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- Contribution from Ecuador -

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

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Session 1: Digital Evidence Gathering in Cartel Investigations

Towards the implementation of digital tools for cartel detection¹ - Contribution from Ecuador² -

1. A brief overview of Ecuadorian legislation on cartels

1. Article 11 of the Ley Orgánica de Regulación y Control del Poder de Mercado [Organic Law on the Regulation and Control of Market Power – LORCPM] prohibits any agreement, decision or collective recommendation, or collusive or consciously parallel practices, and in general all acts or behaviours of any kind carried out by two or more economic operators, the purpose or effect of which is or may be to prevent, restrict or distort competition, or adversely affect economic efficiency or general welfare.³
2. As can be seen from the legal text, Ecuadorian legislation neither defines the concept of “cartel” as such nor defines a specific classification for behaviour known as hard core cartels, although it is understood that the Ecuadorian legal framework provides for such practices within the above-cited definition. This is evidenced by the catalogue of behaviours contained in the LORCPM which are considered to constitute a restrictive agreement and practice, in particular: price fixing; allocation of customers, suppliers or geographical areas; restriction, limitation or collusive control of the production, distribution or marketing of goods or services; certain behaviours of suppliers or bidders in the submission of tenders and bids, or seeking to secure the result for their own benefit or for the benefit of another supplier or bidder (collusion in public procurement), among others.
3. In order to investigate and detect such behaviours, as well as the other offences provided for in the Law, Ecuador's Superintendencia de Control del Poder de Mercado [Superintendency of Market Power Control] (SCPM) has a number of investigative powers which include so-called “intrusive” surveillance. The SCPM may therefore request, recover and search for documentation and information, and may call upon those involved in the cases analysed to testify or make formal statements. In addition, it may carry out inspections, with or without prior authorisation, in the establishments, premises or buildings of natural or legal persons. When the places the inspections are carried out are

¹ This contribution considers the suggested questions issued by OECD Secretary in the document “Call for contributions”. Document available at: <https://bit.ly/357ajf3>.

² This contribution was prepared by María Alejandra Egüez Vásquez, National Intendent for the Investigation and Control of the Abuse of Market Power, Agreements and Restrictive Practices of the Superintendency of Market Power Control. The author is grateful for the comments of David Pozo and Patricio Pozo of the Superintendency of Market Power Control. For more information contact: maria.eguez@scpm.gob.ec.

³ Article 2 of the Organic Law on the Regulation and Control of Market Power defines an economic operator as: “*natural or legal persons, public or private, national and foreign, for-profit or non-profit, who currently or potentially engage in economic activities throughout or in part of the national territory, as well as the associations that group them together, and any natural or legal persons engaged in economic activities outside the country, to the extent that their acts, activities or agreements produce or are likely to produce harmful effects on the national market.*”

the home of a natural person, judicial authorisation is required. This authorisation is also required where entry must be gained to closed premises or establishments.⁴ These powers allow the SCPM to gather evidence to detect agreements which, according to the LORCPM, are considered either: serious infringements, when committed by economic operators who are not competitors (vertical practices), subject to a penalty of up to 10% of turnover; or very serious infringements in the case of cartels or agreements between competitors (horizontal practices), where the fine may amount to up to 12% of turnover. In Ecuador, this type of anticompetitive behaviour is not criminally prosecuted as it is in other jurisdictions.

4. Alongside the investigative powers applied by the SCPM, in its work to ensure the persecution of agreements or cartels, it issued the “*Instruction for granting fine exemption or reduction benefits of the Superintendency of Market Power Control*”.⁵ This regulation governs the procedure for infringing economic operators to take advantage of the leniency programme, as it is referred to in competition law. The programme provides for exemption from payment of the fine,⁶ for the first applicant, or failing this, a reduction of between 20% and 50%⁷ of the fine in accordance with the order (marker) of the application’s submission,⁸ provided the duty of co-operation requirements are met.⁹ This leniency programme is in line with the OECD recommendations on the introduction of an effective mechanism,¹⁰ which include the following: clarity in rules and procedures for accessing benefits; details of information to be submitted by the applicant for access to the programme; a dating system to ensure the order of applications and the allocation of markers; the establishment of requirements to be met by the collaborator during the investigation in order to access the benefits, excluding the possibility of granting these benefits to operators who have forced others to participate in the behaviour (instigator); and ensuring confidentiality.

