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Legal Practice Guides

Cartels

Mexico

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Law & Practice: p.201

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

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1. Legislative Framework

1.1 Legal Basis

The provision containing the main framework in connection with cartels is article 28 of the Mexican Constitution, which has recently been reformed in terms of antitrust and telecommunications, modifying the organisational nature of antitrust authorities and creating a specific authority that will review antitrust matters in the telecommunications market.

Therefore, there are specific laws created for the regulation of this provision, such as the Federal Competition Law (the “FCL”), the Regulatory Provisions of the Federal Competition Law (the “Regulatory Provisions”) and the Regulatory Provisions of the Federal Competition Law for Telecommunications and Broadcasting, all of the above recently issued and published.

Additionally there is secondary legislation, such as guidelines and criteria regarding how to interpret, investigate, enforce and apply antitrust provisions, which will be drafted and published in the following months.

Likewise, there are other applicable laws that, even though they were not created to regulate the cartels, are applicable given that they contain special procedural provisions, such as the Federal Code of Civil Procedure and the *Amparo* Law.

1.2 Scope

1.2.1 Cartel Conduct

Pursuant to article 53 of the FCL, a cartel, also known as a *per se* illegal practice, is considered to be any agreement between competitors with the goal or effect of: (i) fixing prices; (ii) limiting or restricting the available product supply; (iii) dividing markets; (iv) bid-rigging; or (v) exchanging information with the goal or effect of any of the above.

- (i) Price-fixing occurs when one or more competitors in a given market control supply, creating the shortage of a product. In this regard, a group of competitors establishes the market’s supply, increasing profits gained by such competitors. Under Mexican law, an example of indirect evidence of price-fixing may be that the sale prices offered by two or more competitors are significantly higher or lower than the prices of the same products elsewhere, unless it results from taxes, transportation or distribution costs or that such competitors set a range of prices or adhere to the prices issued by a competitor or association.
- (ii) The purpose of restriction of a product is to control supply or demand of a product or service in order for prices to increase. In many markets, the restriction of a product can simply be af-

ected by determining the amount of goods or services competitors will provide or sell, allowing for the market to decide the pricing on such product. Indirect evidence of this type may also require the presentation of additional research studies of the product considering distribution and sales from competitors.

(iii) Market division occurs when competitors distribute, assign or impose segments of a current or potential market of goods and services, using available customers, suppliers, schedules or locations. Such practice occurs when competitors divide the market according to the following:

- By customers, when involved companies agree not to seek or enter into similar agreements with any of the customers of other companies;
- By territory, when competitors agree to limit availability of their products or services to certain areas, cities or territories; or
- By products, when competitors agree not to engage in the production, sale or distribution of certain products sold or produced by their competitors.

(iv) Finally, bid-rigging occurs when competitors agree to participate in certain offers or refrain from participating in public bids that are likely to have the effect of guaranteeing the contract will be awarded to a specific competitor. Such practice can be difficult to identify when the public authority has agreed to help the competitors control the market. However, it is considered as indirect evidence when the bidding is always awarded to the same company or when in a clear rotation competitors have contracts awarded to them (carousel practice), as well as when competitors bid at higher prices or offer conditions out of the market.

1.2.2 Limitation Periods

In accordance with article 137 of the FCL, the authority of the Mexican Antitrust Commission (the “Commission”) to initiate an investigation in connection with the conduct previously listed shall expire within ten years, counted from the date of the cessation of the conduct.

1.2.3 Exemptions

Under the Mexican Constitution and the FCL, the strategic activities that are exclusively reserved to the state are not considered monopolies, as may be postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals and nuclear power generation, and electricity, among others.

Likewise (i) labour unions created in accordance with Mexican law for the protection of their own interests; and (ii) authors’ or artists’ exclusive rights over their works or inventions are not considered monopolies under article 7 of the FCL.

Additionally, in connection with article 8 of the FCL, the associations or producer co-operative companies, that in defence of their interests or the general interest, directly sell domestic or industrial products in foreign markets, shall not be considered as monopolies provided that:

- Such domestic or industrial products are the main source of wealth of the region in which they were produced or are not staples (basic needs products);
- Their sales or distribution are not performed in Mexico;
- Such associations or co-operative companies are under surveillance by the Federal or State Government, and are previously authorised for incorporation by the relevant legislature at its registered office;
- Membership is voluntary and it allows the free entry and exit of its members; and
- They do not grant nor distribute permits or authorisations the issuance of which corresponds to departments or agencies of the Federal Government.

1.2.4 Geographic Reach

Mexican public enforcement actions just reach the Mexican territory.

