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The Standard and the Burden of Proof in Competition Law Cases – Note by Mexico

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Mexico

1. Introduction

1. This contribution addresses the legal framework ruling the preparation, presentation, and evaluation of evidence within the procedures of the Federal Economic Competition Commission (Cofece) in Mexico. It highlights the role that the evidence plays when it comes to the enforcement of competition law.

2. First, an outline of the legal standards established under Mexican competition law, including the Federal Economic Competition Law and its associated regulations, as well as relevant provisions from the Federal Civil Procedures Code is presented. Second, the evidentiary requirements imposed on economic agents and the principles that guide Cofece's evaluation process, such as the free appraisal of evidence and the reliance on indirect or circumstantial elements to prove anticompetitive conducts are discussed.

3. Finally, this contribution presents the challenges in gathering and assessing evidence, such as limited access to direct proof, the increasing reliance on indirect indicators, and the legal limitations surrounding private communications. These challenges are contextualized through case studies that reveal the evolving evidentiary landscape and standards applied by Cofece and the Federal Judicial Branch.

2. Legal framework to assess evidence

4. In Mexico, the Federal Economic Competition Law (LFCE, per its initials in Spanish), the Regulatory Provisions of the Federal Economic Competition Law (Regulatory Provisions of the LFCE) and the Federal Civil Procedures Code (Civil Procedures Code) define the rules to prepare, present, and evaluate the body of evidence collected or provided in the proceedings processed by the Federal Economic Competition Commission (Cofece).

5. Cofece may use the means of conviction it deems necessary to discover the truth surrounding an alleged violation of the Federal Economic Competition Law, before issuing the resolution that ends the corresponding proceeding.

6. The main rules for collecting and offering evidence within Cofece's proceedings are the following:[1]

- That the means of proof are recognized by law;[2]
- That they have an immediate relationship with the facts that are the subject of the proceeding.

7. In addition, economic agents must comply with the following obligations:

- Evidence must be offered with the statement of defense,

[1] Articles 83, section III, and 123 of the LFCE; 83 to 86 of the Regulatory Provisions of the LFCE.

[2] The evidence that is recognized are: confessional, public documents, private documents, expert opinions, visual inspection, witnesses, elements provided by science, and presumptions (Article 93 of the Civil Procedures Code). In addition, the authorities have the following tools to obtain information: requests for information, appearances and verification visits. (Article 73 of the LFCE)

- Evidence must be offered in accordance with the rules established in the regulations,
- Economic agents must clearly express the fact or facts that they are trying to demonstrate with each of the pieces of evidence,
- Economic agents must carry out the acts and assume the necessary costs for the timely presentation of the evidence,
- Economic agents should not provide unnecessary or unlawful evidence and,
- Economic agents cannot offer the confessional and the testimonial by authorities.

8. In assessing the evidence, Cofece has the widest freedom to carry out the analysis, determine its value, weigh some evidence against others, and establish the result of said assessment. Cofece's evaluation of the evidence must be based on the assessment of the probative elements as a whole, whether direct, indirect, or circumstantial, found in the process.[3]

9. To carry out this assessment, the regulatory framework establishes an appraised value for some probative elements, and for others, it is left to the free appraisal of the Cofece's Board of Commissioners.

10. For example,[4] the following types of evidence constitute full proof: i) public documents on the facts legally asserted by the authority and declarations of truth or statements of facts made by economic agents before the authority, if they have expressed their agreement with them; (ii) the express confession made of a fact by the economic agents or by their representative, and concerning the matter; iii) their own facts acknowledged in the statement of defense or any other act in the proceeding; (iv) the private document that a litigant presents in the proceeding; (v) judicial recognition or inspection when it relates to aspects that do not require special technical knowledge; (vi) photographs that contain the certification that accredits the place, time and circumstances in which they were taken, and indicates that they correspond to what is depicted in them; and (vii) legal presumptions that do not admit proof to the contrary or that are not destroyed by other evidence.

11. Also, the regulation allows the free appraisal of the following evidence[5]: i) private documents objected to by the defendants, or for which is evidence to the contrary in the file; ii) expert opinions; iii) testimonial evidence; iv) human presumptions.

12. Mexican legislation also establishes clear rules on how the judge (in this case Cofece) must carry out the analysis depending on the type of evidence.[6] However, the

[3] Article 84 of the LFCE and 197 of the Civil Procedures Code.

[4] Articles 199, 200, 202, 210, 212, 217 and 218 of the Civil Procedures Code.

[5] Articles 202, 211, 216 and 218 of the Civil Procedures Code.

[6] For example, for express confessional documents it is established that these only have detrimental effects to the person who makes them (articles 96 and 126 of the Civil Procedures Code) and, to have value they must be issued by a person able to bound herself, with full knowledge, without coercion or violence, and of an act of her own or of her representative concerning the business (article 199 of the Civil Procedures Code); for indirect confessional documents it produces the effect of a presumption, when there is no evidence to contradict it (article 201 of the Civil Procedures Code); in private documents, the facts mentioned are evidence against their author, unless otherwise provided, and if it is a document issued by a third party it only proves in favor of the party that wants to benefit from it and against their co-litigant, when the latter does not object to it (article 203 of the Civil Procedures Code); in order to give probative force to electronic documents, the reliability of

assessment of the entire body of evidence, as a whole, corresponds to the Board of Commissioners, which determines what is appropriate depending on the scope and adminiculated value of the evidence. That is, it is up to Cofece to have knowledge of the facts and verify their veracity by analyzing and connecting each and every one of the pieces of evidence in the file.