⁴ The powers to perform inspections and searches are set out in Article 49 of the Organic Law on the Regulation and Control of Market Power. They are also regulated by resolution No. SCPM-DS-043-2016, 26 July 2016, which issued the following: “Instruction for searches and maintenance of the chain of custody”. Published in Official Gazette Supplement 820 of 17 August 2016.

⁵ SCPM-DS-2019-38 resolution of 8 August 2019, published in Official Gazette No. 52 of 2 October 2020.

⁶ Organic Law for the Regulation and Control of Market Power. Article 83. Exemption from payment of the fine.

⁷ Organic Law for the Regulation and Control of Market Power. Article 84. Reduction of the fine amount.

⁸ It should be noted that the regulation provides for the creation of an online dating mechanism, which is available at: <https://www.scpm.gob.ec/sitio/iframe-delaciones/>. This tool ensures that those interested in benefiting from the programme can apply. Although teleworking has been prioritised by the Ecuadorian authority due to the COVID-19 pandemic, a date and time for the meeting shall be assigned automatically, ensuring that the relevant authority receives the application.

Regulation on the Application of the Organic Law for the Regulation and Control of Market Power. Article 104. Duty of cooperation of those applying for exemption or reduction of the fine amount.

¹⁰ OECD (2019). Recommendation of the Council concerning Effective Action against Hard Core Cartels. Available at: <https://bit.ly/2XzK1fO>.

2. Relevance of collusion detection in public procurement

2.1. Public procurement in figures

5. Public procurement is the process whereby the public sector procures goods, works and services, the aim of which is to ensure the best value use of public money.¹¹ At the global level, public procurement involves the allocation of significant amounts of money. In the case of Ecuador, for the period 2010-2019, average public procurement amounted to approximately USD 7.9 billion, equating to an average of 8.5 percent of the gross domestic product (GDP). In 2019 specifically, public procurement accounted for 17% of the Presupuesto General del Estado [General State Budget] (PGE) and 6 percent of the GDP, equivalent to USD 6.066 billion.¹² For the period January-July 2020¹³ public procurement, considering all purchases made in the COVID-19 emergency situation, amounts to 7% of the PGE and 3 percent of GDP.

6. Given the size of this market, and its importance to the national economy, it is essential these processes are implemented within a framework of healthy competition in order to meet one of the main objectives of these markets, which is the efficient allocation of public resources. The competitive dynamics of procurement processes allow access to quality and/or low priced goods, works and/or services.

7. This efficiency is affected when competition in the public procurement market is impacted by its participants' lack of independence, with agreement to raise prices, lower the quality of the goods and services offered or to share markets rather than compete to win a public tender.¹⁴ According to the OECD¹⁵ (2011) report, there is evidence from surveys conducted in six economies on overcharging by public procurement cartels, leading to the conclusion that the existence of an agreement can increase prices by 30% (on average), compared with a non-collusion competitive benchmark.

8. In this context, the SCPM, like the competition authorities world wide, is fighting collusion in public procurement, and part of its institutional efforts are focused on detecting bid rigging, which is one of the most devastating behaviours for the market. In particular, at the national level there is low participation of economic operators in procurement processes compared with the number of registered state suppliers, indicating possible anticompetitive behaviour within public procurement, which could have deterred *“the participation of competing companies, decreasing public confidence in competitive procurement processes and undermining the benefits of a competitive market”*.¹⁶ In 2019,

¹¹ OECD (2011). Competition and Procurement. Key Findings.

