

Unclassified**English - Or. English****28 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION FOR-THE-MARKET – Contribution from Mexico****- Session IV -****6 December 2019**

This contribution is submitted by Mexico (COFECE & IFT) under Session IV of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.cd/cmkt.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03455451

Competition for-the-market

- Contribution from Mexico –

Contribution by Mexico's Federal Economic Competition Commission (COFECE)

1. Introduction

1. This contribution focuses on competition for the market in regulated sectors where the Mexican Federal Economic Competition Commission (hereinafter COFECE for its acronym in Spanish or Commission) is empowered to act.
2. The Mexican State grants concessions, permits or contracts to the private sector for the construction and operation of infrastructure needed to provide public services in the following industries: ports, airports, railways, electricity and products of the oil industry.¹ These activities are regulated by sector specific laws.
3. The Commission must issue opinions or authorizations concerning the granting of licenses, concessions and permits, pursuant to Article 98 of the Federal Economic Competition Law (hereinafter LFCE or competition law), when sector laws or, through agreements or decrees by the Federal Executive.
4. When these titles are conferred through bidding processes, before its official announcement, the announcer must submit to the Commission the documents that inform of the transaction at hand (such as the call for tenders, the rules of the public tender and the draft contract). Pursuant Article 99 of the LFCE, COFECE will resolve on measures to be included in order to protect competition.
5. Sector regulation in force establishes the participation of COFECE in the granting of concessions or contacts to build, operate and provide services in railways, airports, ports and port facilities and terminal, as well as in the production of hydrocarbons:²
 - Article 9 subsection IV of the Regulatory Railroad Service Law establishes that those who are interested in participating in public tenders for concessions to build, operate and exploit railroads and/or providing public rail transport services must

¹ A compilation of sector regulations can be found in the Normative Compendium of COFECE available at: https://www.cofece.mx/wp-content/uploads/2018/07/Compendio_julio_2018.pdf. These sector regulations have direct correspondence with Articles 12 subsection XIX and 98 of the LFCE and with Article 111 of the Regulatory Provisions of the LFCE, which lays down intervention of COFECE in the following: contracts for exploration and extraction of hydrocarbons (crude oil and unprocessed gas); permits for oil refining; permits for transport, storage and commercialization of hydrocarbons, natural gas, oil-derived fuels and petrochemicals; permits for the retail of natural gas and oil-derived fuels; permits to generate, transport and distribute electricity; contracts for partial transfer of rights derived from concessions for port maneuvering at terminals and facilities; concessions to operate and provide airport services; concessions to build and operate railways and provide railroad transportation services.

² There are no provisions for the intervention of the Commission in direct award of concessions, permits or contracts.

have a previous opinion from COFECE. This provision results in the issuance of measures to protect and promote competition to be included in the documents of the public tender before they are published.

- Pursuant Articles 29 and 59 of the Ports Law, COFECE issues opinions on aspects of competition that must be included in the public tenders' documents for granting contracts for the partial transfer of rights to build and operate port terminals and facilities; and resolves on the participation of economic agents³ interested in being awarded such contracts.
 - On behalf of the Executive Branch, The Ministry of Communications and Transportation establishes the participation of COFECE in the review of documents for public tenders for concessions to build and operate airports, and in the issuance of opinions related to the participants, in order to adopt necessary measures for the protection and promotion of competition in public tenders.
 - Article 24 subsection III of the Hydrocarbons Law (HL) establishes the need for a previous opinion issued by COFECE exclusively on the criteria for prequalification and awarding mechanisms of contracts for the exploration and extraction of crude oil, oil condensates and unprocessed oil.⁴
6. Thus, COFECE participates in the protection of competition and free market access in the granting of concessions, permits or contracts in two stages:
- Reviewing the calls and other documents of public tenders, to include competition aspects needed to ensure that the rules allow for the greater possible competition. During this stage it is also determined whether the market conditions require an assessment by COFECE of the economic agents participating in the tender process.
 - Assessment of economic agents participating in the public tender.

2. Review of the public tender documents

7. In resolutions about call for tenders, contracts and other documents of the bidding processes, COFECE determines which measures should be included to protect and promote free market access and competition. This is done for each bidding process.

8. These resolutions aim at ensuring maximum possible competition for the market and at preventing bid rigging. Some of the main measures are the following:

- I. Ensure greater market access in bidding processes:
 - That requirements on the characteristics of infrastructure and/or equipment the basic necessary ones, in such a way that competition works as a mechanism for

³ Article 3, subsection I of the LFCE establishes that economic agents are any natural or legal person, either for profit or non-profit, Federal, State or Municipal public administration agencies and entities, associations, business chambers and professional associations, trusts, or any other form of participation in economic activity.

⁴ Pursuant Article 23 of the HL, the awarding mechanisms can be, among others, an ascending price auction, a descending price auction or a first price sealed bid auction.

awarding contracts to agents who offer the best terms of investment and development for exploiting resources and/or providing public services.

- That technical, operative and administrative capabilities to be accredited by participants is not specified in a manner that entails a preference towards specific economic agents, but rather facilitate market access for those capable of developing projects.
- The guarantees of procedural seriousness to participate in bidding processes and/or to comply with contracts can be made through any financial instrument recognized in applicable laws.

II. Ensure an objective assessment for the awarding of tenders:

- For the assessment of technical aspects on the matter of the tender. Establish predetermined criteria, transparent and unambiguous to assess the technical proposals, that do not depend on the interpretation of the convening entity.
- For the evaluation of economic offers. Awarding the contract to the agent who presents the highest initial compensation, from amongst those that comply with the corresponding technical requirements.

III. Incorporate competition aspects in concessions, permits or contracts:

- Avoid exclusivities or preferences, unless when these are strictly necessary for ensuring investment in infrastructure.
- Avoid provisions that imply that future concessions, permits or contracts will be awarded according to the characteristics of facilities and/or equipment offered by the winner.
- Specify that, in the event that the winner seeks to transfer in the future the rights or sell part or the entirety of their social parts to another economic agent, the favorable previous opinion of the COFECE should be obtained.

