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Use of Economic Evidence in Cartel Cases – Contribution from Mexico

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Use of Economic Evidence in Cartel Cases

- Contribution from Mexico –*

1. Introduction

1. This contribution presents the Mexican Federal Economic Competition Commission (Cofece or Commission) experience in the use of economic evidence in cartel cases, as well as the associated challenges and the institutional strategies put in place by Cofece to enhance its economic analysis capabilities and to successfully present this data before tribunals. A case for a bid rigging cartel in the health sector is presented to illustrate the manner in which the Commission uses structural economic analysis to monitor the markets, to identify potential anticompetitive practices, and to substantiate statements of objections.

2. Use of Economic Evidence in Cartel Cases

2. Cartel cases in Mexico have been built primarily on direct evidence. Nevertheless, cartelists have progressively refined their methods for concealing any indications of their collusive activities. This has resulted in economic evidence gaining greater importance in cartel investigations, as it can be combined with direct evidence to open new inquiries and to build solid cases.

3. In the Commission's experience, the analysis of structural characteristics has often been pivotal for initiating formal *ex officio* investigations. Structural economic analysis allows for the identification of factors favoring collusion in certain markets, which, combined with conduct evidence, provide *indicia* to support the launch of an official inquiry. To conduct this survey of the structure of certain markets, the Commission's Investigative Authority relies on its General Directorate of Markets Intelligence (DGIM, per its initials in Spanish), which constantly analyzes markets that, on account of these particularities, are prone to collusion.

4. The main structural factors that the DGIM resorts to identify markets prone to collusion are:

- High market concentration;
- Symmetry between participants;
- Existence of entry barriers;
- High degree of vertical integration;
- Existence of homogeneous products or services;
- Stable and low-volatile demand; and
- Existence of idle capacity.

* Contribution by the Mexican Federal Economic Competition Commission.

5. The identification of these factors is a first step that allows the Investigative Authority to narrow down the markets in which *ex officio* investigations may be launched. The second step is to conduct analyses on price patterns or production levels. When both analyses show signs that a cartel may be affecting a certain market, the Investigative Authority uses these *indicia* as a probable cause to start an official investigation.

6. However, it should be noted that although economic structural evidence is useful for the detection of cartels, the Investigative Authority does not rely on it entirely for issuing statement of objections and to prove the existence of a cartel, because there is a high probability that acting on this evidence alone may lead to Type I Errors. Some of the steps that Cofece follows to shield its economic analysis in cartel cases from Type I Error are:

- Guaranteeing transparency so that the analysis can be replicated and evaluated. Making sure that the information used in the economic analysis isn't taken out of context, and giving transparency to the selection of information process; and
- Assessing whether the economic analysis is relevant and consistent with the rest of the direct evidence available.

7. A paradigmatic example of the use of economic evidence in a cartel case in Mexico is the *ex officio* investigation initiated in 2006 by the extinct Federal Competition Commission (CFC) under file IO-03-2006, for a possible bid rigging scheme among pharmaceutical companies in public tender procedures convened by the Mexican Institute of Social Security (IMSS, one of the two public healthcare institutions in Mexico). This inquiry derived, mainly, from economic structural analyses carried out by the CFC.

8. The structural analysis allowed the CFC to identify market characteristics that made these tender procedures prone to collusion. The investigation focused on the analysis of tenders for insulin and serum conducted between 2003 and 2006. The case started after it was observed that during these years, the bidding positions of the pharmaceutical companies for both products followed similar patterns and high prices. In this case, the homogeneous nature of insulin and serums, and the regularity of public tender procedures convened by the IMSS were two identified structural characteristics that facilitated the cartel.

