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Criminalisation of cartels and bid rigging conspiracies – Note by Colombia

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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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Colombia

1. Overview

1. Since OECD's last discussion on criminal enforcement of cartels in 2003[1], Colombia introduced into its legal system, through the 2011 Anti-Corruption Statute, a personal criminal sanction against individuals who engage in anti-competitive behaviors in public procurement. These behaviors and practices are widely known to constitute obstacles to the achievement of economic growth, trade expansion and other economic goals[2]. Also, as they have certainly a direct impact on public resources, and ultimately on taxpayers, they are permanently condemned by public sentiment as well as by administrative and criminal law.

2. Public procurement is an essential government activity that influences a country's economy[3]. In Colombia, there are approximately over 6300 state entities that purchase goods and services[4]. The volume of these purchases is estimated to be between a 13 – 17 percent of Colombia's Gross Domestic Product. Anti-competitive practices in this context are then extremely relevant as they cost the government and its entities significant sums of money that otherwise could be allocated to other relevant projects.

3. At a glance, the Superintendence of Industry and Commerce's (SIC) administrative fines for cartel conducts, bid rigging and other collusive and anti-competitive activities in public procurement from 2012 to 2019 sum up to $189.862.803.624 COP = $47.764.133,219 US. A total of 230 firms and individuals have been fined. And since the creation of the Elite and Multidisciplinary Task force to fight bid rigging in public procurement in 2017, the number of cases under investigation has increased from 19 in a period of 6 years to 20 in 3 years. The SIC, as an administrative authority has been very active in pursuing bid-rigging in public procurement cases. Today, a considerable percentage of the total investigations conducted by the SIC correspond to anti-competitive behaviors in the context of public procurement. Nonetheless, the recently displayed figures continue to highlight the important role of administrative enforcement and monetary fines in as much as the need for effective application of the other wide and complementary range of criminal sanctions to ensure deterrence.

4. It must be noted that when the competition authorities do not have the power to impose criminal sanctions to individuals in cartel cases, like the imprisonment and the disqualification from contracting with the state, the expected deterrent effect of the introduction of those penalties seems to blur. The need for timely and proper coordination among prosecutors and competition authority is crucial so that the threat of criminal consequence prevents actual wrongdoing.

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[1] OECD (2003), "Cartel Sanctions against Individuals", OECD, Paris, http://www.oecd.org/daf/competition/cartels/34306028.pdf

[2] OECD (2014), "Fighting Bid Rigging in Public Procurement in Colombia", OECD, Paris, https://www.oecd.org/daf/competition/fighting-bid-rigging-in-public-procurement-in-colombia.htm

[3] OECD (2012), "Recommendation of the Council on Fighting Bid Rigging in Public Procurement", OECD, Paris, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396

[4] See: https://www.funcionpublica.gov.co/web/sie/entidades-del-estado

5. On the other hand, in those jurisdictions where the administrative offense to the competition regime is also a crime -and the pursue and the imposition of criminal sanctions isn't in charge of the competition authority-, leniency applications have been proven to be lower than expected. In fact, there have been very few successful applications to the program at the Superintendence of Industry and Commerce when it comes to collusion in public procurement given, for instance, the fear of criminal prosecution. As a result, the effect of criminalization of that specific conduct seems to deter individuals from applying to the competition authority's leniency programs rather than to discourage them from cartel activity. Just as was stated in the Background note by the Secretariat for the present Roundtable: "*(…) discussions on leniency always recognized that leniency programmes can only work if companies and individuals perceive a risk that competition agencies would detect and establish a competition infringement without recourse to leniency. (…) leniency policies do not operate in a vacuum, and need to appraise their interaction with criminal liability, settlement and early termination procedures"*[5].

6. This work will address some of the most relevant issues for the debate on criminalization of cartels and bid rigging conspiracies that were identified by the Secretariat, for instance: actual enforcement of criminal antitrust offences in the Colombian jurisdiction, the evident effects of criminalization on administrative leniency programmes, due process and cooperation challenges related to the different degree of investigative and enforcement efficiency of the administrative and criminal authorities.