IV. Prevent collusive behavior in public tenders:

- Explicitly warn in calls for tenders that cartel conducts are illegal and that they consist in contracts, agreements, arrangements or combinations amongst competing economic agents that participate in a public tender, whose object or effect is establishing, concerting or coordinating bids or abstaining from participating or renouncing to the bidding process, as well as exchanging information with said aims or effects.
- Explicitly warn in the call for tenders about economic and criminal sanctions for committing these conducts.

V. Prevent unlawful mergers:

- In cases when market assessment results in probable market concentration, it must be established the obligation for participants to request an opinion from COFECE.

3. Assessment of participants

9. Evaluation of participants in matters of competition entails the assessment of the resulting concentration in the relevant market (target market of the bidding process) and in related markets (upstream and/or downstream), based on the assumption that each participant is awarded. In other words, this assessment corresponds to the potential competition for the market.

10. The assessment of the effects on competition resulting from awarding a contract is similar to the one applied to a merger between economic agents:

- I. Determination of relevant market entails:
 - Which services are involved in the tender;
 - The possibility of substitute them;
 - The area of influence of the infrastructure to be awarded, and/or the infrastructure through which public services may be provided;
 - Restrictions faced by users to access other providers and other markets;
 - Markets related to the market of the public tender.
- II. Identification of economic agents that are providers in the market and the degree of market concentration.
- III. Evaluation of the effects of the award on every participant, with regards to economic agents already competing in the market and to the demand of a good or service, as well as in other related markets and economic agents, to determine whether the awardee will acquire the capacity to limit supply and/or establishing prices and fees unilaterally.
- IV. Identification of possible barriers to entry derived from the public tender, particularly:
 - The amount of investment required to build and operate the infrastructure and to possess the equipment necessary for providing public services;
 - The timeframe necessary for the return on investments;
 - The legal requirements, public policies and other condition that hinder, restrict or impede access to resources or public goods necessary to lay the infrastructure;
 - Where appropriate, the behavior of economic agents participating in the market.
- V. From the aforementioned assessments it is determined whether:
 - The award facilitates or allows unilateral setting of high prices for users.
 - The award facilitates or allows providing lower-quality services to users.
 - The award facilitates or allows the awardee to provided services according to different terms and conditions for users with similar characteristics.

- The effects on competition derived from awarding a resource that is an essential input for upstream and/or downstream market access, that allows or facilitates displacement of competitors.
11. In cases where assessment shows that the award confers substantial power in the relevant market and/or in related markets to a participant, COFECE issues a non-favorable opinion. This implies that said economic agent cannot be awarded after such an opinion.
12. In cases when the award to an economic agent results in market concentration, the assessment will entail the evaluation of efficiencies potentially created. Some of the relevant elements included in the assessment are:
- The creation of infrastructure and/or investment in equipment that generates larger economies of scale and cost efficiencies that are transferred to users through more favorable fees;
 - Higher quality of provided services (for example, in timeliness, fewer loss of transported goods, faster and more secure delivery of products);
 - Enabling modern multimodal transportation for more expedite and cost-competitive door-to-door transport of goods;
 - Does not imply diminishing an alternative offeror.

4. Challenges for competition assessment in public tenders

13. The main challenges for the assessment of the competition for the market in public tenders lie in inaccurate and insufficient available information. For example, limited or inexistent information on volumes and values of flow of goods per offer or in time, price evolution, and upstream or downstream activities.
14. Limited information on key variables affect in the function of markets that will be assigned through the public tender, this does not allow the estimation, with a significant level of confidence, of the future development of the market. Hence, assessments are primarily based on the evaluation of harm to competition resulting from: i) eliminating the possibility of entrance of a new offer or into the market where is presence of one or more economic agents already participating in it; and ii) upstream and/or downstream presence of participants in the public tender.

5. Other considerations

15. Theories of harm related to refusal to deal, margin squeeze and predatory economic offers are not focal points in the assessment of competition for the market implying awarding of concessions, permits or contracts through public tenders, because:
- Ex ante price regulation is established (pursuant to the LFCE and sector laws, in cases that fall within the jurisdiction of COFECE) when public services subjected to ex ante sector regulation oblige for the effective and not unduly discriminatory access to infrastructure and services; and in cases of public services in monopolistic markets.
 - The LFCE establishes procedures to investigate and, when appropriate, to sanction monopolistic conducts such as refusal to deal and margin squeeze committed by

grantees of concessions, permits and contracts in effect, as well as anticompetitive conducts during bidding processes.

6. Experiences

16. Some noteworthy enforcement cases of competition for the market in bidding processes for the exploitation of public goods and to provide public services are:

6.1. Tender of permits to distribute natural gas

17. In mid-2014, the Energy Regulatory Commission announced two tenders to grant the first permit for the distribution of natural gas through ducts⁵ in two geographical regions: i) southern part of the state of Sonora and northern part of the state of Sinaloa, and ii) center and south parts of the state of Sinaloa. COFECE received requests for opinions on several economic agents interested in participating in both tenders, amongst them, a subsidiary of *Grupo Alerta*, owner of other undertakings in the distribution and retail of liquefied petroleum gas (LPG) business.

18. The Commission considered that natural gas and LPG can be mutual substitutes in those regions where natural gas duct distribution infrastructure allows users to opt for either fuel. Due to the fact that *Grupo Alerta* was already positioned as the distributor with the largest LPG market share in both regions where natural gas distribution through ducts was projected, COFECE considered that:

- Deploying a natural gas distribution network implies high fixed costs, so the awardee would seek to increase the number of users to obtain a return on investment. Thus, an already existing provider of LPG would be obliged to offer better services to avoid loss of clients.
- If awarded, *Grupo Alerta* would hold the only existing permit to distribute natural gas for a 12-year period, along with a large market share in LPG.
- In this context, *Grupo Alerta* would have incentives to strategically deploy the natural gas network, according to its LPG distribution network, thus potentially under-investing in infrastructure in locations where *Grupo Alerta* does not face considerable competition in LPG, and to only develop the duct network where effective competition takes place.
- *Grupo Alerta* would have had little competitive pressure because of its larger market share for LPG, and hence would have had few incentives to improve prices and the quality of distribution services for both fuels.

