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Criminalisation of cartels and bid rigging conspiracies – Note by Mexico (COFECE)

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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Mexico (COFECE)

1. Availability and scope of criminal sanctions for cartel and bid-rigging violations

1. The most severe sanctions considered in Federal Law of Economic Competition (LFCE for its acronym in Spanish) are related to absolute monopolistic practices.¹ The LFCE also considers these practices to be illegal *per se*.
2. Absolute monopolistic practices (which include bid rigging) are closely related to what is referred to as hard-core cartels in the international competition jargon, and will hereinafter be referred to simply as cartels. These, subject to administrative fines, are the only anticompetitive conduct subject to criminal sanctions, and are liable to competition damages actions under the civil law.
3. Taking into account the severity of fines, their *per se* nature and the fact that they are the only conducts subject to criminal penalties, it may be inferred that cartels are considered the most harmful types of conducts by the LFCE.

1.1. Administrative sanctions³

4. Article 127 of the LFCE provides the administrative sanctions to be imposed according to the types of violations. For cartels, sanctions include:
 - An order to suspend or eliminate the conduct.
 - Up to approximately USD 734,138² fine for submitting false information,³ regardless of any criminal liability to which the offender may be subject.
 - A fine of up to 10 % of the economic agent's⁴ annual income regardless of the corresponding civil or criminal liability.
 - Disqualification to hold executive positions at a company for up to 5 years.

¹ Article 53 of the LFCE provides that “*absolute monopolistic practices are considered illegal, and these consist of contracts, agreements, arrangements or combinations amongst competing economic agents, which have as their purpose or effect any of the following: I. To fix, raise, co-ordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets; II. To establish an obligation not to produce, process, distribute, market or acquire but only a restricted or limited amount of goods, or the provision or transaction of a limited or restricted number, volume or frequency of services; III. To divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services, by a determined or determinable group of customers, suppliers, time spans or spaces; IV, To establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls, and V. To exchange information with any of the purposes or effects referred to in the previous subsections.*”

² An exchange rate of \$20.71 Mexican pesos per USD is used throughout the document.

³ Provided in Article 127, subsection III. “*A maximum fine equivalent to one hundred seventy-five thousand times the current daily general minimum wage in the Federal District ...*”. This sanction applies for submitting false information in any of the Commission’s procedures.

⁴ Article 3, subsection I of the LFCE defines economic agent as “*any natural or legal person, either for profit or non-profit, Federal, State or Municipal public administration agencies and entities, associations, business chambers and professional associations, trusts, or any other form of participation in economic activity.*”

- Up to approximately USD 839,0157 fine for individuals who directly or indirectly participate in the cartel.⁵
- Up to approximately USD 755,113 fine for individuals or undertakings who contribute, induce or directly participate in the cartel.⁶
- Up to 8% of the economic agent's annual income, for failing to comply with a resolution of the Federal Economic Competition Commission (Commission or COFECE for its acronym in Spanish), regardless of the corresponding criminal liability, for which the Commission shall file a complaint before the Office of the Attorney General (FGR for its acronym in Spanish).
- Up to 10% of the economic agent's income when failing to comply with an injunctive order referred to in the law.
- In case of recidivism, fines imposed by the Commission can be doubled.

1.2. Criminal sanctions

5. Criminal sanctions apply to all types of cartel offenses established in article 53 of the LFCE and are only applicable to individuals.

6. These sanctions were introduced in 2011, when amendments were made to the Federal Criminal Code, ranging from three to ten years of imprisonment, for those individuals involved in cartel activity. The LFCE was amended in that same year to include exception of criminal liability to those economic agents who were granted the benefit of the Commission's leniency and immunity program, increasing incentives to join it.⁷

7. In 2013 a constitutional reform on economic competition and the new LFCE of 2014 were enacted. In accordance with the new provisions, the Federal Criminal Code was amended to increase criminal liability, thus increasing the years of imprisonment, now ranging from five to ten years,⁸ and adding fines ranging from approximately USD 4,195 to 41,950 for those individuals that ordered, executed or carried out cartel activities.⁹

8. The Federal Criminal Code also provides that those that, either directly or indirectly, totally or partially, alter or destroy documents or electronic information with the purpose of hindering or interfering with COFECE's investigations, or administrative proceedings, can be subject to criminal sanctions that range from one to three years of prison.¹⁰

⁵ Provided in Article 127, subsection X "... *maximum fine equivalent to two hundred thousand times the current daily general minimum wage in the Federal District ...*".

