38</sup>

61. The main LFCE’s tools to enhance and enforce competitive neutrality principle are to promote, in conjunction with Public Authorities, that their administrative acts adhere to the principles of free market access and economic competition (article 12, paragraph XX).<sup>39</sup>

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<sup>35</sup> OCDE (2021). Recommendation of the Council on Competitive Neutrality.

<sup>36</sup> Other cases that have been analysed by the IFT are available at: [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)2/en/pdf).

<sup>37</sup> According to Article 3, economic agents are defined as “Any for-profit or non-profit individual or legal person, dependencies and entities of the federal, state or municipal public administration, associations, business chambers, professional groups, trusts or any other form of participation in the economic activity.” Available at: <http://www.ift.org.mx/industria/autoridad-investigadora/documentos-materia-economica#>, last accessed 4<sup>th</sup> of October 2021.

<sup>38</sup> Article 28 of the Mexican Constitution established strategic activities deemed exclusively for the Mexican State: postal system; telegraphs and radiotelegraphy; radioactive minerals and generation of nuclear energy; the planning and control of the national electricity system, as well as the public service of transmission and distribution of electric energy, and the exploration and extraction of oil and hydrocarbons. All of these, either provided by SOEs or through concessions, hence do not qualify as monopolies and are exempted from the LFCE enforcement.

<sup>39</sup> Also, IFT has powers to: i) carry out special administrative proceedings (market investigations) to determine: the existence of essential facilities or barriers to competition and free market access, and market conditions (effective competition, the existence of substantial market power or other analogous terms); ii) issue opinions or authorization

62. The LFTR explicitly establishes the obligation of the State not to distort markets when participating as an owner of economic entities (article 3, paragraph XXXVIII).

63. According to the LFTR, in the telecommunications and broadcasting sectors, SOEs can apply for: i) public concessions granted to public entities to exercise their public duties, or ii) commercial concessions;<sup>40</sup> in either case, they are subject to the Competitive Neutrality principle. Also, in the case of grants for commercial concessions to public entities (or SOEs), when they participate in public-private partnerships, these concessionaires shall operate as wholesale shared networks exclusively destined to sell capacity, infrastructure or wholesale telecommunication services to other concessionaires or resellers, and under no circumstance may those networks offer services to end users. Hence, through these networks, services shall be provided under non-discrimination and competitive prices.<sup>41</sup>

### 3. Relevant Study Cases

64. The following study cases demonstrate how the IFT has established conditions to prevent conducts that might unduly restrict or distort the competitive market conditions because of SOEs participating as providers of telecommunications services.

#### 3.1. Case Study 1: CFE Telecommunications and Internet Access for All<sup>42</sup>

65. In 2019, the Mexican government mandated the establishment of CFE-TEIT<sup>43</sup>, a subsidiary of SOE's Federal Electricity Commission<sup>44</sup>, to provide telecommunication services with non-commercial purposes. CFE-TEIT applied for a public concession to

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in the awarding of licenses, concessions, permits, transfers or sale of shares, about concessionaires or permit holders, issued by public authorities, in terms of the provisions of the article 98 of the LFCE; iii) issue opinions or authorization in the awarding of licenses, concessions, permits, transfers or sale of shares, about concessionaires or permit holders, issued by public authorities, in terms of the provisions of the article 98 of the LFCE; iv) Perform or order studies, research projects and general reports in subjects related to free market access and economic competition: and v) advocacy powers to promote competition.

<sup>40</sup> Subject to a specific competition neutrality legal regime.

<sup>41</sup> Additionally, they must comply with: i) accounting separation and transparency; ii) submit to IFT's authorization all agreements regarding capacity and infrastructure sharing, or any services with economic preponderant agents, iii) reference offers of services provided must be published on its website and require IFT's approval. Articles 140-144 of LFTR. English version of LFTR available at: <http://www.ift.org.mx/sites/default/files/contentidogeneral/asuntos-internacionales/federaltelecommunicationsandbroadcastinglawmexico.pdf>, last accessed 4<sup>th</sup> of October 2021.

