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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Director Disqualification and Bidder Exclusion – Note by Mexico

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This document reproduces a written contribution from Mexico submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm

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Introduction

1. The Federal Economic Competition Law (LFCE) provides that the purpose of the Mexican Federal Economic Competition Commission (COFECE or Commission) is guaranteeing free market access and economic competition, as well as preventing, investigating and fighting monopolies, monopolistic practices, concentrations and other restrictions to the efficient functioning of markets.

2. To meet this purpose, as it is established in article 127 of the LFCE, COFECE may impose sanctions to i) economic agents¹ which have engaged or are engaging in anticompetitive conducts;² to those that have participated directly, on behalf or by order of other economic agents in these conducts, and to economic agents that have contributed, fostered, induced or participated in the execution of an anticompetitive conduct; ii) economic agents breaching or non-complying with conditions of COFECE's resolutions or any other order; iii) economic agents rendering false statements or submitting false information before COFECE, and iv) economic agents for failing to comply with regulation established for essential facilities or that do not obey the order to eliminate a barrier to competition.

3. These sanctions, depending on the infringement committed, include the possibility of:

- ordering: (a) the suppression or correction of the illegal conduct; (b) divestiture of an unlawful concentration; and (c) measures to regulate essential inputs;
- imposing fines of up to 10% of the economic agent's annual income; and
- disqualifying those who participate directly or indirectly in monopolistic practices or unlawful concentrations on behalf of a legal person (company).

4. Additionally, the Federal Criminal Code provides sanctions from 5 to 10 years of prison for those who order or participate in an absolute monopolistic practice set forth in the LFCE. These sanctions are of criminal nature and are enforced by the Attorney General Office (FGR).

5. This contribution will focus on the sanction of disqualification of directors, which is described in section one of the document. The second section is dedicated to describing how bidders banning has been implemented by the Ministry of Public Administration (SFP), following a decision of the Commission and through cooperation mechanisms between both authorities.

¹ Economic agents are defined by the Competition Law as any natural or legal person, either for profit or non-profit, including 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. All economic agents are subject to this Law.

² Article 52 of the LFCE prohibits anticompetitive conducts such as monopolies, monopolistic practices, unlawful concentrations, and the barriers that hinder, harm, impede or condition free market access or competition in production, processing, distribution or commercialization of goods or services.

1. Disqualification of directors

6. Among sanctions set forth in article 127 of the LFCE, section X establishes the disqualification from serving as advisors, administrators, directors, managers, executives, agents, representatives or proxies in a company for up to 5 years and fines up to 19.24 million Mexican pesos³ for anyone who directly or indirectly participates in monopolistic practices or unlawful concentrations, on behalf or by order of companies.

7. The sanction of disqualification is independent of the fine imposed on natural persons for their participation in the illegal conduct and both can be imposed at the same time. In this regard, the Board of the COFECE, in the exercise of its powers, must determine the appropriateness of imposing the sanction of disqualification, as well as establish and motivate the parameters of its application, respecting the maximum period of 5 years set by the LFCE.

8. The LFCE does not limit the markets with respect to which the sanction of disqualification can be imposed, the only requirement is to prove that the natural person acted on behalf of or by order of the corresponding companies in the commission of absolute monopolistic practices (cartels) or relative monopolistic practices (abuse of dominance), and unlawful concentrations.

9. This type of sanction was imposed by COFECE for the first time in 2021, in file IO-001-2016, as explained below.

1.1. Collusion in the market for the distribution of medicines⁴

10. In 2021, the Board of COFECE sanctioned the *Casa Marzam*, *Casa Saba*, *Fármacos Nacionales*, *Nadro* and *Almacen de Drogas*, 21 natural persons who acted on behalf of these companies, and the Association of Distributors of Pharmaceutical Products of the Mexican Republic for their participation and/or collaboration in a collusion in the market for the distribution of medicines.

11. COFECE found that the illegal conducts affected the distribution (sale of distributors to retailers, such as pharmacies) and medicine commercialization (sale to the public), illegally imposed supply restrictions on the retail channel, and increased and manipulated the medicines prices. The foregoing harmed Mexican families, particularly those with lower income, who spend approximately 24 billion Mexican pesos on the purchase of prescription medicines, over-the-counter medicines and healing supplies. It is estimated that the sanctioned conducts caused a harm to the Mexicans' pockets of around 2.4 billion Mexican pesos.

12. Consequently, a fine of 917.65 million Mexican pesos was imposed and 10 executives from the sanctioned companies were disqualified from serving as advisors, administrators, directors, managers, executives, agents, representatives, or proxies of said companies for terms that range from 6 months to 4 years.