⁶ Provided in Article 127, subsection XI "*Maximum fines equivalent to one hundred eighty thousand times the current daily general minimum wage in the Federal District, ...*".

⁷ Article 254-bis of the Criminal Code provides that: "*There will be no criminal liability for those economic agents granted with the benefits provided in article 103 of the Federal Economic Competition Law...*"

⁸ Article 254 bis of the Federal Criminal Code.

⁹ Article 254 bis of the Federal Criminal Code "*Sanctions ranging from five to ten years in prison and fines equivalent from one to ten thousand time the current daily minimum wage....*".

¹⁰ Article 254 bis-I of the Federal Criminal Code. This sanction applies or any of the Commission's procedures.

1.3. Civil sanctions

9. As for civil sanctions, article 134 of the LFCE provides that, when a cartel conduct is proven, those affected by it may claim civil damages through an individual or collective suit before a specialized competition court.

2. Process for obtaining criminal sanctions

10. Once a Statement of Objection is issued, the Head of the Investigative Authority has the discretionary power to file a criminal complaint before the FGR. After this moment, the FGR is responsible of conducting the criminal investigation of those individuals that are allegedly involved in the cartel. This is relevant because it means that the criminal procedure is independent and may be conducted in parallel to COFECE's administrative trial-like procedure. The administrative proceeding at the Commission concludes with a resolution issued by its Board.

11. During the criminal procedure the FGR may gather its own evidence. However, so far, the FGR does not have prosecutors specialized in competition. Therefore, the Commission is proactive to respond to all queries that the FGR may have and is willing to cooperate in order to aid in the FGR proceedings when needed.

12. COFECE's Board of Commissioners may request the dismissal of the criminal case if the administrative sanctions are complied with by the economic agent. The latter subject to the following conditions: (i) lack of appeals against COFECE's resolution; and (ii) the economic agent is a first-time offender.¹¹

2.1. Investigative tools available for gathering evidence and exchange of information with other agencies

13. The Commission has several investigative tools available for collecting evidence, mainly formal information and documents requests, citations for obligatory interviews, the leniency and immunity program, and unannounced dawn raids. These are described as follows:

- *Formal requests of information and documents:*¹² Once an investigation has been initiated, the Investigative Authority may require an economic agent to submit all the information and documents that are necessary to conduct its proceedings. To protect the nature of the information and avoid its undue disclosure, it can be classified either as reserved, confidential or public information. While reserved information can be disclosed to all agents considered to have a rightful interest in the investigation, confidential data may only be accessed by the agent who provided it to the Commission. In accordance to the LFCE,¹³ all economic agents that request their information to be classified as confidential must justify their petition or otherwise the information will only be considered as reserved.

¹¹ In terms of Article 127 of the LFCE and Article 254 bis of the Criminal Code.

¹² Article 73 of the LFCE.

¹³ Article 125 of the LFCE provides “*For the purposes of this Law, Confidential Information shall only be considered as such at the Economic Agent's request, and upon validation that the information has this characteristic.*”

- *Citations for obligatory interviews*: COFECE has also the power to summon individuals to testify, under oath, before officials in charge of the proceeding.¹⁴ The Commission benefits from these appearances as they provide first-hand information from several agents involved in the investigation, such as former employees, contractors, etc. This is crucial for obtaining evidence for proving the existence of hard-core cartels.
- *Leniency and immunity program*: While the program offers an incentive for cartel participants to cease their participation in the practice and report it to the authority, the Commission also benefits from the information provided by the applicant's cooperation with the investigation. (See also section III of this contribution)
- *Unannounced dawn raids*: The LFCE enables COFECE to order an execute dawn raids for obtaining, on its own, the necessary documents and any particular information.¹⁵ The Commission can carry out these raids without any prior notification or authorization. Furthermore, it can also request the assistance of other authorities, such as the police, to perform the raids. During these, COFECE's officials can access any office, site, electronic device or other locations that could contain relevant evidence for the investigation. Notwithstanding, the Commission's officials may not seize any information.

