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1. This contribution refers to the conditions of the telecommunications and broadcasting (T&B) sectors in Mexico before the creation of IFT, followed by the establishment in 2013 of the IFT as both the competition authority and regulator in those sectors; its main institutional features and functions based on the mandate set forth by the Constitution, the Federal Telecommunications and Broadcasting Law (LFTR) and the Federal Economic Competition Law (LFCE). and its impact on the efficient development and the promotion and protection of free market access and competition in the T&B sectors.

1. Background

2. Until 1995, the Ministry of Communications and Transport (SCT) was the authority responsible for the telecommunications sector regulation. This changed through a 1996¹ Presidential Decree in which the Federal Telecommunications Commission (COFETEL) was created as a decentralized body of the SCT, with technical and operational autonomy and the purpose of regulating and promoting the efficient development of telecommunications, leaving the telecommunication policy, the imposition of sanctions for non-compliance with the regulation, and the granting of qualifying titles to provide telecommunications and broadcasting (T&B) services in hands of SCT.

3. Even though COFETEL was born as a regulatory body, it had certain limitations. COFETEL was unable to impose asymmetric regulation on economic agents with market power; unable to impose effective sanctions on service operators for failing to comply with the conditions set forth in their titles or for failing to comply with the regulation, among other limitations. Further limitations came from the lack of autonomy, the budgetary dependence to SCT, and the lack of its own organizational statute.

4. The institutional design generated a double window problem that resulted in a delay in the application of public interest decisions. Likewise, the incumbent agents made an abusive use of the judicial system which allowed them to extend the time in which regulations were not applicable to them. Regulation measures could not be implemented if decisions were not enforced and suspending these measures faded the process of developing effective regulation and market competition conditions. This was one of the main barriers to competition in the Mexican telecommunication market.

5. Regarding competition powers, the 1992 Federal Economic Competition Law (LFCE) aimed to protect competition process and free market access by preventing monopolies, monopolistic practices and other restrictions on the efficient functioning of the market. Notwithstanding the legal competition framework, the 1995 Federal Telecommunications Law (LFT) established that the Federal Competition Commission (CFC), among other attributions, had the power to define the markets and identify dominant economic agents that warranted ex ante regulation.

¹ Published August 9, 1996 in the Federal Official Gazette. Spanish version available in: <https://www.dof.gob.mx/copias.php?acc=ajaxPaginas&paginas=todas&seccion=UNICA&edicion=209648&ed=MATUTINO&fecha=09/08/1996>

2. 2013 Mexican Constitutional Amendment

6. Telecommunications, including broadband and internet access services, are key elements to social development and economic growth. However, compared to other OECD member states, in Mexico the T&B sectors experienced conditions that impeded growth in the markets. In addition to the above, an inefficient institutional design and the inappropriate coercive tools exercised by the regulator blocked the applicable regulation in the T&B sectors and its competition policy.

7. On this regard, it was necessary to intensify competition in many strategic sectors, including T&B in Mexico, in order to generate more and better goods and services at lower prices and help to reduce social inequality. In particular, this change seek to generate conditions of greater competition in the provision of services such as fixed telephone, mobile, data, broadcasting television and pay television.

2.1. The Creation of an Autonomous Body in Charge of the T&B Sectors and Competition

8. The Federal Telecommunications Institute (IFT)² was created as an autonomous constitutional body responsible for the regulation in the T&B sectors and as the economic competition authority for these sectors. Given the importance of the impact that the regulatory function and competition has on the T&B sectors, it was necessary to provide an organism with constitutional autonomy with legal personality and its own budget, outside any kind of interest.

9. IFT's purpose is the efficient development of T&B sectors. It is responsible for the regulation, promotion and oversight of the radio electric spectrum, networks and the provision of T&B services, as well as access to active, passive infrastructure and other essential facilities.

10. IFT will exclusively exercise the powers to guarantee free competition and free market access, as well as prevent, investigate and fight monopolies, monopolistic practices, unlawful concentrations and other restrictions on the efficient functioning of markets, order measures to eliminate barriers to competition and free market access; regulate access to essential facilities, and order the divestiture of assets, rights, social shares or actions of economic agents, in the proportions necessary to eliminate anticompetitive effects.