<sup>42</sup> Available at: [https://rpc.ift.org.mx/vrpc/pdfs/98550\\_190904111308\\_804.pdf](https://rpc.ift.org.mx/vrpc/pdfs/98550_190904111308_804.pdf), last accessed 4<sup>th</sup> of October 2021.

<sup>43</sup> (Only Spanish) Available at: [https://dof.gob.mx/nota\\_detalle.php?codigo=5567088&fecha=02/08/2019](https://dof.gob.mx/nota_detalle.php?codigo=5567088&fecha=02/08/2019) y [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5603934&fecha=30/10/2020](http://www.dof.gob.mx/nota_detalle.php?codigo=5603934&fecha=30/10/2020), last accessed 4<sup>th</sup> of October 2021.

<sup>44</sup> CFE is a state-owned productive company owned exclusively by the Mexican Federal Government, with its legal personality and assets, and will enjoy technical, operational and management autonomy, following the provisions of the Commission's Electricity Law. (Article 2) CFE provides, in terms of the applicable legislation, the public service of transmission and distribution of electrical energy, on behalf and order of the Mexican State; and, among others, is entitled to use and administrate real estate and industrial properties, and the technology under its control that allows for the provision of any additional service such as, without limitation, construction, leasing, maintenance, and telecommunications. (Article 5 paragraph VI) In Spanish, available at: [http://www.diputados.gob.mx/LeyesBiblio/pdf/LCFE\\_110814.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LCFE_110814.pdf); last accessed October 4<sup>th</sup> 2021.

provide non-profit Internet access services to the population that does not have such service and free Internet access at any public site.<sup>45</sup>

66. The IFT granted the public concession and added *ex-ante* and *ex-post* conditions to comply with Competitive Neutrality, designed to prevent that CFE-TEIT could unduly restrict or distort competition as a consequence of its public ownership.

67. Accordingly, CFE TEIT must comply with the following:<sup>46</sup>

- It is restricted to provide: i) free Internet access in all public sites in Mexico and ii) non-profit telecommunication services at national level, except in “localities with connectivity”. For these purposes, IFT defined “locations with connectivity” as those with at least one of the following characteristics:
  - With provision of household fixed internet access services;
  - With coverage from a provider with at least 3G technology; or
  - With provision of satellite internet access services to the general public.
- In case of providing non-profit telecommunication services, to prevent any unduly distortion to competition:
  - If after having started the provision of a service in a specific locality and another concessionaire and/or authorized provider decides to provide such a service in that locality, CFE TEIT can continue its operations if it does not distort competitive conditions.
  - The IFT will analyse —at its initiative or at the request of a concessionaire or authorized party that considers itself affected by the provision of CFE TEIT's services— whether in the provision of CFE-TEIT's services it unduly distorts competition and/or free market access. In this case, if the conduct is proven and, after a hearing with CFE-TEIT, the IFT shall order the necessary measures to prevent or correct the distortions, this includes the possibility of ordering CFE TEIT to cease the provision of the service in question in the corresponding locality(ies).
- It must report each year all contributions, funding, subsidies, and transfers, whether implicit or explicit, pecuniary or non-pecuniary, from public entities and/or authorities received, explaining the purpose of the contribution and in the case of in-kind resources provide an estimate of the monetary value.
- It does not hold any exclusive or preferential rights over its own or third parties' infrastructure used in the provision of services.

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<sup>45</sup> Public sites are those sites that are in control of federal, state, or municipal agencies or entities or under public programs of any of the three levels of government. some examples of public sites are schools, universities, libraries, hospitals, community centres, and parks, among others. Article 3 fr. LXVII.