14. With respect to evidence gathered during investigations by other agencies, for an exchange of information to occur, article 12 of the LFCE provides that COFECE has the power to request or require the information deemed necessary for the exercise of its powers. In addition, article 28 establishes that the Investigative Authority has the power to request any domestic public institution or foreign authority the information and documentation required to investigate possible infringements to the law.¹⁶

15. Moreover, the LFCE also provides that COFECE may establish coordination mechanisms with public authorities in matters of economic competition and for the compliance of the law.¹⁷ Therefore, an agreement or memorandum of understanding could be signed with another agency to accelerate and facilitate exchanges of information.¹⁸ The Commission has signed several agreements with other public institutions such as the Bank of Mexico, the Ministry of Economy, the National Banking and Securities Commission and the Commission for the Protection and Defense of Financial Services Users.¹⁹

16. One important recent agreement was signed, in 2019, with the Ministry of Public Administration²⁰ which has the objective of establishing the elements for inter-institutional coordination and cooperation for the exchange of information to identify, investigate and

¹⁴ Article 119 of the LFCE.

¹⁵ Article 75 of the LFCE provides that the head Investigative Authority will be responsible for ordering the execution of dawn raids.

¹⁶ Article 12 of the LFCE subsection XXVI and article 28 subsection III.

¹⁷ Article 12 of the LFCE subsection XXVII.

¹⁸ Another mechanism for obtaining information or documents gathered by other agencies is a waiver granted by economic agents that are part of an investigation.

¹⁹ All the agreements signed by the Commission with other public domestic institutions are available in Spanish at: <https://www.cofece.mx/publicaciones/marco-juridico-y-normativo/>

²⁰ More information on this agreement is available, in Spanish, in COFECE's monthly report for August 2019 at: <https://www.cofece.mx/reporte-mensual-agosto-2019/#nota3>

sanction administrative misconducts by public officials and economic agents in the field of public procurement and competition.²¹

2.2. Criminal prosecution

17. Criminal prosecution and adjudication of cartel conducts correspond to the FGR and the Federal Courts, respectively.²²

18. When the FGR receives the claim submitted by the Investigative Authority, it will apply the criminal law rules for its investigation. If the FGR's investigation results in an alleged cartel crime it will submit the case to a criminal court for its sentence. The criminal sanction would be determined considering the severity of the conduct, that is, the damage caused to economic development and social welfare – as established in the Chapter of Crimes Against Public Economy, specifically, against National Welfare and Wealth of the Federal Criminal Code.

3. The role of leniency and compliance programs

3.1. Leniency and immunity program

19. The Commission's leniency and immunity program was launched with the 2006 reform to the LFCE. Prior to this reform, the Commission applied discretionary administrative fine reductions for cooperating economic agents involved in an on-going investigation. In 2011, the program was strengthened, extending its scope to individuals and to criminal sanctions for cartel conducts as mentioned above. The objective of the program is to serve both as a detection tool for cartels and as an investigative tool when an investigation is initiated.

20. Over the past five years, applications to the program have been one of the Commission's main tools for cartel detection. During the period of 2014-2018, COFECE

²¹ In addition, COFECE has conducted several advocacy actions to raise awareness among public procurement officers regarding the seriousness of bid rigging, and to foster a culture to promote the filing of complaints against this type of conducts. For example, in 2018, COFECE launched the "Competition agenda towards integrity in public procurement", with the objective of reducing the discretionary enforcement of the procurement laws and promote competition through a better design of the regulations. Over the years, COFECE has trained public officials and private sector members on competition in public procurement processes. In 2019, approximately 230 members of the Ministry of the Navy and the Ministry of Health were trained on the design of procompetitive procurement processes. Another substantial effort to incorporate competition into public procurement processes is issuing opinions and recommendations to the procurement frameworks of public institutions. For example, in 2019, COFECE made recommendations to improve purchasing rules of the Institute of National Housing Fund for Workers. Changes enacted included: new rules establishing that open bidding should be the main procedure; use of competitive methods for smaller purchases should be enabled; and automatic contract renewal must be removed. Moreover, in its efforts to be at the forefront of the fight against cartels, COFECE hosted the OECD Capacity Building Workshop on Effective Cartel Detection and Prosecution, held in cooperation with the OECD, in which national authorities from 12 OECD country members participated, including Mexico.

