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**INVESTIGATIVE POWER IN PRACTICE - Contribution from Mexico
(COFECE)**

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Investigative Powers in Practice

- Contribution from Mexico COFECE -

1. Introduction

1. Mexico's Federal Economic Competition Commission (COFECE, for its acronym in Spanish, or Commission from here on forth) is a constitutional autonomous body, whose objective is to guarantee free competition and free market access, as well as to prevent, investigate and prosecute monopolies, monopolistic practices, mergers and other restrictions to ensure an efficient operation of markets.¹ The Investigative Authority is the unit within COFECE responsible for conducting the investigation procedure. To ensure effectiveness and fairness throughout this process, it has technical and administrative autonomy to decide on its operation and resolutions².

2. The Federal Economic Competition Law (FECL or Law) endows the Investigative Authority with effective tools to identify Law violations. For this purpose, it may compel information and documents to any economic agent related to the investigation, it may summon persons for declarations and can perform unannounced on-site inspections. The Investigative Authority also has the power to request any Public Authority or foreign authority information and/or documentation required for the investigation³.

3. The Investigative Authority carries out investigations of several types of conducts and market conditions, these being: absolute monopolistic practices⁴, internationally known as hard-core economic cartels; relative monopolistic practices⁵ which involve abuse of dominance by economic agents with substantial market power; unlawful concentrations between competitors that have an anticompetitive object or effect^{6 7}; and market investigations to eliminate competition barriers and regulate the access to essential facilities⁸.

4. For the purpose of this document focus will be given to requests for information (RFI) and unannounced on-site inspections (or dawn raids), two valuable investigative tools that help identify anticompetitive conducts typified as illegal under the Law. The Investigative Authority may request any individual, company or Public Authority to submit documents or information necessary to perform its investigation. Those who receive a RFI

¹ Mexican Constitution Art. 28, pf. 14

² Federal Economic Competition Law, Art. 26.

³ FECL, Art. 28, sections II and III

⁴ FECL, Art. 53.

⁵ Articles 54 and 56 of the FECL.

⁶ FECL, Art. 62.

⁷ FECL, Art. 71.

⁸ FECL, Art. 94.

are obliged by law to submit the information required in a ten-day period⁹. If any of the cited agents fail to comply with these requirements¹⁰, sanctions may be imposed (calculated on daily basis of delay).¹¹

5. Dawn raids are regularly held on the premises of companies, by which investigators gather documents or information deemed relevant for the investigation procedure. Locations are selected determining the probability of finding substantial elements that help identify the existence of an anticompetitive conduct, for which pre-investigations on each company and market are essential (See Annex A for further information on the elements required for dawn raids)¹².

6. This document addresses the major challenges COFECE's investigative team has faced when issuing requests for information and when executing dawn raids and exemplifies the solutions that have been implemented to increase the effectiveness when using these tools. To broaden on the subject, cases will be used to exemplify on each topic, however, no reference to markets or participants will be given¹³.

2. The evolution of using requests for information and dawn raids as investigation tools

2.1. Requests for Information

7. Requesting information has been a power given to Mexico's Competition Authority since the creation of the extinct Federal Competition Commission¹⁴ (COFECO, for its acronym in Spanish).

8. The Competition Law allows investigations on anticompetitive practices to last up to five periods of 120 working-days and for market investigations, the equivalent to half of this period.¹⁵ Thus, it is essential for RIFs to be responded promptly. Challenges have been identified along the years and solutions have been implemented to tackle them. Consequently, the strategies used when requesting information have changed to improve their effectiveness.

⁹ This period may be extended at their request, if the complexity and volume of the information requires it.

¹⁰ With the exception of Public Authorities. When requesting information or documents to Public Authorities, these shall provide, within the scope of their jurisdictions, the assistance needed by the Investigative Authority's public officers (Article 73 of the FECL)

¹¹ Article 74 of the FECL.

¹² On exceptional cases, dawn raids will be conducted in investigations not related to a possible violation of the law, for investigations related to Articles 94 and 96 of the FECL. That is, investigations to determine the existence of essential facilities or competition barriers, or procedures to determine market conditions.

