

**The fight against bid rigging in public procurement in Mexico: An
integral approach to tackle a continuous peril**

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1. Introduction

Public procurement is a key government activity and has an impact on the economy. Creating competitive processes for procurement, giving the adequate framework for government buying and avoiding collusion is in the best interest of governments and society.

In specific, collusion in public procurement, in the form of bid-rigging, is an ever-present peril which can be very harmful if it is not properly addressed by competition law provisions and government action. Cartels are the most harmful type of anticompetitive conduct, and this is emphasized in bid-rigging cases since the damage is inflicted to society in general and the public purse which is filled by peoples' taxes.

No jurisdiction is exempt from this threat. Fighting bid-rigging has been a priority for the Mexican Federal Competition Commission (Comisión Federal de Competencia Económica or COFECE) and both in its advocacy and enforcement functions, there is a constant effort to deter and punish bid-rigging in public procurement. These measures include: an active enforcement by COFECE; the use of different detection tools such as the Leniency Program, complimented by data screening; strong collaboration with different government entities in charge of public procurement to implement best practices; and a vigorous prosecution which includes administrative sanctions, criminal sanctions and private damage claims.

The purpose of this essay is to share the Mexican experience regarding bid-rigging, highlighting the landmark cases that have shaped COFECE's experience on this field. Additionally, this paper seeks to present the challenges that I believe COFECE will be facing in the upcoming years regarding bid-rigging in public

¹ Head of the Investigative Authority in the Mexican Federal Economic Competition Commission. The following opinions are expressed in a personal capacity and with the freedom that an academic discussion allows.

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procurement considering these can be of interest for other jurisdictions in their efforts.

First I will describe the reasons why public procurement is a priority within COFECE's activities. Then I will explain the main tools for detecting bid-rigging, and portray the Mexican experience in a landmark case in the health sector from bid-rigging in tenders of the Mexican Institute of Social Security (Instituto Mexicano del Seguro Social, IMSS). I will summarize the lessons learned in the field and the existing challenges and areas of opportunity for the upcoming years.

2. Public procurement markets are prone to bid-rigging

In Mexico, as in other countries, a large amount of resources are allocated to public procurement. The economic importance of public procurement is evident considering that the average expenditure in public procurement for OECD countries in 2013 was 13% of the GDP. In the case of Mexico, the spending destined to public procurement in 2015 was 6.1% of GDP, and represented 30% of the total public spending of the federal government.²

The large aggregate of public resources destined for government purchases is an attractive target for bid-rigging since cartelists may obtain supra-competitive profits from their illicit activities which can be difficult to detect. Commentators have conservatively calculated that collusion in biddings for public contracts can add between 20% and 30% to the cost of public contracting.³

On account of the inherent risk of bid-rigging in public procurement, some of COFECE's investigations related to public procurement found that tenders, mainly in the health products industry, have been a constant target of price fixing cartels.⁴ Considering the nature of the market as a transversal activity of great relevance for

² Calculations with information from the 2015 public spending accounts (Tomo II Gobierno Federal, Información Presupuestaria por Capítulo de Gasto): 2000 materiales y suministro; 3000 servicios generales; 4000 Transferencias, asignaciones, subsidios y otras ayudas -para este último capítulo sólo se consideraron los subcapítulos: 4100 Transferencias internas y asignaciones al sector público, 4300 Subsidios y Subvenciones, y 4600 Transferencias a fideicomisos, mandatos y otros análogos-; 5000 Bienes muebles, inmuebles e intangibles y 6000 Inversión pública).

³ Froeb, Koyak and Werden, "What is the effect of bid-rigging on prices?", cited in n3. of Richard Kelly "Tackling Bid Rigging in Public Procurement – Another Means of Cutting Public Expenditure During the Recession" *Hibernian Law Journal*, Vol. 9, 2010.

⁴ An example are the COFECE's investigations related to bid-rigging in the health products industry: IO-003-2006 (Insulin), DE-024-2013 (latex products), DE-024-2013-I (latex gloves), IO-005-2016 (tooth brushes), DE-011-2016 (blood banks and laboratory services), and DE-020-2014 (polythene materials).

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different economic sectors, the Commission realized the importance of strengthening its work in public procurement and making it a priority, therefore stating it in its strategic plan for the period 2014-2017.⁵

Collusion in general, and bid-rigging specifically, can be bolstered by structural factors, such as having only a small number of participants in the bid, the existence of channels (and opportunities) of communication between competitors, and a more than necessary level of transparency in the market.⁶ Considering the aforementioned factors, the necessity of having an optimal design of the procurement procedures, which favors competitive biddings and minimizes the structural anticompetitive factors becomes clear. A good example of how a public institution can benefit from a procompetitive design of its procurement processes, is found when analyzing how IMSS saved hundreds of millions by modifying its procurement practices and centralizing purchases.⁷

Additional structural factors that facilitate collusive agreements are closely related to the specific market of products or services required by the government. For example: when there are barriers or limitations for new companies to entry that market, when the public purchaser's demand becomes predictable (e.g. only seasonal purchases) and the biddings are repetitive, there are few or no substitutes of the products or services purchased, and when there is little or no technological change of these products or services.⁸ These elements further facilitate the chances of private companies deciding the winners beforehand, and monitor the results of their illicit agreements.⁹

⁵ COFECE, "Plan estratégico 2014-2017". Available at https://www.cofece.mx/cofece/attachments/article/37/PE_2014-2017_act_2015.pdf

⁶ Fiorina Carlin and Joost Hans. "Bid-rigging Demystified", The in-house perspective, Volume 2, Issue 1. January 2006.

⁷ During 2016 the Ministry of Public Service (SFP by its Spanish acronym) reported that the savings due to the public procurement strategy were in an amount of 1 billion MXN. "4^{to} Informe de labores, Secretaría de la Función Pública". Available at: <http://www.gob.mx/sfp/documentos/4to-informe-de-labores-de-la-sfp-2015-2016>

⁸ OECD, "Guidelines for fighting bid rigging in public procurement", 2009. Available at: <https://www.oecd.org/competition/cartels/42851044.pdf>

⁹ Kara L. Haberbusch "Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime", Public Contract Law Journal, Vol. 30, Issue 1, 2000.

