

Covid-19 Vaccine: Secret price, tied sales and international price referencing schemes

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Many considerations have arisen regarding possible anticompetitive behavior from pharmaceutical companies regarding COVID-19 vaccines' sale contracts. Here it will be addressed whether a confidentiality clause can be considered as a tied product/obligation and configure an anticompetitive behavior. As there is no independent market solely for confidential clauses, tied sales sanctions do not seem appropriate in this case. However, an alternative reason for the secrecy around the vaccines' prices, an alternative reason is posed. That is, an attempt to make impractical price regulation based on international price referencing schemes.

Han surgido muchas consideraciones sobre el posible comportamiento anticompetitivo de las empresas farmacéuticas con respecto a los contratos de venta de las vacunas contra COVID-19. Aquí se abordará si una cláusula de confidencialidad puede considerarse como un producto/obligación atado de forma que configuren un comportamiento anticompetitivo. Dado que no existe un mercado independiente para cláusulas de confidencialidad, las sanciones por ventas atadas no parecen apropiadas en este caso. Sin embargo, se plantea una razón alternativa para el secreto en torno a los precios de las vacunas. Esto es, un intento de hacer impracticable la regulación de precios basada en referencias de precios internacionales.

Introduction and context

The urgent need for a vaccine against COVID-19 has led to a race by pharmaceutical companies to develop, produce, distribute, and commercialize an antidote that for other viruses had taken years to develop. This was made possible within months due to the economic and social crisis the world is currently living. This situation has also raised concerns about the vaccines' affordability and access, especially by

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developing countries. One very well-known position on the matter is the proposal by South Africa and India to waive the application of certain dispositions of the TRIPS Agreement, so intellectual property rights do not get in the way of vaccines' international trade. An initiative that later gained the apparent support of the United States¹.

From the perspective of competition law, many considerations have arisen regarding possible restrictive or anticompetitive behavior from companies. For instance, by creating shortage of basic supplies. As a response, States have allowed certain cooperation activities to secure the production of pharmaceuticals, and adopted export restrictions. Another concern, the one to be discussed here, relates with the confidentiality and secrecy with which the negotiations for vaccines sales between Governments and pharmaceuticals have been held.

Governments around the world have admitted that contracts signed with pharmaceuticals established prices as proprietary information to be kept from the public. This regardless of whether they were wealthy or developing countries. For instances, the Colombian Ministry of Health stated that "no country is able to initiate the negotiations previous to the contracts to buy vaccines without signing a confidentiality agreement"². Even the Ministry of Treasury of Belgium had to erase a Tweet because it revealed prices of vaccines negotiated by the EU³.

<https://twitter.com/EvaDeBleeker/status/1339593022959280128?s=20>

 **Eva De Bleeker** @EvaDeBleeker

De feiten: 33,5 miljoen vaccins worden dit jaar aangekocht aan 279 miljoen € uit de coronaprovisie 2020. Ook in de coronaprovisie 2021 is nog 500 miljoen beschikbaar voor o.a. vaccins. https://pbs.twimg.com/media/Epcwqn_UYAEJbhy.jpg

 Twitter | 1h

Leverancier	prijs/dosis	Aantal	Kost incl. BTW
AZ	1,78€	7.700.450	14.610.834
J&J	\$8,50	5.173.595	41.281.439
Sanofi/GSK	7,56€	7.740.000	62.025.264
BioNTech/Pfizer	12,00€	5.093.847	64.793.734
Curevac	10,00€	5.805.000	61.533.000
Moderna	\$18,00	2.064.000	34.875.920
totaal		33.576.892	279.120.190

erd. © RV

¹ Office of the United States Trade Representative. Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>

² Becerra Elejade, Laura Lucía. Esto es lo que se sabe de los contratos para las vacunas. Portafolio. Enero de 2021. Disponible en <https://www.portafolio.co/economia/vacunacion-coronavirus-colombia-esto-es-lo-que-se-sabe-de-los-contratos-para-las-vacunas-covid-19-548235>

³ Guillermo D. Olmo. Vacunas contra el coronavirus: a qué se debe el secretismo que rodea los contratos entre los gobiernos y las farmacéuticas. Enero de 2021. BBC News Mundo. Disponible en: <https://www.bbc.com/mundo/noticias-internacional-55804567>

The explanations and justifications related with confidentiality dispositions on the vaccine sale contracts are various. Some argue that it is a common practice in the pharmaceutical market⁴, others argue that it is a mechanism to provide efficiency so companies can charge higher prices to richer countries and be more benignant towards less affluent nations, as Pfizer claimed to be doing⁵. However, figures show that richer countries have had reduced prices, as some financed the research and clinical trials for vaccines' development⁶. Some of these nations have also bought more than enough doses to immunize their entire population⁷. While at the same time, medium income countries are charged higher fees and pharmaceuticals restrict the sale or exportation of redundant doses among countries⁸.