19. Consequently, COFECE issued a non-favorable opinion on the participation of *Grupo Alerta's* subsidiary undertaking in both tenders, as anticompetitive effects would ensue if it was awarded.

⁵ The 2014 reforms to the energy sector ended tendering for these permits and, instead, created and simplified direct award for development of this type of infrastructure.

6.2. Tender of the concession to build and operate the Mayan Riviera airport

20. At the end of 2011, the Ministry of Communications and Transportation announced a tender for the concession to build and operate a public service civil airdrome in the municipality of Tulum, Quintana Roo (Mayan Riviera airport). *Grupo Aeroportuario del Sureste (Asur)* was among interested parties to request an opinion from COFECE's predecessor, the Federal Competition Commission (CFC, for its acronym in Spanish) to participate in the tender process, the same company to hold the concession to operate the Cancun airport.⁶

21. For the assessment, CFC took into account the short distance between the Cancun and Mayan Riviera airports (130 km), which implied a considerable overlapping of influence zones of both airports. Particularly, the Commission observed:

- Playa del Carmen, a touristic destination is located a similar distance away from both airports, with commute times of 50 minutes from the Cancun Airport and 60 minutes from the Mayan Riviera;
- The touristic region of Playa del Carmen (also known as Mayan Riviera) accounted for 30% of the total offer of hospitality rooms in the touristic corridor Cancun-Mayan Riviera;
- This region accounted for the most dynamic touristic flow in the region;
- The new airport would allow both tourists and airlines to choose airports according to price and quality of their choosing.

22. From these conditions it was evident that the Mayan Riviera airport would create competition for the Cancun airport for the benefit of consumers and of the tourism industry.

23. Consequently, awarding the concession of the Mayan Riviera airport to *Asur*, would result in a high market concentration for airport services, that would hinder the development of competition. To avoid these adverse effects, CFC resolved to issue a non-favorable opinion on *Asur's* participation in the tender.

6.3. Tender for a terminal specialized in bulk produce at the Port of Veracruz

24. In early 2017, the Integral Port Administration of Veracruz (API for its acronym in Spanish) announced a tender for a partial transfer of rights and obligations derived from the concession to build and operate specialized facilities for the handling of bulk produce at the expansion area of the Port of Veracruz.

25. The Commission received requests for opinions from six economic agents, two of which were companies already operating at the Port of Veracruz with facilities specialized in the same category of products (*ADM México* and *Grupo Logra*), as well as a subsidiary of *Grupo Mexico*, in control of the concession for the railroad connecting the Port of

⁶ The first Federal Economic Competition Law, enacted in 1992, created the Federal Competition Commission (CFC). After a Constitutional Reform in 2013 a new Federal Economic Competition Law was adopted in 2014. This reform introduced major changes to the competition policy replacing the CFC by two new authorities: the Federal Institute of Telecommunications (IFT for its acronym in Spanish), responsible for competition law enforcement in the telecommunications and broadcasting sectors, and the Federal Economic Competition Commission (COFECE) in charge for enforcing competition law in all sectors of the economy, excluding those covered by the IFT.

Veracruz with central and southern Mexico. The main results of the Commission's assessment showed:

- *Terminales de Cargas Especializadas S.A. de C.V. (TCE)*, a company belonging to the same group as *ADM México*, operates a facility specialized in bulk produce at the Port of Veracruz. Thus, in case of *ADM México* being awarded, it would control 77.3% of the areas dedicated to this kind of cargo.
- Through a joint venture with *Terminal Marítima de Veracruz, S.A. de C.V. (TMV)*, *Grupo Logra* operated a facility specialized in bulk produce at the Port of Veracruz. In case of being awarded, *Grupo Logra* would control 57.4% of the surface dedicated to such cargo.
- Access to a port precinct, in this case, the Port of Veracruz, is the main input to be an offeror of maneuvering services specialized in bulk produce. Through the tender, available spaces for construction of facilities would be depleted, thus blocking the entry of new offerors.
- Even though multipurpose facilities can provide maneuvering services for bulk produce, operators of this kind of infrastructure face restrictions in storage areas and for the use of docks that could be used for bulk produce, significantly limiting their efficiency and capacity for timely and sufficient response vis-à-vis the new specialized port terminal, which would have a dock for its sole operation.
- While other economic agents do have surfaces for maneuvering bulk produce for users, these areas are considerably smaller than those held by *ADM México* or *Grupo Logra*, if the latter two were awarded. Competitors would be rendered incapable to effectively compete for the demand of maneuvering services. These conditions would bestow *ADM México* and *Grupo Logra* with the capacity to unilaterally fix prices and impose conditions on the characteristics of services offered.

26. If the *Grupo Mexico* subsidiary were awarded:

- Vertical integration of maneuvering services for bulk produce and railway transport of these products would have occurred, thus becoming the only economic agent capable of providing these services as a bundle. This capacity would facilitate granting preferential treatment to its own bulk produce maneuvering services at the new port terminal, to the disadvantage of competing offerors.
- Competing operators of port facilities specialized in agricultural products would have been unable to compete against this capacity, as there is not an optional effective railroad at the port. Even though another railway concessionaire stops at Veracruz, *Grupo México* controls the railroads connecting the port and hold rights of passage and access to the railroad maneuvering courtyard, which results in the group holding an 82% market share for imported bulk produce (the largest volume for this type of cargo).

27. Based on these reasons, the Commission issued non-favorable opinions on the participation in public tenders for these three economic agents.

