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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Digital
Evidence Gathering in Cartel Investigations**

- Contribution from Spain-

28-29 September 2020, virtual meeting via Zoom

The attached document from Spain is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming virtual meeting via Zoom to be held on 28-29 September 2020.

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Session I: Digital Evidence Gathering in Cartel Investigations

– Contribution from Spain –

1. The National Commission for Markets and Competition (Comisión Nacional de los Mercados y la Competencia, CNMC) is responsible for ensuring the effective application of Law 15/2007 of 3 July on the Defence of Competition (LDC). The Law has provided the CNMC with various tools, including the power to inspect companies, associations of companies and the private homes of entrepreneurs, administrators and other members of the staff of companies with the aim of obtaining evidence of alleged infringements of competition rules that would otherwise be impossible to obtain.

2. Specifically, Article 27 of Law 3/2013 of 4 June creating the National Commission on Markets and Competition (LCNMC) authorises official CNMC staff to carry out inspections for the proper application of that Law. The information examined during investigations includes information in paper and electronic formats found in offices, on computers or in any other material format or accessible from the inspected company that may contain information related to the facts under investigation, whether belonging to employees or managers of the company, including portable hard drives, pen drives, tablets, smartphones, etc. In addition, the aforementioned Article 27 of the LCNMC authorises the appropriate staff to make or obtain copies or extracts, in any format, of any document relevant to achieving the objectives of the investigation.

3. The questions raised are answered below.

1. Does your authority use any digital tools (based on big data, artificial intelligence or other tools) for evidence gathering in cartel investigations? If so, please provide details on:

a. the kind of tool used, including whether it was developed in-house or acquired externally, its functioning and its specific features (market screening, identifying the relevant data set, searching the data, etc.);

b. why your authority decided to use that tool in that specific investigation;

c. the type of investigation in which the tools were applied;

d. the specific markets involved;

e. the outcome of the use of the tool, of the investigation and of the case;

f. the main challenges, if any, your authority has faced in the use of the tool, in the investigation and in the case, and how these challenges may have eventually been overcome.

4. The first thing to highlight about the use of digital tools for evidence gathering in cartel investigations by the Spanish competition authority is that this task is fundamentally conditioned by the availability and quality of the information to be analysed.

5. When analysing public tenders and possible collusion by bidding companies in potential market sharing and/or bid rigging, the Spanish competition authority is empowered to access large amounts of data from different public platforms, which increases the complexity of techniques used. More specifically, using data mining

techniques such as applying statistical, econometric and machine learning techniques to try to detect patterns of behaviour that evidence the existence of anticompetitive agreements.

6. The type of analysis carried out depends on the data to be studied in each specific case. This means that while the use of relatively simple screens is sufficient in some cases, in others more complex statistical and econometric techniques, network analysis and machine learning methods, both supervised and unsupervised, are beginning to be applied.

7. In some areas, where the availability of data is not so evident, case detection is much more limited. To address this, techniques such as web scraping or text mining can be used to increase data availability.

8. The development and application of these techniques is carried out by the Competition Authority itself and specifically within the Economic Intelligence Unit, as will be discussed later. Statistical software, such as R, Python, SPSS, and Stata, are used to apply the above techniques.

9. As inspection procedures have developed, gathering evidence on cartels during company inspections using various forensic analysis tools (off-the-shelf or developed in-house by the CNMC's forensic IT experts) has become particularly important. These software applications are developed in close cooperation with competition inspectors, who are in charge of investigating cases.

10. Among the tools used is the Nuix software platform, which enables analysis of multiple databases and offers a high-speed indexing engine. This software allows the use of various clustering algorithms and other machine learning techniques. Additionally, it offers the option of social network analysis, which can improve information filtering.

11. The main challenges of digital evidence gathering include getting access to and extracting data stored in the cloud and on an increasingly diverse range of mobile devices.