The issue posed

During a seminar organized by the Economic Law Department at the Externado University, it was argued that confidentiality is not an essential element in vaccine sale contracts but just an accidental element. Under this premise, it was argued that by forcing States to keep the secrecy regarding the vaccines' prices as a prerequisite for entering into negotiations, pharmaceuticals have imposed a tied obligation upon countries⁹. Therefore, as no negotiation can be even started without agreeing on confidentiality, confidentiality is forced on and tied to the rest of the vaccine sale contract.

That hypothesis will be examined, whether a confidentiality clause can be considered as a tied product/obligation and configure an anticompetitive behavior.

Tied sales: the requisite of at least two different products

⁴ Ibid.

⁵ <https://www.bloomberquint.com/business/covid-19-vaccine-to-have-differential-pricing-pfizer> Accessed 19/04/2021.

⁶ Apuzzo, M. Gebrekidan. Governments sign secret vaccine Deals. Here's What they hide. <https://www.nytimes.com/2021/01/28/world/europe/vaccine-secret-contracts-prices.html>. Retrived 19/04/2021.

⁷ Tracking Covid-19 Vaccine Purchases Across The Globe. Duke Global Health Innovation Center Launch & Scale Speedometer. <https://launchandscalefaster.org/covid-19/vaccineprocurement> Retrived: 19/04/2021.

⁸ Advance Purchase Agreement (“APA”) for the development, production, advance purchase and supply of a COVID-19 vaccine for EU Member States.

1.10 “Right of the participating member states to re-sell, Export and/or distribute the product.”

“[...] The participating Member States shall take the appropriate measures to ensure that the Products supplied to them pursuant to this APA will not be (i) re-sold or (ii) exported, distributed or donated for free to another country outside the EU and EEA and Switzerland, including for donation via NGOs or the World Health Organization, without prior consent of the contractor.”

⁹ Velandia, Mauricio, Departamento de Derecho Económico. Vacunas COVID y Derecho Antimonopolio. Available at: https://youtu.be/U1Yvl_vpn1c Minute 1:49:20.

In general terms, a *tying sale* means that one cannot purchase product *A* without also acquiring product *B*. The former will be the *tying product* and the latter the *tyed product*. Enterprises can force consumers into these tied-in sales in many ways, such as by refusing to sell each product separately; by deterring consumers from buying each product alone; or by creating discounts only when the two products are purchased together¹⁰. However, there is no tying sale when products *A* and *B* are normally sold together due to their functionality –i.e. the left and right shoes– or because they are parts of a single larger item –the fabric and the button on a shirt–.

From the antitrust perspective, usually, because of the potential of mixed effects, tying sales are evaluated under the rule of reason. They can benefit consumers by reducing costs of distribution and of searching for compatibility, by enhancing accountability of malfunctioning goods, and protecting Intellectual property rights¹¹. Nevertheless, they can also be a mechanism for a powerful enterprise –in the tying market– to leverage its way into a –tied– market in which it lacks such standing. This latter situation can be detrimental for undertakings in the tied market.

When *tyed sales* are used for price discrimination, they can have ambiguous results. It is possible that by discriminating on price, a company lowers the cost of the tying product making it accessible for many consumers, while charging higher prices on the combination, this increases efficiency on the market¹². In contrast, tied sales are not efficient enough when they allow undertakings to charge each consumer according to their willingness to pay, as this reduces consumers' surplus and artificially increases companies' profits¹³.

Still, the number one requirement to establish a tied sale is that there must be at least two distinct products. In order to assess whether there are actually two different and independent goods, antitrust authorities evaluate if there is enough demand for the tied product as to identify a separate market in which it is efficient to offer it as a separate product¹⁴. Examples of products found to be distinct from the tying one are Microsoft's Windows Media Player tying it to its operating system¹⁵, the provision of T.V. and Internet services¹⁶, and the franchise and the supplies to manufacture the franchised goods¹⁷.