6.4. Promotion of competition in public tenders

28. Concerning activities for which applicable laws do not foresee the intervention of the Commission to promote competition in public tenders, the document “Competition agenda towards integrity in public procurement” gathers experiences of COFECE in the matter.⁷ The document provides government agencies and institutions with basic tools to achieve better conditions for the State in the procurement of goods and services and in tenders of public works, through tendering process designs that allow for maximum possible market access, intense competition amongst participants and reduced opportunities for cartel formation and operation.

29. To achieve these objectives, the document points out that it is worth considering:

- To avoid setting unnecessary technical requirements for participation; setting instead those strictly necessary that are transparent, objective and non-discriminatory;
- Timely publicity of the pertinent information for participants to prepare their proposals in a reasonable timeframe;
- Not revealing information that facilitates collusive agreements;
- Objective criteria to assess technical and economic capabilities of proposals and to award contracts;
- Reducing the opportunities for discretionary and uncertain processes, so participants can design proposals based on the characteristics of goods/services they provide, and not on the basis of discretionary evaluation of criteria.
- For public tender to be the rule, and direct awards the exception;
- For exceptions to public tenders to be fully justified: for example, the existence of patents or administrative efficiencies for small-sum procurement.
- To track opportunities for the awardee to subcontract third parties, thus avoiding public tenders to turn into collusive mechanisms;
- To avoid an economic interest group to participate in a public tender through two or more undertakings, as this affects market access, unlawfully displaces competitors, or allows for the renegotiation of bids in favor of undertaking from the same group.
- To avoid evaluation mechanisms based on points and percentages, as they imply high discretionary election of elements, their valuation and assessments of different characteristics of projects presented, all of which generally affects the objectivity in awarding contracts.
- To establish clear and unmistakable criteria to determine the compliance of technical proposals, for example, an “either complies or does not comply” rule. Thus, any offer or who complies with minimum technical requirements will have the same chances to compete against another agent that also complies.

⁷ See press release COFECE-031-2018. Available at: <https://www.cofece.mx/wp-content/uploads/2018/08/COFECE-031-2018-English.pdf>.

- To avoid modifications to contracts that imply substantial alterations to the original project, distorting from the origin, the process of competition in the public tender and facilitating undue advantages by means of negotiations and interactions between competitors and public servants in charge of modifications.

Contribution by Mexico's Federal Telecommunications Institute (IFT)

1. Introduction

1. Competition-for-the-market processes in the Telecommunications and Broadcasting (T&B) Sectors in Mexico apply mainly for the allocation of scarce State assets and resources, such as radio electric spectrum frequencies. In these cases, competition-for-the-market is followed by competition-in-the-market.
2. The Federal Economic Competition Law (LFCE, by its acronym in Spanish)⁸ empowers the IFT as competition authority to issue an opinion on the call and the basis for bidding processes in the T&B markets, to incorporate procompetitive criteria. Complimentary, sectoral regulation⁹ empowers the IFT to manage spectrum¹⁰ —a scarce natural resource— having certain objectives, which include the promotion and protection of effective competition in the converging T&B markets.¹¹
3. Spectrum is facing an increasing demand due to ongoing technological developments, emergence of new applications and convergence. These developments, though often making spectrum use more efficient, have spurred greater demand for this scarce resource. Thus, the efficient and effective management of the spectrum, while crucial making the most of the opportunities that the spectrum represents, grows more complex (ITU-R, 2014) (OCDE, 2005).
4. Market-based criteria for spectrum management include auctioning spectrum concessions and promoting *secondary markets* by minimising the regulatory costs for transfer or lease of spectrum usage rights. Additionally, the competition and sectoral law enforcement pursue the promotion and protection of effective competition in the T&B markets.
5. In this document, the IFT describes the concessions regime, the legal framework and the criteria used in the competition assessment into allocative processes, from the design of bidding processes to their execution, and the market-approach tools to enhance competition-in-the markets.

2. Concessions regime in T&B sectors

6. Before the 2013 Constitutional Reform on Telecommunications, the Ministry of Communications and Transportation (SCT, by its acronym in Spanish) granted a number of concessions to provide T&B services. These concessions conferred the right to provide an specific service in a specific geographical areas requested by the agents. Any

⁸ Available in Spanish at http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_270117.pdf

English version is available at http://www.ift.org.mx/sites/default/files/traduccion_lfce-2.pdf.

⁹ Mexican Constitution and the Federal Telecommunications and Broadcasting Law (LFTR, by its acronym in Spanish), international treaties and agreements signed by Mexico and applicable recommendations made by international organizations.

¹⁰ Spectrum is a public property that belongs to the Nation, and which the State must hold and manage— a power granted to the IFT.

¹¹ Article 54 LFTR.

amendment to add or remove a service or geographical area was subject to specific procedures.

7. As it was the case in other countries, in Mexico the T&B markets were highly concentrated. The provision of the services was in hands of an incumbent operating as a natural monopoly with steeply declining long-run average and marginal-cost curves. This made it very difficult for new competitors to enter the markets. Added to this, between 2009 and 2013, before the IFT creation, there were no bidding processes for allocating rights to use the spectrum frequencies. The former Federal Telecommunications Commission (COFETEL, by its acronym in Spanish)¹² carried out the last process under the so-called Tender 21 (*Licitación 21*).¹³

8. The 2013 Constitutional Reform on Telecommunications recognized the need to promote competitive conditions in the T&B markets, particularly in the television, radio, telephone, and data services. As a result, the simplified concessions regime, now in charge of the IFT,¹⁴ establishes two kinds of concessions:

1. Sole Concession, that allows its holder to provide all manner of public T&B services convergently, and
2. Spectrum concession, that confers, through a bidding process, the right to use, operate or exploit the radio spectrum frequencies.

