

# COFECE penalises cartel in public procurement for health sector: integral services for laboratory studies and blood bank

27 August 2020 | Contributed by [SAI Law & Economics](#)

## Facts

## Decision

## Comment

### Facts

In April 2016 the Federal Economic Competition Commission (COFECE) Investigative Authority initiated an investigation for the probable commission of absolute monopolistic practices in the market of integral services for laboratory studies and blood bank. **(1)** The investigation derived from a complaint filed by the Mexican Institute of Social Security (IMSS), which became aware of a potential agreement between integrators to divide among themselves the regions and packages for public tenders that IMSS had issued in 2015. **(2)**

The investigation concluded in November 2018. In March 2019 COFECE issued a press release informing that it had issued a probable responsibility dictum against various economic agents for collusive practices in tenders for public health institutions. **(3)** Consequently, various distributors of diagnostics equipment and their key directives participated in the corresponding trial-like procedure before COFECE.

In October 2019 COFECE issued another press release informing that, for a second time, it had exercised its powers to request the attorney general to initiate criminal action against people involved in the potential commission of absolute monopolistic practices relating to goods acquired by public health institutions. **(4)**

### Decision

On 10 August 2020 COFECE issued a press release **(5)** informing that 11 companies **(6)** and 14 individuals had established a non-aggression pact in order to distribute items from seven tenders which the IMSS and the Institute of Security and Social Services of State Workers (ISSSTE) had called in 2008, 2010, 2011 and 2015, respectively. On 9 July 2020 COFECE's Board of Commissioners had issued a resolution **(7)** to impose a total fine of Ps626,457,527 (approximately \$28.2 million) on the parties to the pact.

To determine the applicable fine, COFECE considered:

- each party's economic capacity and their participation in the cartel; and
- the damage caused by the practice and its severity and intentionality.

In this regard, COFECE indicated that the practice generated a damage to the public treasury of at least Ps1.2 billion, with an overpricing of up to 58.8% for some tests. Likewise, it established that the agreements acted to the detriment of the quality of medical services available to the beneficiary population. Given that the practice was considered a serious conduct, the fine that COFECE imposed on those that were found responsible corresponds to the maximum amount allowed by the law. **(8)** Moreover, it is the highest fine that COFECE has imposed in the past 10 years for cases relating to public procurement in the health sector. **(9)**

As mentioned above, the collusive agreements were initiated in 2008, when the abrogated **(10)** competition law was in force. **(11)** However, the current Federal Economic Competition Law (FECL) entered into force in May 2014, before the practice concluded, and incorporates more severe penalties. **(12)** Hence, two laws were in force during the collusion. Although COFECE has previously stated that the applicable penalty is the one in force during the consummation of the conduct, **(13)** as a result of various judicial precedents, COFECE applies the fine which is least harmful to the economic agents. In this sense, COFECE applied the fines in accordance with the law in force in 2008, **(14)** but capped to the 10% of the economic agent's annual taxable income.

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Finally, COFECE gave notice of its resolution to the Secretariat of the Civil Service (SFP), which decides whether to initiate an investigation against those that, acting with malice or bad faith in any federal procurement procedure, execute actions which involve or have the purpose or effect of obtaining an undue advantage or benefit.

## **Comment**

### ***Deterrent effect of fines and claims for damages***

In principle, to create a deterrent effect, the applicable fine should not be lower than the amount that results from the damage calculations considering them as a proxy of the extraordinary income gathered from the collusion. However, judicial precedents require the imposition of the most beneficial fine in case the two different competition laws concur.

As a result of the application of these judicial precedents, those economic agents that began their participation in the practice before 2014 faced a lower penalty than those that began their participation afterwards, even if they participated for a shorter period.

Moreover, to ensure the fine is proportional and not excessive, it is capped at 10% of the economic agent's annual taxable income. This criterion is supposed to indicate the agent's financial capability. Nonetheless, in Mexico several companies or individuals implement certain schemes to lower the tax calculation. Therefore, an agent could have a higher financial capability and, hence, bear a higher fine than the one indicated by this criterion of taxable income. Perhaps other aspects should also be considered when assessing financial capability, such as assets, real estate or bank account balances.

Finally, the law provides for those affected by anti-competitive practices the possibility to file judicial actions in order to claim damages for civil liability derived therefrom. This provision complements the fines for purposes of achieving a deterrent effect. However, to date, there are no precedents in this regard. Thus, it is advisable to analyse the potential reasons why claims for damages do not tend to be pursued; otherwise, they would hardly deter monopolistic practices.

### ***Criminal liability***

Until 2011 Mexican legislation included criminal liability for collusion. To date, there are no resolved criminal cases derived from a COFECE investigation. Thus, there is no clarity on how these cases should be analysed by prosecutors or the impact that COFECE's resolution may have. Indeed, the previous case in which COFECE also requested the initiation of criminal action has already been dismissed on COFECE's request.<sup>(15)</sup> Regardless, the burden of proof for criminal cases is higher than that for administrative ones. Therefore, the elements that COFECE deemed sufficient to impose administrative responsibility may be insufficient to impose a criminal penalty. Would the prosecutor be able to do its own investigation and obtain the additional evidence required to impose a prison sentence?