¹⁰ Hovenkamp, Erik and Hovenkamp, Herbert, Tying Arrangements (April 10, 2017). The Oxford Handbook of International Antitrust Economics (Roger D. Blair & Daniel Sokol, eds. vol.2, Ch 14), Available at SSRN: <https://ssrn.com/abstract=1999063> or <http://dx.doi.org/10.2139/ssrn.1999063>

¹¹ Tyrole, J. 2005. The Analysis of Tying Cases: A Primer. Published in Competition Policy International (print ISSN 1554-0189, online ISSN 1554-6853),

¹² Ibid.

¹³ Op cit. Hovenkamp, Erik and Hovenkamp, Herbert. Tying Arrangements.

¹⁴ International Competition Network. 2009 Report on Tying and Bundled Discounting. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_TyingBundDisc.pdf

¹⁵ Microsoft Corp v Commission (Microsoft I [Windows Media Player]) Case T-201/04 General Court

¹⁶ Cfr. Superintendencia de Industria y Comercio. Administrative Resolution No. 08328 of 2003.

¹⁷ Hunt, Shelby D., and John R. Nevin. "Tying Agreements in Franchising." *Journal of Marketing*, vol. 39, no. 3, 1975, pp. 20–26. *JSTOR*, www.jstor.org/stable/1250897. Accessed 20 Apr. 2021.

In Colombia, for instance, tying sales are prohibited in three different norms: i) as type of abuse of dominance¹⁸, ii) as an anticompetitive agreement¹⁹, and iii) as consumer protection mechanism²⁰. In all cases, it is necessary to demonstrate that there are two distinct products bound together. Regarding abuse of dominance, the Colombian antitrust authority has explained that besides the dominant position, it is necessary to establish that i) the tying product and the additional obligation or tied product are different, and ii) because of the tying, it is not allowed to acquire the tying product without the tied one. Such was the consideration in the decision of the case about the tied sale of tickets to the qualifying matches for the World Cup in 2010, in which it was explained why a ticket for the match Colombia vs. Brazil was a different product from one for Colombia vs. Venezuela²¹.

Is there a tying?

Returning to the confidentiality imposition over the price of COVID-19 vaccines, it is hard to identify a market in which States will be willing to agree with a confidentiality clause all and in itself. Pursuing for a moment the initial premise that a confidentiality clause can be considered as an accidental obligation within a vaccines' sale contract, to evaluate whether there is a tying, one has to evaluate whether there is an independent market solely for confidential clauses.

It is hard to think of such market because confidential clauses serve a purpose that makes them always be attached to some other provisions. Those other provisions will determine the matter to be subjected to confidentiality. Whether that is a trade secret, know-how, data test information, commercial information, or in this case, a price. Therefore, in my opinion, the confidentiality clause cannot be considered as a tied product, because there is no point in agreeing solely on a confidential obligation.

The above is without saying that there might not be a case of abuse of dominant position, considering that States are so desperate to get the vaccines that they would accept such confidentiality clauses imposed by the very few providers of vaccines. This consideration leads to another discussion: whether there is a case for antitrust law to reinstate the imbalances in the bargain position between big pharmaceuticals and States.

Although freedom to contract and freedom to compete are different, on occasion collide and, therefore, on occasion competition law has been instrumental to fix anticompetitive effects of freedom to contract²². This is particularly interesting when

¹⁸ Decree 2153 of 1992, Article 50.3

¹⁹ Decree 2153 of 1992, Article 47.7.

²⁰ Article 36, Law 1480 of 2011.

²¹ Cfr. Superintendencia de Industria y Comercio. Administrative Resolution 50342 of 2010. Exp. 2007-98579.

²² In its book, *Economics in Antitrust Policy: Freedom to Compete Vs. Freedom to Contract*, Steiner explains that without competition laws, firms would use their freedom to contract to fix prices, divide

a party imposes abusive contractual dispositions upon the other party, thanks to its better bargaining –dominant– power²³.

Another reason for the secrecy

It seems to me, that the secrecy about the vaccine prices obeys other reasons, one could be to avoid the enforcement of price regulation and for pharmaceuticals to be able to engage in price discrimination. Many countries have enacted laws to control prices on pharmaceutical markets which may imply international referencing price schemes. By comparing the foreign prices of a medicine, countries set a benchmark for the internal or domestic market. Government authorities consider the prices of a particular medicine in other nations with which they have economic or demographical similarities, and geographical proximity²⁴. The source of information about foreign prices may be on the holder of distribution authorizations, public sources, price certificates, tender prices, disclosure agreements, among others²⁵.

Therefore, if a pharmaceutical company imposes a confidentiality clause on vaccines' prices, price regulation based on international referencing prices is impractical while price discrimination is almost certain.