11. The granting, revocation, as well as the authorization of assignments or changes in shareholding control, ownership or operation of companies related to T&B concessions correspond to the IFT. Radio spectrum concessions for commercial and for private communication use will be granted through public bidding, in order to ensure maximum market access, preventing concentration phenomena that contravene the public interest and ensuring the lowest price of services to the end user. As an exception, concessions for public and social use will be non-profit and will be granted under the direct allocation mechanism in accordance with the provisions of the law and under conditions that guarantee the transparency of the procedure.

² In addition to IFT's creation, the constitutional amendment also creates the Federal Economic Competition Commission (COFECE).

12. The maximum governing body of the IFT is the Board, integrated by seven commissioners with voice and vote including its president, complying with the principles of transparency and access to information. The commissioners are appointed in a staggered method at the proposal of the head of the Federal Executive and ratified by the Senate after examining the technical knowledge convened by the Evaluation Committee³.

13. Considering the ample tasks assigned to the IFT, it has a complex structure comprised of numerous departments, each of them in charge of performing different functions. Apart from the Board, which is its governing body, the IFT has a Chairman, the Board's Technical Secretariat and an Executive Co-ordination. The IFT has the following units: Regulatory Policy, Radio Spectrum, Concessions and Services, Audiovisual Media and Content, Compliance (a sub-unit within the Compliance Directorate has recently been created to deal with the specifics on asymmetric regulation), Economic Competition, Legal Affairs, and Management. Also, the IFT has an Investigative Authority (IA) and a Study Center. In addition, the IFT has the following bureaus: Institutional Liaison, User's Policy, Strategic Planning; Regulatory Improvement, International Affairs, and Media Relations. The Economic Competition Unit and the IA are mainly responsible for undertaking the functions enshrined in the Federal Economic Competition Law (LFCE).

14. The IA is autonomous and an independent body with respect to the Board. Regarding the formal initiation of proceedings (such as investigations process, trial-like procedures associated to LFCE violations, the declaration of essential facilities and/or barriers to competition, and the determination of market conditions), the IA is in charge of substantiating the investigative phase of such proceedings, and the Economic Competition Unit is responsible for the trial-like procedure stage, while the resolution is issued by the Board.

15. The constitutional amendment established the separation between the IA (as the authority that is in charge of the investigation stage) and the Board (as the one that resolves the proceedings that are substantiated in a trial-like procedure). In the exercise of its powers, the IA is vested with technical and administrative autonomy to decide on its operation and resolutions.

16. One of the main aspects of the T&B constitutional reform relates to the fact that the IFT, a newly created autonomous constitutional entity, is empowered to carry out both *ex ante* and *ex post* competition intervention in the aforementioned sectors.

3. IFT's Functions as the Competition Authority and the Regulator in the T&B Sectors

17. The IFT has two main purposes:

- The efficient development of telecommunications and broadcasting, for which it regulates fixed-line and mobile telecoms, TV and radio operators, T&B services, internet access, radio spectrum, infrastructure, and others;

³ Applicants to be appointed as Commissioners will accredit compliance with the requirements referred in the Constitution before the Evaluation Committee composed of the head of the Central Bank of Mexico (Banco de México), the National Institute for the Evaluation of Education (Instituto Nacional para la Evaluación de la Educación) and the National Institute of Statistics and Geography (Instituto Nacional de Estadística y Geografía).

- The promotion and protection of free market access and competition in the T&B sectors, for which it prevents, investigates, prosecutes, and punishes anticompetitive practices, unlawful concentrations, barriers to free market access and competition, and other restrictions preventing efficient operation of markets.

18. The IFT imprints competition protection in its actions, including regulatory ones. One of the efficiencies of IFT resides in the possibility of exercising *ex ante* powers to prevent anticompetitive behaviors rather than fighting them *ex post*.

19. IFT's regulatory function is related to the way in which markets are created and controlled through laws, guidelines or resources issued by it⁴. This seeks to promote elements that encourage the performance of companies and contribute to the development of the T&B sectors in the Mexican economy. This function highlights the technical and specialized nature of the IFT, as well as its adaptability to technological advances or changes that allow the issuance of effective regulations for the benefit of the markets.

3.1. Asymmetric Regulation

20. IFT determines the existence of preponderant operators in the T&B sectors⁵, and imposes the necessary measures to prevent that competition and free market access, and thus benefits to users, are not damaged (preponderance is considered as a regulatory measure designed only for the T&B sectors). An economic agent shall be deemed to be preponderant when, taking into account its national participation in the provision of T&B services, it has directly or indirectly a national market share of over 50%, measured either by the number of users, subscribers, audience, traffic on their networks or capacity utilization of such networks.