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Box 1. The role of corruption

Corruption is another element that must be considered and accounted for in the efforts to fight bid-rigging in public procurement, despite not being strictly within the scope of work of competition authorities.

Both competition and anti-corruption provisions serve as a common objective to fight market failures to ensure that economic agents can compete under fair conditions with benefits for the consumers.¹⁰ There is an inverse relation between competition and corruption, as the presence of corruption directly affects the competition process in the markets. Corruption has a negative influence in the correct functioning of governments, and creates inefficiencies in the markets.

Cooperation between competition and anti-corruption authorities is necessary as synergies can be reached in common investigations with potential sanctions that would improve deterrence in both areas.

On the other hand, a factor that should benefit public buyers, and is often unexploited, is adopting a consolidated purchase strategy across different government agencies to achieve more purchasing volume, resulting in buying power that can be used as leverage to obtain lower prices or better conditions.¹¹ It is important to notice that consolidating purchases might not be applicable in all cases, as there are market considerations that may restrict this option. Additionally, these type of purchases present challenges regarding the inclusion of small and medium enterprises, and the analysis of agreements between producers and distributors. Still, it remains as a good option within a larger strategy of efficient public procurement.

As previously mentioned, both the design of the procurement processes and the structural factors can facilitate collusion, but also due to the high amount of resources managed and the possibility to gain supra competitive profits, the incentive to collude is constant. Hence, the natural trend to incline towards bid-rigging makes public procurement one of the main challenges for COFECE and for

¹⁰ Chên, M., Linkages between corruption and competition, Transparency International, 2011. Available at:

https://www.transparency.org/files/content/corruptionqas/Linkages_between_corruption_and_competition_2016.pdf

¹¹ OECD, "Fighting Bid Rigging in Public Procurement in Mexico" 2011. Available at: <http://www.oecd.org/competition/abuse/49390114.pdf>

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public institutions with public procurement activities.

Competition authorities can assist public purchasers to fulfill their obligation towards the public in general to acquire the best value for the tax-payers' money, considering the difficulty to uncover bid-rigging cartels. Thus, an integral approach to fight bid-rigging cartels is necessary, including efficient detection and investigation, high penalties (administrative fines and criminal sanctions), possibility of filing damage claims, and implementation of best practices in the design of biddings to avoid the most common mistakes in tender-design that facilitate collusion.¹² These components of the integral approach to combat bid-rigging, and the Mexican experience will be commented with more detail in the following sections of the essay.

3. Bid-rigging detection: Experience in Mexico

I. Leniency and Immunity Program

One of the most important moments in COFECE's fight against cartels was the adoption of the Leniency and Immunity Program back in 2006.¹³ COFECE's leniency program allows any person or company that has participated or is participating in unlawful agreements with its competitors, to receive a total or partial reduction of the sanctions that would apply, in exchange for its cooperation with the authority.

Leniency programs have proven their value and success around the globe. Thus, since the first program in the United States in 1978 and its revised leniency policy in 1993,¹⁴ other jurisdictions have followed to incorporate this mechanism as one of the main tools to detect cartels. The general acceptance of leniency programs can be appreciated in the records of the International Competition Network (ICN) which

¹² Although there is no undisputed definition of the optimal approach of fines, penalties and redress, authors have explained the benefits of combining different methods as in: G. Werden and M. Simon, "Why price fixers should go to prison", *The Antitrust Bulletin*, Winter 1987; R. Posner, "Antitrust Law: An Economic Perspective" 1976; Wouter Wils, "Antitrust Compliance Programmes & Optimal Antitrust Enforcement", *Journal of Antitrust Enforcement*, April 2013.

¹³ Since the implementation of the leniency program, COFECE has received 113 applications as of September 2016, and received 52 of these applications in the period from January 2014 to September 2016. COFECE, "10 years since the implementation of the Federal Economic Competition Commission's Leniency Program: what has been the impact? Available at: <https://www.cofece.mx/cofece/attachments/article/621/Impacto10AnosProgramaInmunidadENGLISH.pdf>

¹⁴ US Department of Justice, "Frequently Asked Questions about the Antitrust Division's Leniency Program and model Leniency Letters" published November, 2008, updated January, 2017. Available at: <https://www.justice.gov/atr/page/file/926521/download>

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show that at least 75 jurisdictions have implemented leniency programs among their tools to fight illegal price fixing agreements.¹⁵

The benefits of the program consist in discouraging, detecting and sanctioning cartels in a more efficient manner. These benefits translate in more investigations, lowering the costs of investigative procedures and in gaining access to information that otherwise would be difficult to obtain and the deterrent effect towards the creation of new cartels.

In Mexico, the Leniency Program was consolidated in 2009, the year in which the former Federal Competition Commission (CFC, for its acronym in Spanish) successfully concluded the first investigation in which an economic agent applied to the Leniency Program.¹⁶ Following the initial cases of successful investigations based on cooperation with leniency applicants, in 2015 further improvements were implemented to the program by publishing the Leniency Guidelines. These Guidelines sought to provide economic agents¹⁷ certainty and transparency regarding the proceedings undertaken by the Investigative Authority.¹⁸

The sole existence of a program with clear rules is not enough by itself, but the success of a Leniency Program is directly related with the competition authorities' capacity to enforce competition law and successfully apply penalties to infringers. Otherwise, the incentive to seek leniency will be low, considering scenarios where the probability of being caught is low, or where the amount of the fines is not sufficient to make the anticompetitive conduct unprofitable.¹⁹

For example, in Mexico harder penalties for cartels have been established in the legislation,²⁰ both of administrative and criminal nature. The former consist of fines

¹⁵ Information according to the ICN records on Leniency materials per country, available at:

<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx>

¹⁶ The first case solved in which an economic agent applied to the benefits of the Leniency Program was in the provision of professional services within the real estate market in the Chapala Lake; it was reported in 2007. Supra n.13. COFECE, "10 years since the implementation of the Federal Economic Competition Commission's Leniency Program: what has been the impact?"

¹⁷ Article 3, Section I of the Federal Law of Economic Competition (FLEC) defines an 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.