¹³ According to Article 76 of the information and documents that have been obtained by the Investigative Authority in the exercise of its powers shall be considered as reserved, confidential or public in accordance to the law.

¹⁴ Established by with the abrogated Federal Economic Competition Law of 1993.

¹⁵ Up to three periods of 120 working-days.

9. A substantial part of the information collected for an investigation derives from RFIs,¹⁶ as economic agents are obliged by Law to provide what is being requested or sanctions will be imposed dependent on days of delay. Consequently, when responded fully and completely, RFIs are an essential tool to gather information on the functioning and conditions of a market, to collect data on economic agents that participate in the market (producers, consumers, public authorities, etc.), to compile knowledge on the offered products, prices, value chain, industry or market structure, to verify information obtained by additional sources, among others.

10. Although it is compulsory for companies and individuals to respond to the RIFs the Commission issues, the Law allows to extend the stipulated ten working-day period if the volume and/or complexity of the information requires it. This argument is constantly used by the requested parties to extend such period, which results in an average of fifty working-days to fully provide the information and documents demanded. Such was the case during an investigation when almost one hundred RFIs were issued to cover 70% of the customers of companies investigated in the case. To avoid fines, the requested companies filed partial transfers of documents, allowing for a gradual review of the information delivered, but delaying the process.

11. To make our investigation procedures more agile, several strategies have been implemented. Mainly, COFECE has tried to reduce the scope of the information requested in order to diminish the cost both for the Commission and the party responsible of responding the request. This has greatly contributed to lessen the documents received by the Investigative Authority and the period it takes for the economic agent to comply such information.

12. For example, on several occasions a big number of RFIs must be sent at the same time, given that as previously mentioned, the FECL limits investigation periods. In one occasion, more than 30 RIFs on individuals and companies were issued and when replied, each party provided exhaustive information in printed and digital format (CDs and USBs) unclassified, which hindered the possibility of identifying if the information requested had been successfully delivered, unless each file or document was analyzed individually. This exceeded the human and material capacity of the investigation team to effectively examine the material, which was estimated to be more than seven thousand documents upon the conclusion of the investigation.

13. A mechanism that has been implemented to avoid receiving excessive amounts of documents, has been to integrate into RFIs, formats and manageable guidelines per topic or reagent. In this sense, the Commission commonly includes an annex that comprises the instructions, glossary and the questionnaire or reference to the Excel file that must be filled out. The instructive and glossary allows for requested parties to familiarize themselves with the terminology used by the investigators (an example can be seen in ANNEX B). Simultaneously, e-mails and telephone contacts are provided for requested parties to immediately solve doubts when attending RFIs.

14. These mechanisms have helped requested parties to deliver the information and/or documents in a timely fashion. However, in 3% of the cases, parties have failed to do so, in which sanctions are imposed. These may be of a maximum of three thousand times the

¹⁶ These may be issued by three different areas within the Investigative Authority; the General Directorate for Absolute Monopolistic Practices, the General Directorate for Market Investigations and the General Directorate for Regulated Markets.

current daily general minimum wage in the Mexico City¹⁷, which may be applied for each day of non-compliance.

15. Additionally, difficulties arise when determining to whom the RFIs will be sent to, given that on several markets, the commercial, fiscal and labor strategy is for companies to create various subsidiaries in order to distribute its economic activities. To avoid sending hundreds of RFIs, the Investigative Authority tries to identify the company or company who hold the most relevant and complex information of the group, and usually requests information in locations where multiple documents of the group may be found.

16. There are cases in which companies cooperate to the minimum required (taking too long to respond or answering partially what was requested). This happened in a complex industry in which a few number of suppliers offered a homogenous goods and, when RFIs were replied, the obtained data gave diffuse results. When faced with this situation, the sample had to be expanded, requesting information to costumers, sectorial authorities or regulators to respond to RFIs, which permitted to verify the accuracy of the information already held by the Investigative Authority. Also, in some occasions RFIs are issued to the same party, on some occasions, up to three times, with the objective of confirming information previously obtained from other sources, or to gain information that was not requested before such as information related to new lines of investigation or identifying if the market evolved over the duration of the investigation.