13. In addition, there are various presumptions in favor of the authority during the investigation or in the trial-like procedure, for example:

- The proceedings carried out by the Investigative Authority before the notification of the statement of objections are fully valid to support said statement or the closure of the file;[7]
- If in the practice of the proceedings carried out by the Investigative Authority, there is opposition to its execution, the issues that are intended to be proven will be deemed as true unless proven otherwise,[8] and
- The alleged facts that are not disputed or contested will be deemed as true unless proven otherwise.[9]

14. Thus, it can be said that Mexican legislation provides sufficient flexibility for Cofece to evaluate the evidence and determine whether the accusation made by the Investigative Authority is accredited by the evidence gathered during the investigation and contrasted with that provided by the economic agents in their defense during the trial-like procedure.[10, 11]

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the method by which it was generated, communicated, received or archived must be considered, whether it is possible to attribute the content of the relative information to the obliged persons and whether it is accessible for later consultation (article 210-A); in the testimonials, the circumstances that could affect the credibility of the witnesses must be assessed and, in addition, evaluate whether: (i) the witnesses agree on the essentials, even when they differ on the facts, (ii) they declared to have heard the words pronounced, witnessed the act or seen the material fact about which they testify, (iii) due to their age, capacity or instruction, they have the necessary criteria to judge the act, (iv) due to their probity, the independence of their position or their personal background, they are completely impartial; (v) they know the facts about which they testify by themselves and not by inductions or references from other people; (vi) their statement is clear, precise, without doubts or reticence, regarding the substance of the fact and its essential circumstances, (vii) they were not forced by force or fear, nor driven by deception, error or bribery, and (viii) they give a well-founded reason for their statement (articles 187 and 215 of the Civil Procedures Code).

[7] Articles 60 and 74 of the Regulatory Provisions of the LFCE.

[8] Article 62 of the Regulatory Provisions of the LFCE provides: "*When a person directly involved in a procedure opposes the inspection, reconnaissance or visit ordered, does not answer the questions addressed to him or does not provide the required information, the questions that are intended to be substantiated must be taken as true, based on the best available information and unless proven otherwise. The same shall be done if the thing or document that he has in his possession or that he may dispose of is not exhibited during the inspection that is carried out.*" See also the last paragraph of section IV of article 75 of the LFCE.

[9] Article 83, section I, of the LFCE.

[10] Cofece must make decisions based on the best available information, as provided for in Article 120 of the LFCE.

[11] "***EVIDENCE. THE OBJECTIVE OF THE FREE EVALUATION SYSTEM IS THE CLARIFICATION OF THE FACTS WITHOUT NECESSARILY SEEKING THE ABSOLUTE TRUTH, BUT THE MOST REASONABLE PROBABILITY***. *The evaluation of evidence is the exercise by which the probative value of each means of evidence in relation to a specific fact is*

3. The evidentiary standard

15. In Mexico, the administrative sanctioning procedures that are processed before Cofece follow certain rules that are applied in criminal law, according to the criteria of the Federal Judicial Branch.[12] Therefore, the evidence gathered by the Investigative Authority must be sufficient to destroy the presumption of innocence of those notified by a statement of objections, without this meaning that the accused economic agents are relieved from the

determined and its purpose is to establish when and to what degree it can be considered as true, on the basis of the relevant evidence, the discharge of which complied with the corresponding formal requirements. The problem arises when it is asked whether a fact is sufficiently proven to justify the judicial decision based on it, or what is the criterion that the judge used to assess the soundness of the evidentiary inference. For this reason, theoretical systems of evaluation have been created, distinguishing between legal or assessed evidence, as well as free and mixed evidence, which make it possible to determine the existence of a fact that has been proven or the existence of a lack of evidence. In the system of evaluation of assessed evidence, the objective or purpose is to reach a conclusion and declaration of truth of the facts. On the other hand, in the system of evaluation of free evidence, only weighty conclusions or preferences of the probabilities that one hypothesis or statement throws over another are reached, and that conclusion may or may not be reasoned. There are always at least two or more probabilities, and one is preferred over the other because of its coherence or reasonableness. In fact, in the last-mentioned valuation system, it is not a question of absolute facts, but of probabilities, as can be deduced from the statistical evidence, recognized in Article 600 of the Federal Code of Civil Procedures. Thus, the evolution of the evidentiary system in the Mexican legal system has gone from a mere assignment of appraised value to the means of proof attributed by the legislation to one in which, although some appraised evidence remains, it coexists with other evidentiary elements whose merit must be assigned by the Judge but evaluating them in a holistic manner. in a free and logical narrative. So much so that, in the branch of criminal law, in which, historically, the evidentiary standard has been the strictest, due to the legal rights involved and the consequences of certain conducts, it has been reformulated by the Reforming Power to adopt one whose purpose continues to be the clarification of the facts but without necessarily seeking the absolute truth, but the most reasonable probability." Registration 2021913; 10th Era; TCC; Judicial Weekly Report of the Federation; I.4o.A.44 K (10a.); TA. Available at https://sjf2.scjn.gob.mx/detalle/tesis/2021913.