¹⁸ "COFECE Publishes New Monopolistic Practices Guidelines". Available at: <http://www.cofece.mx/cofece/ingles/index.php/prensa/historico-de-noticias/cofece-publishes-new-monopolistic-practices-guidelines>

¹⁹ Supra n. 11. Kara L. Haberbush "Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime"

²⁰ Mainly the reforms to the previous Federal Law of Economic Competition (FLEC) in 2006 and 2011, and the creation of the new FLEC

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of up to 10% of the company's income, maximum fines of around 630,000 USD for facilitators, and sanctions for individuals, which consist in maximum fines of around 702,000 USD and disqualification orders for up to 5 years. The latter consists of criminal fines of up to 10,000 fine days, and prison from 5 of up to 10 years.

Regarding the application of the Leniency Program in the context of a bid-rigging cartel, there have not been many investigations in Mexico started by whistleblowers seeking leniency. However, experience shows that investigations have been strengthened with the existence of applications to the Leniency Program.

II. Screening

Despite the considerable success of leniency, there will always be cartels that remain undetected by the Leniency Program. Undetected collusion could be the worst type of collusion, since it is still an on-going cartel that may still be harming consumers.²¹

Competition authorities have started to search for alternative and complementary approaches to detect and investigate cartels ex-officio. This is very important and should be given priority, especially in agencies and jurisdictions where cartel enforcement has over relied on leniency applications for detection. Some authors have even suggested that this over-reliance on leniency can undermine the credible threat of detection by other means (e.g. ex-officio investigations).²² There is great value of other approaches to cartel detection and for that reason authorities need to work methods to start ex-officio investigations as well.

There are many routes and efforts being explored. Some jurisdictions are working to promote complaints, extracting information from other cases, working with procurement officials and other enforcement agencies, even some countries are

and reforms to the Federal Criminal Code in 2013.

²¹ Carlos Mena Labarthe "Mexican Experience in Screens for Bid-Rigging" CPI, June 2015. Available at: <https://www.competitionpolicyinternational.com/assets/Cartel-Column-June-New-Format-Full.pdf>

²² Stephan, Andreas and Nikpay, Ali, "Leniency Theory and Complex Realities" (December 12, 2014). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537470

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paying whistle-blowers for information.²³ One interesting method that has been advocated by many economists as well as some officers and legal consultants has been the use of empirical methods commonly known as screens. Screening refers to the process by means of which statistical tests, called screens, are carried out to identify industries where the existence of a cartel is more likely, a possible collusion or manipulation in a market and, if the case may be, when did the possible collusion take place and who is involved.

As of 2013, at least 26 different jurisdictions had reported the use of different screening tools in their competition law enforcement activities.²⁴ It must be noted that the degree of sophistication of the analysis changes from one jurisdiction to another, as in some it might just refer to basic screening of public information (e.g. from the media) while in other cases there are institutional programs of data screening applicable to all public procurement activities.²⁵

In COFECE's experience, screening stands out as an efficient tool to complement our Leniency Program in cartel detection. Nearly 30% of the total of COFECE's investigations related to bid-rigging started because of this tool, as compared to more than 57% that started due to official complaints.²⁶

Screens are carried out by economists and highly skilled staff members throughout the different divisions of COFECE's Investigative Authority. Mainly they are carried out by the Market Intelligence Unit and the Anti Cartel Division. The Market Intelligence Unit helps detect the possible existence of cartels throughout screening before the investigation is carried out. In addition, after the conduct is detected, screening can be used as an investigation tool by the Anti Cartel Division, which analyses different variables in several industries depending on the case, and can use its findings to prove that the collusion occurred.

The Investigative Authority handles entirely the screening process, it neither

²³ As the case of the CMA in the UK, which offers rewards of up to 100,000 GBP, with the discretion of the CMA to calculate the reward based on the value of the information, the harm of the activity, and the risk and effort taken by the whistleblower. Information available at: <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>

²⁴ Based on the contributions of different countries to the OECD round table "Ex officio cartel investigations and the use of screens to detect cartels". Available at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>

²⁵ As the case of the Bid Rigging Indicator Analysis System (BRIAS) in Korea.

²⁶ Information retrieved from COFECE's Investigative Authority own data base of investigations and complaints received.

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requests external services from public nor private organisms to carry out the screenings or to obtain the necessary information, as the main data sources are public. However, additional relevant information can be requested to the economic agents involved or to federal and local agencies, regarding ongoing investigations. When investigating bid rigging in public procurement, the information necessary to run a screen is sometimes provided by cartel members in exchange for leniency along with information obtained from other public sources and provided by government agencies.

Since 2006 when the leniency program was introduced, it has been one of the top priorities of the Cartel Investigations Division. Accordingly, we believe in advancing both efforts which are complimentary, and should not be unrelated or contraries.

As experience shows, screens have flagged unusual patterns in a variety of countries and industries, and helped in the detection of cartels. These empirical methods have their pros and cons. There have been great success stories, as well as some failures which imply important waste of resources and never ending work to find a needle in a haystack where ultimately there is no needle.

An enlightening example is how the Korean Fair Trade Commission (KFTC) implemented a systematic market screening as part of its anti-cartel enforcement tools. This screening program, known as the Bid Rigging Indicator Analysis System (BRIAS), automatically and statistically analyses bid rigging indicators based on the data on public tenders provided to KFTC by public institutions. To implement the BRIAS, it was key that Korean public institutions adopted on-line bidding platforms, that made it possible for the system to automatically process the information, generating indicators of the likelihood of bid-rigging in each case, and flagging cases for further analysis by the KFTC staff.²⁷

Another case that exemplifies the benefits of screening, although not related to public procurement, was the case in 2008 when screening was applied to

²⁷ An average of 80 red flags per month are issued to the KFTC staff to further investigate potential cases of bid-rigging. OECD, Note by Korea on the "Roundtable on Changes in Institutional Design of Competition Authorities". Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)98&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)98&doclanguage=en), and OECD round table "Ex officio cartel investigations and the use of screens to detect cartels", available at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>

