

Mexico pursues first criminal action against cartelists

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For the first time, Mexico's Federal Commission for Economic Competition on Wednesday referred for prosecution individuals who allegedly violated the country's competition law, as part of the competition authority's investigation of collusion in public health tenders.

COFECE said it has evidence of coordination between bidders in such tenders between 2009 and 2015, affecting government purchases of goods. It said public health institutions spent more than 1.2 billion pesos in the acquisition of the products during that time, and overpaid up to 52% – resulting in damages of at least 381 million pesos – because of the cartel.

The competition authority has opened administrative proceedings against the companies and individuals that will coincide with the federal public prosecutor's criminal investigation.

Administrative sanctions may reach up to 10% of the cumulative income of each company and individual, and executives may be disqualified from management for up to five years. Criminal penalties could involve prison sentences for up to 10 years.

In a press conference on 15 February, Carlos Mena Labarthe, the head of COFECE's investigative arm, declined to specify the individuals, employers, products or governmental purchasers involved. However, he said this was the first time that all the requirements to refer a competition violation to the public prosecutor had been met.

While the competition authority has had the power to make such referrals since 2011, the law originally required the commission to finalise an administrative decision against the accused before referring the case for criminal prosecution. Legal reforms in 2014 allowed COFECE to refer the case after notifying the accused of an opinion of probable responsibility.

Alejandra Palacios Prieto, chairwoman of the commission, said last year that a large increase in the number of leniency applications meant the enforcer likely would soon deliver its first alleged cartel to prosecutors. Labarthe said on Wednesday that the healthcare sector referral was the first of several cases to be potentially considered for criminal prosecution.

Some antitrust observers have questioned the wisdom and timing of applying Mexico's criminal law to cartels. One practitioner noted that the Mexican criminal law system is being reformed, and that COFECE itself, created as an independent competition authority in 2013, is still in its infancy as an enforcer.

Luis Alberto Aziz of Aziz & Kaye said a potential obstacle to the government's success in its first criminal cartel case may be the prosecutor's lack of experience in handling antitrust crimes. "With this, the prosecutor will hardly have the knowledge to determine if the monopoly practice was carried out," he said.

Fernando Carreño at Von Wobeser y Sierra SC also said the prosecutor's inexperience with antitrust law could pose problems, as could "the constitutional appeals and motions that the defendants may file against actions by the commission and by the public prosecutor throughout the proceeding – something that can delay the resolution of this case by months, even years."

However, Carreño noted that this already is a highly publicised case; several newspapers' websites posted the commission's decision on their front pages within minutes of the announcement. "Considering that the Mexican government suffered the consequences of the bid rigging, it is likely that the public prosecutor will pay greater attention to the commission's arguments and follow up in a more expedited fashion than in other cases," he said.

Lucia Ojeda Cárdenas, a senior partner at SAI Law & Economics in Mexico City, emphasised that before it could refer the case for criminal prosecution, COFECE had to complete an investigation that found sufficient evidence to hold an individual liable for hardcore cartel conduct.

"It is important to note that some specialists believe that the standard of proof to determine a breach of the Mexican Federal Law on Economic Competition might be different from the one required by criminal law," that is beyond a reasonable doubt, Cárdenas said. "My guess is that the evidence submitted within the leniency programmes must have been overwhelming."

In the press conference on Wednesday, Labarthe called on those who have participated in other cartels to inform COFECE and take refuge in the immunity programme as the only way to avoid jail.

Under questioning by reporters, he clarified that the health sector case being referred for prosecution is distinct from the investigation into the production, distribution and marketing of medicines, which he said had not yet met the agency's requirements to refer a case for criminal charges.

Comments

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