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**Session III: Ex officio Investigations**

**- Contribution from Mexico -**

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The attached document from Mexico is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

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## *Session III: Ex officio Investigations*

### *– Contribution from Mexico<sup>1</sup> –*

#### **1. Introduction**

1. The Investigative Authority of the Federal Economic Competition Commission (Cofece) is in charge of conducting investigations for alleged anticompetitive conducts, such as cartels and abuse of dominance, and other restrictions to the efficient functioning of the Mexican market.<sup>2</sup> These investigations may begin from a formal complaint or ex officio, either by proactive detection or leniency applications (exclusively for cartel investigations).<sup>3</sup>

2. During the last decade, the Investigative Authority has focused substantial resources to develop its intelligence and detection capabilities obtaining positive results. For example, in 2023, three out of four ex officio investigations resulted from proactive detection.

3. The General Directorate of Market Intelligence (GDMI), which is part of the Investigative Authority, is the Unit focused on detecting potential anticompetitive conducts by using a broad set of intelligence, market monitoring and screening tools. This contribution will refer to specific aspects of Cofece's proactive detection efforts.

#### **2. Interplay between proactive and reactive cartel detection tools**

4. The Investigative Authority has several proactive and reactive cartel detection tools which are complementary to fulfill its legal mandate. Reactive detection relies mainly on the submission of formal complaints, which need to fulfill several requirements prior to its admission<sup>4</sup>.

5. As mentioned before, the proactive detection efforts of the Investigative Authority are led by the GDMI. This Unit uses several tools and methods which can be summarized in three categories:

- Economic and data tools: focused on structural and behavioral screening, as well as data-based market monitoring applications (collection, processing, and analysis).
- Operational intelligence: Open-Source Intelligence (OSINT) and field investigations to gather actionable insights from the market and firm behavior.

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<sup>1</sup> Comisión Federal de Competencia Económica (Cofece)

<sup>2</sup> Such restrictions can be defined as structural, normative, and behavioral barriers according to Article 3, section IV, Federal Economic Competition Law (LFCE). In addition, Cofece's mandate covers all sectors of the Mexican economy, except telecommunications and broadcasting which fall within the jurisdiction of the Federal Institute of Telecommunications (IFT).

<sup>3</sup> Cofece has previously discussed the relevance of the leniency program as a source for ex officio action. Please refer to the contribution "Global Forum on Competition: Alternatives to Leniency Programmes – Contribution from Mexico (Cofece)" available at DAF/COMP/GF/WD(2023)39 for further information

<sup>4</sup> In particular, Article 68 states the minimum requirements for complaints.

- Reporting mailbox: The GDMI manages a report mailbox in which any individual may provide information on matters they consider to be competition issues<sup>5</sup>. Even though reports are submitted by the general public, Cofece considers this a proactive tool since most of the time these reports will not state a concrete anticompetitive conduct or issue sufficient for ex officio action, but rather flag concerns. These are subject to analysis by the GDMI, which if merited, will develop potential leads including building relationships with informants<sup>6</sup>.
- Cofece has signed Memorandums of Understanding (MoUs) with different public authorities, which include information exchange provisions. These MoUs also facilitate access to key sources of information useful for market monitoring and detection<sup>7</sup>.

6. Considering the last eleven years (2013-2024), complaints have resulted in approximately 38% of the cartel investigations, whilst the remaining 62% have been ex officio cases. Of the latter, 31% have resulted from the leniency program and 31% from other ex officio tools including proactive detection.

7. There have been also differences in specific periods in the sources of cases, with a notorious decline of complaints as a source of cartel investigations compared to previous years. For instance, from 2017 to 2020, complaints resulted in 53% of cartel cases, whilst the remaining 47% resulted from ex officio action (16% from leniency applications and 32% from other tools including proactive detection).

8. From 2021 to date, no cartel investigations have resulted from complaints. All of Cofece's cartel investigations have resulted from ex officio action, 50% from the leniency program and 50% from other tools including proactive detection.

9. Therefore, it could be argued that for the Investigative Authority, there has been a significant increase of ex officio action in cartel enforcement. The latter could also be related to favorable results of the combined ex officio mechanisms, in particular the interaction between Cofece's leniency program and its proactive detection tools. When proactive detection is effective, firms have increased incentives to apply for leniency. In addition, when the leniency program attains a positive recognition by firms and antitrust practice, there are increased incentives to apply and collaborate with the competition authority.