2.1. Sole Concession

9. The Sole Concession¹⁵ confers, for up to thirty years, the right to provide all manners of public T&B services in a convergent way. For its purposes, the Sole Concession is classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use (This category includes indigenous or communitarian social use).

10. A Sole Concession for commercial use grants individuals and business corporations the right to provide public T&B services for profit through a public telecommunications network. It does not grant the right to use radio spectrum frequencies. If the concessionaire needs to use spectrum bands, it must obtain a spectrum concession.

11. According to the Federal Telecommunications and Broadcasting Law (LFTR, by its acronym in Spanish), agents must obtain a spectrum concession to make use of radio spectrum frequencies. In the case of granting spectrum concessions for commercial or private communications purposes, the IFT must carry out a public bidding process to promote an efficient allocation of the spectrum.

¹² The Federal Telecommunications Commission was the telecommunications regulator in Mexico and was part of the SCT. It was created in 1996 and replaced by the IFT in 2013.

¹³ Because of this process, 30 MHz of radio spectrum for mobile services were awarded to Nextel-Televisa.

¹⁴ IFT is the authority on competition in the broadcasting and telecommunications sectors and it is also responsible for the regulation, promotion and oversight of the use, development, and operation of the radio spectrum, satellite orbits, satellite services, public telecommunications networks and the provision of broadcasting and telecommunications services, as well as the access to active and passive infrastructure and other essential inputs.

¹⁵ There are four possible Sole concession uses: commercial, public, private and social (Article 67 of the LFTR).

12. The procedure to obtain a Sole Concession is relatively simple. According to the LFTR, parties interested in obtaining a Sole Concession, regardless of its use, must apply to the IFT and meet all the requirements established by the IFT in light of the LFTR provisions.¹⁶

2.2. Spectrum concessions

2.2.1. Bidding process

13. Bidding processes in Mexico start with the publication of the Annual Frequency Bands Program, which contains the specific frequencies or spectrum frequency bands that shall be tendered or directly allocated¹⁷. The publication of this Program has the purposes of enhancing transparency, raise awareness of investors, stimulate participation in spectrum allocative processes as well as promote the efficient use of the radio spectrum, the benefits for public users, competition and diversity developments, and the introduction of new T&B services.

14. The criteria considered by the IFT to grant a spectrum concession are the following: the economic proposal; coverage, quality, and innovation; lower service prices for end-users; prevention of concentration phenomena that are contrary to the public interest; entry of new competitors, and consistency with the concession program.

15. The IFT has carried out several bidding processes related to radio broadcasting services and television broadcasting services (see Table 1).

Table 1. Biddings related to broadcasting services

Radio Broadcasting	Television Broadcasting
Public bid to grant the use, development, and operation of 191 FM frequencies and 66 AM frequencies for public radio broadcasting service (IFT-4).	Public bid to grant the use of 2 X 123 transmission channels to operate two digital broadcast television networks (IFT-1)
	Public bid to grant the use of 148 transmission channels for the provision of the public digital broadcast television service (IFT-6).

Source: IFT.

16. Besides, the IFT has carried out the following bidding processes related to telecommunication services.

¹⁶See: <http://www.ift.org.mx/sites/default/files/contenidogeneral/industria/lineamientosconmod.arts.3y8.pdf>.

¹⁷ Only for public and social use.

Table 2. Biddings related to telecommunication services

Complementary Terrestrial Service of the Mobile Satellite Service (IFT-9)
Wireless access service, 2.5 GHz band (IFT-7)
Capacity provision for private radio communication systems, trunking (IFT-5)
Wireless access service, AWS Band (IFT-3)

Source: IFT.

2.2.2. Secondary spectrum market

17. Under the LFTR, the IFT must promote the secondary spectrum market,¹⁸ observing the principles of promoting competition, removing barriers to the entry of new competitors, and efficient use of the spectrum. The IFT analyses the effects of radioelectric spectrum leasing on competition through the procedure provided in article 104 of the LFTR, and through the standard ex-ante merger notification procedure provided in article 86 of the LFCE.

18. The LFTR establishes the obligation for concessionaires to report any transaction that involves 10% or more of shares in capital stock, before its execution. Transactions that updates the thresholds of the LFCE for mergers that require ex-ante authorization are analysed under the merger control procedure provided in the LFCE, while also considering the criteria of the LFTR. One of the examples that the IFT has authorized is the following:

Box 1. Spectrum contract lease between DUONO (MVS) and Telcel

Duono, a company with spectrum frequencies operating in the 2.5 GHz band, particularly in the segments 2500-2530 MHz and 2620 - 2650 MHz, with prior authorization from the IFT leases Telcel said frequencies under the same terms and conditions provided in its title of concession.

From the competition analysis conducted at the IFT, it was concluded that the operation constituted a concentration in terms of Article 61 of the LFCE for constituting a transfer of assets between Duono and Telcel since the latter would temporarily acquire assets concessioned to the former.

With regard to the amount of the lease operation, the operation was part of section I of Article 86 of the LFCE, so it should be notified to the IFT. Notwithstanding the amount of the operation, since it is a corporate restructuring (the parties belong to the same group), it updated an exception situation provided for in Article 93 of the LFCE to notify this concentration.

Finally, based on the available information, the lease of the 43 titles of concession of Duono, were leased to Telcel, noting that this contract would foreseeably not have effects contrary to the process of competition and free market access in the provision of telecommunications services in virtue that they belong to the same economic group.

Source: http://rpc.ift.org.mx/rpc/pdfs/5857_180215193933_8960.pdf.

¹⁸ The secondary market or spectrum lease consists of two legal figures: i) the transfer of rights, and ii) the lease of radio spectrum.

19. The IFT also issued guidelines for secondary use of the spectrum¹⁹ in order to regulate this kind of use of radio frequency spectrum bands, intended to meet specific telecommunications needs in specific activities that are not intended to provide telecommunications services for commercial purposes, as well as, allow duly approved short-range radio communication devices.