2. *If your authority does not use any digital tools for evidence gathering in cartel investigations at the moment, does your authority intend to or have any plans to start using any such tools in future cartel investigations? What parameters do you take into account when making such a decision (ease of use, effectiveness, costs, experience in other jurisdictions, deterrent effect, etc.)?*

3. *What kind of problems does your authority face regarding the storage of digital information in cartel investigations? Did you experience any difficulties (IT-related or legal) in accessing servers or in relation to the volume of data to be analysed and copied?*

12. First, during the course of an inspection, accessing and downloading the selected information in digital form can be complicated for two main reasons: i) the large volumes of data to be downloaded; and ii) the increasing preference of companies for storing information in the cloud rather than on local servers. This results in significant delays in accessing this information during inspections due to activities such as contacting cloud storage service providers, obtaining authorisations from the company, etc.

13. As a consequence, the phase of on-site information analysis and filtering by the inspection team is delayed, and performing an effective ranking of evidence becomes particularly important to identify any documents that may be relevant to the investigation being carried out.

14. To ensure a proportionate investigation, all documents collected during an inspection must be related to the subject and purpose of the Investigation Order. In particular, copying is only authorised for those documents related to the subject of the investigation, and the Competition Authority must avoid mass or indiscriminate

downloading at all times. As indicated by the Supreme Court with regard to the documents collected during inspections in its ruling of 6 April 2016:

"[...] searches must always be limited to the subject of the investigation authorised, with collaboration of the company's staff where these are willing and in any case by means of activity that is proportionate and focused on the investigation's purpose. Clearly, this does not mean that only previously identified material can be searched, or that at the time of the search it has to fully proven that it corresponds to the subject of the investigation, since on many occasions this would make the search a very complex – and probably inefficient – operation. But what is required is that the registration and requisition of documents focus on the subject of the investigation and are carried out in a proportionate manner, excluding general and indiscriminate requisitions of material or other matter that is manifestly unrelated to the investigation".

15. In addition, once the inspection is over, the search criteria used in information filtering must be provided to the company, in accordance with one of the first rulings issued by the National Court when initiating inspections under the powers of inspection provided for in the LDC. Two copies of the information collected are made – one for the Competition Authority and another for the inspected company – thereby providing the company with a reliable record of the information collected during the inspection of its headquarters.

4. Did your authority face any due process challenges, for example in relation to confidentiality and privacy of the data analysed or in connection with the private or business nature of the devices inspected when using digital evidence gathering tools?

16. Firstly, with regard to the possible confidentiality and privacy of the data analysed by the Competition Authority, Article 42 of the LDC establishes that a request to maintain the confidentiality of certain data or documents may be made at any time during the procedure.

17. The application of this precept has given rise in recent years to numerous resolutions both from the former Council of the National Competition Commission (CNC) and the current Council of the CNMC, and to subsequent rulings by the National Court and the Supreme Court regarding the confidentiality of data or documents analysed in competition cases.

18. In June 2020, the CNMC published [a guide on the handling of confidential information and personal data in antitrust proceedings under Law 15/2007](#),¹ which reviews the most relevant material and procedural aspects of the declaration of confidentiality in the context of proceedings related to anticompetitive behaviour and merger control, based on the doctrine and case law established in recent years.

19. In June 2016, the CNMC published an information note detailing the procedure it follows in competition inspections, as well as the rights and obligations of inspectors, the criteria for selecting the information to be collected and the handling of the information obtained after the inspection. The objective of such communications is to improve transparency and companies' knowledge about the inspections to be carried out by the CNMC, in accordance with the provisions of the LDC, which enables inspectors as agents

¹ Available on the CNMC website: <https://www.cnmc.es/prensa/guia-confidencialidad-procedimientos-competencia-20200604>

of the authority to access premises, means of transport or private homes, verify documents on any medium (paper, electronic, hard disks, etc.), make copies, seal premises, etc.²

20. During inspections carried out by the CNMC, the matter of the private nature or the possible application of the legal privilege of confidentiality of lawyer-client communications has also been raised by the entities under inspection, sometimes leading to administrative appeals to be filed before the CNMC Board when the inspected entity disagrees with the approach taken by the inspection team. The jurisprudence of the Resolutions issued by the Competition Authority (as in Resolution of 23 September 2013, Case No. R/0148/13 RENAULT, confirmed by the National High Court in its judgment of 21 July 2015), establishes that the act of accessing personal documents or documents unrelated to the subject of the inspection does not in itself constitute an infringement of the company's rights of defence:

"In summary, the case law examined shows that the enterprise under inspection does not have the right to prevent the competition authority from carrying out a thorough investigation during the inspection process or from having access to documents which are not related to the subject matter of the inspection, whether personal or professional, nor does the act of accessing the documents in itself infringe the company's right of defence in any way".

