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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Compliance
Programmes in Antitrust Enforcement**

– 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 I at its forthcoming meeting to be held on 20-22 September 2021, via a virtual Zoom meeting.

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Session I: Compliance Programmes in Antitrust Enforcement

– Contribution from Mexico* –

1. Introduction

1. In 2017, the Federal Economic Competition Commission (COFECE or Commission) requested the consulting firm McKinsey to prepare the Estudio y análisis de la percepción sobre temas de competencia económica y la labor de la COFECE [Study and analysis of the perception about economic competition topics and the work of COFECE],¹ with the objective of knowing the perception of different groups of the society about the effectiveness of the actions of the Commission and its legal framework.

2. The McKinsey Study informed the Commission about the level of knowledge of its powers, as well as of the Federal Economic Competition Law (LFCE), amongst several groups of the interested population. These results made evident that, while specialized lawyers showed high knowledge about COFECE and the LFCE, around 90% of the surveyed businesspersons described their knowledge as very limited or null.

3. From these results the Commission identified several strengths and areas of opportunity which laid the groundwork for the design of several competition promotion strategies; some of these specifically related to compliance with the LFCE, for example:

- Actions to address the low level of knowledge from the business community regarding the LFCE. Prior to promoting the adoption of actions that encourage compliance programs, COFECE undertook different actions to increase the knowledge of the business sector (chambers, corporate lawyers, company officials, among others) regarding the content of the LFCE, especially in the context of the approval of a new Law in 2014. Among these actions, the in-person and online trainings on the *Rights and Obligations in matters of competition* stand out (these actions are described in section 2 of the contribution).
- Actions aimed at promoting companies to develop effective compliance programs. Once a basic knowledge of the LFCE and the work of the competition authority had been built, specifically for promoting the development of compliance programs and actions, COFECE published the document *Recommendations for complying with the Federal Economic Competition Law*² and built spaces to disseminate and discuss these recommendations (these actions are described in section 3 of this contribution).

* Contribution from the Mexican Federal Economic Competition Commission (COFECE).

¹ The complete study is available (in Spanish) at <https://www.cofece.mx/wp-content/uploads/2018/01/Estudio-labor-COFECE-17.pdf#pdf>

² The 2019 version of this document is available at https://www.cofece.mx/wp-content/uploads/2021/02/DYO_Recom-ENG.pdf and the 2015 version is also available at <https://www.cofece.mx/recommendations-for-compliance-with-the-federal-economic-competition-law-addressed-to-the-private-sector/?lang=en>

- Actions aimed at promoting compliance with the LFCE in public procurement procedures. Based on its experience in enforcing the LFCE, specially on the fight against collusion, COFECE identified an area of opportunity for promoting compliance with competition regulation through interinstitutional collaboration with procurement agencies to: (i) disseminate among bidders and buyers the risks of participating in violations to the LFCE and the options it considers to report conducts and apply to the immunity program; and (ii) disseminate among buyers the importance of the design of procedures that reduce the spaces for collusion (these efforts are describes in section 4 of the contribution).

4. Finally, based on its experience, COFECE has identified some key messages for the promotion of competition compliance programs. In addition, it recognizes that there is still much work to be done in the matter. Therefore, it has identified good international practices that could serve as a guide for the next actions of the Commission (these messages and practices are described in section 5 of the contribution).

2. Actions to address the low level of knowledge of the business community about the LFCE

5. Ensuring strict compliance with the LFCE requires that the business sector is aware of the rights and obligations it entails. This is the only way to recognize the value of having compliance programs and allocate resources for their successful adoption and implementation.

6. Since 2017, and from the results of the McKinsey Study, COFECE has undertaken several actions directed at promoting knowledge of the LFCE by the private sector, among which the following stand out:

2.1. Training for corporate lawyers

7. To ensure that there are legal professionals in Mexico who are familiar with the regulatory framework in matters of competition and, that more and more specialists are trained in this area, the Commission implemented 11 workshops during 2019, in which corporate lawyers, law students and interns, as well as representatives from small, medium and large companies from eight states of the Republic and Mexico City participated.