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determine if the US dollar one month London Interbank Offered Rate (LIBOR) was being manipulated.²⁸ The screening process consisted of a comparison of the LIBOR rates with other short-term borrowing rates that were considered not manipulated.²⁹ After initial results that pointed towards a potential manipulation, the likelihood of a large number of banks submitting identical LIBOR quotes absent manipulation was analyzed. From the results of the analysis, it was possible to determine the manipulation of LIBOR by banks, to obtain an unfair advantage in their trading position, and to avoid the public perception of the banks being in risk of failure during the financial crisis.³⁰ Because of the LIBOR manipulating scandal, several banks pleaded guilty to criminal charges and agreed to pay multibillion dollar fines to the US Department of Justice (DOJ) and other regulators.³¹

An additional success story of screening outside the public procurement sector, was conducted by the Brazilian Competition Authority (CADE). CADE used screening tools to select from hundreds of complaints of alleged gasoline cartels. The use of screens in cartel complaints related to the gasoline market allowed CADE to file a massive amount of cases that were underway for several years without sufficient grounds to open an investigation, and accordingly it was possible for CADE to use its resources in other relevant cases.³²

Evidence shows that leniency has been the most useful tool for cartel detection and in addition screening has been fundamental in the Mexican experience to detect and investigate bid-rigging in public procurement; this appears to be a trend as various countries are following the same path for cartel detection.

- **The IMSS case and the screening experience**

In 2006, the CFC started an investigation (file IO-003-2006) regarding a possible collusion of six pharmaceutical companies. After the investigation, CFC uncovered

²⁸ The screening analysis corresponded to the study by Abrantes-Metz, Kraten, Metz and Seow, and a series of Wall Street Journal articles, which raised flags of the potential LIBOR manipulation.

²⁹ Sharon E. Foster "LIBOR Manipulation and Antitrust Allegations", DePaul Business & Commercial Law Journal, Vol. 11, Issue 3 (Spring 2013).

³⁰ Idem

³¹ Business Insider, "Wall Street gets slammed with \$5.8 billion in fines for rate rigging". Available at: <http://www.businessinsider.com/libor-rigging-criminal-charges-and-fines-2015-5>

³² Idem

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that these companies coordinated their positions in public bids carried out by the IMSS with the intention to eliminate competition among them, which forced IMSS to pay higher prices for the treatments of its beneficiaries.

This specific investigation started thanks to cooperation with IMSS, as the bidding information was shared with the CFC and analyzed afterwards. The investigation focused on public tenders to purchase serums and human insulin carried out between 2002 and 2006. After analyzing the bids presented, the Commission detected that the bids followed patterns of similar bids and high prices resembling a possible collusion.

Because of a trustworthy relationship with IMSS, IMSS approached CFC to discuss “strange patterns” in the procurement processes of various generic drugs.³³ This relationship was built due to a previous case where the CFC sanctioned various companies for bid-rigging. Following that case, IMSS requested and received recommendations from the CFC about best practices in public procurement; accordingly changes in IMSS’ procurement practices were implemented, and thus the strange patterns were detected.

IMSS provided CFC with information regarding six years of procurement processes for twenty different medicines, which was too much information for the agency to handle. However, the CFC was having difficulties processing the information and did not know where to focus the investigation. Accordingly, it was decided to execute economic screens and to seek for possible collusions where these screens showed a pattern.

Mainly, the screens performed were based on improbable events as well as on control groups of scenarios with competition in the market. These criteria were consistent with theoretical models of cartels. The screens covered a period going from 2003 to 2007. In some of the observations it was extremely obvious the possibility of a cartel, especially in two groups of medicines: insulin and serum.

Furthermore, the observations concerning the improbability of events were

³³ Carlos Mena. Mexican Experience in Screens for Bid-Rigging. CPI Antitrust Chronicle. March 2012

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materialized within a context where the probability of cooperation between pharmaceutical companies was very likely. This context was directly related to the IMSS procurement design, which had features that created incentives among pharmaceutical companies to collude, considering that:³⁴

1. The bidding guidelines standardized the product (i.e. the product was homogeneous). This led to having only one relevant variable to differentiate between the products: the price, facilitating to achieve collusive agreements.
2. Frequent procurement processes allowed bidders to identify the dynamics and results thereof, with the purpose of verifying the compliance of the collusive agreement. In addition, this feature facilitates the distribution of winners by taking turns to win the tenders.
3. Contract allocation to diverse bidders, which permitted bidders to divide each contract, simplifying the distribution of collusive earnings. This inhibits competition, as it is possible for bidders to allocate the market between cartelists.
4. Information exchange among bidders, which led to the possibility to verify any variations in the agreed bids and thereafter elaborate mechanisms to punish cartel members in future bids.
5. Repeating bidding rules through time, which aid to the stability of the cartel, helping members agree or coordinate tenders.
6. Entry barriers which inhibited new bidders to take part in the auctions. This was the case when the tenders restricted the participation of international bidders. Therefore, a smaller number of participants could be part of the tenders, facilitating the stability of the cartel.

Specifically, the following patterns were identified by the Commission:

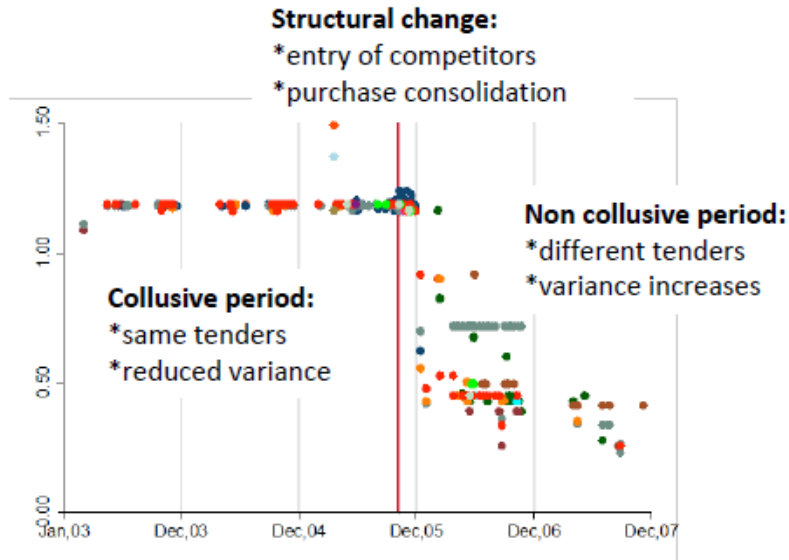
The annual average of the winning and losing bids (from 2003 to 2005) presented by cartel members were extremely similar between them and they changed with the entrance of a new winner or upon the consolidation of bids years later. The

³⁴ Idem

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average price was much higher during these years identified as the collusion period (before the entrance of a new competition and before consolidating purchases), sometimes 72% higher (see figure 1).