¹² Servicio Nacional de Contratación Pública [National Public Procurement Service] (SERCOP). Public procurement figures. Monthly Bulletin. Available at: <https://bit.ly/3gSPCpm>.

¹³ Public procurement for the period January-July 2020 includes information on other procedures (very small amounts, emergencies, purchase and lease of property). Until June 2020, only common system and special system procedures were accounted for. Source: SERCOP – Sistema Oficial de Contratación Pública [Official Public Procurement System of Ecuador] (SOCE).

¹⁴ In this particular case, public procurement is understood to mean any procurement process involving two or more suppliers.

¹⁵ OECD (2011) (2014). Combatting Collusion in Public Procurement Processes in Mexico and Colombia. Report of the Secretary on the legal framework and practices of public procurement. Available at: <https://bit.ly/3585cee>.

¹⁶ OECD (2014). Combatting Collusion in Public Procurement Processes in Colombia. Report of the Secretary on the legal framework and practices of public procurement in Colombia. Available at: <https://bit.ly/357b8Vb>.

an average of 4.66 suppliers participated in each public procurement process.¹⁷ For the period January to July 2020, for example, in the electronic reverse auction processes – a dynamic procedure in which suppliers of equivalent goods and services push down the offered price – some 72% of processes involved between one and two suppliers. As regards the savings generated, which are expected to be directly proportional to the number of suppliers, it is evident that the fewer the participants in the procurement processes the lower the savings generated by the participating suppliers.

Table 1. A practical example of the potential impact on award prices of public procurement processes with increased competition. Electronic reverse auction procedure. January-July 2020

No. Participants	Benchmark budget	Value of contract awarded	Discount
1 ¹⁸	273.46	254.53	-7%
2	309.27	288.21	-7%
3	89.81	76.08	-15%
3	116.29	85.55	-26%
Total	788.83	704.36	-11%

Source: SERCOP. Public procurement figures.

9. In light of the above, public procurement behaviour needs to be regularly analysed, as there may be markets in which certain factors could be identified that could contribute to bid rigging, such as:¹⁹ small number of bidders; low or difficult market entry; stable market conditions; repetitive offers; identical or simple products or services, few or no substitutes, little or no innovation in products or services.

2.2. Collaboration with the public procurement governing body

10. SERCOP is the public body that regulates the management of public procurement in Ecuador and is responsible for supervising and standardising these procedures. In carrying out its investigative work, the SCPM has worked within an inter-institutional co-ordination framework. This co-operation has led to the renewal of the framework agreement that exists between these two institutions since 2019. It aims to co-ordinate joint actions between the SCPM and the SERCOP to achieve the objective of the LORCPM, through the work performed, consultancy, data management and information exchange, with a particular focus on public procurement processes. The main objective is to prevent and detect collusive and anticompetitive practices to promote competition, transparency and market efficiency.

11. Based on the importance of the interaction between these institutions, and given that the LORCPM anticipates enquiries from other public administration bodies to be a starting point, the SERCOP reports possible cases of identified unusual behaviours that could constitute anticompetitive agreements. The submitted documentation includes

¹⁷ National Public Procurement Service. Annual public procurement analysis 2019. Available at: <https://bit.ly/2Z4IOyC>.

¹⁸ According to Article 47 of the Organic Law of the National System of Public Procurement, in cases of single negotiation no bid will be made and “the bidder shall reduce his economic offer by at least five percent (5%) of the benchmark budget of the reverse auction held.”

¹⁹ OECD. Guidelines for combating bid rigging in public markets: For optimised government spending of public funds. Available at: <https://bit.ly/3lJqEfD>.

information collected by the entity itself as well as public information available through the Official Public Procurement System of Ecuador (SOCE).