21. The same can be found in appeals lodged by inspected companies regarding documents potentially protected by lawyer-client confidentiality. In this case, the Judgment of 27 April 2012 of the Supreme Court (appeal no. 6552/2009 DF, Stanpa case) highlighted this requirement of active behaviour on the part of the inspected party:

"[...] require the inspected party to conduct itself in an active manner when alleging the existence of documents protected by lawyer-client confidentiality; mere generic allegations that do not specify clear and duly individualised and identified documents are not acceptable".

22. In any case, all information collected during inspections carried out at a company's headquarters is provisionally declared confidential in the inspection report, a copy of which is also kept by the inspected entity, with the express indication that in no case shall such information be included in the public file until the confidentiality of such information has been substantiated. Once all the documentation collected during the inspection has been analysed at the CNMC's headquarters, the Competition Directorate informs the company which documents collected during the inspection will be included in the file. The company then has a period of 10 days to submit a request stating the documents it considers confidential, in an individualised manner and with justification, providing a redacted version of those documents in accordance with the provisions of the aforementioned Article 42 of the LDC and Article 20 of the Regulation on the Defence of Competition, approved by Royal Decree 261/2008 of 22 February (RDC).

23. This information will remain confidential until the confidentiality request by the CNMC is resolved.

5. How does your authority ensure that the rights of defence of the companies (e.g. protection of privileged information) are observed in digital evidence gathering in cartel investigations?

² Available on the CNMC website: <https://www.cnmc.es/la-cnmc-publica-el-procedimiento-de-inspeccion-empresas-232453>.

24. In relation to legally privileged information, also called confidentiality of lawyer-client communications, the Spanish judicial doctrine,³ following the Community precedents on legal privilege, has established that legal privilege⁴ is restricted to communications between external legal advisors and their clients related to a company's right of defence in matters of competition.⁵

25. In accordance with the regulations and case law already issued in relation to the inspections carried out by the CNMC, the aforementioned information note on inspections states that during the inspection the company's staff must collaborate with inspectors, guaranteeing access to the information and devices that the inspection team considers should be subject to verification, responding to the questions of the inspectors to this effect, and identifying any documentation that could affect their privacy or right of defence.

26. In this way, and in order to prevent inspectors from collecting documents related to the privacy of the persons inspected or lawyer-client communications subject to confidentiality, the company and its workers must collaborate with the inspection team by making these circumstances known and identifying the aforementioned information so that it is not collected, as expressly stated in the Supreme Court ruling of 9 July 2012. The inspection team will expressly request such collaboration from the company for this purpose.

27. This means that the documents prepared by the internal lawyers of the company under investigation can be collected by the CNMC, incorporated into a sanctioning file and used as evidence, while the task of specifically identifying the documents affected by legal privilege falls to the company claiming such privilege. The company also has the burden of proof that a particular document not submitted to external lawyers has nevertheless been drawn up solely for the purpose of obtaining legal advice from an external lawyer in the exercise of the rights of defence.⁶

6. Does your authority have standards or guidelines on how to gather and process digital evidence? If so, what standards or guidelines does it offer?

28. The CNMC has internal rules on how to gather and process digital evidence. As mentioned above, an [information note](#)⁷ on the procedure for inspecting companies is available on the CNMC website. The aim of this note is to improve transparency and companies' knowledge of inspections by providing all the necessary information on the procedure to be followed, the purpose of the inspection and its consequences.