2.2. Online training courses on the Rights and Obligations in matters of economic competition³

8. As mentioned in the previous point, on an ongoing basis COFECE provides face-to-face training to the public interested in competition matters, through lectures, conferences, or panel discussion in in-person spaces. However, since 2017, COFECE identified the need of having an online training platform, which would enhance the institution's capacity to disseminate the knowledge of the LFCE and its benefits. That is, that allowed to reach the greatest number of people possible. Therefore, the Commission designed a digital training platform called Cursos COFECE.⁴

³ Training Course: Rights and Obligations in matters of Economic Competition, *Cursos COFECE*, available in Spanish at <https://cursos.cofece.mx/local/staticpage/view.php?page=derechos-obligaciones-materia-competencia-economica>

⁴ Cursos COFECE platform, available at <https://cursos.cofece.mx/>.

9. In June 2021, as a result of the challenges brought by COVID-19, the platform gained relevance, being a safe space for COFECE to continue providing trainings in matters of economic competition and evolved into an online space with courses available for the business community and the general public.

10. In particular, the platform makes available to the interested public the course Rights and Obligations in matters of economic competition. The purpose of this course is to make more people in the private sector aware of the rights and obligations arising from the LFCE and that govern the acts of economic agents, as well to encourage and motivate the creation of measures to comply with the Law in companies. By the end of 2021, the platform has more than 750 registered users.

2.3. Campaigns to promote the benefits of the Immunity Program

11. The Immunity program has been an important tool for the Commission to gather relevant information for the initiation and investigation of collusion cases. For this reason, educational material on the Program was designed and disseminated.⁵ In addition, two online campaigns were implemented with the purpose of transmitting the benefits that adhering to this program grants to both natural and legal persons. Thus, COFECE is constantly seeking to make more economic agents aware of the Program and the benefits and obligations it entails.

12. The first campaign was carried out with paid advertising in social media (guideline) of an informative video published on YouTube from October 12 to November 24, 2017, and generated 6,296 views;⁶ the second included an informative material social media guideline, with a reach to 43,324 users who, in turn, propitiated 18,418 more views to the original video. This second campaign was implemented from October 25 to November 29, 2018.

2.4. Outreach with entrepreneurs

13. With the aim of learning about and recognizing stories of disruptive entrepreneurship that have promoted competition in different markets, and specially in digital ones, in October 2020 the Commission launched the campaign #EmprendiendoCreoCompetencia. As par of this initiative, COFECE invited entrepreneurs to tell, through a short video, their business story and how it has created competition in the market, as well as benefits for consumers. Thus, the aim was for encouraging participants to identify themselves as an important part of the process of creating competition. At the end of the campaign, the Commission published the best 10 videos received in a virtual memoir of this initiative, which is available on the Commission's website.⁷ As a follow-up to this strategy, during 2021 ten trainings in digital media have been held for entrepreneurs at early and intermediate business stage, as well as to Mexican SMEs. Given that this audience, unlike specialized lawyers, does not has

⁵ Available, in Spanish, at <https://www.cofece.mx/wp-content/uploads/2017/11/TripticoProgramaInmunidadvoline31.pdf>

⁶ The video *What is COFECE's Immunity Program?* Is available in Spanish at <https://www.youtube.com/watch?v=sitE5na-eFw>; also, some posts, in Spanish, of the campaign can be consulted here <https://www.facebook.com/watch/?v=1538552812888053> and here <https://twitter.com/cofecemx/status/904082794334347264?s=21>

⁷ The memoir and results of this campaign are available, in Spanish, at https://www.cofece.mx/wp-content/uploads/2020/12/Resultados-Emprendedores_VF.pdf

previous knowledge about competition, to explain the rights and obligations contained in the LFCE, basic content and competition policy cases are used, as well as a citizen language, in order to introduce them to the culture of competition. Some examples of the topic covered are: i) Introduction to competition policy in Mexico, ii) Economic Competition in digital markets, and iii) What to do when regulation does not let me compete?