12. Although access to the information necessary for the preliminary analysis is gained, this sometimes leads to additional separate exchanges of information between the group of economic operators under analysis, generating constraints in terms of time and delays in the effective examination of operators' behaviour by the competition authority. As an alternative to this situation and given that the information stored by the SERCOP is of the utmost importance to investigations and identification of evidence in cases of collusion, the optimal mechanism for more efficient exchange of and/or access to information are being evaluated, which allows data to be collected and integrated into the digital tool being developed by the SCPM, which will be explained in the next section.

Box 1. "Incidental findings" identified in emergency purchases related to the COVID-19 pandemic".²⁰

The sudden spread of COVID-19 in early 2020, and in Ecuador in March of this year, generated an unprecedented impact on markets. In the health sector in particular, the health crisis forced a state of emergency to be decreed, allowing and facilitating a procurement procedure with different contract procurement and award characteristics.

In accordance with the Ecuadorean legal framework for public procurement, in an emergency situation, contracts for goods, services, works and consultancy directly related to the emergency can be awarded directly and under the responsibility of the highest authority. While a procedure that is more streamlined, instant, fast, transparent and simple is sought, efforts must also be made to obtain the best price, something which must be verifiable and fully supported.

In these circumstances, contracting entities have the possibility of tendering under less competitive conditions, with the participation of few suppliers, and sometimes even involving direct contracts with a single supplier.

Box 2. “Incidental findings” identified by the pandemic generated by COVID-19.

This unusual situation in the markets has led to the identification of possible irregularities in the procurement of medical supplies as well as goods and services needed to address the pandemic.

These irregularities are being analysed by the Fiscalía General del Estado [State Attorney General's Office] (FGE), the State Comptroller's Office and the Superintendency of Market Power Control, within the remit of their respective responsibilities.

Emergency procurement was an enabling environment for corruption and collusion, converging to the same outcome: contracts being awarded for reasons other than fair competition and the merits of the supplier (see: <https://bit.ly/2QE7FVv>).

Specifically, in cases of public access, the FGE is investigating several cases allegedly involving coordinated and “structured groups” (see: <https://bit.ly/2D8HtyQ>) for the award of contracts, where it appears bank transfers were made between those involved as payment or remuneration for such awards.

The competition authority is initiating preliminary proceedings and conducting a series of investigations as a result of the emergency. However, these investigations may focus on the actions of the same economic operators whose facilities have been searched by the FGE. While the competition authority could, within the framework agreement it maintains with the FGE, access certain procedural documents, the collection of physical evidence will become more complex. It is important to point out that, since the events in question are public, the information that could be obtained from potential perpetrators could be compromised.

In this context and with the restrictions imposed by the pandemic, the use of digital tools for obtaining evidence is becoming more relevant. Equally relevant are tools that enable the competition authority to be vigilant and monitor behaviour patterns that could be suspicious or unusual in public procurement (see: <https://bit.ly/3jve8i2>).

