The International Investigations Review

Second Edition

Editor
Nicolas Bourtin

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EDITOR'S PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Environmental crimes. Export controls and other trade sanctions.

US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, has been punished severely by record-breaking fines and the prosecution of corporate employees. Already complex interlocking legal and regulatory regimes have become even more labyrinthine with the passage of new laws in the wake of the recent economic crisis, and the compliance burdens imposed on corporations have grown ever more onerous.

This trend has by no means been limited to the US; while the US government is at the forefront of the movement to globalise the prosecution of corporations, the scenes in Europe and Asia are similar, as non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations, and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can substitute for the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world is undoubtedly long overdue and will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted

to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is a trial a realistic option? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensible guide when your client faces criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that in its second edition, this volume has increased its coverage to 24 countries.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2012

Chapter 16

MEXICO

Claus von Wobeser and Fernando Carreño[1]

I INTRODUCTION

Corporate conduct and activities are supervised by various governmental bodies (mainly of an administrative nature) and this supervision varies depending on the business activity of the corporation in question. In recent years the oversight activities of these authorities have increased and several laws have been issued or amended in order to increase the regulatory authorities' powers.

Although it is difficult to outline every governmental body that has investigative and oversight authority, since the determination of such authority will depend on the activity of the company in question, corporate activity is generally subject to the review and supervision of the following authorities.

The Federal Antitrust Commission ('the Commission') is the authority responsible for investigating and supervising the activities of companies that have operations in Mexico related to fair trade and free competition. The Federal Antitrust Law ('the LFCE') grants the Commission the power to carry out investigations and dawn raids, as well as sanction persons and corporations that breach the LFCE.

The corporate conduct of entities issuing, offering and trading securities ('issuers') is supervised by the Ministry of Treasury and Public Credit ('the SHCP'), the National Banking and Securities Commission ('the CNBV'), the Mexican Securities and Exchange Market ('the BMV'), and by authorised self-regulatory entities. In addition the following authorities can carry out prosecutorial and investigation activities with regards to the corporate operations carried out by issuers: the SCHP, the CNBV, self-regulatory entities, the Public Prosecutor and the judiciary, depending on the activities engaged in and investigated.

1 Claus von Wobeser and Fernando Carreño are partners at Von Wobeser y Sierra SC. This chapter was written with the assistance of Andrés Nieto and José Palomar.

The CNBV undertakes most of the supervision and investigation activities regarding issuers. It is authorised to carry out investigative and prosecutorial activities, including, *inter alia*:

a requesting all the information that it considers necessary;
b requesting access at any time to the premises of the issuer;
c interviewing employees;
d carrying out administrative procedures;
e requesting the initiation of criminal procedures; and
f imposing administrative fines.

Under no circumstances can issuers refuse to cooperate with the CNBV in the aforementioned situations. The scope of the prosecutorial and investigation powers granted by law to the CNBV is very broad.

Finally, corruption-related activities are ultimately regulated and prosecuted by the judiciary. Nonetheless, there is a growing interest, mainly among multinational corporations, in preventing, monitoring and managing the mounting risk posed by cross-border investigations and any possible liability resulting from corruption.

II CONDUCT

i Self-reporting

Despite the fact that the LFCE does not impose the obligation on companies to report acts violating the LFCE to the Commission, the reforms approved in 2006 and in 2011 included a leniency programme that constitutes a significant incentive for those companies involved in absolute monopolistic practices to voluntarily report the carrying out of this type of practice to the Commission. According to the LFCE and the leniency programme regulated in such law, companies or individuals that have participated in absolute monopolistic practices may reduce or avoid the imposition of sanctions (which in such case can even be criminal), provided they denounce the illegal acts in question before the Commission and take the necessary steps to terminate their participation.

The sanctions for the first company or individual to submit to the leniency programme can be reduced almost completely, and the fines can be reduced by 50 per cent, 30 per cent or 20 per cent for companies or individuals that subsequently submit to it, taking into consideration the chronological order in which the companies submit to the leniency programme and the evidence they provide.

Issuers must report any 'relevant event' to the CNBV that may damage its assets or those of any third party related to the issuer. It is not expressly specified if the wrongdoing of a representative (director, employee or agent) of the issuer may be considered as a relevant event, but said wrongdoing can be interpreted as such as it may affect the issuer's assets or activities or those of a related third party. When an individual provides accurate information for an investigation carried out by the CNBV with regards to suspected or unlawful operations by an issuer, the CNBV may abstain from initiating criminal procedures against the individual, taking such cooperation into account when deciding on the penalties that the CNBV or other authorities may impose if the issuer

is found guilty. The CNBV's right to apply leniency is discretionary, and it need only report this situation to the SHCP.