21. Preponderance provides a means to speed up executing asymmetric regulations without the need to involve LFCE tools/elements used when assessing substantial market power⁶. It is important to state that the preponderance status is defined only in the T&B sectors, which is why, in practice, there can only be one preponderant agent in the telecommunication sector and one preponderant agent in the broadcasting sector. Preponderance is one of IFT's most powerful tools because it benefits users and prevents the competition and free market access process from being affected.

22. Allowing IFT to impose asymmetric measures on preponderant economic agents (as a regulatory measure) as well as those declared with substantial market power (as a competition tool) was crucial in a context of high levels of concentration, high prices, poor service quality, and lacking investment and penetration levels.

23. As any regulatory measure, preponderance is transitory and the IFT reviews said regulatory measures every two years in order to identify that the regulation is being effective, and has modified, added and eliminated asymmetric measures according to the actual situation of the markets. The last revision made of the preponderance measures for

4 The Institute shall conduct public consultations under the principles of transparency and citizen participation to issue and amend the rules, guidelines, or general administrative provisions. Before issuing the rules, guidelines or general administrative provisions, the Institute shall conduct and publish a regulatory impact analysis. (Article 51 of the LFTR)

5 America Móvil is consider preponderant in the telecommunications sector and Grupo Televisa in the broadcasting sector. The objective was to promote smaller players in the respective sectors.

6 Article 59 of the LFCE

the T&B sectors was carried out in 2019 and it is expected that by 2020 IFT will publish if it decides to increase, maintain or decrease these measures.

24. The following table shows some of the asymmetric regulations imposed on the preponderant agents in the T&B sector provided in the LFTR as preventive measures face to the legal provisions on competition issues provided in the LFCE.

Table 1. Ex ante regulation to prevent anticompetitive conducts

Preponderance measures in the broadcasting sector provided for in the LFTR	
Asymmetric Measure	Provisions in the LFCE
Article 266: (...) VII. Allow broadcasting concessionaires to access and use their passive infrastructure under any legal title, on a non-discriminatory basis and without subjecting it to the acquisition of other goods and services.	Article 56. (...) IV. Conditioning a sale, purchase or transaction to not using, acquiring, selling, marketing or providing goods or services that have been produced, processed, distributed or marketed by a third party. XII. The denial, restriction to access or access under discriminatory terms and conditions to an essential facility by an Economic Agent or Agents.
Article 266: (...) XIV. Refrain from applying discriminatory treatment with respect to the advertising spaces offered in the concessioned broadcasting television service.	Article 56. (...) XII. The denial, restriction to access or access under discriminatory terms and conditions to an essential facility by an Economic Agent or Agents.
Article 266: (...) XX. Refrain from exclusively contracting rights to broadcast sporting events with high expected levels of audience nationwide, for which the Institute must issue a list every two years in which it indicates the reasons why it considers that such abstention will generate effective competition in the broadcasting sector.	Article 56. (...) I. Amongst Economic Agents not competing amongst each other, the fixing, imposing or establishing of exclusive marketing or distribution of goods or services by virtue of undertakings, geographic locations or specific periods of time, including the division, distribution or allocation of clients or suppliers, as well as imposing the obligation not to manufacture or distribute goods or provide services for a determined or determinable period of time.
Preponderance measures in the telecommunications sector provided for in the LFTR	
Asymmetric Measure	Provisions in the LFCE
Article 267: (...) IV. Allow interconnection and interoperability between concessionaires of public telecommunications networks at any feasible point, regardless of where they are located, and provision interconnection capabilities in the terms requested.	Article 56. (...) XII. The denial, restriction to access or access under discriminatory terms and conditions to an essential facility by an Economic Agent or Agents.
Article 267: (...) VIII. Not establish obligations, conventional penalties or restrictions of any kind in the agreements entered into, which have the effect of inhibiting consumers from choosing another service provider.	Article 56. (...) IV. Conditioning a sale, purchase or transaction to not using, acquiring, selling, marketing or providing goods or services that have been produced, processed, distributed or marketed by a third party.
Article 267: (...) XII. All services or packaged goods may be acquired by users or competitors individually and disaggregated.	Article 56. (...) III. Conditioning a sale or transaction to the purchase, acquisition, sale or provision of another good or service generally different or distinguishable or on reciprocity bases.

