



Comisión  
Federal de  
Competencia  
Económica

# Breakout Session 4: The use of indirect evidence in cartel investigations, including in leniency ones: how to make stronger cases?

## ICN Cartel Workshop, 2016

**Laura A. Méndez Rodríguez**

---

October, 2016

# CONTENT



WHAT IS CONSIDERED INDIRECT EVIDENCE?



THE USE OF INDIRECT EVIDENCE IN CARTEL INVESTIGATIONS



HOW TO DEAL WITH THE INITIATION OF PROCEEDINGS?



STANDARD OF PROOF



EXPERIENCES AND CHALLENGES



# WHAT IS INDIRECT EVIDENCE?

## Direct Evidence



- Direct evidence is derived from meetings or communications between economic agents. It may contain a substantial description of the agreement.
- Examples of direct evidence are statements of those who have been engaged in the cartel conduct, or documents (electronic or printed) which contain the agreement.

## Indirect Evidence



- Indirect evidence does not specifically disclose the terms of the agreement or the economic agents involved. However, it allows to prove facts that once accomplished, are difficult to prove directly.
- The most common examples of indirect evidence are: economic evidence, communication channels and facilitating practices.

The Mexican Supreme Court of Justice recognized circumstantial evidence as equivalent to indirect evidence



# TYPES OF INDIRECT EVIDENCE



## Economic Analysis:

Can be very useful to prove the behavior of companies and industries in a market, as well as market structures prone to collusion.

Examples:

- Structural
- Behavioral

### Screenings



## Communication channels:

Cartelist must find a way to communicate. In consequence there might be evidence related to phone calls or meetings.

Examples:

- Phone invoices
- Agendas
- Bills (restaurants, etc.)
- Minutes or notes taken during meetings.



## Facilitating practices:

This evidence is also called quasi-economic. It helps to complement other types of evidence.

Examples:

- Exchange of strategic information
- Guidelines for the Exchange of Information between competitors.
- Price signaling.

# USE OF INDIRECT EVIDENCE IN CARTEL INVESTIGATIONS

## Initiation



- Monitoring markets.
- Identifying indicia of possible cartel conducts.
- Initiating ex-officio investigations.
- Verifying information provided by Leniency applicants.

## Sanction



- Proving cartel behaviors when there is no direct evidence.
- Strengthening the case, along with the direct evidence.
- Determining the cartel's effect and the amount of the fine.

## Deterrence



- Increases the chances of detection, helping to deter the existence of future cartels.
- Strengthening the cartel cases, so they can be upheld by the Courts, increases the effectiveness of the agency.



# STANDARD OF PROOF

Indirect evidence must be documented.



There should not be an alternative explanation other than the existence of collusion (reasonableness).

Indirect evidences should be analyzed in a comprehensive way to demonstrate the fact (collusion).



# HOW TO DEAL WITH THE INITIATION OF PROCEEDINGS?



Ex-officio



Complaint



President's request



# INITIATING AN EX-OFFICIO CASE



**Public  
information**



**Economic  
studies and  
market  
analysis**



**Previous  
procedures  
(mergers or  
investigations)**



**International  
Collaboration**



**Leniency  
program**

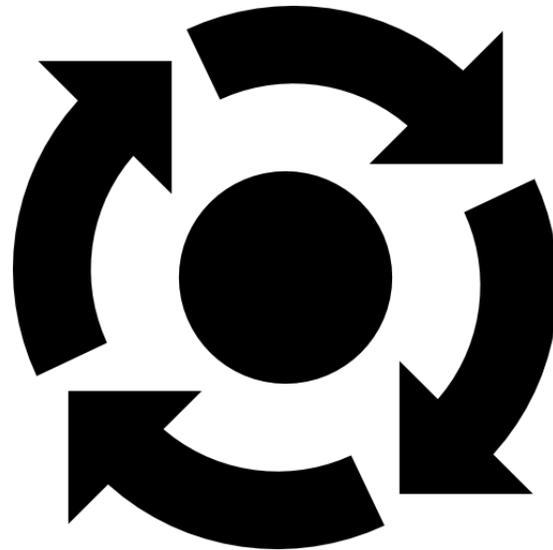


**Institutional  
Cooperation**



# THE RELATION BETWEEN THE LENIENCY PROGRAM AND THE INDIRECT EVIDENCE

**Indirect evidence to initiate or sanction cartel behavior**



**Leniency Program**

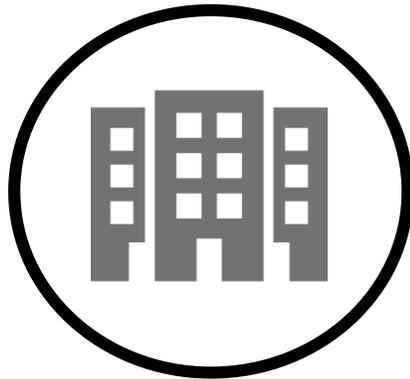
The use of indirect evidence reinforces the leniency program effectiveness:

- Enhances applications as it raises the probability of detection.
- Allows the verification of information provided by the leniency applicant.



# EXPERIENCES: THE USE OF INDIRECT EVIDENCE IN BID RIGGING CASES

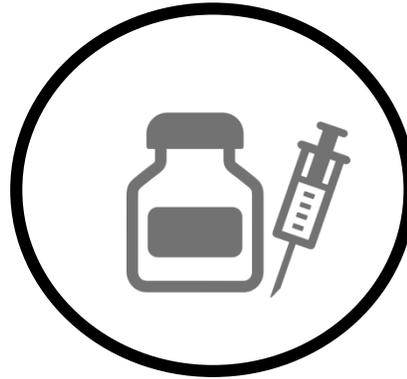
Bid rigging in public tenders of the largest Public Healthcare Institution in Mexico (IMSS)  
File IO-003-2006.