1.2.5 The Principle of Comity

Mexico has entered into several international coordination agreements for the exchange of information concerning antitrust matters by means of which various countries agreed to actively cooperate in the investigations initiated by the other countries. In this vein Mexico has included in its

antitrust regulation the possibility of requesting from foreign authorities the information and documentation that may be necessary for the investigation of possible violations of the FCL.

2. Collecting Evidence

2.1 Standard of Proof

In Mexico one of the essential requirements for certifying the committing of a *per se* illegal practice is to demonstrate the existence of the agreement, contract or arrangement, in other words the existence of a voluntary agreement. In this regard it will always be very difficult to find a written agreement, and therefore it is possible to obtain and offer indirect evidence that allows inferring the arrangement between competitors through an external manifestation of will. As a result of the difficulty of obtaining evidence in these kinds of cases, hints have a relevant significance.

Therefore, the indirect evidence shall be composed of known facts that allowed proving the existence of unknown facts which were being hidden by the accused parties. Some of those facts could be, among others, the following:

- Communications or communication possibilities between competitors;
- Conduct that would not benefit one party, and which can only be explained if it were beneficial for two or more competitors;
- Precedents of collusive conduct in other jurisdictions; and
- Coincidences in products, prices, promotions, etc.

The highest courts in our country have determined the convenience and legality of indirect evidence, concluding the following:

- Indirect evidence occurs when from the demonstration of the existence of a secondary fact (proven fact) it is possible to draw inferences which substantiate the hypothesis of main fact (fact to be proved or suspected);
- The indirect evidence is suitable to prove, through sufficient hints concatenated with general statements, certain facts or circumstances from what is known as the best information available re-

garding the performance of companies that have entered into agreements to perform monopolistic practices; given that it is expected that the acts performed by these companies to achieve goals violating the law can be disguised, hidden or spread to such an extent that the performance of the entity becomes almost imperceptible and this makes it difficult and sometimes impossible to establish through direct evidence the relationship between the act performed and the person or entity to whom it is intended to attribute its realisation.

2.2 Investigative Powers

Our main advice for our clients is of course to avoid any conduct which could be considered as a monopolistic practice or any kind of arrangement that may be taken as a hint of a collusive practice.

Therefore, before a dawn raid we always advise to implement several training courses in connection with compliance with Mexican antitrust provisions in their respective companies and in case of any doubt about past or future arrangements with competitors in terms of antitrust, contact the legal department in order to adequately resolve this matter.

In case they find themselves in a questionable situation with competitors, we advise to: *a)* explicitly state their disagreement (and be sure it is included in the minutes); *b)* abandon the meeting or end the call or conversation; and *c)* keep detailed records of the incident.

It is also useful at the time of drafting documents to avoid misunderstandings by eliminating language that suggests prohibited behaviour and not exaggerate their position in the market.

During dawn raids the first and main advice to take into consideration is that no document or information should be destroyed, given that this may result in a felony under criminal law pursuant to article 254 bis 1 of the Mexican Criminal Code. Also, we advise allowing the competent authorities access to the facilities and to pertinent documents.

2.2.1 Surprise Visits

Pursuant to article 12, section III, the Commission is empowered to performed surprise visits, also known as dawn raids, through one of its internal

bodies called the Investigating Authority (“IA”), in order to obtain additional information or evidence.

2.2.2 The Seizure of Evidence

In accordance with article 75 of the FCL, the IA is authorised to:

- Access any office, locale, land, transport, computer, electronic device, storage device, file or any other media that may contain evidence of the performance of the acts or facts pertaining to the visit;
- Verify books, documents, papers, records or information, whatever the media used, in connection with the economic activity of the visited party;
- Take or obtain copies or extracts therefrom in any format of such books, documents, papers, files or information stored or generated by electronic media; and
- Secure all books, documents and other media of the visited party during the period and to the extent that is necessary for carrying out the dawn raid.

It is important to bear in mind that in any case the AI may confiscate or seize the information of the visited party.

2.2.3 Legal Privilege

In this regard neither the law nor the Regulatory Provisions provide for certain concepts regulated at an international level that are necessary for the protection of the legal security of economic agents, such as client-attorney privileged communications, the safeguarding of industrial secrets, as well as the safeguarding of personal information not related to strictly necessary information for the research in question.

2.2.4 Interviews with Company Employees

Pursuant to article 75 of the FCL, which regulates the dawn raids, during such raids the IA is able to request from any officer, representative or staff member of the visited party explanations in connection with facts, information or documents related to the purpose of the dawn raid and make a record of their answers.