29. This communication covers aspects including access to information in electronic formats, its handling and the process of selecting relevant information.

³ Judgments of the National High Court of 19 November 2014 (Recommendation 1/2014) and of 16 May 2018 (Recommendation 345/2016).

⁴ Judgment of the Court of First Instance of 17 September 2007 (Akzo) and Judgment of the Court of Justice of 18 May 1982 (AM & S v Commission).

⁵ Working Party No. 3 on Co-operation and Enforcement: Treatment of legally privileged information in competition proceedings - Note by Spain DAF/COMP/WP3/WD(2018)44.

⁶ Judgments of the National High Court of 2 March 2011 (Recommendation 1/2010) and of the Supreme Court of 27 April 2012 (Recommendation 6552/2009) and of 21 September 2015 (Recommendation 2595/2014) and 4 July 2016 (Recommendation 395/2015).

⁷ <https://www.cnmc.es/la-cnmc-publica-el-procedimiento-de-inspeccion-empresas-232453><https://www.cnmc.es/la-cnmc-publica-el-procedimiento-de-inspeccion-empresas-232453>.

30. Furthermore, Article 27.2 of the LCNMC empowers officials to verify documents relating to the business contained on any medium, including computer software, during their inspections of companies. It also enables CNMC officials to make or obtain copies or extracts of such documents in any format.

7. Does your authority use specialised IT staff or other dedicated staff members during or after an announced inspection in cartel investigations?

31. The competition authority's own ICT staff is used during inspections. All inspection teams (one for each company inspected) have one or two IT staff members. The ICT staff participating in the inspections are familiar with the case and collaborate in pre-inspection meetings discussing the characteristics of the case.

32. Once the inspections are completed, ICT staff may support the units leading the cases in preparing the information collected in an accessible format for specific searches and for the orderly review of all evidence.

8. Does your authority have a dedicated unit or working group to manage digital evidence gathering, or intend to create one? What factors influenced the decision to create it? If your authority has such a specialised unit or group:

a. What are its mandate, functions and internal composition?

b. What are the characteristics and training of the staff working in it?

c. What practical adjustments were necessary to create it (obtaining licenses, physical space, etc.)?

d. How is the integration of the team leading the cartel investigation into the team of the specialised unit ensured?

e. What challenges did you face during the creation and operation of the specialised unit?

f. Do you consider this budgetary investment useful so far?

33. The CNMC does not have a unit dedicated exclusively to the management of digital evidence gathering. However, it has a Systems and Information and Communication Technologies unit, specialised in computer technologies, which provides support to all the units of the CNMC and which is responsible for the implementation of and permanent support for all technological infrastructure, including databases, servers, storage infrastructure and the fleet of mobile devices (laptops, tablets, PDAs). As mentioned above, IT staff from this Unit actively participate in both the preparation and the execution of inspection activities, as well as in the post-inspection, providing IT support to the investigating officers of the cases where inspections have been carried out.

34. Furthermore, in 2018 the CNMC created the Economic Intelligence Unit (EIU) with full time staff dedicated to the ex-officio detection of anticompetitive practices and a particular focus on the detection of cartels, especially in the field of public procurement. This unit, which is located in the Competition Directorate,⁸ is equipped with qualified staff and specific resources to promote the ex-officio detection of collusive behaviour, in particular of cartels affecting public contracts. The staff of this unit specialises in quantitative techniques, forensic analysis, open-source intelligence (OSINT) and cartel investigation and is responsible for the development of statistical tools and screening

⁸ The Competition Directorate is the CNMC body tasked with investigating cases involving potential sanctions for anticompetitive behaviour and merger control, and is also responsible for monitoring the resolutions adopted by the Council in this regard.

techniques to identify collusive patterns in the data. The evidence obtained from these tools is complemented by additional statistical and econometric analysis and other sources of information such as informants and open sources.

35. All the information processed and analysed by the EIU is made available to the other units of the Competition Directorate to instigate and investigate cases. It should be noted that, as a result of these two years of activity by the EIU, the CNMC has uncovered several cases of bid rigging, other investigations are ongoing, and several inspections have been initiated on the basis of information generated by the unit.