3. Legal Framework for Competition Assessment in Bidding Processes

20. Articles 98 and 99 of the LFCE empowers IFT, as the competition authority in the T&B sectors, to issue an opinion regarding allocation processes carried out by authorities in these sectors, as well as to assess interested candidates in the processes.

21. In these cases, before the call for an allocation process, IFT issues an opinion that includes a competition assessment of the rules of the bidding process, the draft contracts and other relevant documents of the process. In its opinion, IFT proposes measures to protect and promote competition.

22. Once the rules of the process have been published (and before the start of the bidding process), those interested candidates must obtain a favourable opinion issued by the IFT as a requirement for them to participate. According to article 98 of the LFCE, the analysis carried out by the IFT to issue its opinions to interested candidates is based on the application of merger analysis criteria, established in Articles 63 and 64 of the LFCE.

23. The IFT also acts as the calling authority for spectrum bidding processes (as the sectoral regulator). In these cases, IFT designs spectrum allocation processes considering the principles established by the Mexican Constitution regarding the provision of telecommunications services,²⁰ as well as the criteria established in the LFTR regarding the granting of spectrum concessions.

24. In particular, the Mexican Constitution and LFTR state that IFT must promote competition and prevent spectrum accumulations contrary to the public interest.²¹ In these cases, IFT also evaluates those interested candidates by applying the criteria established in the LFCE for merger analysis.

25. The IFT designs bidding rules that are aimed at promoting participation and competition in the processes, promoting competition in the markets, as well as preventing anti-competitive practices in the processes and the provision of T&B services.

26. Draft call and basis of each bidding process are developed by a task force integrated by technical units (e.g. Economic Competition, Legal Affairs and Radio electric Spectrum Units), under the coordination of the Radio electric Spectrum Unit. Drafts are subject to public consultation processes, to get stakeholders' and general public comments. After considering and addressing all views expressed during the public consultation, the IFT publishes the final rules.

¹⁹ Available in Spanish: http://www.dof.gob.mx/nota_detalle.php?codigo=5520397&fecha=23/04/2018

²⁰ Article 6 of the Mexican Constitution states that telecommunications are public services of general interest, so the State must guarantee they are provided in conditions of competition, quality, plurality, universal coverage, interconnection, convergence, continuity, free access and without arbitrary interference.

²¹ Articles 78 and 79 of the LFTR.

27. The IFT integrates competition analysis in the bidding process design and the assessment of the interested candidates. The Economic Competition Unit (UCE) carries out competition assessment and issues opinions about every relevant aspect of the tender process, including spectrum accumulation limits, entry access, bidding process, coverage requirements, technical rules, measures to foster new entrance and maximum reference prices. Other specialized units (e.g. Radio electric Spectrum and Legal Affairs Units) assess other economic, technical and legal requirements. The IFT's Board takes into consideration both technical opinions to issue its decision.

28. IFT's decisions in all the stages of the bidding process are made public to enhance transparency, to enable decision-makers and stakeholders to make informed judgements, to ensure accountability on IFT's decisions, and to enhance participation and competition. Up to date, the UCE has carried out 7 reviews on bidding rules and has issued 217 opinions about interested candidates.

4. Competition Assessment in Bidding Processes

29. The IFT, as the competition authority in T&B sectors, primarily evaluates the following elements of the bidding rules:

- Bidding format (which must promote participation and prevent coordinated effects);
- Spectrum caps to: i) prevent spectrum accumulation contrary to the public interest, or ii) promote the entry of new competitors;
- Requirements that prevent coordinated effects in the bidding process;
- Evaluation of the interested candidates;
- Participation requirements that ensure trustworthiness and capability, without imposing unjustified restrictions; and
- Minimum reference value, to ensure adequate return, without limiting participation.

4.1. Spectrum allocation processes

30. In cases where the IFT acts as the calling authority for spectrum tenders, the IFT establishes rules that aim to prevent spectrum accumulation contrary to the public interest, taking into account that the ability of an operator to compete *for the market* depends on the quantity and characteristics of the frequency bands that can use.²² The IFT considers crucial that operators have access to a balanced basket of spectrum frequencies so they can compete effectively in the end-user market.

31. Regarding the evaluation of interested candidates, the analysis focuses on identifying the economic interest group to which the interested party belongs, its activities, if spectrum caps are met, and if the proposed participation generates risks to the competition in the provision of the corresponding services.

²² J. Chapin, y W. Lehr (2011), Mobile Broadband Growth, Spectrum Scarcity, and Sustainable Competition. Available at <https://pdfs.semanticscholar.org/12cd/b5df83cb6acce1a8d94a8771b184d127ec62.pdf>.

Box 2. Competition analysis for spectrum public tenders 2013-2018

By Constitutional mandate, the IFT must prevent spectrum accumulation that may hamper public interest, eliminate barriers to entry and foster efficient expansion. Additionally, the LFTR requests the IFT to manage spectrum according to several objectives that include effective competition in the converging T&B markets. Therefore, acting as the sectoral regulator and competition authority, the IFT designs and conducts spectrum public tenders subject to criteria contained in the LFCE.

It would be inefficient for the IFT's Board to assess a matter solely as a competition authority just to issue an opinion to itself, to incorporate it into a regulatory decision. Therefore, pursuant the principles of procedural efficiency and administrative simplification, the IFT has adopted converging procedures to incorporate the competition and regulatory assessment into its decisions.

- IFT-4 was the first auction for the leasing of spectrum rights for radio broadcasting services. A total of 191 frequency in the FM band were set in the auction. To foster competition and promote the entrance of new participants, the IFT determined local spectrum caps and included rules to favour the entrance of new participants. The results from the auction showed that new participants entered in 30 local markets and the Hirschman-Herfindal Index (HHI) was reduced by 50 points.
- IFT-1 was the first auction to lease spectrum rights for digital television broadcasting services. IFT set spectrum caps to enhance competition and clauses to promote the entrance of new competitors. The winning bidder was a new participant in the digital broadcasting television market; and, hence, the concentration index for the broadcasting sector was reduced from 4,731 to 3,391 points.
- IFT -7 auctioned spectrum of the 2.5 GHz band to provide mobile telecommunication services. IFT set spectrum caps and clauses to enhance the entry of new competitors. As a result, AT&T and Telefónica enter to the tender process and were allocated with spectrum frequencies.