7. We will further these concerns through: first, the description of the elements of the criminal offence and the range of sanctions available in our jurisdiction, as well as the underlying motivations for such legal treatment. Second, the explanation of the process applicable for obtaining criminal sanctions, the investigative and enforcement powers/tools available in our jurisdiction and the cooperation dynamics among authorities when pursuing these cases. Finally, we will refer to the actual record of Colombian criminal enforcement on individuals and the challenges that approach.

2. Availability and scope of criminal sanctions

8. Not all of the administrative violations to the Colombian Competition Protection Regime are crimes. Criminal sanctions are available exclusively for collusive agreements in public procurement[6] and are applicable only to individuals since legal entities cannot be subjects under criminal procedures. Article 410A of Law 599 of 2000 named "*Anti-competitive agreements*" was introduced to the Colombian criminal legal system through the 2011 Anti-Corruption Statute as one of the criminal measures adopted to fight public and private corruption. The Anti-corruption statute allowed Colombia to explicitly recognize the need to tackle with criminal sanctions the already frequent cases of collusive activity in public procurement. Notwithstanding the fact that at that time the SIC had already began to undertake some initiatives to step up its fight against bid-rigging activity[7].

[5] OECD (2020), "Criminalization of cartels and bid rigging conspiracies: a focus on custodial sentences", Background note by the Secretariat, OECD, Paris, pp. 29, https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf

[6] Decree 2153 of 1992, Article 47-9, Anti-competitive agreements. "*For the purposes of carrying out the functions referred to in Article 44 of this Decree, the following agreements, among others, are deemed to be contrary to free competition*: *(…) 9. Those whose object is to collude in public bids or contests or those whose effect is the allocation of contract awards or the fixing of terms of proposals.*"

[7] OECD (2012), "Recommendation of the Council on Fighting Bid Rigging in Public Procurement", OECD, Paris, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396

9. The provision states that:

> *"Article 410-A. Anti-competitive agreements. Any person who, in a public tender, public auction, abbreviated selection process or a contest, agrees with another with the purpose of illegally altering the contractual procedure, shall incur in prison for a term of six (6) to twelve (12) years and a fine of two hundred (200) to one thousand (1,000) monthly minimum wages and a disqualification from contracting with state entities for eight (8) years.*
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> *PARAGRAPH: Anyone, as an informer or lenient by means of a firm resolution who obtains total exoneration from the fine to be imposed by the Superintendence of Industry and Commerce in an investigation for an anti-competitive agreement in public procurement, shall obtain the following benefits: reduction of the penalty by one third, 40% of the fine to be imposed and a disqualification from contracting with state entities for five (5) years."*

10. The basic characteristics of the criminal offense include the action of "*agreeing with another with the purpose of illegally altering the contractual procedure*". This conduct comprises a wide range of behaviors and practices recognized by international organizations like the OECD, competition authorities around the globe and by Colombian administrative case law for restricting competition in public procurement. Individuals, regardless of their qualification (public procurement official, market agent, proponent or actual bidder) may be prosecuted as a result of executing any of the many different forms of collusive and anti-competitive activities as long as it concerns a context of public procurement. The reason is that such behaviors are considered to truly damage or endanger, without a just cause, the public administration. And given that it is an incomplete type of crime, -meaning that the actual provision does not consider all of the possible elements of the crime- it's factual basis should be interpreted and fulfilled alongside the Competition Protection Regime and other non-criminal provisions; for instance, the General Statute for Public Contracting. Also, any individual can be held liable for the offense irrespective of its role in the infringement or the responsibility recognized after the administrative proceeding.