[12] "***ADMINISTRATIVE SANCTIONING LAW. FOR THE CONSTRUCTION OF ITS OWN CONSTITUTIONAL PRINCIPLES, IT IS VALID TO RESORT CAUTIOUSLY TO THE GUARANTEE TECHNIQUES OF CRIMINAL LAW, SINCE BOTH ARE MANIFESTATIONS OF THE PUNITIVE POWER OF THE STATE.*** *From a comprehensive analysis of the regime of administrative infractions, it can be deduced that the objective of administrative sanctioning law is to guarantee to the collectivity in general, the correct and normal development of the functions regulated by administrative laws, using police power to achieve the objectives outlined therein. In this order of ideas, the administrative sanction has a fundamental similarity with penalties, since both take place as a reaction to the unlawful; in both cases, human conduct is ordered or prohibited. Consequently, both criminal law and administrative sanctioning law turn out to be two unequivocal manifestations of the punitive power of the State, understood as the power that it has to impose penalties and security measures in the event of the commission of unlawful acts. However, given the similarity and unity of the punitive power, in the constitutional interpretation of the principles of administrative sanctioning law, one may refer to substantive criminal principles, even if the transfer of the same in terms of degrees of requirement cannot be done automatically, because the application of these guarantees to the administrative procedure is only possible to the extent that they are compatible with their nature. Of course, the jurisprudential development of these principles in the administrative sanctioning field – supported by State Public Law and assimilated some of the guarantees of criminal law – will form the sanctioning principles proper to this field of the punitive power of the State, however, as this happens, it is valid to take cautiously the guarantee techniques of criminal law."* Registration: 174488; Plenum; 9th Era; Judicial Weekly Report of the Federation; P./J. 99/2006 ; J. Available at https://sjf2.scjn.gob.mx/detalle/tesis/174488.

burden of proof [13] in their statements of defense.[14] Likewise, the imputation must also comply with the principle of typicality,[15] which means that the legal assumptions that determine the infringement must be proven, whether it is an absolute monopolistic practice (cartel), a relative monopolistic practice (abuse of dominance), or an unlawful merger.[16]

16. In the case of monopolistic practices, to be able to impose the sanction established in the law, Cofece has the burden of demonstrating that the elements that constitute the illegal conduct were present, as well as the form of participation or intervention of the economic agents involved in the commission of the conduct contrary to the competition process.

17. In the case of relative monopolistic practices, it is necessary to apply the rule of reason,[17] that is, to assess the circumstances of the case as a whole to determine whether the practice affects competition and, whether it impedes an efficient economy, due to the abuse of the economic agent with substantial power.[18] In particular, the Federal Judicial

[13] "***EVIDENCE IN THE TRIAL. DIFFERENCE BETWEEN PROCEDURAL OBLIGATION AND PROCEDURAL BURDEN. Evidence is the means used by the parties to demonstrate to the judge the truth of their statements and to convince him of the certainty of the facts adduced, since their statement is not enough***. *Now, although it is true that, as a general rule, the parties are not obliged to provide evidence at trial, it is also true that it is* ***in their own interest to collect and provide the necessary evidence to prove the facts adduced, therefore the burden of proof is an imperative of self-interest****; however, this rule admits some exceptions, for example, when the evidence necessary to prove the assertions of one of the parties is in the possession of its opponent falls in one of the assumptions of the 'procedural obligation', where one no longer acts in one's own interest, but in the interest of others and, therefore, the presentation of the evidence to the trial ceases to be a "procedural burden" and becomes an obligation that the requested party is constrained to fulfill under the threat of a sanction. The foregoing is explained if it is considered that the purpose pursued by the judicial procedure is to comply with the fundamental right of access to justice of all the parties involved, which cannot be left to the will of only one of them* [emphasis added]". Registration: 2009352. SCJN; 1 0a. Era; Judicial Weekly Report of the Federation; 1st. CCVI/2015 (10th); TA. Available at https://sjf2.scjn.gob.mx/detalle/tesis/2009352

[14] Article 84 of the Regulatory Provisions of the LFCE.

[15] See the thesis of jurisprudence of the heading: *"**TYPICALITY. THE RELATIVE PRINCIPLE, NORMALLY REFERRING TO CRIMINAL MATTERS, IS APPLICABLE TO ADMINISTRATIVE INFRACTIONS AND SANCTIONS.**"* 174326 Registration; Plenum; 9a Era Judicial Weekly Report of the Federation; P./J. 100/2006; J. Available at https://sjf2.scjn.gob.mx/detalle/tesis/174326.

[16] The types of conduct sanctioned by the LFCE are established in Articles 53, 54, 56, 61, 62 and 64.

[17] *"**RELATIVE MONOPOLISTIC PRACTICE. FOR ITS DEMONSTRATION, THE "RULE OF REASON" MUST BE USED.*** Registration: 2012165. TCC; 10a. Era; Judicial Weekly Report of the Federation; I.1o.A.E.163 A (10a.); TA. Available at https://sjf2.scjn.gob.mx/detalle/tesis/2012165.