2.2.5 Requests for Information

Pursuant to article 28, sections II and III, the IA is empowered to require any kind of information and documentation from anyone who is related to the investigated matters.

2.2.6 Privilege Against Self-Incrimination

Notwithstanding that the Mexican Constitution considers the Privilege Against Self-Incrimination as one of its human rights, the reality is that neither the FCL nor the Regulatory Provisions have expressly regulated it and, as a matter of fact, it is violated by article 62 of such Provisions by establishing that when a person directly involved in a proceeding opposes the inspection, recognition or ordered visit does not answer the questions submitted or does not provide the required information, the issues that it is sought to prove will be considered true, based on the best information available and unless proven otherwise. The same will apply if the thing or document in its possession or available to it is not displayed during the inspection.

2.2.7 Companies Located Outside the Jurisdiction

As we have explained above, Mexico has entered into several international co-ordination agreements for the exchange of information concerning anti-trust matters by means of which various countries agreed to actively co-operate in the investigations initiated by the other countries. In this vein Mexico has included in its antitrust regulation the possibility of requesting from foreign authorities the information and documentation that may be necessary for the investigation of possible violations of the FCL.

2.2.8 Additional Elements of Proof

There are no other elements of proof that the Commission may use to discharge its burden of proof other than those explained above and they cannot tap telephone conversations, given that it would constitute a violation of a human right stated in the Mexican Constitution.

3. Evidence Collected Through the Leniency Programme

3.1 Eligibility

The FCL is very clear regarding the regulation of the leniency programme, included in article 103, by means of which anyone who has been engaging in or is currently engaging in a *per se* illegal practice could recognise it before the Commission and seek the benefit of the reduction of sanctions, provided several conditions are met as will be explained later.

Notwithstanding, as a consequence of the proceeding established for the leniency programme there is a discretionary element: the percentage reduction of the fine that shall apply, given that it will be determined in accordance with the chronological order in which the economic agents disclosed such information to the Commission. However, the confidential nature of such programme makes it impossible to have certainty regarding the percentage that shall apply.

3.2 First-in-the-door Whistleblower

3.2.1 Immunity from Fines

In order for any company to obtain immunity from a fine it must: *a*) be the first among the economic agents or individuals involved in the conduct to provide sufficient evidentiary elements that it possesses and that in the opinion of the Commission allow the initiation of the investigation procedure or the presumption of the existence of a *per se* illegal practice; *b*) co-operate fully and continuously in the investigation and, if appropriate, in the trial; and *c*) perform any necessary actions in order to terminate its participation in the monopolistic practice.

3.2.2 Markers

The leniency application set forth a system whereby second and subsequent companies may apply. The marker under the Mexican leniency programme can be obtained by calling and recording a message in the telephone system available for the leniency programme.

3.3 Second-in-the-door Company and Late Comers

3.3.1 Reduction of Fines

Other companies may obtain a reduction in the fine of up to 50%, 30% or 20% of the maximum allowed, if they submit evidence for the investigation, in addition to that which the IA already has, and meet the other conditions established for the first in the door. To determine the amount of the reduction, the Commission will consider the chronological order of the request and of the evidence submitted.

3.4 Process

3.4.1 Corporate Oral Statements

Within ten days of the date that the file was created and before the resolution of the Commission, the alleged offender or the complainant shall have the right to request an oral hearing before the plenary in order to make the statements they deem appropriate. At least three commissioners shall attend the hearing, one representative of the IA and one of the technical secretaries, and its duration will depend of the number of attendants.

The complainant, the alleged offender and the IA will only be able to intervene once and after such interventions, the commissioners may ask questions of any participant.

The complainant and the alleged offender will only be able to make clarifications in connection with the arguments made in the response to the opinion of probable liability, the evidence offered by the alleged offender and the sufficiency thereof, pleadings and documents in the record.

After the hearing, minutes will be drafted that shall contain only the fact that the hearing was held, details of those attending it and the manifestations of the alleged offender, the complainant or their representatives.

3.4.2 Leniency

The confidentiality granted by the leniency programme has no expiration.

4. Disclosure of Evidence in Private Damage Actions

4.1 Investigative Powers

The evidence collected by the IA may be used in court for private damages actions given that the Investigation file of the Commission is totally public.

4.1.1 Leniency Programme

First of all, discovery, as it is known in the USA and other Anglo-Saxon jurisdictions, is not available in Mexico. If the evidence obtained through a leniency application is considered by the Mexican Commission to issue its resolution, such evidence will be available for future private claims; however, if the evidence is not considered in the resolution of the Commission, such evidence will not be available.