From a criminal perspective, an individual that (1) is aware of any wrongdoing in the operations of an issuer, and (2) keeps said operations in secrecy can be considered as engaging in a 'cover-up' felony and be criminally prosecuted.

If a responsible party, spontaneously and prior to the beginning of the proceedings for imposing the sanction, informs the CNBV in writing of the violation and corrects the omissions or contraventions – or, if applicable, notifies a compliance programme – this will be taken into account when imposing administrative sanctions; likewise, when the party presumed responsible demonstrates to the CNBV that the damage caused has been repaired, and contributes information that assists the exercise of CNBV's investigation, this will be taken into consideration.

As opposed to other countries, there are no specific corporate regulations in Mexico that establish self-reporting obligations on internal wrongdoing when corrupt activities are discovered. Nonetheless, the Federal Code of Criminal Procedures ('the FCCP') states that 'any person' that has knowledge of the commission of a felony that should be prosecuted *ex officio*, must denounce it before the Public Prosecutor.[2] In other words, when a company (or any of its representatives) discovers an act of corruption by one of its employees, directors or agents, there is a legal obligation to report this crime to the prosecution authorities.

ii Internal investigations

Companies may carry out the internal investigation procedures they consider relevant, provided that carrying out such investigations does not violate third-party rights. In fact, these types of procedures have become commonplace in many corporations with activities in Mexico in order to prevent the occurrence of monopolistic practices. The extension and scope of these types of procedures vary from company to company; however, typically there is a review of documents and witnesses are interviewed. Nevertheless, there is no obligation to perform these investigations or to report them to the Commission.

In relation to the interviewing of witnesses and employees, although such employees have the right to be advised by their own lawyers, in practice it is very unusual for those subject to these procedures to be advised by independent lawyers.

The Mexican Stock Market has published self-regulatory guidelines that issuers are recommended to take into consideration that are based on customary stock market practices (i.e., corporate governance rules). These guidelines recommend that the oversight committees of each issuer supervise the internal operations of the company establishing internal procedures for the investigation, control, correction, etc. of the issuer's corporate operations, as well as to sanction those who do not comply with the recommended stock market practices. In addition, in terms of the Stock Market Law ('the LMV'), the oversight committees of the issuer are entitled to carry out internal investigations when there is a suspicion of unlawful corporate operations.

2 FCCP, Article 116.

In terms of the applicable laws, individuals subject to internal investigations are not prohibited from retaining their own lawyers when internal investigations are carried out, and said individuals are not legally obligated to waive their attorney–client privileges. Notwithstanding, this matter may be otherwise controlled by the issuer depending on the circumstances of each case.

Private businesses may conduct the internal investigations they consider necessary, provided they are permitted (or not prohibited) by the applicable laws or not reserved to the prosecution authorities. If the investigations performed by a company itself yield any results on a probable commission of a crime, the company must report it to the legal authorities.

iii Whistle-blowers

Unlike certain other countries, Mexico does not provide adequate protection for whistle-blowers. Employees that report the occurrence of illegal acts to the proper authorities may lose their jobs or be subject to other internal sanctions. Currently, there is no real incentive for employees of companies to come forward to denounce illegal practices by the corporation.

One legal alternative individuals have to avoid being the subject of reprisals are anonymous accusations. The authorities in charge of enforcing criminal and anti-competitive activities have developed systems to allow such accusations.

In addition, several multinational corporations (and some Mexican public companies) are issuing corporate governance guidelines, including whistle-blower protection provisions, which specifically prevent any retaliation against employees that report any wrongdoing and – in some cases – even encourage them to do so.

III ENFORCEMENT

i Corporate liability

In Mexico, both companies and employees that are either directly involved in any decision-making for the companies or involved in any activities in breach of antitrust law can be held jointly responsible for any non-compliance with the antitrust provisions; however, the penalties imposed on companies and individuals are different.

It is important to mention that Mexico does not consider as monopolies strategic activities as defined in the Mexican Constitution, and which are exclusively reserved to the state. Additionally, the activities of labour unions created in accordance with Mexican law and the authors' or artists' exclusive rights over their works or inventions cannot be considered as monopolies under Mexican law.

