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Introduction

Cartel formation is a surprisingly persistent economic practice around the world. The temptation to manipulate the conditions of the game in favor of a few is particularly enticing when demand is weak and the product in question is an undifferentiated good. Some notable cartels have managed to remain intact for up to a decade before being discovered, whilst some may never see the light of day at all.

When cartels are discovered or investigated, actions to deter or repair the damages caused to consumers and the economy vary between jurisdictions and depend on the current legal framework in each. To ensure that the principle of proportionality is applied, some jurisdictions set a maximum amount for fines and consider the economic capacity of the sanctioned company when determining penalties. However, in some cases, the fines imposed by the authority appear not to be sufficient to deter collusive behavior. As we will see below, despite recent reforms to Mexico's Federal Economic Competition Law (LFCE), three problems remain in Mexican competition law: (I) Fines seem to be lower than gains from collusion; (ii) there is an evident lack of a robust damage compensation system; and (iii) economic criteria still needs to be implemented in the determination of fines.

Antitrust Legislation and the Impact on Cases

In Mexico, antitrust matters are governed mainly by Article 28 of the Political Constitution of the United Mexican States (the Constitution), the Federal Economic Competition Law (the Competition Law), and the Regulatory Provisions contained in said law (the Regulations).[2] This article presents two recent cases that have drawn widespread attention due to the magnitude of the imposed penalties, mainly because of the applicable regulatory framework in each case.

In the first case, Mexico's antitrust watchdog Cofece, in 2021, imposed fines totaling 35 million pesos US$1.75 million) on seven international banks and traders accused of market manipulation and collusion in the government bond market dating back about a decade.[3]

Cofece found evidence that between 2010 and 2013, 7 banks and 11 traders entered into 142 illegal agreements to sell or buy bonds at a certain price, or not to commercialize certain government debt papers. Of the 142 agreements reviewed, 103 had price manipulation purposes, 21 included a non-commercialization or acquisition condition, while the others (18) had the goal and effect of both manipulating prices and establishing the obligation not to commercialize or acquire certain government bond papers. In this case, the Commission makes the distinction between two types of arrangements: materialized arrangements and non-materialized arrangements. Materialized arrangements were defined as those in which the Commission was able to identify the amount of financial assets involved and the price modification resulting from the agreements.

Regarding non-materialized arrangements, the Commission considered that the damage caused by them was at least equal to the average of the estimated damages for agreements that did materialize. This approach, however, fails to follow best international practices for the quantification of damages – for instance, those holding that the criteria used

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[2] Pursuant to the Competition Law, cartel activities are categorized as absolute monopolistic practices, and include: all types of contracts or agreements, arrangements, or combinations between competitors that have as their purpose or effect price fixing, restricting the production or distribution of products, allocating segments of a particular market, and bid rigging; or the exchange of information among competitors, with any of the above-mentioned purposes or effects.

[3] https://www.reuters.com/article/mexico-banks-idUSL1N2K02OA.

must be clear enough to allow replicability[4]– and presents several deficiencies. Specifically, since the analysis is unable to pinpoint the bonds involved, the Commission: (1) did not prove that the collusive agreement had materialized, so it could not confirm that an overprice or volume loss existed; and (2) the Commission was unable to make a legitimate comparison between the after effect and the hypothetical outcome absent the settlement. Therefore, the Commission lacks the necessary elements to identify an adequate counterfactual that simulates a competitive situation. In this case, the issue can be solved through the use of more sophisticated techniques, such as theoretical IO models that, despite their complexity, are generally less intensive in terms of data but require strong assumptions for their correct implementation.[5]

While the estimation of damages shows some shortcomings for non-materialized arrangements and raises questions about the validity of the methods applied to calculate damages Cofece decided to apply the maximum fine allowed by law.

In this case, considering the period over which the collusive practice was committed, the fines corresponded to the old Federal Economic Competition Law (LFCE) of 2006, where the maximum sanction was equal to 1.5 million times the minimum wage of Mexico City (SMGVDF) for the year when the monopolistic practice ceased. Following these considerations, the Commission imposed fines for a total of 35.075 million Mexican pesos (USD$1.75 million) against Barclays Bank, Deutsche Bank, Santander, Banamex, Bank of America, BBVA, J.P. Morgan, and 11 natural persons (traders). However, compared to the estimated total damage, the fines handed out were equal to just 4 percent of the potential penalties the banks could have received and fall well short of the US$20.7 million that the Mexican subsidiaries of Barclays and J.P. Morgan paid in United States in 2015 over their collusive practices in the Mexican bond market.[6]

Foreign penalties derived from this case underline the fact that the Mexican watchdog sets fines well below the level that could have meant a real punishment for these companies, as current legislation establishes.

In the second case, in 2021 Cofece determined that 4 companies and 21 natural persons had acted jointly in order to restrict the supply of medicines by fixing, manipulating, and increasing prices. The conducts caused damages to the market estimated at 2.359 billion Mexican pesos (USD$106.226 million) due to the harm caused to the population by affecting health services and household income.[7]

In this case, the sanctioned conducts were: fixing, raising, concentrating or manipulating the sale price of certain drugs; manipulating the price of medicines through the approval of limited discounts for certain products; coordinated schemes not to distribute or commercialize medicines within the national territory on certain days of the year; restricting the amount of drugs allowed to be distributed and placed in the market; dividing or assigning Points of Sale;; increasing by 3.66% the prices charged to laboratories that limited the conditions of their medications, reducing profit margins for distributors, and finally, increasing the price in a coordinated and staggered manner in order to "standardize the discount to be applied", aiming to reach homogeneous prices for various drugs. These anticompetitive practices had an impact on the distribution and commercialization of medicines, creating supply restrictions in the retail channel and leading to further price manipulation over a ten-year period, from June 2006 to the end of December 2016.