### ***Disqualification of collusive agents from future procurement procedures***

COFECE has highlighted that, in order to be fully effective, the deterrent effect of the fines that it imposes must be complemented with other mechanisms such as the temporary disqualification of the responsible economic agents.<sup>(16)</sup> Nonetheless, COFECE does not have the powers to do so. In this regard, COFECE has given sight to the SFP on four previous occasions when penalising bid rigging in federal procurement procedures.<sup>(17)</sup> However, to date the SFP has initiated no investigations in this regard and no economic agent has been disqualified from participating in future procurement procedures as a consequence of anti-competitive practices. The SFP has investigated and disqualified companies that supply medical inputs to public health authorities only for providing false information in various procurement procedures called for by the IMSS and the ISSSTE.<sup>(18)</sup> Given that cartels may be considered a more severe infraction, it is important to question why the SFP has been reluctant to use its powers and disqualify entities involved in this type of case and whether it will be willing to do so for this particular case.

Before 2017, the SFP had powers to investigate and penalise actions that were "executed with malice or bad faith which involve or have the purpose or effect of obtaining an undue advantage or benefit". Therefore, the applicable law when this cartel took place did not refer to collusions as such. It was not until the General Law on Administrative Responsibility entered into force that an express reference to collusion was incorporated within the scope of the SFP's powers.

In addition, an exception to the disqualification may be made if the involved agents are indispensable to fulfil the demand by being the only possible suppliers of the goods or services that they offer. This may be the case in this situation given that the participants in the cartel correspond to the companies with the highest ability and experience to provide integral services to public health institutions. Likewise, there may be cases in which the legal person is disqualified but not the natural persons behind it (ie, its shareholders and directors). Hence, the

natural persons which ultimately committed the infraction could constitute a new company to participate once again in federal procurement procedures without restrictions.

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## Endnotes

- (1) Published in the *Official Federal Gazette* on 13 April 2016. The investigation and trial-like procedure were carried on under file DE-011-2016.
- (2) Public tenders identified under number LA-019GYR988-T3-2015 (laboratory studies) and LA-019GYR988-T5-2015 (blood bank).
- (3) See press release "Emplaza COFECE a agentes económicos por posibles prácticas monopólicas absolutas en el mercado de servicios integrales de estudios de laboratorio y de banco de sangre". Available in Spanish [here](#).
- (4) Even though the press release does not expressly indicate that this criminal action referred to the blood bank cartel, multiple newspapers have linked both legal procedures. See press release "Por segunda ocasión, la COFECE presenta una querrela contra personas que pudieron haberse coludido en la venta de bienes y servicios en el sector salud". Available in Spanish [here](#).
- (5) See press release "Multa COFECE a empresas y personas físicas por coludirse en licitaciones de servicios integrales de estudios de laboratorio y banco de sangre que convoca el IMSS e ISSSTE." Available in Spanish [here](#).
- (6) Selecciones Médicas SA de CV; Selecciones Médicas del Centro SA de CV; Centrum Promotora Internacional SA de CV; Impromed SA de CV; Hemoser SA de CV; Instrumentos y Equipos Falcón SA de CV; Dicipa SA de CV; Grupo Vitalmex SA de CV; Vitalmex Internacional SA de CV; Vitalmex Administración SA de CV; and Vitalmex Soporte Técnico SA de CV.
- (7) This resolution may be challenged through an *amparo* trial, which can suspend the payment of the corresponding fines until it is resolved.
- (8) The maximum is limited to 10% of the individual's annual taxable income.
- (9) This case was also the cartel with the most participants in 10 years. Hence, the fines may not be the highest individually. Nonetheless, the individual fines are not publicly available, since the public version of the resolution is not yet available.
- (10) In force from December 1992 to May 2014.
- (11) This law established a maximum fine for legal persons equivalent to 1.5 million times the general minimum wage applicable for Mexico City during the year that the practice concluded. Considering that the minimum wage for 2015 was \$70.10, the maximum fine amounts to Ps105,150,000.
- (12) This law established a maximum fine for legal persons equivalent to 10% of the economic agents' taxable income of the year that the practice concluded.
- (13) Resolution to file IO-005-2016, pp. 83-84. Available in Spanish [here](#).
- (14) Except in those cases in which a participant entered the collusion after the new law became enforceable.
- (15) Criminal procedures derived from COFECE's investigations may be closed by petition of COFECE's Board of Commissioners when the prosecuted agents comply with the requirements established in COFECE's technical criteria.
- (16) See "Agenda de Competencia para un ejercicio íntegro en las Contrataciones Públicas". Available in Spanish [here](#).
- (17) Regarding penalties within files DE-024-2013-I (latex gloves), DE-024-2013 (condoms and probes), IO-006-2015 (media monitoring) and IO-005-2016 (toothbrushes).
- (18) Grupo Fármacos Especializados SA de CV was disqualified on 18 July 2019; Cyber Robotic Solutions SA de CV was disqualified on 6 July 2020; Grupo Laboratorios Imperiales Pharma SA de CV and Lomedic SA de CV; and Abastecedora de Insumos para la Salud SA de CV were disqualified on 27 July 2020. All of the disqualifications were published in the *Federal Official Gazette*.

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