3.2. Other Competition Provisions in IFT's Functions

3.2.1. Infrastructure Sharing

25. The IFT may at any time verify the conditions of the sharing agreements, in order to assess their impact on effective competition in the sector in question and may establish measures for the sharing to take place and granting access to any concessionaire under non-

discriminatory conditions, as well as those that are required to prevent or remedy effects contrary to the competition process.⁷

26. Collocation and sharing shall be established through agreements signed by and between the concessionaires concerned. In the absence of an agreement between the concessionaires, when there are no substitutes, and they are essential to provide the required services, the IFT may establish the conditions of use, sharing of physical space, and the appropriate fee, provided there is capacity for such sharing. Disagreements shall be resolved by the IFT.

3.2.2. *Network Neutrality*

27. The concessionaires and authorized to provide the Internet access service must comply with the general guidelines issued by the IFT for this purpose in accordance with, among others, the following:

- *No Differentiation.* Concessionaires and authorized Internet service providers shall not obstruct, interfere with, inspect, filter or differentiate against content, applications or service;
- *Traffic management.* The concessionaires and authorized may take the necessary measures or actions for traffic management and network administration in accordance with the policies authorized by the Institute, in order to guarantee the quality or speed of service contracted by the user, provided that this does not constitute a practice contrary to healthy competition and free competition.⁸

3.2.3. *Granting of Radio Electric Spectrum Concessions and Leasing*

28. The IFT grants radio spectrum concession titles (prior a public tender process) so that spectrum frequencies can be exploited for profit or for private communication purposes. In this process, the IFT must prevent concentration phenomena that contradict the public interest. Attentive to the above, the bidding rules, among others, include criteria that ensure effective competition in the T&B sectors as appropriate.

29. Likewise, the LFTR contemplates the secondary radio spectrum market, allowing concessionaires that have frequencies for commercial use or for private communication purposes to lease these frequencies, prior authorization of the IFT, observing that no phenomena of concentration, cross ownership or hoarding. The objective of the secondary radio spectrum market is to provide flexibility, agility and dynamism to the management of the radio spectrum, using allocated spectrum that remains underutilized, to allow third parties to use it in order to meet the demand for users and thereby achieve an efficient spectrum use.

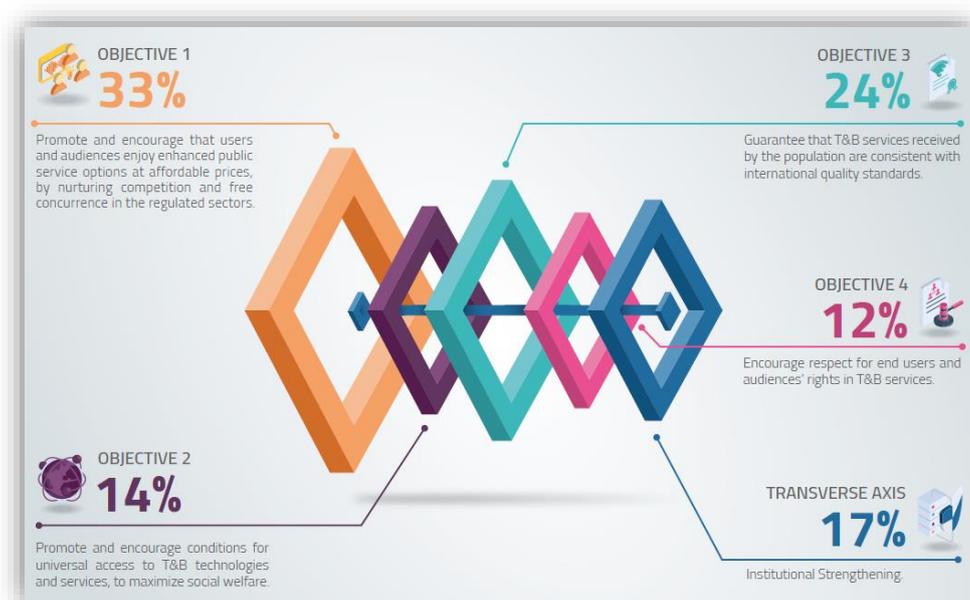
⁷ Article 139 of the LFTR.

