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**FIGHTING CORRUPTION AND PROMOTING COMPETITION**

**Contribution from Mexico**

-- Session I --

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## FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- Mexico \* --

**1. In particular are competition authorities, especially those in developing countries, well advised to focus their efforts on combating pervasive competition-dampening corruption than on traditional concerns of competition law enforcement?**

1. The Ministry of Public Administration (SFP for its acronym in Spanish) is the public federal institution in Mexico responsible for overseeing public purchases and enforcing the law in case corruption is present.

2. In turn, the Federal Economic Competition Commission (Commission or COFECE for its acronym in Spanish) is the responsible for preventing, investigating, and sanctioning monopolistic practices, including bid rigging (or collusive tendering) in public procurement.

3. The awarding of public contracts is one of the government activities most prone to corruption. Therefore, making it one of the most investigated aspects of illegal conduct.

4. Corruption and collusion are interrelated as both distort the functioning of public markets.

5. Competition is lower when corruption in public procurement is present, since firms might be discouraged to participate because of the suspicion of unfair competition and the unwillingness or inability to pay bribes. Corruption in public procurement could create an uneven playing field that affects competition. Furthermore, where there is less competition, corruption finds a fertile ground since it becomes easier for public procurers to extract personal benefits from companies interested in participating in the procurement processes.

6. By contrast, it is harder to offer bribes when many firms are competing in public procurement processes. Consequently, when competition authorities protect the efficiency of public procurement processes, by preventing or correcting anti-competitive conduct, corruption will also be prevented. Accordingly, competition law enforcement could play a key role in the lessening of corruption levels.

7. Governments face the risk of corruption and collusion when trying to obtain the best available conditions for the State through its public procurement processes. Although these problems are different in nature, their effect is similar since they prevent the achievement of value for money (when using public resources). As a result, the range and quality of services provided by the government are adversely affected.<sup>1</sup>

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\* Contribution submitted by the Mexican Federal Economic Competition.

<sup>1</sup> SPF, *Rendición de cuentas y compras de gobierno*. México, 2012. Available at: <http://www.funcionpublica.gob.mx/web/doctos/transparencia/estudios/cuaderno-05.pdf>

8. COFECE is aware of the importance of promoting and applying the principles of integrity in public procurement procedures (such as free access to public tenders, as well as transparency and publicity of purchasing proceedings). When applying these principles, unjustified restrictions on competition are inhibited and the likelihood of collusive behavior is prevented. Therefore, when carrying out these activities COFECE also promotes an indirect fight against corruption.

9. In recent years, the Commission subscribed several cooperation agreements with all-level governmental authorities to facilitate the application of competition principles.

10. Particularly, the year 2010, was a milestone in the work carried out by the Commission to improve public procurement processes. In this endeavor, the role of the Organization for Economic Cooperation and Development (OECD) has been instrumental, by supporting the Commission in the promotion of the adoption of the OECD's Guidelines to Fight Bid Rigging in Public Procurement in Mexico. Likewise, these joint efforts have been focused on the elaboration of recommendations by the Commission and the OECD to improve the public procurement process of Mexican public institutions and state governments.<sup>2</sup>

11. This work started with the Mexican Social Security Institute (Institute or IMSS for its acronym in Spanish), the third largest public purchaser of goods and services in Mexico. It continued in 2010 with the government of the State of Mexico and in 2012 with the Institute for Social Security and Services for State Workers (ISSSTE for its acronym in Spanish). Similarly in 2012, the Commission and the OECD signed an agreement with the Federal Electricity Commission (CFE for its acronym in Spanish), the second largest public purchaser in the country. All agreements with these institutions and governments include capacity building on prevention and detection of collusion, as well as the elaboration of reports that provide recommendations to improve their public procurement legislation, regulation and practices.