Source: IFT

4.2. The 2.5 GHz band Bidding Process (Auction IFT-7)²³

32. In the 2.5 GHz band bidding process, the IFT was the calling authority and the competition assessment of the bidding rules was oriented to assess:

- The quantitative limits defined as spectrum caps to prevent spectrum accumulations contrary to the public interest, and
- Interested candidates (i.e. as economic groups or undertakings), to prevent anticompetitive effects in the process and the provision of services.

²³ 120 MHz Tender in the 2500-2690 MHz band. Reference documents about this process are available in Spanish at <http://www.ift.org.mx/industria/espectro-radioelectrico/telecomunicaciones/2018/licitacion-no-ift-7-servicio-de-acceso-inalambrico>

4.3. Use of Spectrum Caps

33. In the analysis to determine spectrum caps, IFT took into account spectrum concessions in all frequency bands used to provide mobile telecommunications services (IMT bands).

34. Before the Auction IFT-7, mobile operators had asymmetric spectrum holdings in bands for capacity and coverage. In particular, in the two previous years, *Telcel* had increased its spectrum rights by 136.7%, being one of the two winner participants of the bidding process in the AWS band (IFT-3)²⁴ and due to a spectrum acquisition in the 2.5 GHz band carried out in the secondary market.²⁵

35. Thus, spectrum caps were established in each of the two stages of the adjudication process. The caps had the following purposes: i) prevent accumulations that could damage competition or whose purpose or effect is to establish barriers to entry, ii) promote the entry of new participants, and iii) strengthen the capacity of already established competitors who owned fewer spectrum rights.

36. In the first stage of the process, it was established a spectrum cap of 32.5% of the total IMT licensed spectrum, equivalent to 194.46 MHz. In the second stage (to take place only if the first stage resulted in unallocated spectrum blocks), it was established a maximum accumulation limit of 35.0%, equivalent to 209.42 MHz.

37. Furthermore, the IFT-7 bidding rules established that applicants had to be evaluated in terms of competition, as a requirement to be considered participants. Based on this analysis, using standard criteria for merger analysis, the IFT approved the participation of the two applicants: AT&T²⁶ and *Telefónica*.²⁷ Both participants obtained spectrum blocks in the Auction IFT-7.²⁸

4.4. Opinions issued to other authorities

38. The 2013 Constitutional Reform on Telecommunications²⁹ established the obligation for the Mexican State to develop two connectivity projects using public resources:

- The *Red Compartida*, based on the use of the 700 MHz band to provide wholesale mobile telecommunications services, and

²⁴ 80 MHz Tender in the 1850-1910 and 1930-1990 MHz bands. Reference documents on this process are available in Spanish at <http://www.ift.org.mx/industria/espectro-radioelectrico/espectro/2015/licitacion-ift-3-banda-aws>

²⁵ In 2016, Telcel acquired 45.25 MHz on average at the national level in the 2.5 GHz band. This operation was notified as a merger and authorized by the IFT. The public version of the resolution is available in Spanish at http://apps.ift.org.mx/publicdata/Version_Publica_UCE_270417_221.pdf.

²⁶ Available in Spanish at http://apps.ift.org.mx/publicdata/P_IFT_200618_426.pdf

²⁷ Available in Spanish at http://apps.ift.org.mx/publicdata/P_IFT_200618_427.pdf

²⁸ Available in Spanish at http://apps.ift.org.mx/publicdata/P_IFT_310818_533.pdf y http://apps.ift.org.mx/publicdata/P_IFT_310818_534.pdf.

²⁹ Available in Spanish at https://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013.

- The *Red Troncal*, based on the use of approximately 25,000 kilometres of fibre-optic for the development of a backbone network to provide wholesale fixed telecommunications services.

39. In both projects, the IFT issued opinions to the calling authorities of the bidding processes, which included recommendations, as well as measures to protect and promote competition to be incorporated in the bidding rules.

4.4.1. *Red Compartida*

40. The purpose of the *Red Compartida* project is to guarantee the installation of one public shared telecommunications network that provides wholesale mobile services (i.e. exclusively provide services to retailers and concessionaires of telecommunications networks), and thus increase the population's access to broadband Internet.³⁰

41. The bidding process for the Red Compartida project was called by the SCT, and was open for all interested Mexican and international economic agents, except for those who were providers of telecommunications services in Mexico and could have an influence on the operation of the network. To regulate this condition, the IFT issued a specific document.³¹

42. The adopted design for the project was a public-private partnership in which the federal government provides the right to use 90 MHz of the 700 MHz band nationwide, while the winner contributes all the economic, financial, human and other resources required to carry out the project.

43. Before the issuance of the bidding rules, at the request of the calling entity, the IFT issued an opinion, which included measures to protect and promote competition in the bidding process.³² The IFT noted that:

- The sealed-bid auction format was adequate since it is the mechanism established in the Public-Private Partnerships Law (LAPP, by its acronym in Spanish) and it was not legally feasible to explore alternatives.
- It was necessary to establish as a requirement that applicants have the favourable competition opinion of the IFT as the competition authority, where IFT carried out a competition assessment using a merger control approach and evaluated if they meet the condition of not being providers of telecommunications services that could influence the operation of the network.