3. Obtaining evidence in digital format: Investigation phase²⁰

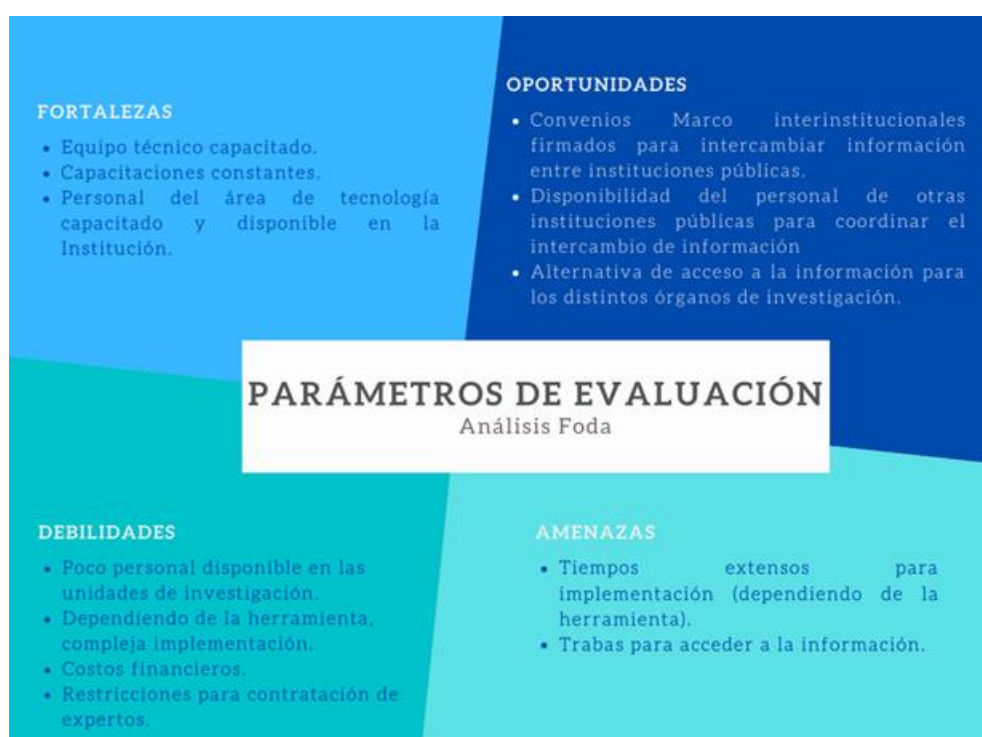
13. The SCPM is in the process of implementing a digital tool²¹ that will allow information to be gathered for use in investigations. With the aim of strengthening cartel detection capacities as part of its technological development, the SCPM is currently exploring complementary methodologies will allow application of Ecuadorian cartel law in the digital age, incorporating the use of screening or data mining tools in line with international trends.

²⁰ This section responds to the question posed by the OECD guidelines: “If your authority does not use any digital tools for evidence gathering in cartel investigations at the moment, does your authority intend or have any plans to start using any such tools in future cartel investigations? What parameters do you take into account in this choice (user-friendliness, effectiveness, costs, experience in other jurisdictions, deterrence effect, etc.)?”

²¹ For the purposes of this section, digital tools are understood to be those based on *big data* and artificial intelligence, or other tools used to gather evidence in investigations (e.g. through information screening techniques).

14. To determine whether a certain tool type should be implemented, several factors were evaluated, such as time, costs and experiences in other jurisdictions.²² The need for a consolidated information access tool was being addressed prior to the pandemic, although the various unusual market situations and behaviours have highlighted the need to implement this instrument in the short term, which is why it was evaluated among the available options (access to information through web services or construction of a *data warehouse*). The evaluation considered the tools that could generate results in the shortest possible time, and assessed the feasibility of their implementation in the event that resource allocation was necessary, whether in terms of storage, technological infrastructure or specialised personnel.

Figure 1. SWOT analysis to determine the digital tool to be implemented



Source: *Compilation*: Author's own based on the analysis carried out.

15. At present, therefore, the tool most suitable for the operational capacity of the competition authority consists of an information access and collection interface, which would be implemented through a dedicated application being developed by the SCPM (hereinafter the Application). This exercise is the first step towards collecting the information or data which is the main essential element for analysis.

²² Review of public information on the tools and projects implemented by: the Swiss Competition Commission (see: <https://bit.ly/32GdtU6>), United Kingdom Competition and Markets Authority (<https://bit.ly/31OqmN>), the Brazilian Economic Defense Administrative Council (<https://bit.ly/3boTGwx>) and other experiences available at: OECD (2013). Ex officio cartel investigations and the use of screens to detect cartels.

16. In the case of Ecuador, the National System of Public Data Registers was established by the Organic Law of the National System of Public Data Registers with the aim of coordinating the exchange of information from public data registers. This system is chaired by the Dirección Nacional de Registro de Datos Públicos [National Directorate of Public Data Registration] (DINARDAP), a public entity which provides a portal for the consultation of information concerning natural and legal persons from a set of sources (public institutions).

