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COFECE hits pharmaceutical cartel with maximum fines and disqualifies senior executives

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Introduction

The Investigative Authority of the Federal Economic Competition Commission (COFECE) have fined the numerous actors involved in a case of collusion in the pharmaceutical sector, in which agreements had been made to manipulate the supply and pricing of medical products. In an unprecedented move, COFECE also disqualified 10 executives involved in the collusion. Their actions are considered to have done great financial damage to the public treasury and low-income families.

Facts

On May 2016,⁽¹⁾ COFECE initiated an ex officio investigation into the probable commission of absolute monopolistic practices (collusion) in the national market for the production, distribution and commercialisation of pharmaceutical products. The investigation concluded in January 2019. In June 2019, COFECE said in a press release⁽²⁾ that it had issued a statement of probable responsibility against various economic agents for collusive practices.

As a consequence, various distributors, their key executives, as well as other economic agents throughout the supply chain, participated in a procedure led by COFECE similar to that of a trial. During this procedure these economic agents had the chance to state their best interests and offered evidence related to the accusations made against them. COFECE concluded the procedure issuing a condemnatory resolution against several agents participating in the investigated market.

Decision

On 16 August 2021⁽³⁾ COFECE stated in a press release that it had fined five of the distributors that had participated in the "trial" for engaging in absolute monopolistic practices in the drug distribution market: Casa Marzam, Casa Saba, Fármacos Nacionales, Nadro and Almacén de Drogas, as well as 21 individuals who had worked on their behalf. In addition, the Association of Distributors of Pharmaceutical Products of the Mexican Republic and one further individual were penalised for contributing to the distributors' unlawful practices.

The fined economic agents had made agreements to restrict the supply of medicines, as well as to fix, manipulate and increase the price of medicines in the following ways:

- they did not distribute medicines during holidays established in the Federal Labour Law, and other holidays;
- they did not distribute or commercialise a limited quantity of products to certain pharmacies based on their payable accounts to the distributors;
- they set a maximum discount amount on certain medications commercialised to pharmacies;
- they coordinated a 3.66% increase in prices on drugs sold to pharmacies; and
- managers of Marzam, Nadro, Fármacos Nacionales and Casa Saba devised a mechanism to prevent their distributors' clients from immediately noticing the coordinated price increase. This allowed the companies to collude in order to homologate their sales prices to pharmacies.

COFECE issued the maximum fines according to each economic agent's financial capacity and the relevant legal framework, which totalled approximately 903.4 million pesos (\$45.1 million). COFECE indicated that the distributors' practices had generated damage to the public treasury of at least 2,359 million pesos (\$118.4 million). The competition commission also indicated that damage had affected lower income families' ability to pay for prescription drugs, over-the-counter medicines and medical supplies.

For the first time ever, COFECE disqualified 10 executives of the fined companies from acting as directors, administrators, directors, managers, officers, executives, agents, representatives or attorneys-in-fact of such companies for terms ranging from six months to four years.

Comment

Although the public version of COFECE's extensive resolution has not yet been published, the relevant topics to highlight following the press release are the different types of conduct and actors involved in the collusion, the entities penalised for contributing to the collusion and the disqualified executives.

Conduct and actors involved in collusion

In the press release, COFECE stated that it had assessed the different ways in which collusive agreements had been executed, and then penalised the actors responsible. COFECE not only sanctioned the competitors who were directly involved in the execution of such agreements, but 21 natural persons who assisted in implementing them. However, other participants in the market (eg, a pharmaceutical



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company and a market intelligence provider) were also called to participate in the COFECE procedure but were not deemed responsible.

Based on these two points, it would firstly be interesting to understand what criteria COFECE used to determine each fine, given the variety of conducts identified, and secondly, it is important that the specifics of the initial charges against economic agents participating in the "trial" be revised.

COFECE's assessment appears to have been the most comprehensive investigation ever carried out in the health sector, since it involved the analysis of conducts carried out by various participants throughout the entire medication supply chain. In recent years, COFECE has maintained a strong focus on this sector given its importance to families across Mexico.

Sanctions for acting as a contributor

COFECE also fined the Association of Distributors of Pharmaceutical Products of the Mexican Republic for contributing or facilitating the collusion by receiving and integrating discount lists of the participating companies and then sharing such lists with the same companies. This prevented distributors from competing for customers (pharmacies) by offering discounts on pharmacy prices. According to COFECE, the Association also agreed to assist the distributors in implementing their "no distribution during holidays" scheme.

It will be interesting to understand what COFECE's assessment of the participation of potential contributors or facilitators included, as well as what standard of proof it considered.

Disqualification of executives

As mentioned, this is the first time that the national antitrust agency has penalised those who directly or indirectly participated in a collusion or any other monopolistic practice or unlawful merger on behalf of a company. While such individuals are entitled to challenge COFECE's resolution in court (via *amparo*),⁽⁴⁾ it is unclear whether an injunction can be obtained to suspend such an order. This question is important as the 2013 amendment to the Constitution states an exception that punishments consisting in fines or the order to divest assets or rights imposed by COFECE can only be executed provided that the *amparo* proceeding has been resolved. Nevertheless, the Federal Economic Competition Law included disqualification as a punishment until May 2014.

The question then will be if the federal court understands a disqualification as a "fine" and would grant an injunction to suspend it, or it does not constitute a fine and it can be executed right away.

Some insist is possible that the restriction established by the 2013 constitutional amendment intended to impede a sanctioned company from continuing with an anticompetitive behaviour by means of a suspension ordered by a judge. Therefore, it could be argued that the amendment did not consider the sanction of disqualification at that moment, and it is possible to obtain an injunction to suspend it. In any case, the judicial rulings in the coming days will shed light on this discussion.

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Endnotes

(1) Further information is available [here](#) (in Spanish).

(2) Further information is available [here](#) (in Spanish).

(3) Further information is available [here](#) (in Spanish).

(4) An *amparo* action is a constitutional procedure before the federal court to dispute acts of public authorities and protect human rights recognised in the Constitution.