3. Actions aimed at encouraging companies to develop effective compliance programs.

14. Once obliged subjects have a better understanding about the content of the LFCE and their rights and obligations that arise from it, as well as the consequences of infringing it, they tend to value more the elaboration and implementation of effective compliance programs in the matter. When companies ensure a rigorous compliance with the LFCE, these can reduce legal and economic risks that could harm their finance and reputation, prevent employees and directives from facing sanctions of various types and generate certainty and trust both within and outside of the company.

15. Due to the foregoing, in order to facilitate the development of robust and effective corporate compliance programs, COFECE has undertaken several actions that guide the adoption and implementation of competition compliance programs, among these the following stand out: the publication of the *Recommendations to comply with the Federal Economic Competition Law* and the organization of fora on compliance with the LFCE; these are described in the following sections.

3.1. Document Recommendations for complying with the Federal Economic Competition Law

16. In 2015, in the framework of the approval of a new Competition Law, COFECE published the document *Recommendations for complying with the Federal Economic Competition Law*. Later, in 2019, the Commission published an update of this document, which included recently resolved cases.

17. The document includes recommendations for economic agents to design and implement effective compliance with the LFCE programs and provides examples of cases resolved by COFECE in different sectors that could be of use in the construction and execution of these programs. Due to the pertinence of the document, it is publicly available on the Commission's website, and has been physically and electronically sent to practitioners in matters of competition, companies, chambers and business representation bodies. In addition, the document is regularly shared as a recommended bibliography in the trainings and conferences given by officials from the Commission.

3.2. Compliance Programs Forum

18. With the aim of sharing experiences, lessons learned and best practices, from the view of the competition authority, with companies and the society in matters of compliance programs, in 2019, COFECE, along with the Ministry of Public Administration (SFP per its acronym in Spanish) and the International Chamber of Commerce (ICC), organized the *Compliance Programs Forum, Fighting corruption and anticompetitive practices: Shared responsibility between authorities and companies*.

19. One of the main topics discussed during this event was the overlap between competition and the fight against corruption, especially in the context of bid rigging and how effective compliance programs can play an important role in the deterrence of these practices.⁸ During this event, the Commission signed a collaboration agreement with the SFP which is described in detail in section 4 of this contribution.

4. Compliance actions related to the promotion of the LFCE in the area of public procurement

20. Through its LFCE enforcement actions, COFECE detected and sanctioned several cartels in public procurement. In this way, it identified the opportunity to conduct actions aimed at promoting competition in these procedures: (i) through informing participants of tenders and public officials who design and execute them about the implications of facilitating or participating in agreements contrary to the LFCE; and (ii) through raising the awareness of public officials about the importance of designing competed procedures that make the formation of collusive agreements more difficult and train them to contribute to their identification. These actions promote compliance with the LFCE specifically in this sector.

21. Competition in public procurement procedures is an ally to achieve contracting under the best possible conditions for the State. In this sense, its design should be oriented to: (i) obtain the greatest market access possible avoiding artificial limits to the number of bidders, (ii) generate intense competition of the participants by favoring the presentation of aggressive price bids and, (iii) reduce the spaces for the possible formation and maintenance of collusive agreements.

22. In order to achieve more competitive designs of the public procurement procedures, the Commission has collaborated very closely with public authorities to (i) familiarize the officials involved in said processes with the LFCE, (ii) increase their awareness about possible violations to the LFCE in case of facilitating or coordinating collusion and (iii) teach them to design procedures that close the spaces for collusion, increase competition and establish incentives for bidders to comply with the LFCE. An example of these incentives, which has been proposed by COFECE, are the “Letters of Independent Bid Determination” which are documents submitted by bidders to procurers in which they certify their knowledge of the LFCE, of absolute monopolistic practices (cartels) and, that their bid is independent and not a simulation of competition.