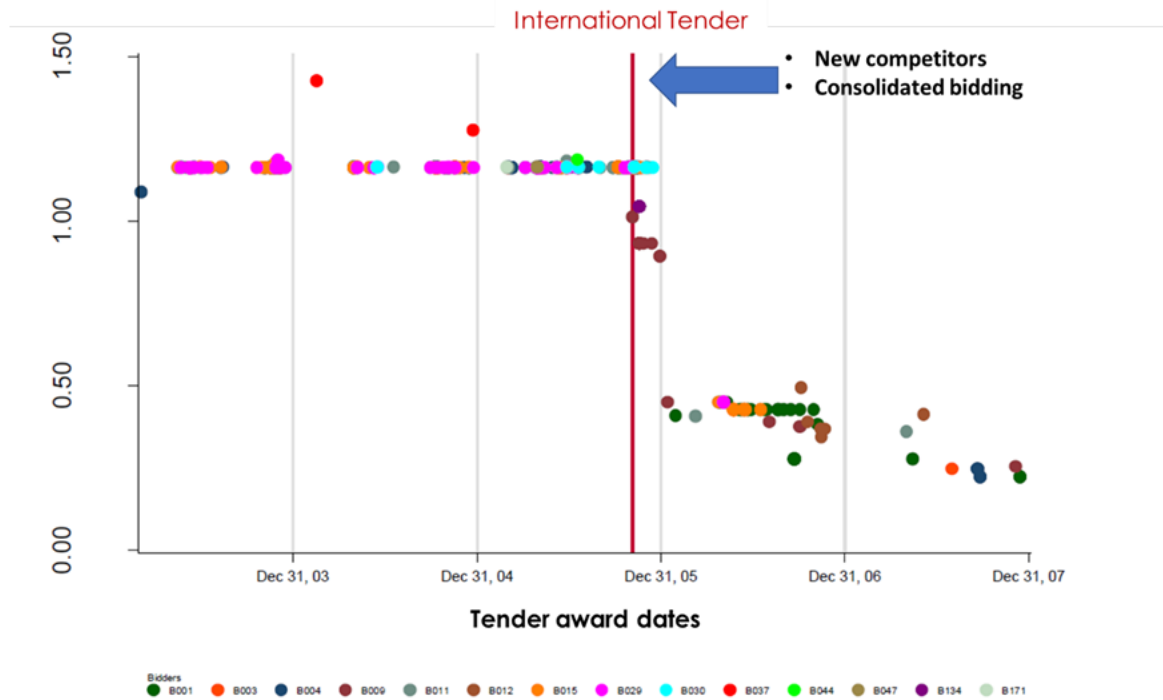
9. Although the case did not rely entirely on economic evidence, it was a key factor to demonstrate the collusion. During the investigation, the CFC gathered enough economic information to arrive at the following conclusions:

- Bids were practically the same between tender procedures, independently of the winner, volume, location, etc.;
- Winning bids only varied by 1.5% between different tender procedures;
- Contracts awarded were concentrated among four main laboratories;
- There was a bid rotation scheme to choose the winner for each public tender;
- The annual averages for bids between 2003 and 2005 (collusive period) were almost the same and only changed with the entry of a new competitor or the consolidated bidding; and
- These laboratories had high profit margins that could allow them to offer more competitive bids, but that did not happen.

10. Furthermore, economic analysis was key to show a counterfactual scenario. In 2006, the IMSS opened up its public tenders to international bidders and consolidated its

public tender procedures (both after recommendations by the CFC), this allowed two new international bidders to aggressively compete in the tender procedures and, as a result, the cartel broke up and the bidders were forced to lower their prices. This can be appreciated in Image 1.

Figure 1.



Source: *Resolution to case file IO-03-2006*, available at: <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V33/16/1312286.pdf> **Image 1**

11. The evidence from the bidding positions, combined with the counterfactual scenario and additional indirect evidence, allowed the General Directorate of Investigations of Absolute Monopolistic Practices (DGPIMA, per its initials in Spanish) to effectively prosecute this cartel. The other indirect evidence used to support the case was the following:

- Phone records that proved that these companies had been communicating during the public tender procedures and that the frequency of the calls increased during the days prior to the filing of the bidding positions; and
- Meetings between Executives of the laboratories in the framework of the Public Sector Supply Commission of the National Chamber of the Pharmaceutical Industry (CANIFARMA).

12. As a result of this investigation, in 2010 the CFC fined four pharmaceutical companies and several natural persons with approximately \$12.2 million dollars. Furthermore, the Mexican Supreme Court upheld the validity of the economic analysis as indirect evidence to detect anticompetitive conducts.

3. Managing and Communicating Economic Evidence in Cartel Cases

13. Two challenges are associated to the use of economic evidence in cartel cases, one being the availability and management of resources, and the other communicating this evidence to outside parties, particularly courts.