[18] "***COMPLAINT OF RELATIVE MONOPOLISTIC PRACTICE. IN ORDER TO BE ADMISSIBLE, THE NEGATIVE IMPACT ON COMPETITION AND ECONOMIC EFFICIENCY MUST BE DEMONSTRATED***. *In complaints of relative monopolistic practices, it is necessary not only to demonstrate the existence of the acts or omissions referred to in Article 10 of the repealed Federal Economic Competition Law, but also that they generate a negative impact on competition and economic efficiency within the market or activity in which it has substantial power. To this end, it is necessary to resort to the rule of reason, that is, to assess the circumstances of the case as a whole to determine whether the practice affects free competition and, of course, whether it impedes an efficient economy, due to the abuse of the economic agent with substantial*

Branch has interpreted that Cofece must assess the net effects on the market, that is, it must evaluate the potentially procompetitive effects demonstrated by the economic agent under investigation, since only in the case that the gains in verifiable efficiencies and directly derived from the conduct are insufficient to compensate for the previously proven damage to consumer welfare will the declaration of illegality be admissible.[19]

18. In this sense, the burden of proof must be borne by the economic agent under investigation to demonstrate the scope of its claims, while the Investigative Authority must demonstrate the scope of its imputation.

4. Indirect and Circumstantial Evidence

19. To determine the fact or conduct contrary to the LFCE, Cofece has made use of **indirect evidence**[20] **and reasoning processes**, given its importance in the construction of a resolution that determines the responsibility of the subjects involved. Indications[21] are

power": Registration: 2008767. TCC; 10a. Era; Judicial Weekly Report of the Federation; I.1o.A.E.35 A (10a.); TA. Available at https://sjf2.scjn.gob.mx/detalle/tesis/2008767.

[19] Amparo review R.A. 78/2017 resolved by the First Collegiate Circuit Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications.

[20] "***ABSOLUTE MONOPOLISTIC PRACTICES. THE HOLISTIC METHOD TO MOTIVATE THE EVALUATION OF INDIRECT EVIDENCE IS IDEAL TO PROVE ITS EXISTENCE.*** *It is usual for the existence of absolute monopolistic practices to be proven through indirect means of evidence, reasonably adminiculated, while it is exceptional that this result can be achieved through direct evidence. In fact, the scheme of indirect evidence starts from considering several elements, these being a known fact (premise, indication), followed by an inference to conclude in a probable fact (conclusion), which is precisely the objective of a presumption. Additionally, between the premises and the conclusion there must be a causal relationship that the decision-maker must appreciate through reasoning and experience. The credibility of the presumption will therefore depend both on the certainty of the indicia and on the degree of acceptance of the inference, which requires a relevant and convincing link to justify the hypothetical conclusion. In addition, the decision-maker must motivate his determination, for which there are various methods, among which is the so-called holistic, through which it is explained that the final decision on the facts is obtained by presenting them together, forming a story that narrates them in a temporal sequence, whose plausibility is achieved with the exposition of behavioral or content aspects. Consequently, the aforementioned method is suitable for proving the existence of absolute monopolistic practices, taking into consideration that, in such cases, it is difficult to establish precisely how an anticompetitive agreement has been concluded, given the care that the interested parties take to veil or hide any vestige or trace that may evidence it, therefore, it is not common for there to be direct proof of the conduct displayed by those involved. nor of all the details they hide.* "Registration: 2015666. TCC; 10a. Era; Judicial Weekly Report of the Federation; I.1o.A.E.215 A (10a.); TA; Available at https://sjf2.scjn.gob.mx/detalle/tesis/2015666.

[21] *"**CIRCUMSTANTIAL EVIDENCE. REQUIREMENTS THAT THE INDICATIONS MUST MEET IN ORDER FOR IT TO BE UPDATED.** In the opinion of this First Chamber of the Supreme Court of Justice of the Nation, although it is possible to sustain the criminal responsibility of a person through circumstantial evidence, the truth is that various requirements must be met for it to be considered up-to-date, otherwise there would be a violation of the principle of presumption of innocence. Thus, in relation to the requirements that must be met for the proper updating of circumstantial evidence, they refer to two fundamental elements: indicia and logical inference. With regard to the evidence, it should be noted that they must meet four requirements: a) they must be accredited by direct evidence, that is, the evidence must be corroborated by some means of conviction because, otherwise, the logical inferences would lack any reasonableness as they are based on false facts. In short, certainties cannot be built from simple probabilities; b) they must be plural, that is, criminal responsibility cannot be based on isolated evidence; c) they must be*

particularly relevant, especially if it is considered that it is difficult to establish precisely how anticompetitive practices are concerted, given the care that those involved take to hide any trace of it.[22] For this reason, it is necessary to connect or combine various facts (indications)[23] to make inferences based on experience that lead to the demonstration of the main fact.