17. Nonetheless, given that the insight that can be obtained through RFIs is sometimes limited, COFECE's investigative team often uses additional tools that help cross-check intimation. Primarily, persons are summoned to declare and verify the authenticity of the information provided in the requests for information and when applicable, the Leniency and Immunity Program, serves as one of the most effective tools to collect key insight.

18. In line with the above, when public information on a market is limited, costly formats and tools must be implemented to analyze its conditions. To achieve so, there is a General Directorate for Market Intelligence with a team specialized in data science that develops techniques and/or software to digitalize information of the main public sources consulted. This simplifies the analysis carried out by investigators and enables the use of tools for managing information through filters, tables, browsing, among others. As information technologies change rapidly, software is constantly acquired by the Investigative Authority to shorten the analysis times.

19. In this sense, there was a case in which parties provided the requested data delivering electronic files, which contained several of the investigated elements but with significant inconsistencies (prices were given in various currencies, units of measurement were mixed, several markets were included, among other irregularities). With support of the IT team, a single data base was created, which helped generate consistent and useful statistics that allowed to explain and understand the functioning of the market. Also, the data base served to detect if there was information duplicated or missing, in which case, it was requested from other parties such as regulators, expert organizations and potential competitors. Additionally, in future RFIs COFECE has requested more precise

¹⁷ Daily minimum wages for fine allocation and now measured using Units of Standardized Measurement (UMAs for its acronym in Spanish). An UMA in 2018 is worth 80.60 pesos. In cases of non-reply, fines could go up to 241,800 pesos, equivalent to approximately 12,118 USD (calculated on Nov. 5th exchange rates).

information, asking for specific units of measurement, the usage of a single currency, prices of a specific product in a certain location, and other details.

2.2. Dawn raids

20. COFECE received additional powers for conducting dawn raids with a legal reform in 2011 and with the new Federal Economic Competition Law (2014). Since 2011, the law allowed us to conduct dawn raids without notice, increasing the possibilities of finding crucial information.¹⁸ Additionally, since 2011, the Commission may conduct dawn raids on any location where relevant information related to the investigation can be found and any electronic device may be reproduced, physical documents may also be copied and/or scanned for future analysis. As a result of the new FECL, officials who attend the raid may question members of the inspected company regarding the files and information located in the raided premises. Moreover, if the visited party does not permit access to its premises, it may receive a criminal sanction and facts may be considered as certain if a Statement of Objections is issued¹⁹.

21. This has improved the efficiency of the authority's dawn raids and has helped them become an essential investigation tool through which it has gained key evidence. Consequently from 2014, to 2017 the number of dawn raids increased in three times, with a significant peak in 2016 with 21 raided locations²⁰. According to the new FECL, dawn raids are ordered by the Head of the Investigative Authority in premises where there are sufficient grounds to suspect that relevant information related to the investigation can be found in such premises.

22. COFECE conducts dawn raids during different stages of the investigation. On one hand, raids are commonly carried out before the investigation is made public. In them, our chances of gaining key evidence are high since raids are conducted without notice, to avoid concealment or destruction of documents and/or files (actions that are sanctionable by Law²¹). On the other hand, raids are also usually conducted to collect specific information that cannot be obtained through other means.

23. These proceedings are highly important, given that investigators enter premises to gather relevant information needed to advance the investigation. In it, a raided party's books, business and financial records may be copied, examined and used for prosecution whether found physically or digitally (in which case documents, full disk drives or digital information may be copied).

¹⁸ The new Law, allowed for unannounced inspections to be carried out before an investigation is made public, this considering that the statement which opens an investigation may be published at any chosen moment during the first investigation period, that is, during the first 120 days of the procedure.

¹⁹ Article 28, 73 and 75 of the FECL.

²⁰ 4 raids were carried out in 2014, 16 in 2015, 21 in 2016 and 12 in 2017

²¹ With up to three years of imprisonment and up to five thousand days of those who during an on-site inspection, by any means alter, destroy or disturb in whole or in part documents, images or electronic files that contain information or data, in order to divert, hinder or prevent the investigation of a possible criminal act or the practice of administrative diligence. Article 254 bis 1, from the Federal Criminal Code.