11. The "Anti-competitive agreements" crime (Article 410A) falls under the category of the offenses relating to the improper celebration of public contracts. All of these crimes, except for the Article 410A require that the subject executing the crime is a public official, for example: the director of the state entity, the contract supervisor, other public officers and even the contractor when conducting public functions. These crimes also have in common that they are aimed at protecting both the public administration and the social economic order. Enough reason to understand why they are enforced in contexts where anti-competitive practices have occurred and have been sanctioned administratively by the SIC. For example, in bid-rigging in public procurement cases that have already been sanctioned by the SIC with administrative fines, public officials involved in the commission of the administrative offense have as well been prosecuted for offenses like the execution of contracts without compliance of legal requirements, undue interest in entering contracts, conspiracy, bribery and procedural fraud (Contracts Carousel Case). This circumstance is relevant to the discussion given that it shows a complementary approach to administrative cartel enforcement, namely that individuals that in addition to the cartel offence engage in other crimes in the same context, can also be prosecuted for those, which in turn will sum up to the deterrent effect of criminalization.

12. The criminal sanctions provided for this offense: (i) the imprisonment from 6 to 12 years; (ii) a fine between 200 to 1,000 monthly minimum wages and (iii) a disqualification from contracting with state entities for 8 years. Only the ordinary criminal jurisdiction is responsible for the prosecution and trial of the crimes committed in the national territory.

The Office of the Attorney General is compelled to file the criminal action, carry out the investigation of facts reported to the Institution through claims, special request or complaints or any other means. The Office of the Attorney General is compelled to charge the alleged perpetrators before any competent court or tribunal (Article 250, Colombian Constitution). The SIC, therefore, does not have the power to impose criminal sanctions against individuals, these powers rely only within the ordinary criminal jurisdiction. It should be noted that the decisions regarding whether and how to prosecute the antitrust infringement as a criminal offense are not coordinated among authorities. Criminal prosecutions of individuals are not regarded to be an alternative to the pursue of administrative actions against companies or individuals or vice versa.

3. Process for obtaining criminal sanctions

13. Colombian jurisdiction has a clear separation between investigative and prosecutorial functions from adjudicative and decision-making functions. Colombian Constitution states that the Office of the Attorney General of Colombia has the power to file the criminal action, carry out the investigation of facts and charge the alleged perpetrators before any competent court or tribunal. Whereas the Superintendence of Industry and Commerce, as a technical and administrative authority and Competition Protection National Authority, has the powers of inspection, supervision and control and in accordance with these functions it investigates and sanctions violations to the Competition Protection Regime. The Deputy Superintendence for Competition Protection is in charge of the investigation phase of the procedure while the Office of the Superintendent decides and imposes the consequent fine.

14. The facts investigated by the Deputy Superintendence for Competition Protection can lead the Office of the Attorney General to investigate whether criminal law may have been breached. It is the obligation of the Deputy Superintendence to communicate to the Office of the Attorney General whenever it initiates a formal investigation for collusive activities in the context of public procurement or of the facts that may have crime elements. The prosecutor can build on an earlier administrative investigation into the same conduct, but that doesn't mean that the presumption of innocence or any other due process guarantee will be breached whatsoever. Fundamental Due Process guarantees apply and criminal procedures rules aren't lowered for that reason, on the contrary, it is a fact that prosecutors will meet a higher standard to prove the criminal offense when it comes to scenarios were parallel administrative procedures have been held.

15. The SIC can play an important role during prosecution. Officials of the Competition Authority have been granted judicial police powers to support prosecutors during the evidence gathering stages of the criminal procedure regarding the Article 410A. The law states that the SIC will conduct such activities under the direction and coordination of the Office of the Attorney-General of the Nation: with instructions from the Attorney-General, the Deputy Attorney-General or the prosecutors in each specific case, for the purposes of investigation and prosecution. Joint efforts are aimed at contributing to increasing effectiveness and efficiency in the detection, prosecution and sanctioning tasks of both the judicial and administrative investigations that are being carried out by these authorities for cartel activities.

16. Another issue concerns the admissibility and legality of evidence and information gathered during administrative proceedings conducted by the SIC into the criminal proceedings. To have a validity under criminal proceedings the evidence must be subjected to prior and subsequent judicial control by the Judge of Control of Guarantees. Also, when

evidence gathered by the SIC through its investigative proceeding is shared with the prosecution it must be subjected to contradiction to grant Due Process guarantees.