12. Also, considering that bad law increases the likelihood of collusion, corruption and expensive government purchases, in 2012 the Mexican Institute for Competitiveness (IMCO for its acronym in Spanish) presented a study entitled "State Ranking of Public Procurement Processes". This study was elaborated with the advice of the Commission and the OECD. It consists of an evaluation of the effectiveness of the procurement laws and regulations of all the Mexican states and the federal government. In addition, IMCO, with the advice of the Commission, elaborated and published a Model Procurement Law for the States<sup>3</sup>. This model law proposes a set of basic rules to promote competition, transparency, accountability and thereby, has the aim of reducing the amount of discretion (which is the source of corruption) of the authorities responsible of public procurement processes.

13. COFECE's efforts to promote the principles of competition, transparency and accountability are paralleled with law enforcement activities. The Commission considers essential that public procurement advocacy work is carried out in coordination with the detection, investigation and, if necessary, sanction of conducts that restrict competition in public procurement. The latter also with the aim of effectively deter anti-competitive conduct.

14. Examples of these coordinated efforts are the cases that derived in sanctions in the public health market (IMSS procurement of drugs, medicinal and industrial gases and chemicals developers). Based on these precedents the Commission is strengthening its efforts to detect, deter and investigate collusion in bidding processes through proactive measures. These measures also include a close coordination with the SFP which includes capacity building activities for the Ministry's officials on collusion and for COFECE's staff on the Federal Acquisitions Law.

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<sup>2</sup> Mexican Federal Economic Competition Commission, Annual Report 2011, available at [www.cofece.mx](http://www.cofece.mx)

<sup>3</sup> Mexican Federal Economic Competition Commission, Annual Report 2012, available at [www.cofece.mx](http://www.cofece.mx)

**2. How, if at all, can competition law enforcers and anti-corruption law enforcers complement each other's efforts to promote competition and combat corruption?**

15. Opacity in procurement processes and poor monitoring of public officials favor illegal practices such as corruption, collusion and fraud. Therefore, it is essential that competition authorities and those responsible for anti-corruption in public procurement processes coordinate and intensify their efforts to ensure competition in procurement processes.

16. COFECE and SFP, and other institutions are working on multiple fronts to promote competition and combat corruption, according to their respective legal powers. One of the measures being taken is the design of framework contracts to eliminate the possibility of collusion and corruption.

17. As mentioned above in paragraph 14, the Commission, in cooperation with the OECD and other agencies, has conducted training for procurement officers and internal comptroller officials (from SFP). Training includes courses on the costs and risks of collusion in bid rigging, tender process design aimed at reducing the risks of collusion – through an appropriate design of tender calls that prevents and eases detection of collusion. This training is very important because procurement and comptroller officials are directly involved in the procurement process and are closer to the signs that can lead to suspect collusive behavior between suppliers. In addition, these officers might have better knowledge of public markets and can detect any abnormal signs, such as suspicious patterns in bidding processes that might lead to the investigation of corruption, collusion and fraud.

18. However, training is not always enough for an effective fight against bid rigging; this is because in many cases the incentives, or interests, of public procurers are not aligned to competition principles. This may be due to different factors, such as: i) fear of losing their positions if finding evidence of collusive behavior, believing this might lead to the suspicion of their involvement in illegal activity (corruption or fraud); ii) when corruption acts also involve collusion, public procurers will not cooperate with the Commission for fear of being discovered; and iii) lack of willingness to stop or hinder the procurement processes if a cartel is detected and reported. Consequently, sometimes public procurers are indifferent to the presence of collusive behavior.

19. For this reason, it is recommended that competition authorities and public procurers maintain a close relationship that: promotes awareness on the benefits of competition amongst public procurers; creates incentives that encourages public procurers to report possible cartel activity; and generates open communication channels and clear procedures to report any suspected collusive behavior in public procurement processes.

20. In order to ensure value for money in public procurement processes it is essential to promote closer cooperation channels between the competition authorities and anti-corruption authorities. This should be paired with the creation or improvement of preventive mechanisms that contribute to open and transparent public tenders that reduce incentives for corruption or collusive behavior.