24. The main challenge the Commission faces when conducting dawn raids is that, contrary to what happens in other jurisdictions, COFECE is not a criminal agency, which limits the scope of actions that can be implemented. For example, it cannot seize computers, documents or information (it can only copy them). This implies that the Investigative Authority's dawn raids absorb plenty of the Commission resources since it cannot simply take relevant physical documents and electronic devices for further analysis at the Commission headquarters. The team must copy these documents and devices which takes significantly more time and resources.

25. When observing dawn raids that were carried out for six investigations during 2017, it was identified that the average time spent executing these proceedings is 17 hours, the longest-ever taking 29 hours straight.²² In total, the Investigative Authority performed twelve dawn raids, four out of six of these investigations required simultaneous raids on separate locations, demanding considerable coordination and planning. Additionally, these proceedings require a great amount of human resources: on average, ten people attend each raid, two of them are from the Information Technologies team. This implies that if the Commission carries out three simultaneous raids, thirty officials will be dedicated to executing the raid.

26. Usually during dawn raids a great volume of information is gathered, thus it has been essential to have the necessary infrastructure, technology and know-how to collect this information as efficiently as possible and analyze it at COFECE. As mentioned before, when documents are found physically, they must be scanned or copied to collect for future analysis. Regarding digital information, forensic copies are taken, and the duplication of documents must be done *in situ*.

27. Considering this, the Commission must be highly strategic in determining which premises to raid and which information or devices to copy. COFECE works with these limitations and make strong efforts prior to each raid to maximize its effectiveness by acquiring knowledge on the market conditions, the participants in it, etc., to anticipate the information to be collected during the inspection. To do so, a specific strategy is created for each case.

28. In order to optimize dawn raids, COFECE has invested important resources in the training of forensic experts and investigators, as well as hardware and software which is constantly updated, in order to face constant technological changes. The hardware that is currently used serves to duplicate more than one device at a time, significantly reducing the time for creating forensic images and the software operated has helped us copy electronic information regardless of the equipment's operating system.

29. In this sense, the expertise of COFECE's human capital has been key to analyze great volume of data that is collected in a dawn raid once this data is at COFECE's premises and to identify key evidence. For example, in 2017 more than forty hard drives were used in 2017 to collect information, which resulted in more than 36 Thera Bites worth of data. Part of the preparation of a dawn raid is to have the necessary infrastructure, techniques and know-how to analyze such information when collected.

²² Dawn raid conducted in 2018.

3. Conclusions

30. Strong enforcement is essential to fulfill COFECE's legal mandate to monitor, promote and guarantee economic competition and free market access in the Mexican markets. Two of the major tools that are used for investigation procedures are requests for information and dawn raids.

31. In the first case, the major challenges faced are: 1) the time the requested parties take to fully respond RFIs; 2) to analyze great amounts of information when RFIs are replied and, 3) whom to send RFIs to. These difficulties have been addressed by facilitating tools to the requested companies as to how to reply to RFIs, by reducing the scope of the information requested and by better selecting the targets to whom RFIs are addressed. When all these strategies fail, sanctions are imposed. In the case of dawn raids, strong challenges are faced since COFECE is not a criminal agency. These challenges are addressed by conducting effective investigation strategies; given the high cost this type of proceedings require, which help when maximizing our resources.

Annex A. Requirements to conduct on-site inspections

Rules for the Investigative Authority's to preform on-site inspections:

I. The Investigative Authority shall issue the inspection order, that shall contain the purpose, scope and duration to which the procedure will be restricted; the name and address of the inspected individual or undertaking; the name or names of the authorized personnel that shall carry out the inspection either jointly or separately, as well as a warning indicating that should access be denied, hindering the performance of the procedure or refusing to provide the documents or information requested, the enforcement measures established in the Law shall be imposed;

II. The Investigative Authority shall conduct the on-site inspections in order to obtain the information and documents related to the investigation. On-site inspections cannot exceed two months, which may be extended for an equal period, if warranted by the investigation;

III. Inspections shall be conducted on business days and during business hours only by duly authorized and previously identified personnel, who must exhibit the inspection order to the individual found at the address when the on-site inspection takes place. The Investigative Authority may allow an inspection to be initiated on non-business days and hours or for an inspection to be continued into non-business days and hours, in which cases the document that orders the inspection shall indicate the corresponding authorization;