In Mexico, both the company and the individuals in any alleged breach of antitrust law can be represented by the same counsel for any investigation or proceeding initiated by the Commission.

The LMV states that if the officers of the issuers that have decision-making powers breach their fiduciary duties (duty of care and duty of loyalty) or engage in illegal acts, they will be individually liable before the issuer for their acts, and may be subject to administrative, civil or criminal penalties. The LMV provides only certain specific events regarding when the issuer may be liable as a legal entity, and the CNBV is entitled to impose administrative fines on the issuer. These include when: (1) issuers fail to furnish

the information or reports referred to in the LMV (and the corresponding securities rules and regulations), or when they file them incompletely or without fulfilling the requirements, or the required terms or conditions; (2) issuers publicly offer, promote, reveal, or in any form disclose the intention of purchasing or selling securities in violation of the provisions of said law; and (3) issuers fail to prepare financial statements pursuant to the accounting principles issued or recognised by the CNBV in violation of the provisions of said law, or fail to reveal relevant events, in violation of said provisions.

Furthermore, civil and administrative fines may be imposed on issuers as well as on their board members, officers, managers, employees or attorneys who directly engaged in or ordered the performance of the unlawful conduct in question.

The members of the board of directors of the issuers will not, however, incur individual or joint liability for damages and losses, when acting in good faith.

In Mexican law, a company is considered to pursue its corporate purpose and activities through its representatives. If a director, employee or representative of a company is engaged in corrupt practices, the liabilities for these crimes – both criminal and civil – can be enforced upon both the representative and the company.

Depending on the specific circumstances, the company and the individuals may be represented by the same counsel (i.e., if the defence of the company and the individual does not conflict). Public companies may limit corporate liability of the members of its board of directors, or negotiate compensation and contract insurance for members to guarantee compensation for damages that the company (or any of its subsidiaries) may suffer as a result of its directors' actions, unless such action consists of deceitful, bad faith or illegal conduct. Breach of the duty of loyalty by a member of the board of directors cannot be limited, excluded or secured in any manner.

ii Penalties

In Mexico, the sanctions for breach of antitrust legislation can be administrative and criminal. The LFCE states a number of fines that can add up to either 5, 8 or 10 per cent of the economic agent's income, depending on the action in breach of antitrust regulations. The LFCE can impose the following fines:

a Up to 5 per cent of the economic agent's income if companies carry out a concentration without giving prior notice to the Commission.

b Up to 8 per cent of the economic agent's income if a company engages in any relative monopolistic activities, prohibited concentrations or carrying out concentrations in breach of a previous order of the Commission that stated otherwise. The LFCE considers relative monopolistic activities to encompass all acts, agreements, procedures, contracts or combinations whose aim or effect is or may be to unlawfully cut off other market agents, substantially prevent them access to the market or establish exclusive advantages in the market.

c Up to 10 per cent of the economic agent's income if a company engages in absolute monopolistic activities, breach of any preventive measures or breach of any conditions imposed regarding concentrations. The LFCE considers absolute monopolistic activities to encompass any agreements among competitors with the purpose of fixing prices, dividing markets, restricting supply of products or services or agreeing on positions for public auctions or bids.

d Up to 180,000 times the daily minimum wage of the Federal District on anyone who helps, induces or participates in any monopolistic activities, prohibited concentrations or other efficient market restrictions stated in the LFCE.

e Up to 200,000 times the daily minimum wage in the Federal District on anyone who directly participates in any monopolistic activities or prohibited concentrations, representing a company.

In case of recidivism regarding any of these activities, the fines imposed by the Commission can also be doubled.

The Commission determines the aforementioned fines based on the seriousness of the breach, the damage caused by said breach, the agreement to participate in the affected market, as well as the market's size, the duration of the monopolistic activities and whether the activity is a first offence.

Furthermore, recent reforms to the Federal Criminal Code ('the FCC') have included crimes regarding breach of antitrust provisions. The penalty for those who are involved in any absolute monopolistic activities is imprisonment for between three and 10 years. Such an accusation, however, can only be filed by the Commission.