20. The Federal Judicial Branch has acknowledged that agents involved in monopolistic practices often take steps to hide any trace of their actions, making it difficult to find direct evidence of their conduct. It has also recognized that economic evidence constitutes indirect evidence[24] since such analysis allows for the establishment of

concomitant with the fact to be proved, that is, with some material and direct relationship with the criminal act and with the perpetrator; and d) they must be interrelated, that is, the indicia form an argumentative system, in such a way that they must converge in a solution, since the divergence of one would detract from the effectiveness of the circumstantial evidence as a whole." Registration: 2004756. First Chamber SCJN; 10a. Era; Judicial Weekly Report of the Federation; 1a. CCLXXXIV/2013 (10a.); TA; Available at https://sjf2.scjn.gob.mx/detalle/tesis/2004756.

See also the thesis of jurisprudence of the heading: *"**CIRCUMSTANTIAL EVIDENCE. NATURE AND OPERABILITY.**"* Registration: 166315. TCC; 9th Era; Judicial Weekly Report of the Federation; I.1o.P. J/19; J; Available at https://sjf2.scjn.gob.mx/detalle/tesis/166315.

[22] In fact, the Federal Judicial Branch (PJF, per its initials in Spanish) has interpreted that: "[...] *It is difficult to establish precisely how an agreement has been reached or anticompetitive behaviour has been reached, given the care that the interested parties take to conceal or conceal any vestige of it, so it is clear that, in most cases,* ***no direct evidence of the conduct by the agent or agents involved can be found.*** [...] *In this order of ideas, in accordance with the provisions of both the* [LFCE] *and its regulations,* ***indirect evidence is suitable to prove***, [...] *certain facts or circumstances based on what is known as the best available information, regarding the actions of companies that have entered into agreements to carry out monopolistic practices* [...] [emphasis added]", in the thesis under the heading "***ECONOMIC COMPETITION. INDIRECT EVIDENCE IS SUITABLE FOR PROVING, THROUGH INDICATIONS, CERTAIN FACTS OR CIRCUMSTANCES BASED ON WHAT IS KNOWN AS THE BEST AVAILABLE INFORMATION, WITH RESPECT TO THE ACTIONS OF COMPANIES THAT HAVE ENTERED INTO AGREEMENTS TO CARRY OUT MONOPOLISTIC PRACTICES.***" Registration: 168495. TCC; 9th Era; Judicial Weekly Report of the Federation; I.4o.A. J/74; J. Available at https://sjf2.scjn.gob.mx/detalle/tesis/168495.

[23] "***ABSOLUTE MONOPOLISTIC PRACTICE. FOR ITS ACCREDITATION, THE AUTHORITY MAY RESORT TO CIRCUMSTANTIAL EVIDENCE, WHICH IS NOT CONTRARY TO THE PRINCIPLE OF PRESUMPTION OF INNOCENCE.*** *While it is true that the principle of presumption of innocence implies that in order to rebut it, the authority must meet a high evidentiary standard, it is also true that in the sanctioning proceedings before the Federal Competition Commission, it may explore and base its decision on contrary presumptions contained in circumstantial evidence, which may be considered sufficient to sanction the subjects under investigation if they do not disprove such evidence when exercising their right to a hearing; which is not contrary to the aforementioned principle and is explained by the fact that, in the case of absolute monopolistic practices referred to in Article 9 of the Federal Economic Competition Law, in force until July 6, 2014, it is difficult to establish precisely how an agreement has been reached or concerted anticompetitive behavior has been reached, given the care that the interested parties take to veil or hide any vestige or trace of it, so that in many cases, if not in the vast majority, it will not be possible to find direct evidence of the conduct displayed by the agent or agents involved or of all the details that, for obvious reasons, they are hidden or obscured.*" Registration: 2009659. SCJN; 10a. Era; Judicial Weekly Report of the Federation; 2a./J. 101/2015 (10a.); J; Available at https://sjf2.scjn.gob.mx/detalle/tesis/2009659.

[24] "***ABSOLUTE MONOPOLISTIC PRACTICE. THE 'ECONOMIC ANALYSIS' CONSTITUTES AN INDIRECT PROOF WITH WHICH THE FORMER CAN BE DEMONSTRATED***. *The so-called 'economic analysis' prepared by the Federal Competition Commission based on documents and information of an economic nature, may constitute valid*

indications that lead to presumptions that, adminiculated, demonstrate the existence of the conduct to be sanctioned.

21. Thus, indirect evidence constitutes an ideal and effective means of proving the existence of anticompetitive agreements. This form of evidence allows certain relevant facts or circumstances to be inferred through the best available information, especially in contexts where monopolistic practices are presented in a veiled manner.

22. For example, in some cases of absolute monopolistic practices[25] in the market for insulin purchased by the Mexican government in the health sector, in the market for the sale of marine diesel and in the retail sale of gasoline at service stations, Cofece used economic evidence to demonstrate the existence of the agreement. Even though there were no direct documents in which the existence of the agreement could be perceived, the economic evidence demonstrated the existence of collusion.