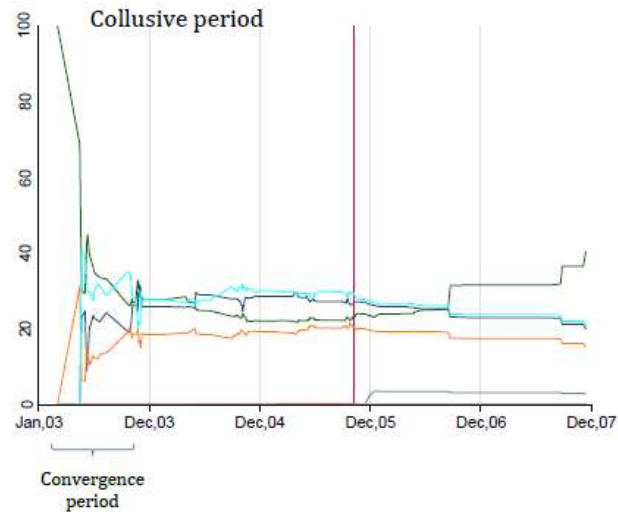
Figure 1. Medicine 1 average price 1



1. The prices of winning and losing bids were always the same. The only variations were in the identity of the winner, which after winning, kept participating with loser bids, waiting for their turn to win again (bid rotation).
2. The amount of the allocated contracts for each of the identified medicines was concentrated in the pharmaceutical companies involved in the cartel and, in some cases; the achieved portion for each of them is practically the same. Likewise, such participation rapidly converged in time, at the same level (see figure 2).

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Figure 2. Medicine 1, participation pattern 1



3. The six pharmaceutical companies involved in the cartel had high earning margins which allowed them to bid with more competitive offers. However, no attempts from the companies to compete were ever observed, despite awareness of the previous bids submitted by their competitors.

Additionally, during the investigation, evidence was found to confirm that there were communication channels that allowed coordination among competitors:

1. Top managers from the different pharmaceutical companies knew each other and attended the same meetings carried out by the public procurement commission for the national chamber of the pharmaceutical industry.
2. These top managers shared information and communicated by exchanging calls with an important volume and frequency especially in periods where several bids were open.

Top managers that represented the companies involved in the collusion coordinated prices to participate in the public auctions and took advantage of the

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inadequate design of the IMSS procurements as well as of the communication channels available among them.

Consequently, the Commission concluded that the behavioral pattern identified in the IMSS bids was not the result of an independent competitive conduct, in which each bidder had incentives to offer a best price to increase the probability to be awarded a contract. On the contrary, it revealed a coordinated behavior between pharmaceutical companies to increase their economic benefit by colluding through the fixing of tender bids and dividing the tender in detriment of the IMSS beneficiaries. The economic agents involved in this practice were found responsible, after the trial-like procedure was over, for participating in the collusion practice.

In consequence, the members of the cartel were ordered to stop the practice and were charged with a fine that totaled more than 7 million USD.³⁵ In this case, the CFC also sanctioned individuals who participated in the cartel representing the pharmaceutical companies. The CFC's resolution was challenged before the courts, and due to its relevance, it reached the Supreme Court of Justice. The Supreme Court determined the legality of CFC's resolution on April 8, 2015, which used as cornerstone evidence the economic analysis of public bids for serums and human insulin made by these six pharmaceutical companies in the public procurement processes.

The Supreme Court recognized the Commission's economic analysis as an indirect evidence to detect collusion cases and ruled that said economic analysis "was useful to evaluate if the conducts of competitors restrict free supply and demand operations in order for the price to reach the competitive equilibrium, or if the restrictions imposed by the companies with market power impeded the efficient operation of the market or maintain prices above the competition level, as was observed in the resolved files."³⁶

Finally, this case stands out because it was built mostly with indirect evidence and

³⁵ The amount of the fine was 151 Million MXN; exchange rate 21.5 MXN= 1USD

³⁶ Mexico, Plenum of the Federal Commission of Competition, File IO-003-2006 of March 11, 2006. Available at: <https://www.cofece.mx:4443/cfcre resoluciones/Docs/Asuntos%20Juridicos/V39/3/1371186.pdf>.

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the judicial system in Mexico did not have many precedents. The criteria established by the Supreme Court allows linking a series of facts and evidence in order prove the existence of a cartel.³⁷

The Court determined that it is possible to demonstrate with economic analysis not only that there is a clear pattern regarding the winning and losing bids, but also that prices that were offered in the bids maintained a certain similarity, whether they were the winner or loser bids.³⁸ These actions had no logic in a bid dynamic, in which an economic agent's main objective is to win. Due to the use of economic analysis as a means – recognized by the Courts – to prove the existence of a cartel, this case set a fundamental precedent for ulterior cartel investigations.

Up to this date, the IMSS case is enlightening regarding the importance of having a competitive market for public procurement. The damage caused by bid-rigging was of overprices of up to 57.6%, causing a loss of public resources that harmed society in general. In an ex post study conducted by Cofece, it was concluded that the money lost in cartel overprices could have been used to acquire 727 ambulances, 2,168 incubators, or 5 health clinics with space for 10 medical offices each.³⁹

4. Lessons learned can be replicated with large potential savings

As previously stated, the combination of factors such as the high risk of collusion in public procurement processes, its high impact in the price in detriment of the general public, the large size of the market comprising government expenditure, and its transversal impact, makes public procurement one of the priorities of the competition authorities in the world.

Competition authorities in Canada, Brazil, Korea, Singapore and Spain expressly mention public procurement among the areas where their efforts are emphasized. In the Mexican case, it is one of COFECE's priority areas, and it has also received

³⁷ Mexican Supreme Court of Justice, "No. Registro 168495, Jurisprudencia, XXVIII, Noviembre de 2008, Tesis: I.4o.A. J/74"

³⁸ Mexican Supreme Court of Justice, "Práctica Monopólica Absoluta en Licitaciones Públicas. Características que pueden evidenciarla, Tesis Jurisprudencial: 2a./J. 98/2015 (10a.)

