

Amparo actions against CENACE act's impact on competition in electricity industry

08 October 2020 | Contributed by [SAI Law & Economics](#)

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Overview

Since 2013, the private sector has been allowed to participate in the generation and commercialisation of electricity. Through the creation of the wholesale electricity market, generators, suppliers and consumers can buy and sell electricity, with the National Energy Control Centre (CENACE), designated as the market operator and monitor, acting as an intermediary.

Pursuant to Article 101 of the Electric Industry Law, the electricity industry operates under an efficient dispatch mechanism. Essentially, this mechanism means that CENACE will first dispatch energy generated from the plant that provides the best offer (normally renewable energy plants) – that is, the one with the lowest variable production costs. When the agreed capacity from the power plant with the best offer is dispatched, the power plant with the next best offer dispatches energy to its maximum capacity at the associated cost, and so on, until all the demand estimated by CENACE has been satisfied. Consequently, the price is determined by the variable cost of the last power plant dispatched because, in order to satisfy market demand, the power plants with the lower costs will have a profit equivalent to the difference between their variable cost and the variable cost of the power plant that dispatched last. This competition dynamic incentivises energy generation at lower costs, with the aim of obtaining legitimate profits.

On 31 March 2020 the Ministry of Health published an act in the *Federal Official Gazette* establishing extraordinary powers to combat the health emergency caused by the COVID-19 pandemic.⁽¹⁾ On 29 April 2020 CENACE issued an act to guarantee the efficiency, quality, reliability, continuity and safety of the national electricity system during the COVID-19 pandemic (the CENACE act).⁽²⁾

Through the act, CENACE established that due to the COVID-19 pandemic, there had been a reduction in electricity consumption, as well as a series of network failures in the system, supposedly attributable to solar and wind power plants, that, allegedly, could affect the reliability and continuity of the supply of electricity.

In general, the CENACE act:

- suspends pre-operational tests of intermittent solar and wind power plants, which, according to the legal applicable framework, constitute a necessary requirement for power plants to initiate commercial operations; and
- grants CENACE the power to:
 - limit the dispatch of all sources of electricity generation that it considers may put the national electricity system at risk, without having to justify the measure; and
 - designate conventional plants to dispatch energy regardless of their costs.

In response to the CENACE act, many renewable energy investors challenged it before the constitutional courts through various *amparo* actions,⁽³⁾ aiming to obtain a court injunction to suspend its effects and, in the last instance, a final decision declaring it null and void. Given the effects that the CENACE act may have on the sector's competition process, a considerable number of *amparo* lawsuits were submitted before the constitutional courts specialised in economic competition.

Concurrently, on 6 May 2020 the Federal Economic Competition Commission (COFECE) issued an opinion sustaining the measures that affect the sector's competition process (OPN-006-2020).⁽⁴⁾

[Comment](#)

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COFECE held that the CENACE act affects competition in the electricity industry by:

- indirectly denying solar and wind power plants the possibility of beginning operations; and
- favouring the dispatch of energy from conventional power plants.

COFECE highlighted the following main arguments.

The act lacks clarity concerning its application and duration

First, COFECE held that the CENACE act lacks clarity concerning its application and the duration of the measures imposed, creating uncertainty for generators that participate in the market and future investors.

Mainly, the act:

- is unclear as to why the imposition of the referred measures will solve the network failures allegedly derived from the shortage of electricity consumption; and
- does not provide for a period of validity or a date of termination for the measures.

Moreover, it seems that the measures were imposed to benefit the generation of electricity from conventional plants – which, in their majority, are owned by the Federal Electricity Commission (a state-owned enterprise) – at the expense of other more efficient plants. This caused a discriminatory dispatch affecting all other generators in the sector and future renewable energy investors for an undetermined period.

The act prevents the possibility of entering the market through new solar and wind power plants for an undetermined period

The CENACE act established the suspension of ongoing pre-operational tests of solar and wind power plants and the ban to authorise new tests. Pursuant to the sector regulation, the fulfilment of pre-operational tests constitutes a necessary requirement for power plants to initiate commercial operations. Consequently, these plants will be unable to initiate commercial operations until the tests are resumed, which causes a delay in their entry to the market.

This measure does not include guidelines or criteria concerning the suspension and its duration. Therefore, it will indefinitely affect new and more efficient electric plants' entry to the market, which implies depriving users of the opportunity to have cheaper electricity rates in the medium term. In addition, this measure artificially strengthens the market power of generators that already operate in the market by creating regulatory barriers to entry and competition.

The act generates uncertainty regarding the dispatch of solar and wind power plants that already operate and enables possible discriminatory measures against them

Due to the operating mechanism of the wholesale electricity market, electricity demand must be satisfied by the most efficient power plants. Therefore, a decrease in demand caused by the contingency (as CENACE claims) would mean that the participation of conventional plants – that are not as efficient and, in their majority, owned by the Mexican state – would decrease, as they would intervene only in periods where the energy of more efficient plants is insufficient to satisfy the demand. Although energy generated by renewable plants would be complemented by conventional generators, the costs associated with this mechanism would be paid under normal conditions. Hence, by limiting dispatch to solar and wind plants as it is imposed in the act, it seems as if CENACE is giving preferential treatment to state firms.

In addition, the limitation of dispatch from existing solar and wind power plants would reduce their ability to compete, by preventing them from offering their energy regardless of whether they are more efficient. The displacement, even temporarily, of the most efficient generators would artificially reduce the supply, allowing conventional plants to determine the market price. An increase in the dispatch from conventional plants implies a dispatch from the most expensive plants which causes negative effects in the market, such as:

- an increase in the market price and higher electricity rates to final consumers; and
- higher government subsidies.

In either case, consumers would be affected either by the high prices or by the inefficient use of public funds to subsidise the rates.

So far, most of the *amparo* actions before the specialised courts have been admitted and granted a court warrant in order to suspend the CENACE act's application until a final judgment is issued. In case of a favourable judgment, the CENACE act will be suspended permanently, allowing solar and wind power plants to continue with their activities in the national electricity system. Nonetheless, in case of an unfavourable judgment, the act will continue in all of its terms until a new regulation is issued.

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Endnotes

(1) Available [here](#) (in Spanish).

(2) Available [here](#) (in Spanish).

(3) An *amparo* action is a constitutional procedure before the federal courts to dispute acts of public authorities and protect human rights recognised in the Constitution.

(4) Available [here](#) (in Spanish).

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