IV. The inspected Economic Agent, its officers, representatives or supervisors of its facilities or buildings are obligated to allow the on-site inspection, facilitating the Investigative Authority's authorized personnel to carry out their duties, which shall be authorized to:

1. Access any office, premise, site, means of transport, computer, electronic device, storage device, file cabinet or any other media that could contain evidence regarding the acts or facts pertaining to the visit;
2. Verify ledgers, documents, papers, files or information, whatever its material support, related to the inspected Economic Agent's economic activity;
3. Produce or attain copies or extracts in any format, of said ledgers, documents, papers, files or information which may be stored or generated by electronic means;
4. Secure all ledgers, documents and other means from the inspected Economic Agent during the time and in the measure required to conduct the on-site inspection, and,
5. Request explanations regarding the facts, information or documents related to the purpose and objective of the on-site inspection from any of the inspected Economic Agent's officers, representatives or personnel, and record their answers.

The information obtained by the Commission from the on-site inspection may only be used for the purposes provided for in this Law. For the effective performance of the on-site inspection, the Investigative Authority may authorize the participating public officers to request the immediate assistance of the public force.

In no case may the authority seize or forcefully remove information from the inspected Economic Agent.

During the conduction of the on-site inspection, the personnel authorized by the Investigative Authority to conduct said proceedings may take pictures or video recordings, or reproduce by any means papers, ledgers, documents, files or information generated through any technology or material support and which are related to the subject matter of the procedure. The photographs and videos taken, and any other piece of information gathered pursuant to this article, may be used by the Investigative Authority as material with full evidentiary value.

When sealing and securing the inspected Economic Agent's offices, premises, ledgers, documents and any other means under inspection, the public officers conducting the proceedings may seal and mark said items, as well as order their safekeeping and legal deposit under the responsibility of the inspected Economic Agent or the individual present at the inspection. A prior inventory shall be performed to that end.

When a document or object secured in terms of the previous paragraph, is essential for the performance of the Economic Agent's activities, its use or extraction shall be allowed prior reproduction of the information contained therein by the authorized public officers.

On-site inspections shall be conducted in consideration of production, distribution and marketing capacity for goods and services, so as to avoid damages to the Economic Agent or consumers.

If the inspected Economic Agent, its officers or the supervisors of the inspected premises do not grant access to the personnel authorized to conduct the inspection, or do not provide the requested information and documents, or if they obstruct the performance of the onsite inspection in any way, such circumstance shall be stated in the corresponding minutes and the facts attributed to the eventual offender in the statement of probable responsibility shall be presumed as true, without prejudice of the application of the enforcement measures deemed pertinent and the criminal liability which may arise;

V. The inspected Economic Agent has the right to render observations to the authorized public officers during the conduction of the inspection which will be recorded in the minutes. In addition, the inspected Economic Agent may provide evidence related to the facts contained in said minutes, or exercise this right in writing by filing a motion within five days following the moment in which the inspection minutes were drafted;

VI. Inspection shall be registered in a minute which shall include a detailed description of the facts or omissions witnessed by the authorized personnel. The minutes shall be drafted by the authorized personnel in the presence of two witnesses proposed by the individual present at the inspection, or designated by the authorized public officers if the individual present refuses to propose said witnesses, should this occur, it shall be included in the minutes. If the inspection is conducted simultaneously in two or more places, detailed minutes describing the unfolding events shall be drafted for each inspection. In this case, the presence of two witnesses shall be required for every premise where inspection minutes are drafted, in terms of the previous paragraph.