23. In fact, the Supreme Court of the Nation (SCJN, per its initials in Spanish) ruled that in the case of absolute monopolistic practices "[…] *Among the characteristics that may show the existence of such conduct sanctioned by law, **which do not find reasonable economic justification** , are the following: a) That there is a pattern of winning and losing bids; b) That the **offered prices have a certain similarity**, either to win or lose the tender; c) That there are economic agents that predominantly turn out to be winners, with a notable difference with respect to the rest of the competitors; and d) That the entry of new*

indirect evidence tending to demonstrate the existence of an absolute monopolistic practice referred to in Article 9 of the Federal Economic Competition Law, in force until July 6, 2014, since it can be seen indications that lead to presumptions that, adminiculated, demonstrate the existence of the conduct to be punished, a study that, in addition, must clearly contain the reasonableness of that conclusion. It should be added that the use of this evidence is explained by the characteristics of an absolute monopolistic practice, since the person who commits it tries to hide his conduct, avoiding leaving any evidence or vestige of its existence." Registration: 2009653. SCJN; 10a. Era; Judicial Weekly Report of the Federation; 2a./J. 96/2015 (10a.); J. Available at https://sjf2.scjn.gob.mx/detalle/tesis/2009653 and "***COMPETENCIA ECONÓMICA. INDIRECT EVIDENCE IS SUITABLE FOR ACCREDITING, THROUGH CIRCUMSTANTIAL EVIDENCE, CERTAIN FACTS OR CIRCUMSTANCES BASED ON WHAT IS KNOWN AS THE BEST AVAILABLE INFORMATION, WITH RESPECT TO THE ACTIONS OF COMPANIES THAT HAVE ENTERED INTO AGREEMENTS TO CARRY OUT MONOPOLISTIC PRACTICES.*** *In the field of economic competition, it is difficult to establish precisely how an agreement has been reached or anticompetitive behaviour has been reached, given the care that the interested parties take to hide or conceal any vestige of it, so it is evident that, in most cases, no direct evidence can be found of the conduct shown by the agent or agents involved, nor of all the details that, for obvious reasons, are hidden or obscured, for which purpose a work must be done to connect or adminiculate various known facts in order to extract a presumption or hypothesis from an indication, and to derive inferences based on experience that lead to knowledge of the main fact, without requiring greater rigor in the accreditation of circumstances and reasons, given its nature. In this regard, in accordance with the provisions of both the Federal Economic Competition Law and its regulations, indirect evidence is suitable for accrediting, through sufficient indications, adminiculated with general statements, certain facts or circumstances based on what is known as the best available information, with respect to the actions of companies that have entered into agreements to carry out monopolistic practices; since it is to be expected that the acts carried out by these companies to achieve an end contrary to the law, will be disguised, concealed, sectioned, disseminated to such a degree that the action of the entity, as such, becomes almost imperceptible and this makes it difficult, if not impossible, to establish by direct evidence the relationship that exists between the act carried out and the legal person or entity to which it is intended to be imputed*". Registration: 168495. TCC; 9th Era; Judicial Weekly Report of the Federation and its Gazette; I.4o.A. J/74; J. Available at https://sjf2.scjn.gob.mx/detalle/tesis/168495.

[25] Cofece files IO-003-2006, DE-029-2019 and DE-009-2019.

competitors reflects a ***drastic change in the decrease in the prices offered.*** [emphasis added]" [26]and that "[…] *the theory of competition law has consistently pointed out that, given the obscurity in which these types of practices are presented, demonstrating their existence constitutes a difficult task to achieve, since those who carry it out try to hide their conduct and avoid leaving evidence or traces that demonstrate it; therefore, it is valid that* [Cofece] *primarily resorts to the integration of* ***indirect or circumstantial evidence****, to have these practices demonstrated, evidence that, when adminiculated, can lead to the accreditation of the act sanctioned by law*."[27]

4.1. Cases

24. As mentioned before, Cofece sanctioned a case in the market for the sale of marine diesel[28] and in the retail sale of gasoline at service stations[29] using indirect evidence. In these two cases, economic evidence was used to demonstrate that competitors simultaneously set similar, and in some cases identical, prices in a systematic manner. This similarity in prices was not explained by their costs since these were different between the companies.

25. In particular, in the case of retail sale of gasolines at the national level, the anticompetitive conduct was demonstrated as follows:

- **Parallel prices**: It was noticed that, over time, the investigated companies had very similar price patterns. These patterns allowed to observe the effect of the agreements entered into between those sanctioned. Participants in the collusion had different pricing and cost determination methodologies, however, they presented similar or identical prices simultaneously.
- **Simultaneity**: Cofece took advantage of the fact that energy regulation requires service stations to register their prices in an electronic system of the Energy Regulatory Commission (CRE) at least 60 minutes before they become effective. This means that a company cannot know in advance the price to be registered by its competitor. To determine whether two price records met the element of simultaneity, Cofece analyzed the date and time of registration into the CRE's electronic system, as well as the date and time of application of said price. Determination: Based on the functioning of the CRE's Price Registration System, Cofece determined it was not possible to see prices registered by another competitor until the price was valid. This allows to conclude that the price visible in the CRE System rules out price monitoring that would explain why companies maintained identical and/or similar prices, since the operation of the system did not allow that

[26] "***ABSOLUTE MONOPOLY PRACTICE IN PUBLIC TENDERS. CHARACTERISTICS THAT MAY EVIDENCE IT***". Registration: 2009657. SCJN; 10th. Period; Judicial Weekly Report of the Federation; 2nd ./J. 98/2015 (10th .); J. Visible at https://sjf2.scjn.gob.mx/detalle/tesis/2009657