²² Article 28, subsection VII of the LFCE and Article 254-bis of the Federal Criminal Code.

received 76 leniency applications and the program has triggered 20% of the Commission's investigations.²³

21. The program stands out from other investigative tools, since it allows COFECE to acquire important information and evidence to substantiate its decisions. For example, in 2018, 36% of the applications were first in,²⁴ typically these applications provide the Commission with elements to build an objective cause and decide the opening of investigations.

22. Moreover, the program allows a more efficient and expedite sanctioning process against cartels. For example, in 2019, one of the four cartel cases sanctioned derived from a leniency application.²⁵ This further explains the key role the program has had not only in investigations, but in enforcement of the law through sanctions.

3.2. Compliance program

23. Mexican competition law does not expressly credit corporate compliance programs as part of the cartel enforcement process. However, it could be the case that an investigated economic agent presents as part of its defense the existence of a corporate compliance program or initiatives to prove its commitment to cease the anticompetitive practice. Thus, the Commission could take into account these efforts to grant an immunity as long as they credit concrete efforts to terminate and address competition misconducts.²⁶

24. Since its creation, COFECE has advocated for the importance of compliance programs to be established by companies. In August 2019, the Commission updated the *Recommendations for complying with the Federal Economic Competition Law*²⁷ (first published in 2015) which provides companies with pointers on how to develop an effective compliance program and a description of the resources that the Commission has made available to them in order to comply with the law. These recommendations joined a series of publications aimed at explaining the benefits and the functioning of the competition

²³ See Enforcement activity section of the OECD (2020), OECD Peer Reviews of Competition Law and Policy: Mexico, available at: www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-andpolicy-mexico-2020.htm.

²⁴ See Anti-cartel section of the Global Competition Review (2019) Rating Enforcement 2019: Mexico's Federal Economic Competition Commission, available at: <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197066/mexicos-federal-economic-competition-commission>

²⁵ COFECE's Internal Statistics and Quarterly Reports for 2019, available in Spanish at: <https://www.cofece.mx/category/planeacion-informes/informes-trimestrales/>. See DE-031-2017, DE043-2017, IO-005-2016, and IO-002-2015. For the latter case, its public resolutions states that a leniency application was received.

²⁶ Article 103 of the LFCE provides that "*Any Economic Agent who has engaged or is engaging in an absolute monopolistic practice; [...], may acknowledge such actions before the Commission and apply for the sanction reduction benefit established by this Law*". Furthermore, subsection III of said article clarifies that in order to obtain the benefit, the economic agent must credit that "*It undertakes all necessary actions so as to no longer engage in the unlawful practice.*"

²⁷ Document available in Spanish at: <https://www.cofece.mx/recomendaciones-para-cumplir-con-la-lfce/>

regime to the business community, such as a *Competition Toolkit*²⁸ and *Competition and Small and Medium Enterprises (SMEs)*.²⁹

4. Enforcement of criminal sanctions

25. The Investigative Authority has filed two criminal complaints before the FGR, both related to bid-rigging cases in the public health sector.

26. The first complaint, lodged in 2017, involved several bidders accused of rigging public tenders in the health sector between 2009 and 2015, where fiscal resources for more than sixty-four million US Dollars were allocated.³⁰

27. The second complaint, lodged in 2019, referred to a case where the conduct was executed between 2011 and 2015 and affected the public procurement of goods and services for the health sector.³¹

28. The Commission has the intention to continue filing criminal cases as they have an important deterrent effect for cartel conduct and a good incentive for requesting leniency.