36. In addition, the EIU cooperates with the other units of the Competition Directorate by seeking relevant information about locations of company headquarters and staff to be investigated during inspections.

37. Both units – the Information and Communication Technologies and Systems Unit and the EIU – collaborate on the use of OSINT techniques, as well as to improve the filtering applications used during inspections and in the creation, improvement and debugging of the public tenders database.

38. The Information and Communication Technologies and Systems Unit also works closely with the Competition Directorate, jointly drawing up the catalogue of search criteria used in inspections.

9. *Has your authority ever cooperated with other national public bodies or with another competition authority to retrieve, copy and analyse digital evidence in a cartel investigation or to set up a specialised unit to manage the collection of digital evidence? If so, how did you organise this cooperation to ensure its effectiveness?*

39. Since the creation of the ECN Network⁹, the Spanish Competition Authority has been cooperating with other national competition authorities (NCAs) and the Competition Directorate in this legal framework for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union, among others, by exchanging evidence obtained in inspections with other NCAs.

40. In 2010, at the request of the Spanish NCA, a simultaneous inspection was carried out with the Italian NCA to gather evidence of a cartel in the fruit and vegetable packaging sector, which was sanctioned by the Spanish NCA in 2011.¹⁰

41. In 2012, the NCAs of Portugal and Spain organised and executed simultaneous inspections to collect evidence on two cartels in the same sector (flexible polyurethane foam), one in Portugal and one in Spain.¹¹

42. The CNMC has collaborated with the Portuguese competition authority on a case involving several terabytes of information, advising them on the indexation with Nuix.

⁹ European Competition Network: Network of 27 EU National Authorities (NCAs) and the Commission of the European Union to cooperate on the implementation of Art. 101/102 cooperation, with a legal basis for cooperation in Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the Treaty establishing the European Community).

¹⁰ File S/0251/10: <https://www.cnmc.es/expedientes/s025110>.

¹¹ File S/0342/11: <https://www.cnmc.es/expedientes/s034211>.

43. At the national level, we have collaborated with the Competition Authorities of Spain's Autonomous Communities, supporting them in their inspections and providing them with our forensic tools, in addition to the annual training given to all of them in the area of inspections. In these cases, the inspection procedures established by the CNMC are usually followed and, as mentioned above, all the Autonomous Regions are trained on a regular basis.

44. In addition, the CNMC collaborates with the European Commission on its inspections of companies located in Spain, supporting them in the recovery and copying of digital evidence. In such cases, the CNMC follows the procedures of the European Commission and becomes part of its team as an additional force.

10. What, in your view, are the most effective tools for conducting cartel investigations during the Covid-19 pandemic?

45. The pandemic situation generated by Covid-19 has considerably limited the possibility of carrying out inspections in companies during the state of alarm that was declared. Therefore, NCAs must evaluate new tools that facilitate remote evidence collection to continue with the authority's investigative work.

46. As regards investigations during the state of alarm, we can highlight the use of video conferences for communication with informants or complainants and the smooth running of the CNMC's electronic headquarters, where leniency¹² applications can be submitted or illegal anti-competitive practices reported without the need to file a formal¹³ complaint. During these months, it has been observed that both leniency applications and complaints have continued to be filed. In particular, a high number of complaints have been received concerning prices of goods and services needed to address the Covid-19 crisis. The use of OSINT techniques has also been intensified to exploit available open sources and data mining using databases available at the CNMC, as well as public information.

47. In addition, it has enabled files to be viewed remotely to continue the authority's activity under the restrictions imposed during the pandemic.

¹² <https://sede.cnmc.gob.es/tramites/competencia/solicitud-de-clemencia><https://sede.cnmc.gob.es/tramites/competencia/solicitud-de-clemencia>

¹³ <https://sede.cnmc.gob.es/tramites/competencia/colaboracion-para-la-deteccion-de-carteles><https://sede.cnmc.gob.es/tramites/competencia/colaboracion-para-la-deteccion-de-carteles>