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COFECE issues an antitrust study of the public service of railroad freight transportation

On May 24, 2021, the Mexican Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*; “COFECE”) published a document with the purpose of promoting competition and free concurrence, pursuant to Article 12, Sections XXI and XXIII of the Federal Antitrust Law (*Ley Federal de Competencia Económica*; “LFCE”), that consists of a preliminary study of competition in the public service of railroad freight transportation in Mexico.

In such study, COFECE identifies problems that undermine the efficiency of the Mexican Railway System (*Sistema Ferroviario Mexicano*; “SFM”) derived from regulatory failures and the model of vertically integrated regional concessionaires. In that connection, COFECE argues that despite the fact that the current regulatory framework is designed for the seamless operation of the SFM, such framework needs to be modified in order for it to function efficiently.

COFECE indicates that:

(a) The original design of the railroad network is not neutral to competition.

The SFM was designed in order for concessionaires of the shorter networks to grant open access to their railways to concessionaires with larger networks, such as Ferrocarril Mexicano, S.A. de C.V. and Kansas City Southern de México, S.A. de C.V., prior to the occurrence of reciprocal access, which results in a system that is not equitable for different concessionaires.

In order for this to work properly and to seek to mitigate imbalances, COFECE proposes to eliminate in the short term the obstacles to the use and creation of rights of way and different forms of interconnection, as well as to establish better conditions of network access of other concessionaires.

(b) Challenges of the exercise of existing rights of way and establishing new ones.

Due to the limited use of the rights of way, COFECE proposes the introduction of a new regulation that guarantees conditions of non-discriminatory access to the networks of the different concessionaires and encourages users to apply for new rights of way. Furthermore, COFECE recommends an amendment to the statute that regulates the SFM so that rights of way can list and not limit the products to be transported, which would afford greater flexibility in the use thereof.

In light of the above, COFECE considers that the Regulatory Agency of the Railroad System (*Agencia Reguladora del Sistema Ferroviario*; the “Agency”) should have authority to (i) issue mandatory criteria on the regulation of rights of way; (ii) determine the mandatory nature of granting rights of way; and (iii) ultimately resolve disputes between concessionaires on the scope and use of rights of way.

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(c) High tariffs for haulage rights at rail bottlenecks make interline services between rail networks more expensive.

According to COFECE's analysis, the increase in the cost of interline services between rail networks obstructs interconnection and reduces competition, forcing users to use less efficient or safe routes.

Therefore, COFECE proposes the design of tariff regulations that eliminate double marginalization, that penalize the unjustified denial to provide interconnection service, and that establish a mechanism whereby the user has the option to request a railroad company to haul its freight to an interconnection hub of the competing company, provided that this interconnection hub is within a certain distance.

COFECE's analysis emphasizes that the regulatory changes it proposes would generate a more efficient public service of railroad freight transportation, which would contribute to Mexico's competitiveness. In addition, COFECE highly recommends taking advantage of the fact that concessions and their exclusivities are close to their expiration date in order to plan and redesign a reconfiguration thereof.

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