<sup>46</sup> CFE TEIT, Concession. Available at: [https://rpc.ift.org.mx/vrpc/pdfs/98550\\_190904111308\\_804.pdf](https://rpc.ift.org.mx/vrpc/pdfs/98550_190904111308_804.pdf), last accessed 4<sup>th</sup> of October 2021.

### 3.2. Case Study 2: Wholesale broadband shared network (Red Compartida)

68. One of the most important provisions of the 2013 Constitutional Reform on Telecommunications is the obligation to allocate the 700 MHz spectrum band, through a competitive auction bidding process, to create a wholesale mobile network “*Red Compartida*” as a Private Public Partnership (PPP). *Red Compartida* participates exclusively in the wholesale market, so it enhances competition at the retail level by providing access to wholesale inputs for Virtual Mobile Operators and concessionaires who request access to its services and infrastructure.

69. To address any competitive concerns as a consequence of its public co-ownership, the IFT participated in the:

- Bidding process: i) the IFT worked along with the Ministry of Communications and Transport (SCT, by its acronym in Spanish) to ensure that the bidding rules incorporated pro-competitive criteria; and, ii) the IFT assessed every interested candidate to approve their suitability, i.e., to discard that its participation could hamper competition.<sup>47</sup>
- The IFT included the following provisions in its commercial concession to detect situations that could unduly distort market competition:
  - To inform the IFT, within the first quarter of each year, and include in its annual financial statements, in a disaggregated manner, all contributions, funding, subsidies, and transfers received from public authorities after the signature of its concession title.
  - To submit annually to the IFT, within the first quarter of each year, detailed information regarding the procedures and conditions under which it enters into contracts or agreements with public authorities.
  - The IFT may enforce all measures to prevent or correct distortions whenever it detects that a conduct unduly distorts competition.

### 3.3. Case Study 3: Access to poles and rights-of-way of the national electricity system

70. The IFT holds powers to issue opinions when pertinent, or upon request, regarding proposed provisions, rules, agreements, circulars and other general administrative acts before they are issued by public authorities (including other sectoral regulators), to prevent that these have adverse effects on free market access and competition in the telecommunication and broadcasting sectors. Whilst these opinions are not legally binding, they are one of the IFT’s key advocacy tools to prevent any act that could affect competition, free entry access, and, ultimately, competitive neutrality.

71. Accordingly, in 2017 the Energy Regulatory Commission (CRE, by its acronym in Spanish) requested IFT’s expert competition opinion on the draft of the “*General administrative provisions to allow access to telecommunications service providers that use the facilities and rights of way of the national electric system*”. Through which, CFE would provide access and capacity to its infrastructure to telecommunication providers.

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<sup>47</sup> For example, as part of the assessment IFT determined that one of the evaluated companies (Rivada Networks) could only participate in the bidding process subject to conditions, because one of its shareholders (EchoStar) was a telecommunications operator and it was identified that the participation of this company could potentially influence the operation of *Red Compartida*.

72. To promote a level playing field, CRE in collaboration with IFT, SCT and CFE, included the following considerations: i) objective parameters to determine maximum capacity of poles, ii) the obligation of suppliers to provide access under not unduly discriminatory conditions and to refrain from unjustified refusals to deal; iii) neutrality and non-discrimination principles regarding discounts agreements; iv) criteria to determine monetary compensations.

73. These provisions allowed telecommunications providers access to 11 million CFE's poles throughout Mexico in fair and competitive terms.<sup>48</sup>

#### 4. Conclusion

74. For regulatory, advocacy and enforcement of Competitive Neutrality, the IFT, as a competition and regulatory authority, has implemented obligations to address Competitive Neutrality, to ensure that all participants enjoy a level playing field and undistorted markets.

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<sup>48</sup> IFT's competition opinion is available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/pift151117696.pdf>; the final administrative act is available at: [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5542320&fecha=29/10/2018](https://www.dof.gob.mx/nota_detalle.php?codigo=5542320&fecha=29/10/2018).