17. As part of this project's implementation, the SCPM is currently jointly developing the information access interface in co-ordination with the DINARDAP. Through a web service, this interface will allow access to information sources and a particular set of variables necessary for the analysis of economic operators that could be committing anticompetitive acts. An additional element to this tool is that it could be supplied with information from other databases that can be compiled in accordance with the investigative powers of the SCPM. In other words, information that is not available in the DINARDAP or from public sources through agreements or information requests will be compiled and stored in the tool, gaining as much data as possible for the corresponding analyses.

18. This first exercise, as such, will not allow the behaviour of different sectors to be constantly monitored in real time, which could trigger the detection of ex officio investigations. It will, however, allow information to be compiled for the corresponding analysis, to discover if indeed the previously identified determined behaviours of economic operators indicate that they could be committing some kind of anticompetitive behaviour, with an emphasis largely on cartels. One of the benefits of the Application's creation is that economic operator profiles can be generated without the need to contact those involved or for them to submit information which, depending on the results, will allow information to be compiled for searches or inspections.

19. In addition, in gaining access to a considerable volume of information on the potential economic operators involved, evidence can also be obtained indirectly from cartels. This type of evidence resulting from the application of economic analyses is also a powerful evidence tool since agreements are mostly made orally, making the collection of direct evidence more complex. In addition, as a result of the pandemic and the constraints faced by competition authorities, which have prevented movement for the collection of direct evidence such as documentation, e-mails, and evidence describing their operations,²³ economic analysis is becoming more relevant, as it will make it possible to demonstrate the behaviour of operators in the market, assessed by the dynamics of key indicators and variables such as prices, participation fees, production levels, and as regards public procurement, bids, participants, amounts awarded, and so on.

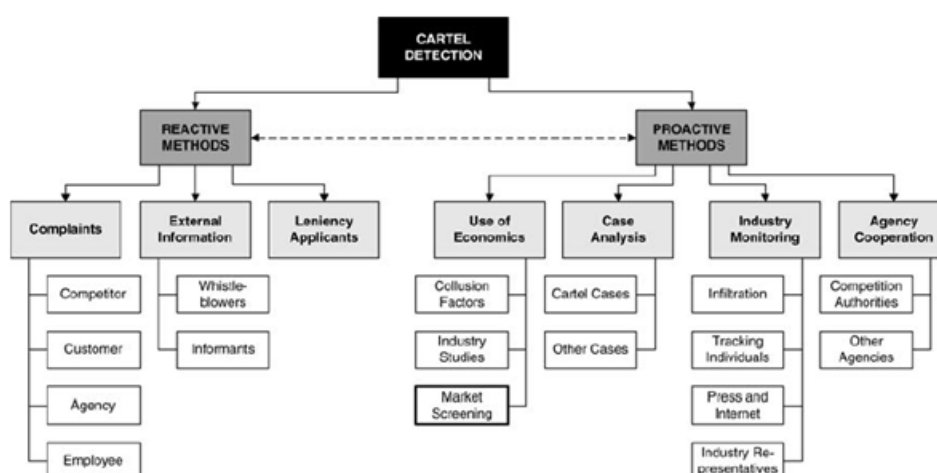
20. Unlike other jurisdictions, Ecuadorian legislation and its jurisprudence do not limit the authority's power to base an infringement in accordance with Article 11 of the LORCPM on economic evidence, since both tacit and explicit agreements are prohibited. For example, in the United States, economic evidence is considered insufficient to prove a violation of Section 1 of the Sherman Act and has more of a supporting role than serving as evidence itself: direct evidence of the agreement is always necessary.²⁴

²³ OECD (2007). Prosecuting Cartels without Direct Evidence of Agreement.

²⁴ Harrington, J. E. (2006). Behavioral screening and the detection of cartels. *European Competition Law Annual*, Pages 51-68.