4.2 International Co-operation Between Enforcement Agencies

4.2.1 Extent of Co-operation

Currently Mexico is part of the International Competition Network which seeks to facilitate effective international co-operation to the benefit of member agencies, consumers and economies worldwide.

Likewise, and taking into consideration that international trade has increased significantly in the past two decades, Mexico has entered into several international co-ordination agreements and free trade agreements with several countries, e.g. USA, Canada, Japan, Chile, the European Union, etc., that realise the importance of international co-operation and co-ordination in connection with antitrust matters, specifically the exchange of information regarding collusive practices. By means of such arrangements, various countries agreed to co-operate actively in the investigations initiated by the competition authorities of other countries.

In this vein, Mexico has included in its antitrust regulation the possibility of requesting from foreign authorities the information and documentation that may be necessary for the investigation of possible violations of the FCL.

4.2.2 Impact of Co-operation

The existence of such co-operation has recently been a key weapon of the Commission, given that

many of the current investigations initiated by the Commission have started thanks to the exchange of information with other countries and other antitrust commissions and, as we have already explained, the importance of the precedents provided by the conduct of the companies in other jurisdictions may constitute indirect evidence which can help to prove monopolistic conduct.

5. Decision Making

5.1 Settlement/Plea Bargaining

In accordance with article 100 of the FCL, before the Commission issues an opinion of probable responsibility in connection with an investigation procedure for rule of reason practices or prohibited mergers, the economic agent subject to such investigation will be able to submit, on a single occasion, a written expression of its wish to seek the benefit of a waiver or reduction of fines, provided it meets several conditions explained later.

It is important to take into consideration that this special procedure applies only for investigations initiated for rule of reason practices (vertical practices) and prohibited mergers, meaning it could never apply for *per se* illegal practices.

The main difference between the Mexican special procedure and the settlement and/or plea bargaining procedures is the moment at which economic agents can receive the benefit conferred by such procedures, given that in the Mexican procedure it is only possible to seek the benefit before the issuance of an opinion of probable liability.

5.2 Sanctions

Pursuant to article 12 section I of the FCL, the Commission is empowered to impose the sanctions resulting from anti-competitive conduct performed by economic agents (listed in article 127 of such law) without the need to bring a suit against the companies in a court.

5.2.1 Fines

In accordance with article 127 of the FCL, the fines that can be imposed by the Commission on a company for breaching the FCL or engaging in any monopolistic practices or illegal mergers, are the following:

- Up to 10% of the company's income if the company engages in a *per se* illegal practice;
- Up to 8% of the company's income if the company engages in a rule of reason practice;
- Up to 8% of the company's income if engaging in a prohibited merger;
- Up to 5% of the company's income if the merger is carried out without giving prior notice to the Commission, in the event such notification is legally required;
- Up to 10% of the company's income for failing to comply with the conditions imposed by the Commission in the merger resolution;
- Up to 10% of the company's income for failing to comply with the regulation imposed by the Commission in connection with an essential input controlled by the company; or
- Up to 10% of the company's income if the company breaches any preventive measures.

It is important to take into consideration that all these fines are subject to the possibility of doubling in case of recidivism.

5.2.2 Criteria

Pursuant to article 130 of the FCL, in order to determine the aforementioned sanctions, the Commission shall consider several elements to determine the seriousness of the breach, such as: (i) the damage caused; (ii) the intention to carry out any prohibited actions; (iii) the market share of the offending party; (iv) the size of the damaged market; (v) the duration of the monopolistic activities; (vi) the economic capacity of the economic agent; and (vii) the degree of effect on the exercise of the functions of the Commission.

In addition to the above, in April 2011 the Commission issued a draft of the technical criteria for the imposition of fines, which contains, among other things, the methodology and mathematical formulas for calculating such fines.

5.2.3 Joint and Several Liability

According to the criteria of the Commission and of the Mexican courts, there is a concept called "economic interest group" that may exist when a group of individuals or entities has related commercial and financial interests, and co-ordinate their activities to achieve a specific common goal. In addition to said elements, it is necessary to attend to oth-

ers, such as control, autonomy and unity of market behaviour.

Therefore, the commission must analyse case-by-case the behaviour engaged in and the companies through which this behaviour was carried out in order to determine the existence of an economic interest group and thereby the extent of liability in relation to all the companies and the imposition of a joint or individual fine.

5.2.4 Other Sanctions

The Commission is able to impose other sanctions, such as: (i) order the correction or suppression of the monopoly practice or prohibited merger; (ii) order the partial or total demerger of a prohibited merger; (iii) order restrictive measures to regulate access to essential inputs under control of one or more economic agents.