21. It is important highlighting that Mexico's SFP has developed and implemented an Electronic Government Procurement System (COMPRANET for its acronym in Spanish) that has various on-line, electronic and automated stages of the public procurement process. Through this system public procurement units are linked with possible suppliers. COMPRANET provides the procurement units with the ability to make public on-line announcements of the goods and services that government would like to acquire. Interested suppliers can access this on-line system and present their documents via internet and then continue with an on-line process, even onto the selection stage.

22. Additionally, COMPRANET contains public databases that provide information of the public goods and services acquired by the government. Thus, this system not only eases the fight against corruption by preventing face-to-face contact between public procurers and suppliers and allowing transparency in the bids, but also facilitates the detection, through screening methods, of possible collusion.

23. In light of the above, the Commission is considering the possibility of using COMPRANET's databases in a format that facilitates statistical analysis of bids with the aim of identifying suspicious patterns that might lead to investigate collusive behavior.

**3. Where a national procurement system has been thoroughly corrupted, should scarce resources be devoted to investigation and prosecuting anti-competitive horizontal bid rigging arrangements, or should they be devoted to confronting corrupt vertical relations between buyer and seller?**

24. Both aspects are equally important, therefore each institution, within its scope of powers, should implement actions to improve public procurement practices in Mexico.

25. As mentioned before, competition policy plays a key role in reducing corruption. Therefore, competition authorities and anti-corruption institutions must work together to create preventive mechanisms that contribute to promote competition, and therefore help preventing or decreasing corruption levels.

26. Since the 80s, there has been a tradition amongst Mexican government authorities to fight corruption. During the last three decades, important steps have been taken to build transparent and accountable institutions; to control and oversee the good use of public resources; and to create a legislation that guarantees the professionalization and accountability of public officers.

27. Currently, Mexico has the aforementioned SFP, and the Superior Audit Office of the Federation, both responsible for controlling and the oversight of the whole public administration.

28. Also, there is a Federal Institute for Access to Public Information and Data Protection (IFAI for its acronym in Spanish). It is worth mentioning that in 2007, Article 6 of Mexico's Constitution was reformed to compel government agencies from the three levels of government (federal, state and municipal) to abide by the "principle of maximum public disclosure".<sup>4</sup>

29. However, sometimes there is difficulty in finding the right balance between the fight against corruption and ensuring a competitive process. In addition, procurement processes in Mexico often focus in the protection of domestic suppliers. This, in turn, can increase the likelihood of collusion and corruption.

30. For example, in a protectionist environment that accepts only domestic suppliers, full transparency throughout a procurement process (where the economic proposals of the participants are included) on the one hand can help fight corruption, but on the other hand can help suppliers to take advantage and use disclosed information in order to increase the prices of supplied services or goods to government. Thus, while countries progressively reveal more information about their procurement processes, in line with transparency laws, it has become a common practice to carefully select and classify

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<sup>4</sup> SFP, *Rendición de cuentas y combate a la corrupción: retos y desafíos*. México, 2012. Available at: <http://www.funcionpublica.gob.mx/web/doctos/transparencia/estudios/cuaderno-06.pdf>

the information that cannot be public in any of the stages of the procurement process. The latter with the aim of easing cartel activity in the procurement process.

**4. How do competition authorities themselves guard against the corruption of their own decision-making processes? In particular does the “revolving door” phenomenon that characterizes the practice of competition law everywhere not lead to the “capture” of the agencies?**

31. The Commission has several mechanisms to prevent corruption within its organization. First, it has an internal comptroller unit, whose head is appointed by the Chamber of Deputies. Also, by Constitutional mandate, the Commission must comply with the principles of transparency and access to federal public information. Therefore, its Plenum sessions and decisions are public, with the exceptions included in the law.<sup>5</sup>

32. Second, COFECE’s staff is subject to administrative public service liability. Therefore, staff is compelled to safeguard the principles of legality, honesty, fidelity, impartiality and efficiency. The Federal Law of Administrative Responsibilities of Public Servants (LFRASP for its acronym in Spanish) requires that public officials disclose a financial personal record that allows tracking and monitoring the evolution of their personal affluence. The latter is important to gather evidence that proves that officials’ equity increases in an honest and transparent manner.