⁸ Article 145 of the LFTR

3.2.4. Annual Work Program

30. In the 2019 Annual Work Program⁹ 33% of IFT's strategic projects were aligned to objective 1: "To promote and encourage that users and audiences enjoy enhanced public service options at affordable prices, by promoting competition and free market access in the regulated sectors"; 14% were aligned with objective 2¹⁰; 24% with objective 3¹¹; 12% with objective 4¹² and the remaining 17% with the transversal axis¹³. The vast majority of the actions of the IFT (the regulatory ones) promote competition and free market access in said regulated sectors.

Figure 1. Distribution of Strategic Projects by Institutional Objective, 2019



Source: 2019 IFT's Annual Work Program

31. The IFT has internalized the competition and regulatory instruments, enabling it to efficiently mix and match problems and instruments, considering assorted situations in which identifying the efficient regulatory solution requires an analysis of competition.

32. The effective enforcement of the LFTR and the LFCE ensuring that competition remedy does not conflict with regulatory requirements or vice versa is achieved due to

9 Available in English: <http://www.ift.org.mx/sites/default/files/contentidogeneral/consejo-de-transparencia/2019awp.pdf>

10 Promote and encourage conditions for universal access to telecommunications and broadcasting technologies and services, to maximize social welfare.

11 Guarantee that telecommunications and broadcasting services received by the population are consistent with international quality standards.

12 Foster respect for the rights of telecommunications and broadcasting services end users and audiences.

13 Institutional Strengthening.

IFT's expertise in the T&B sectors, for which it is best placed to enforce the competition rules if that route is chosen. Likewise, the IFT is more adaptable to changing markets, due to the sectors convergence.

Box 1. Example of relevant cases avoiding dual enforcement and sanctions:

As a preponderant economic agent in the telecommunications sector, Telmex is subject to a regulatory obligation to make available and share its passive infrastructure services with other operators. Telmex is able to decide which kind of access constitutes the best alternative solution, whether that is: 1) access to high-capacity optical pipelines for alternative operators to deploy their own fibre or 2) lease its own optical fibre when there is limited capacity in a pipeline or when alternative routes exist. On the basis of this obligation, Telmex submitted to IFT for authorisation a reference offer containing the conditions under which it would share its passive infrastructure. Telmex reference offer containing the option of granting access to capacity in its optical pipelines was approved by IFT.

Contrary to what was set out in the reference offer, Megacable requested that Telmex lease its optic fibre. IFT dismissed this request because this option was not considered in the authorised reference offer. This was confirmed in amparo trials initiated by Megacable.

Megacable then submitted a competition complaint to the IA about Telmex's refusal to lease its optical fibre in accordance with its regulatory obligation. IFT closed the investigation, because according to preponderance measures, Telmex provided access to capacity in its optical pipelines, it was not obliged to lease its optical fibre and so it could not be argued that the refusal to lease fibre constituted an anticompetitive behaviour.

Megacable appealed the competition decision, but the Court concluded that the existence of the behavioural element was not proven since access to capacity in the optical pipelines was provided, not refused. IFT's decision was confirmed.

Source: Board Resolution P/IFT/070218/85. Available at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/pift07021885.pdf>

3.3. *Ex ante* Compliance Powers

33. There are several items around the fulfillment of obligations of the industry. Some of this obligations are related to revenue collection, radio spectrum measurements, monitoring compliance with asymmetric regulation, monitoring compliance with documentary obligations, complaints arising from asymmetric regulation, for non-compliance with the LFTR and for interference, visits of verification as well as sanctioning procedures.

34. During the third quarter of 2019, 79 proposals for administrative procedures sanctions were received and still pending. Likewise, for the 268 sanctioning administrative proceedings pending at the end of the second quarter of 2019, 47 were resolved (27 were fined, 8 were admonished, 6 had no sanction, 4 were declared with loss of goods in Nations favor, and 2 were revoked) and 221 are still pending.¹⁴

14 Available in Spanish: <http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/3ita2019.pdf>

3.4. *Ex post* Competition Powers

35. Regardless of the regulatory measures in which the IFT imprints aspects of competence, the IFT also applies the LFCE of which it is worth noting the following actions:

3.4.1. *Relative Monopolistic Practices*

36. IFT's ex ante regulatory intervention contributes to reduce the opportunity for relative practices (including unilateral conducts) to occur. However, IFT's IA has opened 16 investigations, 5 of which are pending and 2 led to infringement decisions.