21. As a next step to the tool's implementation, the Ecuadorean competition authority, and specifically its cartel unit, will work on developing a methodology that allows the analysis of the information gathered through the Application. In their interventions, the competition authorities use a number of tools that allow effective application of the cartel persecution regulations, including tools that seek to prevent or avoid the formation of cartels (*ex ante*) and tools used to intervene and detect them; the latter include digital tools and, in this case, the SCPM Application. It is widely known that two different methods: reactive and proactive, can be used for detection.

Figure 2. Methods for the detection of cartels



Source: Kai Hüschelrath, How Are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements

22. Given the Application's structure, cartel detection will begin with the use of proactive methods. These methods "offer a variety of tools to actively detect cartels. The explicit use of economics, for example, can play a role in studying collusion factors between industries, conducting market or industrial studies or research and applying a market selection approach".²⁵ According to the International Competition Network (ICN),²⁶ these methods are classified into the use of economic techniques, case analysis, industry monitoring and co-operation with other agencies. Within these categories, the SCPM will focus initially on methods based on the use of economics.

23. According to the OECD (2007), economic evidence can be classified into two categories:²⁷ structural and market behaviour. The first approach, the "structural" approach, "looks at the structure of the industry at hand "scoring" the likelihood of collusion based on factors such as homogenous product, too few competitors, stability of demand, and other commonly used collusive markers".²⁸ The second type, behaviour or "results" analysis, seeks to "look at the behaviour of markets and their participants and apply screens to assess

²⁵ Kai Hüschelrath, How Are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements, *Journal of European Competition Law & Practice*, Volume 1, Issue 6, December 2010, Pages 522-528.

²⁶ ICN (2010), Anti-Cartel Enforcement Manual Cartel Working Group - Subgroup 2: Enforcement Techniques, Page 7.

²⁷ OECD (2007). Prosecuting Cartels without Direct Evidence of Agreement. What is circumstantial evidence?

²⁸ OECD (2013). Ex-officio Cartel Investigations and the Use of Screens to Detect Cartels. *Rosa M. Abrantes-Metz*.

whether the observed behaviour is more or less likely to be consistent with collusion or competition”.²⁹

24. Therefore, as one of the main objectives of implementing the digital tool is to improve detection of “bid rigging”. Having explored these two options, the design and implementation of “screening” techniques is planned, considering the following elements as a starting point:³⁰

- understanding the characteristics of the markets and sectors under analysis, considering the nature of the competition and the potential incentives or opportunities to distort it;
- a theory of the characteristics of the agreement between competitors;
- a theory of how the agreement would affect market outcomes in terms of prices, bids or participation fees (available information) for example;
- the design of a statistical technique capable of capturing key market variables as well as case theory;
- empirical and theoretical substantiation; and
- identification of an appropriate counterfactual to compare the collusion theory and the empirical results obtained.

4. Final remarks

25. In addition to the tools available to competition authorities for detecting cartels, such as complaints and the leniency programme, there are clear signs of increased implementation of digital tools for cartel detection.

26. The pandemic has not only led to changes in the behaviour of market players, but has also forced government authorities to rethink the application of public policies, including the competition policy. In view of the given distortions, the authorities must strengthen their actions and adapt their investigative powers to ensure their detection capacity remains equally effective and efficient. Digital tools will therefore play a more important role in evaluating and detecting cartels.

27. It should be noted that the Application’s implementation generates a series of positive externalities institutionally, since it is an instrument that provides access to simultaneous information, allowing the extraction of data and consolidating information from different sources in data files. This is useful not only to the cartel analysis unit, but to the institution’s other investigative bodies.

²⁹ OECD (2013). Ex-officio Cartel Investigations and the Use of Screens to Detect Cartels. *Rosa M. Abrantes-Metz*.

³⁰ Abrantes-Metz, Rosa M. (2011), Design and Implementation of Screens and Their Use by Defendants. *Competition Policy International (CPI) Antitrust Chronicle*, Vol. 2 September 2011.