For example, in Colombia the National Commission for the Regulation of Prices of Medicines and Medical Devices is a collegiate body entrusted to formulate and regulate prices for medicines and medical devices. If a medicine is subject to maximum wholesale price control, one of the criteria to apply the direct price control is the international price reference which takes into account the prices at Argentina, Brazil, Chile, Ecuador, México, Panamá, Uruguay, Spain, United States of America, United Kingdom, Australia, Canada, France, Germany, Portugal and Norway²⁶.

up markets and merge with rivals to gain market power. Therefore, continues the author, Governments intervention through competition law is necessary to uphold freedom to contract as necessary for functioning markets. These contracts affect others freedom to compete. M. Steiner, Economics in Antitrust Policy, Freedom to Compete vs. Freedom to Contract, Dissertation.com. 2007. The Constitutional Court in Colombia has also addressed these issues. Cfr. Sentence T-240-93. M.P. Eduardo Cifuentes Muñoz. June 23, 1993. Available at: <https://www.corteconstitucional.gov.co/relatoria/1993/t-240-93.htm>

²³ Superintendencia de Industria y Comercio. Administrative Resolution 56350 of 2018. Exp. 13-114718.

²⁴ World Health Organization. WHO guideline on country pharmaceutical pricing policies. Geneva. 2020. Available at: [who.int/publications/i/item/9789240011878](https://www.who.int/publications/i/item/9789240011878)

²⁵ Anke-Peggy Holtorf, Fotini Gialama, Et al 2019. External Reference Pricing for Pharmaceuticals— A Survey and Literature Review to Describe Best Practices for Countries With Expanding Healthcare Coverage. Value in Health Regional Issues, Volume 19, Pages 122-131. <https://doi.org/10.1016/j.vhri.2019.04.003>.

²⁶ Comisión Nacional de Regulación de Precios de Medicamentos y Dispositivos Médicos, Circular 3 de 2013.

The price of Zytiga in Sweden, a medicine to treat prostate cancer, exemplifies why confidentiality upon prices can block international reference pricing policies²⁷. In 2012, Zytiga was not included within the reimbursement scheme of the country. In order to enter the Sweden market, Zytiga had to negotiate its price with the association of county councils (NLT). This price was finally lower than the reimbursement one, but it is confidential and not included in the official prices national list while the reimbursement one is. Hence, the reimbursement price is used as an international price reference for third countries but the NTL is not.

International price referencing schemes may have many advantages. They can secure affordability and access to medicines, and they are relatively easy cost effective mechanism to implement²⁸. Another rationale behind international price reference policies is not to pay more than other similar countries for a particular medicine. In other words, by including a mechanism of international referencing, States avoid to be discriminated against by pharmaceutical companies.

Now, what alternative would be better to secure access to vaccines? Allowing or banning price discrimination through the confidentiality of prices is another issue to be examined. Some economic studies on the impact of international price referencing policies suggest that such policies deter pharmaceuticals from launching new and innovative products in countries with low demand or small markets²⁹. This ultimately ends up affecting patients in low-income countries.

Final remarks

From the above, two main ideas can be drawn:

1. Competition law may offer a way to reinstate the bargain disparities among States and pharmaceutical companies, but tying sales sanctions do not seem to be appropriate because there is no independent market solely for confidentiality agreements.
2. The secrecy about the vaccines' prices could be explained as an attempt to avoid the enforcement of international referencing prices regulations. These policies are aimed at securing access to drugs and medical devices, but also prevent price discrimination among comparable countries. However, there is

²⁷ Danzon, P. M., Wang, R., & Wang, L. (2005). The Impact of Price Regulation on the Launch Delay of New Drugs—Evidence From Twenty-Five Major Markets in the 1990s. *Health Economics*, 14 (3), 269-292. <http://dx.doi.org/10.1002/hec.931>

²⁸ Sabine Vogler, Chapter 15 - External Price Referencing Policy Brief. En: Vogler, Sabine. *Medicine Price Surveys, Analyses and Comparisons*, Academic Press, 2019. Pages 433-439, ISBN 9780128131664, <https://doi.org/10.1016/B978-0-12-813166-4.00021-8>.

²⁹ Kanavos, P. Fontrier, A. Gil, J. Et al. The Impact of External Reference Pricing within and across Countries. London School of Economics. DOI: <https://doi.org/10.21953/lse.m0bluqcv10g>. 2017

no consensus about the impact of such price policies on the access to medicines.

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