

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO
DETECT CARTELS**

-- Note by Mexico --

This note is submitted by Mexico to the Competition Committee FOR DISCUSSION under Item X at its forthcoming meeting to be held on 30-31 October 2013.

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ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS

-- Note by Mexico --

1. Proactive and reactive detection measures

1.1 *Please describe your current cartel detection policy: what are the cartel detection measures in place in your jurisdiction? Do you rely exclusively or mainly on either proactive or reactive detection tools? Or does your policy strike a balance between the two?*

1. The Federal Economic Competition Commission (CFCE for its Spanish acronym, or Commission) cartel detection policy has reactive and proactive measures. The main tool for the reactive approach is the Sanctions Reduction Program (PROGRAM), stipulated in Article 33 bis 3 of the Federal Law of Economic Competition (FLEC or law). Furthermore, the Commission may initiate investigations through complaints filed by any person, whether or not it has been affected by the cartel.

2. Regarding the proactive approach, the Commission has two main tools: i) statistical analysis of data (screens) and ii) continuous review of publicly available sources that may indicate the existence of a cartel, i.e. at the beginning of September of this year the Commission started an investigation into the corn market in the state of Colima after obtaining a collusive agreement through internet.

1.2 *Please describe the factors that influence the formulation of an optimal cartel detection policy. In what terms do you measure the effectiveness of an anti-cartel enforcement proactive and reactive detection tools? It is possible to measure the cost and benefits of particular proactive or reactive detection measures? What might convince you to divert more resources from reactive to proactive detection or vice versa?*

3. The Commission considers that the best cartel screening policy needs efficient reactive and proactive measures.

4. Regarding the reactive approach, the Commission has focused its efforts in developing its main tool, that is the PROGRAM, from two different perspectives: i) by increasing the incentives of those that violate the law to use the PROGRAM (through higher economic sanctions and the possibility of imposing criminal penalties, accompanied by the effective enforcement of the FLEC),¹ and ii) by providing legal certainty to the offenders throughout the PROGRAM's application and admission procedures.²

5. For the proactive approach, the Commission i) has promoted cooperation with different government agencies to have access to important sources of statistical information and ii) has trained its officials to conduct economic analyzes for cartel detection. Likewise, the Commission developed a search

¹ For the latter, success stories that give credibility to the Commission serve as deterrent precedents.

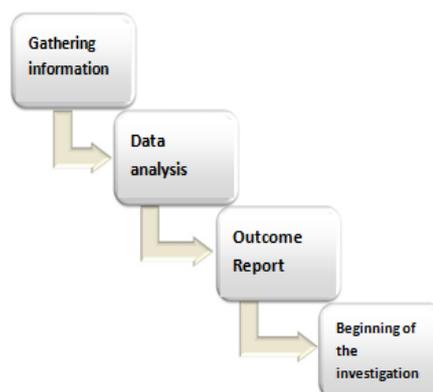
² These procedures are publicly available in the Guidance of the Commission's Leniency and Sanctions Reduction Program.

methodology based on the business development model³ that consists of collecting, analyzing, selecting and evaluating information to determine its utility in detecting cartels or interstate commerce restrictions in domestic markets. The methodology consists of three stages: i) information collection and analysis; ii) selection of useful information and theoretical evaluation for detecting possible cases of success and; iii) determine feasible investigations.

6. The CFCE does not have a specific methodology for evaluating the effectiveness of each approach. However, the number of investigations initiated, the quality of evidence obtained for each case, the impact of the market investigations, are indicators that demonstrate the efficacy of each measure and provide valuable information to the Commission on which measures are more cost effective for certain cases.⁴

1.3 Please describe your policy towards ex officio cartel investigations. Is there an established framework or procedure for initiating ex officio cartel investigations? Does your ex officio enforcement represent an important part of your anti-cartel enforcement strategy? For example, do you prioritise (or not) ex officio investigations over cases initiated otherwise? If so, why?

7. Article 30 of the FLEC empowers the CFCE to initiate ex officio investigations. The methodology used by the Commission to initiate an ex officio investigation is:



8. Currently the Commission is carrying out 11 cartel investigations, which include those initiated ex officio (8) and by claims (3). This indicates that 73% of the investigations carried by the CFCE are ex officio investigations. However, it should be noted that 6 out of 8 ex officio investigations were based on information obtained from the PROGRAM, which represents 55% of all cartel investigations.

9. In order to give further impetus to ex officio proceedings, the Commission established last year an investigation methodology based on the new research development business model described in paragraph 5. This has led to several pre investigations (based on information obtained through the media) which could lead to a formal investigation.

³ Strategies used in the private sector to attract more clients.

⁴ The case information of the Commission is included on an annual basis in its annual reports.