[27] "***ABSOLUTE MONOPOLY PRACTICE. FOR ITS ACCREDITATION IT IS VALID TO RESORT TO INDIRECT OR CIRCUMSTANTIAL EVIDENCE***". Registration: 2009658 SCJN; 10th. Period; Judicial Weekly Report of the Federation; 2nd ./J. 95/2015 (10th .) ; J. Visible at https://sjf2.scjn.gob.mx/detalle/tesis/2009658

[28] For more information see press release Cofece-025-2024, available at: https://www.cofece.mx/wp-content/uploads/2024/06/Cofece-025-2024_ENG.pdf

[29] For more information see press release Cofece-045-2024, available at: https://www.cofece.mx/wp-content/uploads/2024/11/Cofece-042-2024_ENG.pdf

possibility. Likewise, the companies did not prove in their defense the existence of alternative explanations for the price patterns that would discredit the collusion.

- **No other alternative explanations**: Cofece analyzed and ruled out other plausible hypotheses for price patterns, which reinforced the conclusion that collusion was the reasonable explanation for the observed patterns. Using statistical analysis, Cofece found that the proportion of identical or similar prices recorded simultaneously, behaved differently between the investigated companies compared to the non-investigated companies. With this, it was concluded that the most probable explanation for similarity of prices was collusion. It was established that the companies registered in the CRE system a high percentage of simultaneous and similar prices (in a range of zero to three cents), during the period that the conduct lasted, which constituted a price setting. It is also noted, that during the trial-like procedure, the companies could not offer alternative explanations for the identical and/or similar simultaneous price records; also they were unable to establish an alternative explanation through their pricing methodologies; and when comparing the percentage of records of identical and similar simultaneous prices of the companies with those at the national level, it was observed that the percentages of the companies accused were higher than the national average, which reinforces the existence of a coordinated and not independent behavior.
- **The Holistic Method**:[30] Although there were no elements of evidence in the file that directly proved the existence of the conduct, from the administrative analysis of the indirect evidence it was possible to validly infer and, therefore, accredit the existence of an agreement to fix, raise, arrange or manipulate the retail price of gasoline. All the elements and indirect evidence were analyzed together, using a holistic method that facilitated connecting the pieces of evidence and constructing a hypothesis of collusion that was consistent and logical.

26. In the case of marine diesel, service stations were sanctioned for registering simultaneous and identical prices over a prolonged period, with reasoning similar to that of the retail of gasoline.

5. Challenges

27. In Mexico, the difficulty of accessing direct evidence that demonstrates the commission of anticompetitive conducts has increased; thus, access to information that allows determining the existence of monopolistic practices through indirect evidence is particularly relevant. The Judiciary has already validated the use of such indirect evidence.

28. For example, it is a challenge to obtain information to demonstrate the effects of anticompetitive conducts and measure impact on the process of competition, due to the difficulty of gathering such information from the market, users or customers and competitors.

29. Another challenge is the way in which the Investigative Authority obtains information. For example, the use of private communications (chats, emails, data

[30]As mentioned before, in Mexico, the Federal Judicial Branch has endorsed the use of presumptions and indirect evidence to sanction monopolistic practices when direct evidence is difficult to obtain. Economic analysis, based on indications and reasoning, is accepted as valid evidence. Thus, a so-called "holistic" method has been adopted, which allows for the construction of a coherent narrative, despite the difficulty in obtaining direct evidence.

messages) has been the subject of challenge by economic agents. On the one hand, the LFCE establishes a power for the Investigative Authority to obtain information through dawn raids.; however, economic agents have challenged these determinations, arguing that the power to obtain information through a dawn raid does not extend to communications.

30. The LFCE also empowers Cofece's Investigative Authority to request information and documents from economic agents. This power has been used to request information on private communications from one of the parties involved in a proceeding. For example, in case IO-006-2016[31], the economic agents voluntarily handed over information from WhatsApp chats to demonstrate illegal conduct, which was confirmed positively by the Federal Judicial Branch. A Circuit Collegiate Court ruled that screenshots of WhatsApp chats brought to the trial-like procedure by one of the economic agents under investigation do not cause harm to the economic agents under investigation since these means of proof were provided during the investigation by one of the parties involved in such communications.

31. On the other hand, there are probative elements such as attorney-client communication that cannot be used,[32] so there are provisions that allow economic agents

[31] For more information see press release Cofece-001-2021, available at: https://www.cofece.mx/sanciona-cofece-a-bancos-por-acuerdos-ilegales-en-mercado-de-deuda-gubernamental/?lang=en