## Conspirators

Six pharmaceutical companies were sanctioned with fines that totaled 151 million pesos.

*Eli Lilly, Cryopharma, Probiomed, Pisa, Fresenius y Baxter*



## Investigated conduct

Bid rigging in serum and insuline public tenders of the IMSS from 2003 to 2006.



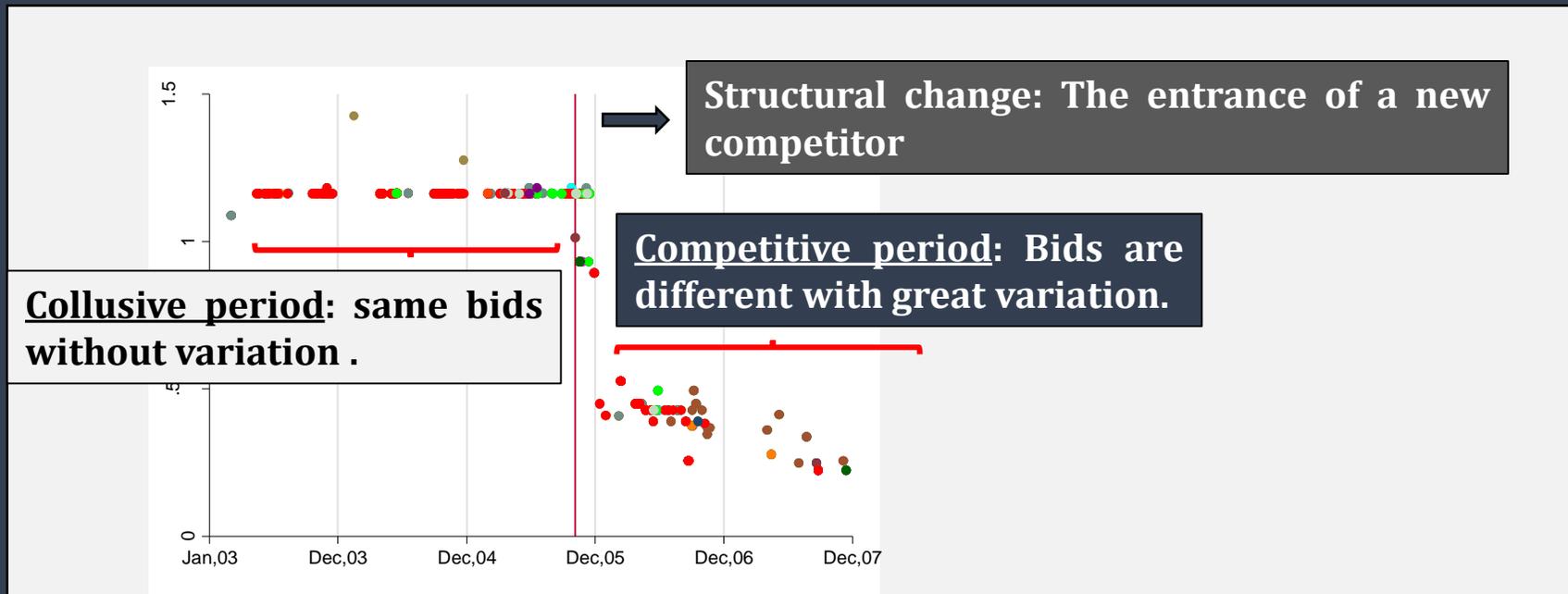
## Supreme Court decision

In 2015, the Supreme Court confirmed the use of economic evidence to prove cartels.



# THE IMSS CASE

The annual averages of the bids from 2003 to 2006 (collusive behavior period) were very alike and changed only after the entrance of a new competitor or when the tenders were consolidated. This resulted in an artificial price increase.



# THE IMSS CASE

The elements of proof that led to credit the responsibility of the companies were:



## Economic Evidence

- The winner and loser bids were always the same and were high.
- The pharmaceutical companies had high profit margins which could have allowed them to offer competitive bids, which did not happen.
- **Bids were reduced after the entrance of a new competitor.**



## Communication channels

### Evidence of communication between bidders

- The executives involved fixed the prices (bids) to participate in the IMSS public tenders.
  - They met and had frequent contact in the Pharmaceutical Chamber (Canifarma by its acronym in Spanish).
  - They had an important and frequent volume of phone calls, specially when the date of the public tenders was approaching.



# THE SUPREME COURT RULING

**THE “ECONOMIC ANALYSIS” IS AN INDIRECT EVIDENCE THAT CAN PROVE AN ABSOLUTE MONOPOLISTIC PRACTICE [Cartel].**

The “economic analysis” elaborated by the Federal Economic Competition Commission, based on economic documents and information, **can be considered as a valid indirect evidence in order to prove the existence of an absolute monopolistic practice** [...], because from it, indicia is derived leading to presumptions that, when comprehensively analysed, demonstrate the existence of an illegal conduct [...]. Moreover, **the utilisation of this evidence is explained due to the characteristics of an absolute monopolistic practice, because those who engage on it will try to hide its conduct, avoiding to leave evidence of its existence.**



# CHALLENGES

Access to reliable  
information



Judicial dialogue



Criminal cases



False positives

**ERROR**

Budget constraints



# Thank you!



Comisión  
Federal de  
Competencia  
Económica