³⁹ IMSS case analysis, available at: https://www.cofece.mx/cofece/images/Promocion/Historias/HISTORIA_IMSS_080415.pdf

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great attention from international organisms, as it is the case of the OECD.

In this section, the lessons learned in the different stages of the fight against bid-rigging in public procurement will be presented. From the advocacy efforts made by COFECE and the collaboration with international organizations to improve public procurement, to the additional achievements in the detection of cartels through screening, the criminalization of cartel conduct and the creation of damages claims.

I. Improvement in public procurement

- **COFECE's recommendations to promote competition in public procurement**

In April 2016 COFECE issued a document with recommendations directed to all public entities, with the objective of contributing to a more efficient public spending and obtaining better purchasing conditions in public procurement.⁴⁰ To achieve efficiency in procurement processes COFECE recommends entities to follow the principles of competition and open market.

The recommendations are organized based on the different phases of the procurement process, from the planning of the procurement needs, the design of the requirements and rules, the execution of the procurement mechanism (e.g. public tender). Finally, the document contains recommendations with transversal impact across all phases of the procurement process. The recommendations are accompanied with illustrative examples from COFECE's experience.

- **International collaboration**

Mexico has sought to improve its procurement practices and step up its fight against bid rigging in partnership with the OECD. COFECE agreed to collaborate to fight bid rigging by providing information in advocacy efforts to improve public procurement and to foster detection of bid-rigging, to continue with its enforcement

⁴⁰ The recommendations are available at: <https://www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/publica-cofece-recomendaciones-para-promover-la-competencia-en-contrataciones-publicas>

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activities.

The collaboration is focused in performing studies of the main characteristics of the supply for public procurement, strengthen the design of the public procurement processes, and analyze the existing contracting processes. the main purpose of this collaboration was reducing the risk of anticompetitive agreements.⁴¹ The OECD focused its efforts in evaluating the procurement procedures, and afterwards suggesting the implementation of a reference checklist that allows detecting collusion.⁴²

Because of this partnership, reviews of the procurement regulations and practices have been conducted in public health institutions, local state governments and state enterprises. The selection of these entities for the reviews reflects their importance to public procurement in terms of the large amounts of funds managed in their purchases. Below is a brief overview of the reviews and its findings:

- **Health institutions**

IMSS and the State's Employees' Social Security and Social Services Institute (Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado, ISSSTE in Spanish) provide nearly 45% of the health services in Mexico, and their public procurement activities represented 31% of the total federal public procurement in Mexico in 2016.⁴³ The IMSS recommendations issued in the report address opportunities for the institution to exercise buyer power, fight practices that may facilitate corruption, increase the use of competitive mechanisms, overhaul its market studies, and implement monitoring and information sharing with other agencies such as COFECE.⁴⁴

In the case of ISSSTE⁴⁵, the report portrays issues that restrict competition such as:

⁴¹ World Bank Group, "The Competition Policy. Advocacy Awards. Department for International Development, p. 58-59. 2014

⁴² OCDE "Combate a la colusión en los procedimientos de compras públicas en México: Informe del Secretariado sobre las reglas y prácticas de compras públicas del IMSS, p. 15. 2011

⁴³ Compranet. (Mexican public procurement system). In the case of CFE and PEMEX, the data does not consider public purchases not acquired through Compranet.

⁴⁴ Accessed 22 March 2017. Report available at: <http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurementinmexico2011.htm>

⁴⁵ Accessed 22 March 2017. Report available at: <http://www.oecd.org/mexico/mexicoissste2013.htm>

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preferential treatment in laws and procedures, limitations to foreign bidders' participation in tenders, the use of procurement procedures which are less competitive than public tenders, as well as the use of joint bids, split awards and sub-contracting.

On the other hand, a change of trend after the issuance of the reports can be observed, especially regarding consolidated purchases. The use of aggregated procurement in the last 3 years has allowed savings of 14,214 Million MXN, approximately 15% of IMSS' annual public procurement expenditure. Still, savings due to aggregated demand are not the only benefit, considering that efficiency and transparency were increased in the procurement procedures, which has brought more agility to the processes and incentivized the demand.

- **State Governments**

The State of Mexico is the largest of Mexico's 31 states in terms of the annual volume of goods and services purchased and one of the largest public buyers of goods and services in Mexico. Considering Mexico's national public procurement (the combination of public procurement at the federal and local level), Mexican states' procurement represents 22% of the total public spending in procurement.

Among the findings in the report, ⁴⁶ the existence of limits to foreign bidders' participation in tenders was highlighted; along with the use of procurement procedures which are less competitive than public tenders, certain disclosure requirements which may facilitate collusion, and with provisions which may also facilitate collusion such as mandatory clarification meetings, joint bids and split awards. Another major finding was the lack of aggregated procurement at the state level. Indeed, the study observed how states are not taking part in large scale acquisitions of goods (e.g. medical products), affecting the efficiency principle in their public procurement processes.

- **State enterprises**

In 2015, the review of the Federal Electricity Commission (Comisión Federal de

⁴⁶ Report available at: <http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurementinmexicogemreport--2012.htm>

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Electricidad, CFE) procurement practices was launched.⁴⁷ CFE is the second largest public entity in terms of procurement budget in Mexico, with over 300 purchasing units throughout the country. The report finds that the most important areas for improvement relate to how CFE procurement officials can design better purchasing strategies, collect and gather more and better information, and acquire an understanding of how collusion can be detected by identifying warning signs during the tender process.

The second review regarding state enterprises corresponds to Mexican Petroleums (Petroleos Mexicanos, PEMEX),⁴⁸ which is the largest public entity and state productive enterprise in Mexico and one of the largest oil companies in the world, with 150,000 employees and an annual budget in 2015 of about 570 billion MXN. Among the main observations in the report are that PEMEX does not have a separate department to conduct market analysis, that it uses many exceptions to open tender procedures and that the tools created for tracking procurement data do not identify red flags in relation to collusion. During 2015, more than 70%⁴⁹ of the procurement was through direct awards, and less than 25% of the processes were open tenders.