[32]The following Federal Judicial Branch criterion is relevant: "***SECRECY OF COMMUNICATIONS BETWEEN A LAWYER AND HIS CLIENT IS APPLICABLE TO ADMINISTRATIVE PROCEEDINGS FOR LIABILITY IN MATTERS OF ECONOMIC COMPETITION.*** *The privilege of secrecy of communications between a lawyer and his client when the latter faces a criminal proceeding, constitutes a protection measure that derives from the constitutional rights to privacy, defense and the inviolability of private communications, provided for in articles* ***6, 14, second paragraph, 16, twelfth paragraph and 20, subparagraph B, section VIII, of the Political Constitution of the United Mexican States****, consisting of the fact that the former has the duty to preserve the confidentiality of the information and documents that the latter refers to him in order to be in a position to produce his defense and, consequently, he is exempt from the obligation to bring to the attention of the authorities facts that could be related to the commission of an unlawful act. On the other hand, the Plenary Session of the Supreme Court of Justice of the Nation held that the exercise of the State's punitive power in criminal proceedings is similar to administrative liability proceedings, which is why, in the constitutional interpretation of the principles of administrative sanctioning law, the substantive criminal principles are applicable, without overlooking the fact that this transfer must be made only to the extent that they are compatible with its nature. Therefore, in addition to the rights to due process, non-self-incrimination and the assistance of a professional in defense of the individual, the figure of professional secrecy, which has been applied to administrative liability proceedings in matters of economic competition, are applicable to the following: instituted as a guarantee for the adequate defense of the rights of the accused and, by analogy, in favor of the litigants subjected to said procedures, because in a broad sense, an administrative sanction is similar to penalties, since both take place as a reaction to what is unlawful, while an essential condition for professional secrecy to occur consists of the punctual confidentiality of communications between the defender and the defendant, given that the former requires all the necessary information and the latter requires the confidence of not being exposed by providing it, with the understanding that this privilege does not operate when there are indications that may implicate the lawyer no longer as a defender, but as an accomplice to an illicit act. FIRST ADMINISTRATIVE CIRCUIT COLLEGIATE COURT SPECIALIZED IN ECONOMIC COMPETITION, BROADCASTING AND TELECOMMUNICATIONS, WITH RESIDENCE IN MEXICO CITY AND JURISDICTION THROUGHOUT THE REPUBLIC. Complaint 41/2016. SAI Consultores, SC November 10, 2016. Unanimous vote. Speaker: Patricio González-Loyola Pérez. Secretary: Carlos Luis Guillén Núñez." TCC; 10th . Period; Judicial Weekly Report of the Federation; I.1st. AE194 A (10th); TA.*

to exclude and not give any probative value to communications between economic agents and their attorneys, including information derived from an investigation. This procedure is regulated in the Regulatory Provisions of the Federal Economic Competition Commission for the Qualification of Information[33].

32. Lack of sufficient information has led to the closure of some investigations. For example:

- IO-003-2018: Market of technology and systems used in road infrastructure in the national territory. The case was closed due to the absence of evidence that would confirm the objective cause for which the investigation was initiated and, therefore, that would allow concluding the existence of a possible pact to agree on positions or the abstention from participating or exchanging information for the same purpose.
- IO-001-2018: Market for the commercialization, storage and transportation of petroleum products in Mexico and services related to them. The case was closed due to lack of elements to charge those accused.
- IO-006-2017: Market for the production, distribution and commercialization of sugar in national territory. The case was closed because there was no evidence, not even at the circumstantial level, to prove an agreement, contract or convention between the various agents investigated.
- IO-004-2015: Market for the production, distribution and commercialization of eggs in the national territory. The case was closed because there was no evidence to determine that the object of the exchange of information was price manipulation.
- IO-001-2009: The market for the production, distribution and marketing of CRTs (cathode ray tubes) in the national territory. This case lacked sufficient elements of conviction to prove the existence of contracts, agreements, arrangements or combinations between competing economic agents, which prevents it from considering the elements established in the law to be fulfilled.
- IO-003-2009: Market for the production, distribution and commercialization of glass panels and components. The file was closed because it only proves an admission of guilt before the US authorities for having infringed the antitrust laws of said country, without containing the circumstances of specific manner, time and place, which are likely to prove the presumed charge made or having additional elements that would allow proving the imputed conduct.

33. Also, the Federal Judicial Branch has annulled resolutions because it considers that the evidentiary standard was not met due to lack of information:

- Maritime transport services for motor vehicles and machinery for construction and agriculture in the national territory: in the file of the appeal for review, the appealed judgment was revoked given that the participation of an economic agent as the person who entered into the collusive agreement could not be proven and, as a result of the above, he should not be sanctioned as such by Cofece.
- Maritime passenger transport: In the file of the appeal for review, the court determined that the responsibility for its participation in the imputed conduct was not proven since it was an alleged renewal of collusive agreements previously studied by the competition authority, without being able to prove said renewal

[33]Published in the Federal Oficial Gazette on August 24, 2021.

and/or participation in said agreements, therefore the corresponding resolution was revoked for the purposes of the complainant.

34. In this sense, there have been challenges in the evidentiary standard achieved in different cases, since it depends on the evidence that has been collected and, especially, in cases where there is no direct evidence, finding the clues and connecting them to conclude the existence of anticompetitive conduct. When using economic evidence, it is necessary to establish controls and verify the correct use of the databases and methods used, as well as to verify whether applying different methods or parameters allows to reach the same conclusion. This requires trained personnel, access to information and programs that allow running large databases.

35. As it can be seen, allowing the use of economic evidence has given Cofece more tools to accredit anticompetitive conduct, but that the evidentiary standard for proving a conduct has not been reduced since the object of the proof has not been reduced either. In this sense, not only has the standard of proof remains, but rigorous standards have been established within the Commission to validate economic evidence, given the growing sophistication of the markets.