The inspection minutes shall contain:

1. Name or corporate name of the inspected Economic Agent;
2. Time, day, month, and year in which the proceedings are commenced and concluded;

3. Street, exterior and interior number, neighborhood, county, state and postal code of the location where the inspection is conducted; if this were not possible, register the information that may identify the place in which the proceedings are conducted;
4. Number and date of the inspection order;
5. Purpose of the inspection;
6. Names and identification information of the personnel authorized to conduct the inspection;
7. Name and office or position of the person present during the proceedings;
8. Name and address of the witnesses;
9. An indication of the opportunity awarded to the inspected Economic Agent to exercise its right to render observations to the public officers during the inspection, as well as its statements if they are so issued and the evidence provided;
10. A narrated account of the facts relative to the proceedings and the indication of whether documents or information have been reproduced, pictures taken, videos filmed or other evidentiary elements obtained during the conduction of the proceedings. If the case may be, these elements shall be attached to the corresponding minutes;
11. An indication of the opportunity awarded to the inspected Economic Agent for rendering clarifications and observations to the inspection minutes, within five days following its drafting, and
12. Name and signature of those intervening in the proceedings, and, if the case may be, the indication that the inspected Economic Agent refused to sign the minutes;
13. Before or during the conduction of the on-site inspection, the Investigative Authority may request technical or specific assistance from the Federal Public Administration's agencies or entities in order to carry out the inspection.

A copy of the inspection minutes shall remain with the individual(s) present during the proceedings, notwithstanding refusal to sign, situation which shall not affect its validity.

Annex B.

Box A B.1.

A. Instructions to respond the request for information

In order to have greater security measures, control, protection and management of information provided to this authority:

1. The information and documents required in each of the numerals must be presented in annexes.
2. If the requested documents are in electronic format.
3. The information that is requested in numerical terms and in summary tables, should be provided with: unit of measurement, time period, and in the case of municipalities, entities and countries, with their name and code based on the classification of the National Institute of Statistic and Geography (INEGI, for its acronym in Spanish). The information must be presented in spreadsheets (Excel formats) archived in compact discs or USBs.
4. For each response all documents in possession of the requested party, must be presented to support the answers provided.
5. All answers must be presented in Spanish. When applicable, an official expert translation must be provided.
6. When information provided contains nomenclatures, a glossary must be included.

B. Glossary of terms used by the Investigative Authority

- Commission: Federal Economic Competition Commission.
- Economic Agent: any individual or company, 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 activities.
- FECL: Federal Economic Competition Law.

C. Questionnaire

General

1. Indicate the name of company's or individual's legal representative and provide an original copy or a certified copy of documents or instruments to credit such personality.
2. Legal representatives must indicate the address to hear and receive notifications, pursuant to article 117 of the FECL.
3. A simple copy must be presented of the audited and consolidated annual financial statements for XX and XX fiscal years.

Activities related to the investigated market

1. Explain in detail how prices were determined by the company during the period from XX to XX, indicating variables (costs, margins, etc.).
2. Explain in detail how prices offered to clients are determined.
3. Provide a list of all the clients to which the product was sold to, indicating name of physical persons or business/company name and control codes, as well as the number of signed contracts.
4. Explain in detail the criteria and methodology for:
5. Assigning discounts or sales privileges to a client.
6. Territorial grouping of client.
7. Terms of contracts per client.
8. Commercial conditions established per client.
9. Provide a table that contains the following information for each distribution unit, per day (working and non-working) and by product type, within the period of XX to December XX.
 - a. Location (Street, municipality, geo-referenced location).
 - b. Sales volume per customer.
 - c. Cost of merchandise distribution per customer (or route).
 - d. Information must be provided in Excel.

ANNEX II**A. Instructions to respond the request for information**

In order to have greater security measures, control, protection and management of information provided to this authority:

1. The information and documents required in each of the numerals must be presented in annexes.
2. If the requested documents are in electronic format.
3. The information that is requested in numerical terms and in summary tables, should be provided with: unit of measurement, time period, and in the case of municipalities, entities and countries, with their name and code based on the classification of the National Institute of Statistic and Geography (INEGI, for its acronym in Spanish). The information must be presented in spreadsheets (Excel formats) archived in compact discs or USBs.
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Activities related to the investigated market

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- b) Explain in detail how prices offered to clients are determined.
- c) Provide a list of all the clients to which the product was sold to, indicating name of physical persons or business/company name and control codes, as well as the number of signed contracts.
- d) Explain in detail the criteria and methodology for:
 - a. Assigning discounts or sales privileges to a client.
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 - d. Information must be provided in Excel.