The study concluded that savings in PEMEX's procurement would generate a direct impact in the global profitability of the company, and would bring consistency between the objectives of the business and the public procurement objectives. Per the study, with the implementation of more competition, it will be possible to obtain indirect savings of up to 8.2% of the company's costs.

II. Screening has been implemented as an important tool for detection and pro-active enforcement.

Based on the Commission's experience and the IMSS case, I can affirm that screenings are a very useful tool to detect cartels, particularly to detect bid-rigging practices. The Investigative Authority has continuously relied on screenings

⁴⁷ Report available at: <http://www.oecd.org/mexico/fighting-bid-rigging-mexico-cfe-report-2015.htm>

⁴⁸ Report available at: <http://www.oecd.org/mexico/fighting-bid-rigging-mexico-pemex-review-2016.htm>

⁴⁹ Measured by value

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throughout its investigations, starting with the detection of the conducts, but also as evidence during the investigations and in the trial like procedure. Below are some additional lessons learned regarding screening:

- Screens can be useful to start an investigation since monitoring the market makes it easier to find collusive patterns. This is particularly true in public procurement, where it is a key instrument to continue detecting bid-rigging, as it was in the IMSS case.
- An efficient way to obtain information regarding bid rigging is to keep a close relationship based on coordination and reliance with the entity that is being affected by collusion. Procurement agencies help COFECE to obtain relevant information necessary to conduct screens as well as other relevant evidence. COFECE has signed MOUs with public agencies to share information. For example, it has signed MOUs with the Mexican Institute of Statistics and Geography (INEGI) in 2011,⁵⁰ with IMSS in 2014,⁵¹ and with the Federal Attorney's Office of Consumer (PROFECO) in 2015.⁵²
- If direct evidence exists, the statistical and economic analysis should not just support the hypothesis but also illustrate or exemplify it, linking the indirect evidence to prove the conduct with the accumulation of evidence. This allows the Commission to reduce the risk of evidence objection and leaves no room for the economic agents to give an alternative explanation.

III. Criminalization to deter bid-rigging

It has been vastly argued by different commentators that hard-core cartels are intentional conducts to harm consumers, and the probability of these agreements to be efficient is so small that it can be safely ignored.⁵³ Accordingly, limiting cartel

⁵⁰ Available at: www.cofece.mx/cofece/index.php/normateca/category/21-autoridades-publicas%3Fdownload%3D758:convenio-cfc-inegi-del-03-de-agosto-de-2011+%&cd=1&hl=es-419&ct=clnk&gl=mx

⁵¹ Available at: <https://www.cofece.mx/cofece/index.php/normateca/category/21-autoridades-publicas?download=670:convenio-cofece-imss-de-16-de-julio-de-2014>

⁵² Available at: <https://www.cofece.mx/cofece/index.php/normateca/category/21-autoridades-publicas?download=760:convenio-cofece-profeco-del-29-de-enero-de-2015>

⁵³ G. Werden and M. Simon, "Why price fixers should go to prison", *The Antitrust Bulletin*, Winter 1987, 917; R. Posner, "Antitrust Law: An Economic Perspective" 1976.

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punishment only to fines would be equivalent to determining a tax to an unwanted conduct that is acceptable if the tax is paid.⁵⁴ The previous argument reveals that criminal penalties send a strong message to society of how hard-core cartels, and for this matter bid-rigging, is unacceptable. In addition to the years in prison of a potential conviction, the public exposure of criminal sanctions and moral condemnation serves as another deterrent for business people considering to join bid-rigging cartels.⁵⁵

Even though many countries have adopted criminal provisions against cartels, every one of them has created diverse mechanisms and operation schemes, which have derived in different outcomes, both positive and negative. As we know, countries like Brazil and Chile, have followed the example of countries like the United States, United Kingdom, Australia and New Zealand by establishing criminal sanctions for cartels and aligning with best international practices, which establish that the dual effect of the Leniency Program (criminal and administrative immunity) is an enormous incentive for cooperation.

Box 2. Reforms to the Competition System in Mexico

On May 10, 2011, a reform to the competition Mexican law and to the Criminal Federal Code was published in the Federal Official Gazette. The most important change was the criminalization of cartels with the addition of a new article to the Federal Criminal Code. Because of this reform, participating in a cartel was considered a criminal offense punished with prison for the first time

In the first semester of 2013, as part of an agenda to increase and secure competition in several markets, the President and the Congress passed a constitutional amendment that, among other improvements, transformed COFECE into a new and truly autonomous agency. COFECE initiated its functions on September 10th of 2013, once the Senate approved the appointment of six of the seven commissioners who integrated the Plenum, the Commission's governing and decision-making body. The amendment also decreed that the Congress had to issue a new competition law accordingly with the principles established in the Constitution.

On May 24th 2014, the new Federal Law of Economic Competition ("FLEC") was

⁵⁴ Robert Cooper, "Prices and Sanctions", 84 Columbia Law Review

⁵⁵ Wouter P.J. Wils, Is Criminalization of EU Competition Law the Answer? World Competition: Law and Economics Review, Vol. 28, No. 2, June 2005

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published on the Federal Official Gazette. The aim of this new law was to enhance the investigative powers given to the agency on previous reforms to increase its effectiveness. Consequently, the FLEC preserved the main provisions and procedures (cartels, abuse of dominance, market power, mergers) and established some others.

Under the new law, COFECE received “incremental powers”, which provided the Commission with tools to tackle competition issues in a more efficient manner. Moreover, the new Act ensured transparency, independence and, in general, due process of law.

It is important to point out that the criminalization of hard-core cartels was already established in the 2011 reform, however, to date no case has been prosecuted under criminal legislation, partly because the criminal prosecution had to wait for COFECE’s decisions to be final, in the sense that no more judicial appeals are pending for a final decision. Is not surprising that the implementation of criminal sanctions has not been easy, as international experience has shown that it is difficult to apply criminal sanctions in the field of competition; the challenges to successfully convict cartelists include the high standard of proof in criminal matters, and also the incipient experience in the area that must be overcome as more cases are processed.

The Federal Criminal Code was amended to raise the minimum criminal penalty in cartel conducts from 3 to 5 years of jail time. By raising the minimum jail time, individuals accused of these crimes will have fewer chances of obtaining provisional liberty through bail; thus, they will most likely face their criminal process inside a prison.