2. Cartel screens

2.1 Please describe whether you have ever considered implementing cartel screens. Which screening approaches (structural / behavioral) and which screening methods have you considered? Which industries or markets have you considered as possible candidates for screening? What are the factors that influenced the decision to implement or the screens under consideration? Do you make public the details of your screening programme?

10. The General Direction of Economic Studies is responsible for providing technical support to the General Direction of Cartels and the General Direction of Unilateral Conduct. Some of the technical support consists of conducting screenings for cartel detection and economic analysis of the behavior investigated. This support serves as input to the arguments included in the CFCE's Statement of Objections.

11. The CFCE's screenings methods lean more towards the behavioral approach, i.e. the identification of:⁵

- A higher list (or regular) price and reduced variation in prices across customers.
- A series of steady price increases is preceded by steep price declines.
- Price rises and imports decline.
- Firms' prices are strongly positively correlated.
- A high degree of uniformity across firms in product price and other dimensions including the prices for ancillary services.
- Low price variance.
- Price is subject to regime switches.
- Market shares are highly stable over time.
- There is a subset of firms for which each firm's share of total supply is highly stable over time.
- A firm's market share is negatively correlated over time.

12. The Commission's arguments generally include information about the market structural characteristics that favor the formation of collusive agreements, i.e. if the good is homogeneous, consider the number of competitors in the market, the existence of entry barriers, the stability of demand in the market, etc.

13. The industries or markets that the CFCE considers as candidates for behavioral screening are those that show structural characteristics prone to⁶ the formation of cartels; or those in which the CFCE has

⁵ Harrington, Joseph E., *Behavioral Screening and the Detection of Cartels*, 2006 EU Competition Law and Policy Workshop/Proceedings, pp. 5-11.

⁶ For example: few competitors in the industry, symmetric competition, homogeneous goods, the existence of entry barriers, multi-market contact, etc.

information on the likelihood of collusive agreements (the information might come from a manager, a complaint from a consumer, an internet publication, etc.).

1. The main factors that the Commission consider relevant for conducting a screening are: i) the availability of human and material resources, ii) the existence of reliable market data, and iii) the time required to perform the analysis and its degree of complexity.
2. Finally, it should be noted that the Commission does not make public the details of the screening analysis.

2.2 *If you have experiences with the implementation of cartel screens, please discuss which approaches did you take and which methods did you employ. Were you able to initiate an enforcement action based on the result of a screening exercise? If so, please elaborate and provide details of the relevant cases. For which purposes were screens used (e.g. for justifying unannounced inspections, providing indirect proof of conspiracy, estimating damages, sifting through complaints, etc.)?*

14. In August 25, 2006 the Commission initiated an investigation in the procurement process of medicines of the Mexican Social Security Institute (IMSS for its Spanish acronym), one of the public health service providers in Mexico. IMSS cooperated with the Commission by granting access to its procurement databases and by giving advice on the latter.

15. With the databases provided by IMSS, the Commission conducted a behavioral screening to identify the following patterns: i) equal winning and losing positions, ii) convergence in market shares, iii) structural changes in the incumbent firms behavior before the entry of new competitors, iv) high profit margins that did not translate into more competitive positions, etc.

16. With the results obtained, the Commission decided to initiate an investigation. During this investigation the Commission obtained relevant evidence that reinforced the hypothesis of collusion, as it pointed out the existence of contact and communication between the firms investigated. Finally, based on the results of the economic analysis and the contact and communication evidence, the Commission issued a Statement of Objections accusing the firms of bid rigging in the IMSS procurement process.

17. To conclude, the economic analysis was useful for detecting collusive behavior and for supporting the allegations made by the Commission against several pharmaceutical firms. In January 28, 2010, the Commission's Plenum issued a decision to sanction four pharmaceutical laboratories for eliminating competition through bid rigging in human insulin (essential for the treatment of diabetes),⁷ during the years of 2003 to 2006, and sanctioned three other laboratories for coordinating bids in IMSS' public procurement of serums. The total amount of the fines imposed was \$130,131,845.48 MXN.⁸

⁷ More information is available at the following link:

<http://www.cfc.gob.mx:8080/cfcresoluciones/Docs/UPVAI/V1/2/1478307.pdf>

⁸ More information is available at the following link: <http://www.cfc.gob.mx/index.php/publicacionesinformes>

2.3 *If you have experience with the implementation of cartel screens, please discuss the benefits and cost of implementing such tools and what are the possible drawbacks of screening. How did you measure the efficacy of the implemented screens? What obstacles did you overcome or fail to overcome? How costly was it to implement the screening programme? Did the benefits justify the costs? Overall, was your experience with implementation of cartel screens a success?*

18. Screening costs, in terms of human and financial resources, for the case described in question 5 were low (compared with the benefits described below) since most of the screening was done by Commission's staff (from the General Direction of Economic Studies). The key to its success was the full cooperation by IMSS, which gave access to their procurement databases and advised the Commission during the investigation.