4.1. Companion civil and administrative remedies in bid rigging cases

29. As mentioned above, the Mexican private enforcement legal regime allows for the claim of civil damages. The predominant statutory provision for competition claims is article 134 of the LFCE, which states that persons who have suffered damage or loss caused by bid rigging may bring a civil liability claim before a specialized court after the competition authority's decision is confirmed as final.³²

30. With respect to administrative actions, article 127 of the LFCE establishes that COFECE may determine to order the disqualification to act as an undertaking's board member, manager, director, executive, agent, representative or legal representative, for a period of up to five years, to those persons who directly and indirectly participate in bid rigging.³³

31. Administrative temporary suspensions or disqualifications, and even destitution of public officials are foreseen in the Procurement Law of the Public Sector, the Federal Law of Anticorruption in Public Procurement, and the Federal Law of Administrative Responsibilities.

²⁸ Document available in Spanish at: https://www.cofece.mx/wp-content/uploads/2017/11/Herramientas_CompeticionEconomica_vf250815.pdf#pdf

²⁹ Document available in Spanish at: https://www.cofece.mx/wp-content/uploads/2017/11/PyMESyCompetenciaEconomica_250815_vf1.pdf#pdf

³⁰ Press release COFECE-08-2017, available at: <https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-08-2017.pdf#pdf>

³¹ Press release COFECE-042-2019, available at: <https://www.cofece.mx/wp-content/uploads/2019/10/COFECE-042-2019-English.pdf>

³² This provision applies also for damages or losses derived by an unlawful concentration or any monopolistic practice foreseen in the LFCE.

³³ This provision applies also for those who directly or indirectly participates in any of the cartel conducts foreseen in the LFCE.

32. Notwithstanding the above, in the case of public procurement, none of the aforementioned laws consider bid-rigging as a conduct worthy of debarment. Therefore, on the recent Peer Review of Mexico's Competition Law and Policy, the OECD issued a recommendation for including bid-rigging in the violations that could result in public procurement debarment as *“this measure, combined with more conventional criminal, civil and administrative sanctions could increase deterrence and contribute to combatting bid ridding.”*³⁴

5. International cooperation in criminal cases

33. The LFCE can be enforced against domestic and foreign economic agents when their actions have or may have negative effects in the Mexican territory. This allows COFECE to exercise its powers extraterritorially. Therefore, the competition law allows for international cooperation.

34. Formal international cooperation with authorities from other jurisdictions can take place based on international instruments that incorporate provisions on competition policy. Such instruments are free-trade agreements (FTAs), bilateral competition agreements between the Mexican government and other governments, as well as bilateral competition agreements between COFECE and the competition authorities from other jurisdictions.³⁵

35. However, none of the aforementioned instruments include cooperation in the context of criminal cases, and to date there are no mutual legal assistance treaties in antitrust criminal matters in force. The latter may be due to the following important impediments for effective cooperation in enforcement cases:

- Case file information cannot be disclosed during the investigation stage.
- Disclosure of confidential information without a waiver is not possible.³⁶
- Access to the case file during the trial-like procedure is only granted to those who have legal standing in the procedure.³⁷

36. These hurdles were addressed in the aforementioned Peer Review conducted by the OECD,³⁸ in which two recommendations were made regarding cooperation:

- The first one has to do with the possibility of adopting the so-called “information gateway” provisions, that will allow the exchange of information without a waiver.
- The second one focuses on the possibility of entering into second-generation international cooperation agreements that allow such exchanges of information with the competition authorities from other jurisdictions.

37. Therefore, today informal international cooperation in enforcement cases is crucial to COFECE because of the aforesaid impediments. In order to overcome these challenges,

³⁴ OECD, Peer Review of Competition Law and Policy: Mexico, 2020. Available at: <http://www.oecd.org/daf/competition/Mexico-Peer-Reviews-of-Competition-Law-and-Policy-en.pdf>

³⁵ All cooperation instruments and agreements signed by the Commission are available, in Spanish, at: <https://www.cofece.mx/publicaciones/marco-juridico-y-normativo/>

³⁶ Article 125 of the LFCE.

³⁷ Article 124 of the LFCE.

³⁸ Available at: <http://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-mexico-2020.htm>

voluntary waivers granted by economic agents are the only possible measures available to formally cooperate with competition agencies from other jurisdictions.