³⁰ Sixteenth Transitory Article from the “DECRETO por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones”. Available in Spanish at https://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013

³¹ Elementos de referencia para identificar ex ante a los agentes económicos impedidos para tener influencia en la operación de la Red Compartida (Reference Elements to identify the economic agents barred to influence the operation of the Red Compartida), available in Spanish at <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/elementos.pdf>

³² Available in Spanish at <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/piftext2801164cmodelostitsreducida.pdf>

- The criteria to designate the winner (the one who committed to cover the highest percentage of the national population) was adequate and consistent with the provisions of the 2013 Constitutional Reform on Telecommunications.
 - It was not necessary to use spectrum caps.
 - No unnecessary requirements to prove technical, legal, administrative or financial capabilities were identified.
44. After the publication of the bidding rules, IFT received two requests for opinions from agents interested in participating in the process. The two applicants were identified as consortiums, *Consortio Rivada* and *Consortio Altán*, each with different members, including investment funds.
45. The IFT issued favourable competition opinions to the two interested parties, with the following clarifications:
- Regarding *Consortio Rivada*, *Echostar* was identified as a member and a telecommunications service provider that intended to have up to 49% of the shares of the company that would be the winning contestant. The IFT issued a favourable opinion regarding the participation of *Echostar*, subject to hold less than 10% of the shares of the company that constituted the winning contestant, among other conditions, because otherwise it could influence on the operation of the network, which was prohibited in the bidding rules.³³
 - In the evaluation of the *Consortio Altán*, the IFT identified *Axtel* and *Megacable*, two telecommunications service providers, as members. However, these two members would hold less than 5% of the shares of the company that would be the winning contestant, so no risks of having *influence* on the operation of the network were identified.³⁴
46. At the end of the bidding process, the *Consortio Altán* was the winner and is currently deploying the *Red Compartida*.³⁵

4.4.2. Red Troncal

47. The 2013 Constitutional Reform on Telecommunications established that the public entity Telecomunicaciones de México (Telecomm) must plan, design and execute the growth of a robust backbone network of telecommunications of national coverage, for which it may have the fibre-optic, rights of way and other resources of the Federal Electricity Commission (CFE, by its acronym in Spanish).³⁶

³³ Available in Spanish at <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/versionpublicauepifttext13101625.pdf>.

³⁴ Available in Spanish at <http://www.ift.org.mx/sites/default/files/contenidogeneral/temas-relevantes/versionpublicauepifttext13101626.pdf>.

³⁵ Available at <https://www.altanredes.com/red-compartida/>.

³⁶ Fifteenth Transitory Article from the “DECRETO por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones”. Available in Spanish at https://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013.

48. Therefore, Telecomm acted as calling entity in an international bidding process, to assign the *Red Troncal* project to provide wholesale fixed services, using the right to use two pairs of fibre-optic wires installed in the high voltage electric transmission lines of the CFE.³⁷

49. Like the Red Compartida Project, the adopted design for the Red Troncal project was that of a public-private partnership in which the federal government provides the right to use two pairs of fibre-optic threads (approximately 25,000 km), while the winner contributes all the economic, financial, human and other resources required to carry out the project.

50. The IFT issued a competition opinion in response to the Telecomm's request, which included measures to protect and promote competition in the bidding process.³⁸ The IFT noted that:

- The sealed-bid auction format was adequate, since it is the mechanism established in the LAPP, and it was not legally feasible to explore alternatives.
- It was necessary to establish as a requirement that interested parties have a favourable competition opinion of the IFT, carried out a competition assessment using a merger control approach.
- The criteria to designate the winner (the one who committed to cover the highest percentage of the national population) was adequate and consistent with the provisions of the 2013 Constitutional Reform on Telecommunications.
- No necessary requirements to prove technical, legal, administrative or financial capabilities were identified.

51. On October 3rd, 2018, the IFT issued favourable competition opinions to those interested in participating in the process.

52. The process for the *Red Troncal* project was scheduled to end on August 22, 2019; however, this project was cancelled by the calling entity.

5. Final Remarks

53. The 2013 Constitutional Reform on Telecommunications introduced objectives and criteria for the design and execution of tendering processes for allocating State assets and resources and established specific provisions for Public-Private Partnership projects that involve the use of State assets.

54. To accomplish these objectives, the legal framework empowers IFT to carry out a competition assessment to define measures that protect and promote competition in the bidding processes and in the provision of T&B services (i.e. to promote competition-for-the-market and competition-in-the-market).

55. The IFT encourages competition-for-the-market by including several rules in the bidding processes, such as adequate bidding format, spectrum caps, requirements that prevent coordinated effects and the corresponding sanctions in case of non-compliance,

³⁷ Available in Spanish at <http://www.telecomm.gob.mx/rtroncal/download/bases-del-concurso-red-troncal/?wpdmdl=768>.

³⁸ Available in Spanish at http://apps.ift.org.mx/publicdata/VP_P_IFT_210618_463.pdf

evaluation of the interested candidates, and participation requirements that ensure trustworthiness and capability without imposing unjustified restrictions.

56. The legal framework also establishes a concession regime that allows convergence in services and contains provisions applicable to transactions in spectrum secondary markets that simplify the requirements and procedures. When analysing these transactions, the IFT carries out a competition assessment, applying merger control criteria, to prevent agents from controlling scarce resources that can confer them undue advantages when competing for-the-market.

57. The competition analysis that is carried out as part of the procedures established in the LFTR is consistent with that performed in the procedures provided in the LFCE, as both are subject to the established criteria in the LFCE. Therefore, it is not necessary to subject the same acts to two procedures different to obtain a resolution of the IFT's Board. IFT acts as the regulatory and the competition authority for the T&B sectors.

Bibliography

ITU-R. (2014). *Economic aspects of spectrum management*. International Telecommunication Union, Sector de Radiocomunicaciones. Available at https://www.itu.int/dms_pub/itu-r/opb/rep/R-REP-SM.2012-4-2014-PDF-E.pdf

OCDE. (2005). *Secondary Markets for Spectrum*. Available at <https://www.oecd-ilibrary.org/docserver/232354100386.pdf?expires=1573520838&id=id&accname=guest&checksum=E7924C5AAD853AAA1913229DD77B73EB>