The administrative and criminal competition systems are explicitly interrelated. Hence, a criminal complaint from the Investigative Authority is a necessary prerequisite for the Office of the Attorney General to prosecute a cartel case. The laws give the Investigative Authority discretionary power to file a complaint. This means that both the administrative (during the trial-like procedure stage) and criminal procedures will be parallel, as the Office of Attorney General will have to prosecute the case, even if the Plenum of Commissioners has not reached a resolution

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regarding the same case.⁵⁶

In February 2017, for the first time COFECE requested to the Office of the Attorney General to start criminal procedures against cartelists involved in bid-rigging, in IMSS tenders for latex products. I consider that COFECE's efforts to seek criminal penalties for cartelists will have a great deterrent effect on this type of behavior as it has happened in other jurisdictions such as the United States and Brazil.⁵⁷

IV. Claims for damages

The degree upon which a jurisdiction relies more on private enforcement rather than on public enforcement depends on the structure of the competition system and the role of the specialized competition agencies.⁵⁸ This can be observed when comparing the US system where private enforcement is particularly strong, as opposed to other jurisdictions such as Mexico where private enforcement has recently begun to be considered as part of the competition policy system.

Among the main criticism to incorporate private damages where these are not part of the competition system yet, are the arguments that public authorities are more efficient at investigating competition infringements than private parties; that private enforcement is driven by the private profit motive; and that private litigation is more costly than public enforcement.⁵⁹

Even though private enforcement serves mainly a compensatory objective, considering that private actions seek compensation for those harmed by anticompetitive practices, it still serves the public interest, as it is in the public benefit the disgorgement of cartel profits, and it serves as a deterrence mechanism to further disincentive anticompetitive practices.

In Mexico, the importance of private enforcement has not been ignored. The

⁵⁶ Carlos Mena, "Criminal Sanctions for Cartel Conduct in Mexico", Competition Policy International. Available at: <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/North-America-Column-June-Full-1.pdf>

⁵⁷ Carlos Mena, "New Competition Policy in Mexico" supra n.2

⁵⁸ Assimakis Komninos, "The relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari", June 23, 2011. Available at SSRN: <https://ssrn.com/abstract=1870723> or <http://dx.doi.org/10.2139/ssrn.1870723>

⁵⁹ Wouter Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?", World Competition, Volume 26, Issue 3, September 2003, pp. 473-488.

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possibility to file a damage claim was established in 2012, as individuals that may have suffered damages or losses deriving from an anticompetitive conduct have the right to file a private claim. Within the 2013 reform and the new Federal Law of Economic Competition clearer criteria on the procedure to claim damages was set, consisting of “follow up” actions from COFECE’s decisions that have been upheld by tribunals. Once a resolution by COFECE is final in the sense that no more appeals can be made, then the parties who suffered damages can seek for relief in court.⁶⁰

In Mexico, there have not been many claims for damages cases, although among those few cases it must be highlighted that IMSS is currently seeking damage relief from the 2016 bid-rigging cartel involving insulin. This case is still in an early phase, although the resolution of the tribunals will be pivotal considering the potential deterrent effect that private liability in damage claims can provide.

5. Conclusion

I expect to see more cases in Mexico the upcoming years, as more investigations already in the pipeline are decided. As these new cases evolve, it will be interesting to see how the tribunals evaluate our actions and our analysis, including the use of new tools and analysis. Looking towards the future, COFECE still has plenty of challenges ahead, both on the continuing implementation of the tools available, and to stride for further goals in the fight against bid rigging.

I envision that COFECE will remain very active both on the advocacy level, and in the use of its investigation and sanctioning tools. Regarding the advocacy efforts, there is a great area of opportunity to build from the good relationships made with the different public agencies; these relationships can certainly serve to promote the implementation of best practices, and to share information such as databases of procurement, which is an essential element for screening.

An additional challenge is obtaining reliable and complete information that will allow to gather better results from the screening techniques. Currently, not all

⁶⁰ Art. 134 of the FLEC, related to damages claims.

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government agencies use the existing online procurement system “compranet” (with an emphasis in local governments and parastatal companies), and accordingly, there is an existing risk that some collusion will remain undetected despite the existing screening efforts. Accordingly, additional efforts lie ahead towards integrating those government agencies and state owned enterprises that are still not integrated in the “compranet” system.

On the other hand, the effort to establish relationships with other agencies must remain as a priority for COFECE, as bid-rigging is a constant peril for all areas of the government public procurement. As in the IMSS case, effective enforcement can serve as a tool to gain the attention and commitment from government agencies that are not making efforts yet to fight bid-rigging cartels.

As for the challenges within the investigation and sanctioning of conducts by COFECE, the major areas for enhancement regard achieving criminal prosecutions for cartelists, and see more claims for damages, considering that these areas, in compliment with COFECE’s law enforcement, can provide a holistic approach to fight bid-rigging.

I can also envision that the role of corruption in bid-rigging cases will gain more importance, as both collusion and corruption often coincide.⁶¹ Encouraging steps have already taken place in Mexico regarding the fight against corruption, as a new National Anticorruption system was designed in 2015 and is currently in its implementation phase. The future opportunities for collaboration between COFECE and its new anti-corruption counterparts shall be considered as key in the pursuance of the public interest.

The bid-rigging peril is a constant menace for the public interest and accordingly competition authorities have the obligation to fight collusion on the different fronts explained on this essay. Still, as it was mentioned the fight against bid-rigging also touches other fronts beyond the reach of competition authorities, as the case of

⁶¹ A recent example of how bid-rigging and corruption can be part of a single case is the Brazilian carwash operation. In this case government officials were part of bid-rigging in Petrobras public procurement in exchange for bribes. As this case further develops in Latin America, it has brought to the spotlight the thin line that can exist between collusion and corruption.

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public institutions implementing best practices in their purchasing activities, public officers in charge of public procurement that shall be aware of the bid-rigging peril and can recognize red flags, and the private parties affected that can claim the damages suffered in private actions.

There is no single path towards a public procurement free of collusion, although the use of the many tools to prevent, deter, uncover and sanction bid-rigging is certainly a good start.

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