23. Likewise, the Commission collaborates with procurers so that they become allies of the authority in the identification of cartels. Although this collaboration is not focused on compliance with the LFCE by bidders, it does contribute to the promotion of compliance as there are successful collaboration cases that result in sanctions to collusive conducts that serve as an example for bidders to strengthen compliance with the LFCE and thus avoid these practices in future procedures.

24. Based on the above, the Commission has undertaken several collaboration actions with public authorities, such as:

⁸ The memoir of this event is available in Spanish at <https://www.cofece.mx/wp-content/uploads/2019/11/MemoriaForo.pdf>

4.1. Trainings on competed public procurements

25. In order to contribute to the search for competition conditions in public procurement, COFECE trains public officials from different sectors in matters of design and execution of contracting procedures that promote competition and free market access, this with the purpose of institutions obtaining the best conditions regarding price and quality of the goods and services they acquire, thus, since 2016 more than 20 workshops for public officials from the federal and state level have been organized.

4.2. Documents on Competition in public procurement

26. To incorporate the principles of competition and free market access in the design of public procurement procedures that come into play in an important way in the obtention of better contracting conditions in terms of price, quality, and opportunity for the Mexican State, in 2016, COFECE published the *Recomendaciones para promover la Competencia y la libre concurrencia en la contratación pública* [Recommendations to promote competition and free market access in public procurement].⁹ This document is directed to any type of public authority or body that conducts contracting of goods, services or works, it contains recommendations that identify the most relevant aspects that, in matters of competition and free market access, should be considered in each of the stages that are generally comprise a procurement procedure (these are: planning, design and contest). In a similar way, the document includes examples based on cases and the experience of COFECE that allow a clearer understanding of the importance of competed contracting procedures.

27. Subsequently, in 2018, the *Agenda de Competencia para un Ejercicio Íntegro en las Contrataciones Públicas* [Competition Agenda for a Comprehensive Exercise in Public Procurement] was published, which presents the recent learnings of the Commission in the compliance of its functions, related with competition problems in the processes of public procurement, raising action proposals, both in the administrative and regulatory sphere, to effectively promote competition in said economic activity.¹⁰ Also, the document concluded with agenda proposals of actions (that whether or not require legislative reforms) to improve public procurement in Mexico.

4.3. Collaboration Agreement with the Ministry of Public Administration

28. In order to establish the necessary elements for interinstitutional coordination and cooperation, in 2019, COFECE signed a collaboration agreement with the Ministry of Public Administration. Through the cooperation with this Ministry, the exchange of information is facilitated in order to identify, investigate and sanction administrative misconduct by public officials and economic agents in the field of public procurement.¹¹

⁹ The document is available in Spanish at <https://www.cofece.mx/wp-content/uploads/2017/11/RecomendacionesContratacionPublica-v2.pdf#pdf>

¹⁰ The document is available in Spanish at <https://www.cofece.mx/wp-content/uploads/2018/07/CPC-ContratacionesPublicas.pdf#pdf>

¹¹ *Para evitar corrupción en contrataciones públicas la Función Pública y la Cofece firman convenio de colaboración* [To avoid corruption in public procurement, the Public Administration and Cofece sign a collaboration agreement], Press Release 086, Ministry of Public Administration. Available in Spanish at <https://www.gob.mx/sfp/prensa/para-evitar-corrupcion-en-contrataciones-publicas-la-funcion-publica-y-la-cofece-firman-convenio-de-colaboracion-214958>

Also, with the agreement, COFECE and the SFP undertake to provide joint trainings to improve the investigation of possible collusions and avoid acts of impunity.¹²

29. It should be noted that the SFP disqualified a company after COFECE, in the resolution of file IO-006-2015, ordered to deliver a public version of the resolution to the Ministry of Public Administration and to the heads of the agencies that were affected by the practices committed, for the legal effects that may be applicable.