10. According to Article 71 of LFCE, the Investigative Authority needs a probable cause to start an investigation, which is formed by direct and indirect indications or clues of the existence of anticompetitive conduct. Therefore, the standard of proof required to start an investigation is significantly lower than the one required to issue a statement of objections, as the opening of the investigation effectively enables Cofece to use its formal

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<sup>5</sup> The mailbox may be accessed through the following link <https://www.cofece.mx/autoridad-investigadora/denuncia-o-reporta-practicas-anticompetitivas/reporta-practicas-anticompetitivas/>

<sup>6</sup> Even though Cofece does not have a formal whistleblower program in place, the interaction with individuals that submit a report through the mailbox is confidential and managed exclusively by the GDMI as part of its functions under Article 31 of the Organic Statute of the Federal Economic Competition Commission.

<sup>7</sup> The list of current MoUs signed by Cofece is available at <https://www.cofece.mx/category/normateca/convenios/>

investigative powers, such as requesting information from undertakings or ordering dawn raids<sup>8</sup>, tools that cannot be used to gather indicia to start the investigation.

11. Detection tools are considered complementary rather than alternatively. Proactive and reactive methods of detection that support ex officio enforcement action contribute to fulfilling the legal mandate of the Investigative Authority. Moreover, as mentioned before, proactive detection is strategic, as it contributes to increase deterrence and generate incentives for leniency applications.

12. In addition to its role for proactive detection, the GDMI provides specialized services to support ongoing investigations such as IT forensics, data analytics and operational intelligence. In light of the above, the staff is multidisciplinary and with different backgrounds that are relevant for their specific functions. For instance, staff that focuses mainly on screening and market monitoring are economists, mathematicians, and data scientists, with skills that include advanced statistical analysis, programming, development of algorithmics, artificial intelligence and machine learning, as well as data collection, processing, and visualization techniques, to mention a few.

13. Cofece is convinced that data analytics and technology are key components for the effective detection of anticompetitive conducts. Thus, it also invests substantial resources in developing general and specific application tools that draw from data science and technological applications. These include dedicated screening tools in public procurement, tools useful for geographic market definition, automatized price and data collection algorithms, data visualization solutions.

### 3. Industry Monitoring

14. The GDMI continuously monitors the Mexican economy to detect potential anticompetitive conducts and competition issues. Even though the discussion has centered mostly in cartels, the mandate of the Investigative Authority covers other conducts such as abuse of dominance, but also barriers to competition and essential facilities.

15. Therefore, monitoring activities are also aimed at detecting leads and indications of various types of anticompetitive conducts and barriers, either through economic and data analysis, as well as different sources of information (either publicly available, collected using data methods or provided by public authorities as part of an MoU agreement).

16. The GDMI monitoring activities are aligned with the strategic priorities of the agency. The Board of Commissioners defines a Strategic Plan every four years for Cofece to focus its activities and efforts on, ranging from advocacy to enforcement. The Strategic Plan defines a set of priority economic sectors based on its impact on households and transversality, which for the 2022 – 2025 period are: food and drink; transportation and logistics; finance; construction and real estate; energy; health; public procurement, and digital markets<sup>9</sup>.

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<sup>8</sup> According to Articles 73 and 75 of LFCE.

<sup>9</sup> For more information, please refer to the following link (in Spanish): [https://www.cofece.mx/wp-content/uploads/2022/03/PE2022-2025\\_VF.pdf](https://www.cofece.mx/wp-content/uploads/2022/03/PE2022-2025_VF.pdf)

17. Most of the monitoring efforts are focused on the priority sectors defined above. However, the Investigative Authority may instruct the GDMI to monitor other sectors across the economy under its legal powers<sup>10</sup>.

18. In the following subsection, Cofece's cartel screening efforts, which have been really successful in public procurement, will be discussed.

#### 4. Cartel screening

19. One key area of focus for the Investigative Authority, and in particular the GDMI since its creation, has been developing and implementing cartel screening tools. Screening depends significantly on information availability; in spite of sophisticated tools that may be deployed, and even the broad set of literature that has developed on the subject, the lack of sufficient information with a certain degree of disaggregation, consistency and quality will most likely limit the effectiveness of screening initiatives. Thus, rather than focusing on broad sectors, Cofece's screening has been effective mostly in federal public procurement as well as regulated markets with information availability.

20. The GDMI has focused mostly on behavioral screening. For such purpose, it has drawn from best practices such as the patterns and flags of suspicious behavior discussed in the Guidelines for Fighting Bid Rigging in Public Procurement as well as several recommendations published by the Organization for Economic Co-operation and Development (OECD)<sup>11</sup>.

21. From these patterns, the GDMI has developed specific analytical and detection criteria considering both pricing and non-pricing variables to systematically screen data sets from federal public procurement. The use of behavioral screening particularly in structured data sets helps the detection of suspicious patterns that are then subject to further analysis.

22. Some examples of the types of behaviors that have been found include the following:

- Price related patterns: Similar or exact pricing between different bidders, minimum relative differences between offers, substantially divergent prices in tenders (lower or higher), price consistency across different bidding processes in time, to mention a few.
- Non-price related patterns: Rotation between bidders in similar processes in different time periods, segmentation of products and categories in bidding processes, suspected intentional abstention or disqualification of participants, potential allocation of contracts awarded by different procurement entities to compensate losses, among others.