Regarding the calculation of damages, it is difficult to evaluate the elements considered by the Commission to estimate the harm due to the vast amount of information that is censored in

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[4] European Commission or FTC guidelines stipulate these practices and highlight that the choice of model or technique will usually depend on the specifics of the case and the data which is available.

[5] Oxera (2009). *Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission*. Available at https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

[6] https://www.bloomberg.com/news/articles/2021-01-24/seven-big-banks-escape-with-minor-fines-in-mexico-antitrust-case.

[7] https://www.cofece.mx/wp-content/uploads/2021/08/COFECE-022-2021ENG.pdf.

the publicly available resolution of the case.[8] Although it is true that there are sensitive data that ought to be hidden for privacy reasons, information such as the methodologies used to calculate damages should be made public. Where chosen methodologies are not available or illegible, the opportunity for further analysis is lost and, consequently, the discussion about improvements in the sanctioning processes suffer.

As for the period where the infringement took place, the Commission decided to indict pursue the sanction under the Federal Economic Competition Law of 2011 and charged a total of $903.479 billion Mexican pesos (USD$40.684 million). These fines are the highest possible when considering the economic capacity of the sanctioned agents, as well as the competition law in force at the time the transgression occurred.

Before 2006, the LFCE established under Article 35 that fines in cases of collusion would amount to up to 1.5 million (1,500,000) times the current minimum wage of in Mexico City. As of 2011, the article was amended and stated that the fine for having incurred in an absolute monopolistic practice will reach up to 10% of the economic agent's income, regardless of the criminal liability incurred.

Notwithstanding the positive impact the 2006 reforms to the LFCE had on the enforcement of competition policy in Mexico, the Commission still lacks the policy instruments to make competition enforcement more efficient, such as the adequate setting of maximum amounts for fines or setting up an appropriate system of damage compensation, such as those used by the European Commission or FTC.

In accordance with international best practices[9], there are two boundaries that need to be considered when determining a fine. In the Upper boundary, penalties must not be so high as to harm the company in such a way that it endangers its viability, and therefore competition in the market. The lower bound must be harsh enough to dissuade further anticompetitive behavior. In cases where the companies involved might have a lax financial situation and keeping in mind the low-intensity enforcement of punishments, behavior infringements seem to be the result of a cost-benefit analysis by companies, where the payable fine – if the conduct is discovered- is compared to the expected gains from collusion. Thus, a consequence of capped fines is that, by not considering the effective damages when estimating the fine, the mechanism does not seem to dissuade more powerful economic agents from colluding. Additionally, in terms of criminal penalties, so far there has been no evidence of actions against those who carry out these practices. Although the Federal Penal Code provides for the possibility of criminal sanctions, the Investigative Authority at Cofece has been very careful regarding the matters referred to the Public Ministry and has made it clear that not all cases of collusion will lead to a complaint. Currently, the only two cases where a criminal justice procedure has been carried out were in 2017, in cases of collusion in the health sector[10,11]. The criminal investigation is still ongoing, which shows that at least in Mexico, these tools do not seem to be the most effective way to deter collusive behavior.

Conclusion

Although it is important that current level of fines in Mexico increase as a means of improving the enforcement of competition law, it is also fundamental to develop a robust system of damage compensation for antitrust violations, as well as defining clear and solid guidelines that set the criteria on how these fines should be calculated. As we describe above, had the regulation been the same in the bank case as in the pharmaceutical case, the fines imposed would have been harsher. Furthermore, despite the methodological differences, in both cases the damages were much greater than the

[8] In contrast, in cases where the information required to measure damages comes from both, public and private sources, the methodology used by the authority is available.

[9] See "Quantification of Harm to Competition by National Courts and Competition Agencies" available at https://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf.

[10] https://www.cofece.mx/solicita-cofece-accion-penal-contra-3-personas-que-de-acuerdo-a-sus-investigaciones-se-coludieron-en-la-venta-de-bienes-en-el-sector-salud/.

[11] https://www.cofece.mx/querella-por-posible-colusion-en-ventas-a-sector-salud/.

sanctions, showing that setting fines for big players might not really be a punishment but rather a reflection of a cost–benefit analysis where the penalty is meaningless compared to the reward for colluding.

Finally, it is important we consider that there are structural factors that influence companies' and peoples' incentives to collude. For example, improving the investigative capacity of the Mexican Competition Commission would increase the probability of detecting infringements. By the same token, increasing the efficiency of the legal system to collect and impose fines, affects the probability of payment in a positive way. Thus, Mexican specialized regulators should start applying more rigorous approaches based on economic theory when quantifying damages to better capture reality instead of using spontaneous methods far removed from international best practices. These solutions will help companies, regulators, and judges to navigate the complexity and adjust to new challenges in Mexico's competition law environment.