33. Third, on issues related to confidentiality, COFECE’s staff has the obligation to preserve confidential information and documents used in their work. Therefore, staff is also liable in case any confidential information is disclosed.<sup>6</sup> To guarantee the latter, new staff should sign a "Declaration of Confidentiality and Preservation of Information", thus making them aware of their responsibilities, as well as, on the administrative and criminal sanctions that could be imposed in case of disclosure, theft, misuse and / or intentional or negligent destruction of the information.

34. From a criminal standpoint, in Mexico corruption is non-existent. However, offenses committed by public officials, such as, fraud, bribery trafficking of influences, illicit enrichment, etc. are classified as corrupt acts (also recognized at such in the international level).

35. With respect to the "revolving door" phenomenon, the LFRASP establishes that public officials should not take advantage of the knowledge acquired over public service until at least a year has passed after the conclusion of their public service<sup>7</sup>. In addition, the Federal Law of Economic Competition (FLEC) prohibits COFECE’s Executive Secretary to join, during a period of one year after leaving the Commission, a firm investigated by the Commission.<sup>8</sup>

36. In addition, both, members of COFECE’s Plenum, and its Executive Secretary, may not hold any other employment, business or public or private commission, except for academic positions, and shall not take part in any COFECE’s decisions in which they might have a direct or indirect interest<sup>9</sup>. Commissioners shall not have occupied former positions, during a three year period of prior to their

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<sup>5</sup> Article 28, twentieth paragraph, sections VI and XII, of the Mexican Constitution.

<sup>6</sup> Articles 31 and 31 bis of the FLEC, Article 3 of COFECE’s Organic Statute, and Article 8, Section V of the LFRASP.

<sup>7</sup> Article 9 of the LFRASP.

<sup>8</sup> Article 29, last paragraph of the FLEC.

<sup>9</sup> Paragraph twenty fourth of Article 29 of the Constitution and article 29 of the FLEC.

confirmation by Congress, in any of the firms investigated by COFECE.<sup>10</sup> The latter rules apply as well to the Executive Secretary but instead of three years it should only be one.<sup>11</sup>

37. It should be noted that COFECE Commissioners may be removed by the Senate in case of serious misconduct in the exercise of their functions.

38. It is noteworthy that to prevent COFECE's "capture", prior to any of COFECE Plenum's decisions, individuals or firms that have legal interest with the Commission (e.g. investigated parties) may request an oral hearing with its Commissioners in order to make the clarifications they deem relevant with respect to their case (it is not possible under any circumstance to conduct such hearing over the course of an investigation)<sup>12</sup> and the hearing requires the presence of at least three Commissioners.<sup>13</sup> This rule also applies when economic agents request consultation meetings or other type of meetings with any of the Commissioners.

39. In addition, it is a COFECE's practice that in all meetings requested by any economic agent with an investigation area, at least three members of the staff should be present. One of the officials should be a member of the Executive Secretary's office, another one from the General Directorate of Legal Affairs, and another one from the General Directorate of Economic Studies (except in the cases with leniency application, in which case, only the staff from the General Directorate of Cartels should be present).

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<sup>10</sup> Article 28, twentieth paragraph, section VIII of the Constitution.

<sup>11</sup> Article 29, Section V, of the FLEC.

<sup>12</sup> Article 33, Section VI, of the FLEC and 40 of COFECE's Organic Statute.

<sup>13</sup> Article 41 of COFECE's Organic Statute.