13. In its resolution, COFECE's Board determined in section "*K. IMPOSITION OF THE SANCTION OF DISQUALIFICATION*", that the necessary legal elements were met to impose

³ Equivalent to 200,000 times the "Unit of Measure and Update" (UMA for its initials in Spanish). In 2022, the value of the UMA is MXN 96.22 as published by the National Institute of Statistics and Geography (INEGI) at www.inegi.org.mx

⁴ The resolution of this file is available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V351/0/5523892.pdf>

disqualifications on those executives who participated in the proved cartel practices. To determine the terms for the disqualification of each executive, the Board considered the elements that characterized their participation in each of those practices. In particular, the Board considered:

- the degree of legal harm caused by the executives which participated in the accredited cartels practices;
- the existence of intent in their participation in the accredited conducts; and
- the duration of their participation in the accredited conducts.

14. Due to the assessment of the harm, intentionality, and time during which each executive took part in the different cartel conducts, that seriously affected a market particularly sensitive for Mexican families, the Board determined to impose this type of sanction for the first time, which was incorporated into the LFCE in 2014.

15. Although the sanction of disqualification may be appealed before the Judicial Power through an indirect amparo, this type of sanction is not subject to suspension. Therefore, executives are immediately obliged to comply with it until the Judicial Power issues a decision. The judiciary's ruling may nullify the disqualification, can end its term, or can confirm COFECE's disqualification.

2. Bidder exclusion

16. The Commission is not empowered to limit, or disqualify, the participation in public procurement processes of any economic agent which has been sanctioned or is currently under investigation for collusion by it. However, it has the attribution to establish coordination mechanisms with other authorities for the fulfilment of the LFCE's provisions.⁵

17. In 2019, COFECE signed a cooperation agreement with the SFP, the government authority responsible for defining, monitoring, and enforcing procurement and contracting rules in Mexico.⁶ In the agreement, it is established the commitment from both authorities to inform the counterpart when elements that could be subject to investigation or sanction by the other authority are identified. Through this cooperation, the administrative sanctions (fines) imposed by COFECE could be complemented with other mechanisms to deter collusion, such as the exclusion to participate in future public tenders, sanction imposed by the SFP, creating stronger incentives for companies to act in accordance with the law.

18. To date, COFECE has informed the SFP about bid rigging in public procurement and there is evidence that SFP has acted accordingly, banning economic agents from tendering processes, as it is explained below.

⁵ Article 12, section IV, of the LFCE.

⁶ The Collaboration Agreement between COFECE and the SFP is available in Spanish at: https://www.cofece.mx/wp-content/uploads/2019/08/Convenio_SFP_08_2019.pdf

2.1. Bid rigging in laboratory tests and blood banks⁷

19. In 2020 COFECE fined 11 companies and 14 natural persons for agreeing to and/or exchanging information for coordinating bids or abstaining from participating in tenders for the procurement of comprehensive services for laboratory tests and blood banks, convened by the two main social security institutions in Mexico, the Mexican Social Security Institute (IMSS), and the Institute for Social Security and Services for State Workers (ISSSTE).

20. The Commission found that the economic agents established a non-aggression pact, avoiding competition and allocating the items of the tenders through intense communications via email and phone calls. These conducts generated a damage to the treasury amounting at least 1.2 billion Mexican pesos due to the payment of overprices by IMSS and ISSSTE to the sanctioned companies. Consequently, the Board determined to fine the participants in the collusion with the maximum amounts established in the LFCE, which in this case were of 626.5 million Mexican pesos. Additionally, the Board determined to notify the case to the SFP, as well as to both IMSS and ISSSTE for the corresponding legal effects.⁸

21. In August 2022, the SFP published in the Federal Official Gazette⁹ that the economic agents were banned for seven years from participating directly or indirectly in contracting procedures, and from entering into contracts with any contracting public institution,¹⁰ especially in laboratory tests and blood banks. In its publication, the SFP stated that the economic agents segmented zones and fixed prices while bidding for 37 contracts for 469 million clinical analyses since 2016.

⁷ The resolution of this file is available in Spanish at: <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V332/3/5238535.pdf>

⁸ More information on COFECE's resolution see press release in English at: https://www.cofece.mx/wp-content/uploads/2020/08/COFECE-031-2020_ENG.pdf

⁹ More information on the SFP's administrative sanction see the Federal Official Gazette, available in Spanish at: <https://www.dof.gob.mx/index.php?year=2022&month=08&day=25&edicion=MAT#gsc.tab=0>

¹⁰ According to article 3, section VII, of the Federal Anticorruption Law in Public Procurement.