4. Leniency and Enforcement of criminal sanctions

17. It was stated in the background note to this roundtable that "*Detecting and investigating cartel violations of competition laws is just a first step. In order to ensure deterrence, such violations should be effectively prosecuted*"[8], otherwise the introduction of criminalization may not have the expected complementary deterrent effect. In addition, both administrative and criminal regimes should be in some degree aligned as their ultimate goal is analogous. As noted before, criminal and administrative activities are not isolated from one another. See, for instance, that absence of criminal enforcement of cartel conducts by the criminal authority may drive negative outcomes in the administrative procedure, like the possible paralysis of leniency programs and the variation of the detection and investigation rates. Let us now consider the state of play in the Colombian jurisdiction as to the interaction between criminalization, leniency and actual enforcement.

18. Law 1340 of 2009 introduced the Colombian leniency program into Competition Protection Regime. The program was regulated by the Decree 1523 of 2015. It offers full or partial leniency to natural or legal persons who contribute to the detection and repression of anti-competitive agreements or other restrictive practices in which they acknowledge participation or contribution as market agents or facilitators. It is important to note that the instigator of an anti-competitive agreement cannot be a beneficiary of the leniency program, and that leniency is conditioned to the provision of useful evidence of the existence, operation, scope, location, period and participants of the anticompetitive behavior. The benefits for market agents and facilitators include: to the applicant that is first in order the total exoneration of the fine to be imposed, to the second applicant a reduction between the 30-50% of the sanction depending on the utility of the information and evidence provided, to the third and the rest of the applicants, if that were the case, a reduction up to 25% of the sanction also depending on the utility of the information and evidence provided.

19. According to the law, the usefulness of the evidence and information provided by the applicants to the investigation shall be evaluated altogether with the evidence that is (i) already available to the SIC and (ii) the information provided by other applicants. Also, the degree of usefulness will depend as well of the stage of the procedure in which it is provided.

20. Our administrative leniency program does not grant automatic immunity from criminal prosecution when it comes to the execution of anti-competitive behaviors in public procurement. It does however allow the reduction of the criminal sentence as follows: *"reduction of the penalty by one third, 40% of the fine to be imposed and a disqualification from contracting with state entities for five (5) years".* It also doesn't have an effect on civil liability nor in individual tort actions or class actions.

21. Furthermore, as anyone can be prosecuted for the anti-competitive agreements in public procurement crime, regardless of their qualification, role in the conduct or place in the company, there is no limitation to prosecution, not even to employees when a company received immunity in the administrative procedure.

[8] OECD (2020), "Criminalization of cartels and bid rigging conspiracies: a focus on custodial sentences", Background note by the Secretariat, OECD, Paris, pp. 24, https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf

22. As noted in paragraph 4, there have been very few successful applications to the leniency program for bid-rigging and other anti-competitive behaviors in public procurement, as opposed to the number of applications for other violations to competition provisions which do not have a criminal equivalent. In the first cases they have been either withdrawn by the applicants or rejected by the authority. Our jurisdiction is part of the important number of jurisdictions worldwide that face a lack of robust criminal enforcement with imprisonment imposed in very few cases. As a matter of a fact, at this moment we have only one conviction by virtue of a plea-agreement (Rad. 11001-6099-087-2018-0028 of September 19, 2019, Criminal Court Fifty-five of the Circuit with knowledge function of Bogotá) and one sense of the ruling of an ongoing criminal procedure against 16 individuals belonging to a criminal enterprise in charge of defrauding the State through bid rigging schemes. It should be noted that none of the abovementioned involved leniency applications in administrative instances.

5. Final remark

23. Colombia's state of play as to the criminalization of cartels and bid rigging conspiracies raises the debate of whether the introduction of the criminal offense, pursued by a different authority other than the competition agency actually debilitates or enhances the effectiveness of the administrative leniency program. Also, it poses a difficult question regarding the degree to which the criminalization of the antitrust offense actually prevents or reduces future crimes. The fact that the number of investigations conducted by the SIC for anti-competitive agreements in public procurement has increased over the years, bets against the expected deterrent effect of the custodial sentence prescribed by the law.

Sources

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