In addition to the all the sanctions aforementioned, during the procedure the Commission will be able to apply the following coercive measures:

- Warnings;
- Fines up to approx. USD15,000.00 for each day of non-complying the order issued by the Commission;
- Ask for the assistance of the police or other public authorities; and
- Arrest for up to 36 hours.

5.2.5 Sanctions Against Company Employees

In connection with individuals or employees involved in the defendant company's execution of monopolistic activities, the applicable fines, as stated in the FCL, are the following:

- Up to approximately USD905,000.00 for misstating or delivering false information to the Commission;
- Up to approximately USD930,000.00 for anyone who helps, induces or participates in any monopolistic activities, prohibited mergers or other market restrictions stated in the FCL;
- Up to approximately USD1,035,000.00 for anyone who directly participates in any monopolistic activities or prohibited mergers while representing the defendant company;
- Up to approximately USD930,000.00 for the government officials who have participated in any act

related to a merger which had to be authorised by the Commission.

The Federal Criminal Code includes felonies regarding breach of antitrust provisions. The penalty for individuals directly involved in any absolute monopolistic activities is imprisonment from five to ten years and from one to three years for those who alter, destroy or disturb documents, electronic files or any evidence during a dawn raid.

The FCL also foresees as a sanction the disqualification for a term of five years for exercising as member of the board, administrator, director, manager, officer, agent, or legal representative of a company, for those who, directly or indirectly, participate in the performance of a monopolistic practice or prohibited concentration, in representation or on behalf of companies.

6. Damage Claims

6.1 Claimants

6.1.1 Collective Redress

The Federal Code of Civil Procedure states that the following have legal standing to initiate a class action in connection with antitrust matters: (i) the Commission; (ii) civil non-profit associations which include in their purpose the defence of the rights of the community; and (iii) the Attorney General of the Republic, who will act as common representatives of a community comprised of at least 30 members.

The Mexican legal system provides that any person can join the class action during the trial and within the 18 months after the issuance of the judgment, and therefore it is considered as an Opt-In system.

Our legislation provides for three different modes of such collective actions:

- Collective actions (*stricto sensu*): indivisible in nature exercised to protect collective rights and interests, held by a determined or determinable community, which aims to claim the reparation of the damage caused to the community and to cover the damages caused to each one of the members of the community.

- Diffuse actions: indivisible in nature exercised to protect the diffuse rights and interests, held by an indeterminate community, which aims to claim reparation for damages caused to the community; and
- Individual homogenous actions: divisible in nature exercised to protect the individual rights and interests, held by grouped individuals with common circumstances, which aims to claim compliance with a specific agreement or its corresponding rescission.

6.1.2 Indirect Purchasers

Indirect purchasers are not empowered to bring a damages class action given that the Federal Code of Civil Procedures provides an exhaustive list of individuals or entities that may initiate such actions on behalf of the community, among which indirect purchasers are not included.

6.2 Damages

6.2.1 Types of Compensation

Losses and forgone profits caused by the cartel (i.e. compensatory damages)

Pursuant to article 1915 of the Federal Civil Code, the repair of the caused damage must consist of, at the election of the victim: (i) the re-establishment of the previous situation, if possible; or (ii) the claim for damages.

Punitive damages

The Federal Civil Code does not establish a limitation for the damages that can be claimed, so the victim will be able to ask for any kind of damages.

6.2.2 Quantifying Damages

Currently we do not have guidance or criteria regarding the methodology for quantifying damages arising from violations of the FCL. Given that the quantification of such damages involves the use of advanced economic methodologies, we consider that the authority that must provide such guidance and criteria is the Commission.

7. Judicial Review

7.1 The Appeal Process

By means of the recent constitutional reform it is impossible to appeal intra-procedural acts through a regular appeal.

Therefore, the general rules, acts or omissions of the Commission and the Federal Telecommunications Institute could only be challenged through an indirect appeal and will never be subject to suspension.

In connection with the suspension, there is a kind of exemption for cases where the Commission imposes fines or orders the divestment of assets, rights, partnership interests or shares, given that those sanctions may not be executable until the issuance of the judgment of the indirect appeal filed.

In the case of decisions emanating from a procedure followed in the form of a trial, this decision may only be challenged at the end of the whole procedure. Likewise, the general rules applied during the procedure may only be claimed in the indirect appeal.

This indirect appeal will be substantiated at any time by judges and courts specialising in antitrust and telecommunications matters.

7.2 Extent of Review

Judges and courts specialising in antitrust and telecommunications matters are able to review both substantive and formal questions. Therefore, they are able to review the findings of fact, the legal assessment and the sanctions imposed by the Commission.

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