3.1. Management of economic evidence

14. At Cofece, the DGIPMA is the unit of the Investigative Authority tasked with investigating cartel cases. With respect to the use of economic evidence, the DGIPMA has faced resource constraints, particularly in data-intensive markets. In this regard, it is worth mentioning that lawyers represent a significant portion of the DGIPMA's staff. Consequently, in 2014 the DGIM was created to enhance and strengthen the enforcement capabilities of the DGIPMA and other units within the Investigative Authority.

15. Among its main tasks, the DGIM detects potential anticompetitive conduct and competition issues in Mexican markets. It also supports the units for cartels, unilateral conducts, and regulated markets by providing insights resulting from the collection and analysis of key information from the markets and companies. Furthermore, it conducts the forensic acquisition of digital information during dawn raids, and processes economic and digital data from investigations that aid to substantiate cases.

16. The DGIM team relies on highly multidisciplinary profiles, with a staff that varies from 20 to 25 members. Approximately half of these officials focus on screenings and economic analysis, whereas the rest perform forensics and other functions. Additionally, because of the complexities of the subjects that the DGIM handles, it is the unit with the highest number of academic degrees in the Investigative Authority, as almost half of its members hold at least a Master's degree or above, with a wide array of areas of specializations, such as Security, Data, Economics, Information Technologies, and Intelligence.

17. The coordination between the DGIM and the DGIPMA has been instrumental in building stronger cases. It has also resulted in learnings concerning the importance of having more staff members capable of processing large amounts of data. Consequently, the Investigative Authority is currently undergoing staff changes to recruit more data scientists and economists, that will be appointed to both units.

18. Moreover, the Commission has also sought to address this challenge by prioritizing training to all its staff. These trainings are carefully selected to improve the skills of its officials and also to provide them with updated knowledge of emerging tools and theoretical approaches. Specifically for the investigators in the Investigation Authority, some of the trainings focus on data analysis and processing, economic theory, and investigative techniques. These regular training programs are also expected to improve the investigators' ability to process economic evidence.

3.2. Communicating Economic Evidence in Cartel Cases

19. With regards to the reception that the courts have given to economic evidence presented by Cofece, the case described above provides an interesting example. The insulin and serum case was heavily challenged in courts, to the point that the Mexican Supreme Court had to attract it and subsequently solve it in 2015, ultimately confirming the CFC's decision.

20. This ruling recognized that economic analysis constitutes valid indirect evidence for cartel cases, as a form of rebuttable presumption. The Supreme Court established that if economic evidence generates conviction of the conduct and no argument or evidence was presented to demonstrate that the analysis in the statement of objections is incorrect, then the courts shall give predominant value to the information described and examined in the economic analysis.

21. Although this was a positive outcome, it should be taken into account that the case faced many challenges when communicating and explaining the economic analysis carried out by Cofece to lower courts, who were not familiarized with this type of evidence. Perhaps this issue may not persist in the Mexican system, since the constitutional amendments of 2013, created administrative tribunals specialized in competition and telecommunications, as well as Cofece as an autonomous body. This was a significant step forward, as the judges and magistrates chosen for these courts have a solid economic background and are aware of the use of economic analysis as indirect evidence in competition cases.

4. Conclusions

22. While this contribution focused on the Commission's experience in the use of economic analysis as evidence against a bid rigging cartel in the health sector, it is expected that economic evidence will play an increasingly substantial role in future cases. For example, the Commission's Investigative Authority recently issued statements of objections in two different investigations that are still in the trial-like procedure, which significantly relied on economic analysis as the main evidence. These inquiries concerned the market for the retail sale of gasolines and diesel at service stations, and the retail sale of maritime diesel at service stations in the national territory.

23. It is also expected that economic evidence will be the subject of further developments in the framework of competition tribunals in Mexico. So far, the case law on this matter has set standards that economic evidence must meet. In this regard, one important precedent was set in 2017, when a District Court determined that economic evidence may be admissible to prove a collusion if it fulfills the following conditions:

- It must be based on a known fact (premise);
- An inference is made that allows for a conclusion of a probable fact to be drawn; and
- There must be a pertinent and convincing causal link that justifies the relationship between the premise and the conclusion.¹

¹ Precedent: I.Io.A.E.215 A (10a.).