23. One constant challenge when conducting screening work is related to information availability and quality. Even though most of federal public procurement data in Mexico is public and there is a centralized information platform (CompraNet), there may be inconsistencies in data capture and reporting when sent by procurement entities to the

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<sup>10</sup> The Investigative Authority has technical and operational autonomy under LFCE.

<sup>11</sup> Available at <https://www.oecd.org/en/topics/sub-issues/competition-enforcement/fighting-bid-rigging-in-public-procurement.html>

platform. In addition, the information provided to CompraNet by procurement entities are usually documents rather than structured data.

24. Referring to the use of technology in screening, the GDMI has developed and implemented different tools for such purposes. These have included using Artificial Intelligence (AI), including Machine and Deep Learning technologies for data analysis, as well as automatized data processing solutions. We have also invested in developing data capabilities, ranging from collection to visualization of results.

25. In terms of the potential use of Generative Artificial Intelligence (GAI), the approach has been exploratory, in terms of assessing the potential benefits and risks of the use of this type of technology for screening. It is considered that there may be positive and favorable applications of GAI for analyzing large sets of unstructured data, in particular, by leveraging LLM in document and file analysis.

26. Cofece has been using technologies such as AI and data analytics for several years. Moreover, the GDMI has also deployed specialized infrastructure arrangements for such purpose, in addition to having staff with skills and knowledge relevant for introducing emerging technologies in support of its detection and screening work.

27. On an added note, the GDMI is also working on structural screening. This, with the purpose of expanding our monitoring and detection capabilities, achieving a greater scope and reach of screening work. For such purpose it has been considered to adapt, develop, and train more models drawing from data sets and prior experience in Mexico. Structural analysis applications are also being developed for broader sectors to contribute to our monitoring activities.

28. It is important to highlight that the screening work conducted by the GDMI has resulted in the opening of cases, in particular, focusing on procurement contracts that have substantial value and major impact in the Mexican economy as well as society. For example, on June 6<sup>th</sup>, 2024, Cofece published the opening of an investigation into public procurement related with neonatal metabolic screening<sup>12</sup>, a key part to build this case was cartel screening, which was also possible due to effective institutional collaboration that facilitated access to key information, as well as understanding of the market.

29. Another key area of the screening work also involves discussing and exchanging best practices with partner agencies worldwide. Even though development and use of screens is done exclusively by Cofece, the Commission looks to establish networks and relationships with other agencies to learn from their experience and challenges when conducting screens.

30. Finally, considering the case related data presented in the previous section, it is important to highlight that the proactive detection tools including screening that are deployed by the Investigative Authority are part of its strategy to enhance enforcement. Therefore, Cofece will proactively and continuously develop tools as well as mechanisms to enhance its detection capabilities, which in turn have contributed to generating incentives for leniency applications.

31. In the following subsection, co-operation initiatives with other agencies will be briefly described.

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<sup>12</sup> Press release available at <https://www.cofece.mx/cofece-encuentra-indicios-de-acuerdos-ilegales-en-pruebas-medicas-para-recien-nacidos/#:~:text=El%20tamiz%20metab%C3%B3lico%20neonatal%20es,que%20puedan%20ser%20tratados%20oportunamente.>

## 5. Co-Operation with other agencies

32. As mentioned before, Cofece has signed several MoUs with public entities to contribute to its enforcement and advocacy efforts. In addition, it has focused on expanding competition policy both at the national but also local level. In this sense, from domestic cooperation efforts launched by Cofece, the Investigative Authority has managed to gather relevant information and insights to contribute to its detection activities.

33. Furthermore, Cofece and its Investigative Authority have a close partnership with international competition agencies, which also apply to cartel detection. One example is the joint initiative with the Antitrust Division of the United States Department of Justice (US DoJ) and the Canadian Competition Bureau (CCB) related to the FIFA World Cup 2026<sup>13</sup>.

34. As part of this joint initiative, the three agencies are joining efforts to detect and counter potential anticompetitive conducts related to the provision of services and goods of the FIFA World Cup 2026. This, considering that the United States, Canada, and Mexico will host this major sporting event, which at the same time has major economic and social impact in each country. This joint project features different components, from advocacy and outreach to detection and enforcement.

35. Therefore, for detection purposes the current joint initiative with the US DoJ and the CCB is a priority for Cofece. This initiative includes both, formal collaboration as well as informal collaboration between relevant teams.

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<sup>13</sup> Cofece's press release is available in the following link: <https://www.cofece.mx/cofece-lanza-iniciativa-conjunta-con-sus-homologas-de-estados-unidos-y-canada-en-el-marco-de-la-copa-mundial-de-la-fifa-2026/>