19. The fine mentioned in paragraph 19 represents approximately 60% of the budget of the Commission (of 2012).⁹ Additionally, as a consequence of this investigation, IMSS redesigned its public procurement system rendering benefits for the institution of several billion pesos more. These figures undoubtedly represent a clear benefit compared to the costs incurred by the Commission's screening and investigation procedure.

20. The main challenge faced by the Commission in the IMSS case was to sustain its arguments with economic evidence that provided the Commission's Plenum with enough elements to sanction the pharmaceutical firms. Although evidence pointed to the existence of communication between bidders close to the dates in which the tenders took place, the Commission had to support this communication with evidence that led to the conclusion that the patterns showed coordinated bids. For this, the economic analysis derived from screening was crucial.

21. Nevertheless, it is important to mention that screening results are not infallible, that is, sometimes these alone cannot lead to a sanction (i.e. in the absence of proof of explicit communication between bidders or colluded firms). It is also important to consider that the use of screening has some limitations. For example, it can only be used when there is sufficient information to identify patterns of behavior and, frequently, it requires a lot of time and human resources.

2.4 *If you don't have experiences with the implementation of cartel screens, is there a particular reason why? Have you considered applying screens in the past and decided not to? Why?*

22. N/A.

3. Screens for procurement officials

3.1 *Do you have guidance for procurement officials to detect possible cases of collusion in public tenders? Do you provide training to public procurement officials on how to detect possible bid rigging conspiracies? What type of red flags have you identified to detect bid rigging cases?*

23. The Commission does not have its own guidance for fighting bid rigging in public procurement. However, resultant from the successful experience in the IMSS case, the Commission collaborated with the OECD to implement the OECD's Guidance for Fighting Bid Rigging in Public Procurement in several Mexican public institutions.

⁹ CFC's budget for 2012 was \$ 221,000,000 MXN. CFC Annual Report for 2012, p.10. Available at the following link: http://www.cfc.gob.mx/Inf_anual2012/pdf/04.pdf

24. Through this collaboration, the Commission and the OECD have trained government officials (in the period of 2010-2013) from: i) IMSS, ii) the Institute of Security and Social Services for State Workers (ISSSTE for its Spanish acronym); iii) the Federal Electricity Commission (CFE for its Spanish acronym); and iv) the State of Mexico. Additionally, the Commission and the Mexican Institute for Competitiveness (IMCO for its Spanish acronym) (in the period of 2011-2012) trained, for collusion detection and prevention, government officials from the States of: Quintana Roo, Guerrero, Jalisco, Oaxaca, and Zacatecas. The Commission has also trained public officials from the Ministry of Public Administration (responsible for the oversight of public procurement processes under the Federal Procurement Act).

25. The training courses are intended to explain to the procurement officials what are the warning signs and patterns that may indicate the existence of a cartel, such as: i) the same bidder wins with the same frequency, ii) there is a pattern indicating rotational assignment in tenders or geographical allocation, iii) some bidders do not bid, remove bids, always make an offer, but never win, and iv) joint bids or unnecessary subcontracting. Furthermore, the training courses show what to do in case procurement officials identify any of the patterns described above or find some other indication of bid rigging in public procurement processes.¹⁰ In this regard, officers are encouraged to: i) maintain all documents and records that may contain proof of the possible existence of bid rigging; ii) not to discuss their concerns with the bidders; iii) make contact with the internal comptroller of their institution; iv) make contact with the Commission; and v) after getting advice, decide whether to proceed with the tender.

3.2 *How effective is your cooperation with public procurement bodies? Have you been able to launch successful investigations or enforcement procedures? Are the competition authority's interest always aligned with those of public procurement officials? Do the costs of your training or outreach programme justify the benefits?*

26. As mentioned above, much of the Commission's success in the pharmaceutical market investigation relied in the collaboration with IMSS. Also, as a result of the IMSS case, the Commission initiated collaboration with the Ministry of Public Administration to train its officials.

27. It should be noted that the CFCE and other public bodies' interests are not always the same. This may be caused by different factors: i) if the officials of these bodies are afraid of being removed from their jobs when finding evidence of bid rigging, and believe this evidence might led to the conclusion that they are involved in the illegal conduct (they are being corrupted), ii) corruption is often mistaken with bid rigging, therefore some officials involved in such illegal conducts do not cooperate with the Commission for fear of being discovered.

28. Finally, the Commission considers it is important to strengthen competition policy in Mexico from different sectors regardless of the costs incurred. Therefore, the Commission, regardless of the cost, invests a lot of resources in training government officials in the detection and prevention of collusion in public procurement.

¹⁰ For example: i) competitors hold a private meeting, i.e. trade association meetings, ii) the bidder requests or submits a competing bid (same attorneys or representatives), iii) the bidder seeks to determine who is doing an offer and then, perhaps, change the offer, and iv) multiple bidders make similar inquiries or requests.