5. Key messages for designing and implementing an effective compliance program and issues to be explored in matters of compliance with the law in Mexico

30. As described in the previous section, one of the main objectives of the *Recommendations for complying with the Federal Economic Competition Law* is to facilitate the development of effective and robust corporate compliance programs. To this end, the Commission proposes 9 elements in the document, aligned to the best international practices.

31. For this, in its dissemination strategy on the importance of adopting effective compliance programs, COFECE proposes that these should at least include the following elements: (1) Fostering a corporate competition culture; (2) Dedicating human and monetary resources to the program; (3) Assessing the company's risks through the elaboration of, for example, a risk matrix; (4) Elaborating compliance guides, manuals and policies based on the risk matrix; (5) Ongoing and tailored training; (6) Monitoring and auditing of the compliance program; (7) Establishing internal report systems and disciplinary actions applicable to those employees that do not comply with the LFCE; (8) Evaluating compliance program in a periodic manner and; (9) Additional recommendations with special attention to the participation of companies in public procurement procedures

32. In addition, COFECE emphasizes that, in matters of competition, compliance programs in Mexico include elements such as: i) knowledge and protocols for the elaboration of informed complaints; ii) general description and benefits of the immunity and sanction reduction program, and iii) indications and protocols for cooperating with the competition authority in on-site searches, investigations and information requirements.

33. A well-designed compliance program must punctually describe the powers that COFECE has and specifically, the Investigative Authority (IA) to avoid sanctions for disregard, for example, supporting the authority in the processing of an on-site search.

34. These elements, as well as the general messages of the document published by the Commission, draw from the experiences and best international practices gathered by several international organizations, such as:

35. The *Explaining the Benefits of Competition to Businesses* of the Advocacy Working Group of the International Competition Network (ICN) which in addition to highlighting the importance of transmitting clear and key messages regarding the benefits of competition, it also establishes the importance of encouraging companies to promote a corporate culture of compliance that allows to reduce the risks of possible anticompetitive practices. It also highlights the importance of compliance trainings in matters of compliance to strengthen knowledge of the law. Both elements, are included in points 1 and 5 of the Recommendations published by the Commission. In addition, this same working group is currently developing a specific project on the role of compliance

¹² The agreement is available in Spanish at https://www.cofece.mx/wp-content/uploads/2019/08/Convenio_SFP_08_2019.pdf

programs in various jurisdictions. This report with the findings and best international practices is expected to be published by the end of 2021 and it will include the experience of COFECE in this matter.

36. Since 2011, the Competition Committee of the Organization for Economic Cooperation and Development (OECD) has discussed the importance of establishing effective compliance programs. In its 2011 Policy Roundtable on the Promotion of the Compliance with Competition Law, the OECD proposed some elements, that are included in points 1, 3 and 6 of the Recommendations' document of COFECE, such as risk assessment, the corporate commitment, constant monitoring, and continuous improvement as key elements to any compliance program. This discussion was taken up in another roundtable in 2021, in which the role of compliance programs to complement enforcement activities was discussed in more depth. Likewise, the discussion continued about which elements an effective compliance program should have, including concepts such as incentives for employees, the involvement of directors and third-party compliance. The first two concepts coincide with elements 1 and 7 recommended by COFECE for an effective compliance program.

37. Although COFECE has taken a considerable number of actions for the promotion of compliance programs, there are international best practices that can be explored and implemented in Mexico. To this end, the Commission has reviewed initiatives developed and implemented by competition agencies from other jurisdictions, whose objective is to encourage the adoption of competition compliance programs by companies. Some examples that COFECE would seek to replicate in the near future are:

- The Competition Bureau of Canada conducts trainings on competition law with other governmental agencies that work directly with SMEs, especially the ones related with the digital economy, to help them to detect competition issues in the market.
- The Competition Authority of Kenya and the Philippine Competition Commission have compliance programs models, especially for SMEs.