3.4.2. *Unlawful Concentrations*

37. Unlawful concentrations are those concentrations having as purpose or effect to hinder, diminish, harm or impede free market access or economic competition. Parties interested in a concentration are subject to sanctions in case of failure to notify and comply with the standstill obligation made as part of a review ("gun-jumping").

38. In 2015, IFT imposed fines of MXN 57.6 million (around USD 3.1 million) on Telmex, Teninver, Cofresa, Corporativo Mexicano de Frecuencia Dish, Dish Mexico Holdings, Dish México, and EchoStar for a gun jumping case. In addition, Cofresa was fined MXN 3 million for having falsely declared during the processing of the file.¹⁵

3.4.3. *Market investigation*

39. IFT has launched nine market investigations. Seven were initiated to determine substantial market power conditions and two investigations were initiated to determine the existence of barriers to competition in the deployment of fixed telecommunications infrastructure. With these type of actions, the IFT is monitoring and taking care of market behaviour in benefit of final consumers.

4. Conclusion

40. Since the 2013 constitutional reform, new economic agents have entered the market, the prices of services have reduced substantially, mobile broadband subscriptions and the use of data has grown, and the quality of service has improved in terms of broadband services speeds. In addition, foreign investment has increased and the T&B sectors have grown faster than the Mexican economy in general.¹⁶

41. From June 2013 to March 2018, telecommunications prices decreased 25.3%. During the mentioned period, with the elimination of national long distance charge, the international long distance prices fell more than 40%. Moreover, the prices of the mobile services decreased 43.1%. It is also worth noting that since the reform to 2017, 66% of

15 See, http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_070115_30.pdf

16 OECD Telecommunication and Broadcasting Review of Mexico 2017. Available : <https://www.oecd-ilibrary.org/docserver/9789264278011-en.pdf?expires=1571714262&id=id&accname=guest&checksum=4D6E9D0F7032914B26AD7E65D16B3D72>

homes in Mexico have pay TV; 50% of Mexican's homes count internet service; and 65% of mobile subscribers count with internet in their mobile phone. During 2016 Mexico was the third place in fiber growth in the countries of the OECD, just behind Australia and New Zealand, and by 2017 fiber optic participation in Mexico grew almost 200%¹⁷

42. When referring to the regulatory and competence powers of the IFT, it should be understood that these are exercised jointly. In other words, the IFT is an autonomous constitutional body that cannot be seen as a traditional authority of competition, since its mandate goes beyond that. For this reason, in its resolutions the IFT includes and considers aspects for the protection of competition, such as in the case of the lease of the radio spectrum, the assignment of concessions, etc. Due to its structure and design, the IFT has to be seen as an authority with broad regulatory and competence tools that allows it to exercise ex ante and ex post roles.

43. The scaffolding of the IFT allows it to fulfill the mandate of the regulation, promotion and supervision of the radio spectrum, networks and the provision of broadcasting and telecommunications services, as well as access to active and passive infrastructure, and other essential inputs as well as the mandate to guarantee free competition and free market access, as well as to prevent, investigate and combat monopolies, monopolistic practices, concentrations and other restrictions on the efficient functioning of markets.

44. The extensive variety of mechanisms available to the IFT to promote competition are complex and derive from LFTR, LFCE and the Constitution. New concepts like preponderance, and classic mechanisms and concepts like substantial market power and monopolistic practices, seem to overlap at first sight. Nevertheless, before entering any competition analysis, IFT considers these concepts from a general perspective, and traces the best path to follow in the specific case. All of which are of countless significance on effectively addressing competition in the T&B sectors.

45. In accordance with the aforementioned, the Board of the IFT maintains that: *“The analysis of economic competition that is carried out as part of the procedures established in the LFTR is consistent with that performed in the procedures provided for in the LFCE, since both are subject to the criteria established in the LFCE. Therefore, it is not necessary to subject the same acts to two different procedures to obtain a resolution of the Plenum of the Institute. On the other hand, the specific procedures foreseen in the LFTR establish shorter terms than those foreseen in the LFCE, which meets the specific legal mandate to boost the secondary spectrum market.”*¹⁸

17 Resultados de la Reforma en Telecomunicaciones y Radiodifusión, (in Spanish) available in: <http://www.ift.org.mx/sites/default/files/contenidogeneral/estadisticas/resultadosreformatyrmrmarzo2018.pdf>

18 File P/IFT/EXT/151215/187, p. 18, available in Spanish: http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones_pleno/acuerdo_liga/p_ift_ext_151215_187.pdf