The LMV establishes civil, administrative and criminal penalties for issuers or officers with decision-making powers that engage in any unlawful acts on the understanding that the severity of each of the penalties will be decided based on the circumstances of each unlawful act. These penalties can range from fines to mandatory resignation or even imprisonment. More than one penalty may be imposed on the responsible subjects for one unlawful act. In addition, the LMV states that not only issuers and their officers may be liable and subject to these penalties, but also any external auditors and lawyers that render their services to issuers are liable for the acts carried out in providing said services.

When a member or representative of a legal entity (with the exception of public institutions) commits a crime as a result of an assignment of, under the protection of, or for the benefit of the legal entity, a judge may force the legal entity to remedy the economic damages caused by the crime, suspend or prohibit the carrying out of determined operations, remove directors, or even dissolve the legal entity.[3] In cases of corruption, Mexican law also penalises the conduct of public officials; the policy of the Mexican government is to prevent public officials from engaging in corrupt practices.

The Federal Administrative Liabilities of Public Officials Act ('the FALPOA') and the Federal Liabilities of Public Officials Act ('the FLPOA') expressly forbid public officials from accepting gifts from private individuals. Public officials must refrain from receiving gifts or any other goods, the value of which exceeds 10 times the general daily minimum wage of the Federal District from persons whose professional activities are related to or supervised directly by the public official's office.

Under both the FALPOA and the FLPOA, the penalties for public officials include administrative warnings, suspension of duties, removal from position, fines and temporary bans.

3 FCC, Articles 11, 29, 30 and 32; and the Criminal Code for the Federal District, Articles 27, 68 and 69.

Neither the Government Procurement and Services Act ('the GPSL') nor the Public Works and Related Services Act ('the PWRSA') establishes specific penalties for any 'corrupt' act; however, anyone who infringes the law will be subject to a fine of 50,000 times the general monthly minimum wage in the Federal District. Additionally, a temporary ban on contracting with the Public Administration can be ordered.

The FCC considers the presentation of a gift to a public official as a crime, where both the giver and the receiver may be subject to the criminal liabilities applicable to bribery. The essential element of this crime is the purpose of influencing a public official's conduct. Each person that intends to influence the conduct of a public official by presenting a gift may be held responsible and criminally liable, and the value of the gift determines the applicable penalties. The FCC punishes the act of corruption itself (the offering of any good, the promise or the payment) regardless of its effect.

iii Compliance programmes

In Mexico, healthy corporate practice includes the existence of compliance programmes regarding any applicable legislation that may affect the way companies and their employees conduct their everyday activities. For companies that may have substantial power in their relevant markets, a compliance programme regarding antitrust legislation is particularly important.

Furthermore, if a company is subject to an investigation or proceeding regarding any non-compliance or breach of antitrust law, this company can present all documentation to the Commission documenting the existence and effectiveness of the antitrust compliance programme in order to prove its commitment to preventing any possible breach of antitrust regulations. The Commission will take this information into consideration in its decision and, if applicable, the amount of the sanctions.

Under the terms of the applicable Mexican laws there are no obligations for issuers to create and adopt compliance programmes. In terms of general stock market practice, the authorities recommend that issuers establish corporate ethics codes that are enforceable against their employees, engaging in self-regulatory proceedings and sanctions within the company. The BMV has furnished a professional ethics code for the Mexican stock market community that outlines basic principles that range from customary stock market practice to disclosure of relevant information. It has also furnished, in collaboration with banking, stock market and commerce entities and organisations, a best corporate practices code that sets out principles and recommendations applicable to the corporate governance of the issuers and other securities and stock market-related entities; it includes basic guidelines for the internal organisation of the corporate governance of issuers, mainly with regards to shareholders' meetings, board of directors, oversight committees, and finance and planning committees.

Aware of the impact that the application of the Foreign Corrupt Practices Act ('the FCPA') and other similar legislation around the world may have on their activities, many international companies with branches or affiliate companies in Mexico have engaged in compliance programmes regarding how any member of the company must conduct when engaging with public officials, preventing any possible corrupt activities that may affect the entire corporate group.

iv Prosecution of individuals

The LFCE does not set out any prohibitions concerning how a company should manage relations between the government and the company's employees that the government holds liable for any breach of antitrust law. However, it is extremely rare to find a situation in which an employee may be held liable and the company not. It is important to understand that the sanctions or fines imposed on individuals that are held liable by the Commission are different from those that are imposed on the company said individuals work in. The company can always impose internal actions it considers necessary if employees' actions (without the company's knowledge) have had a negative effect on the way the company conducts business or if the company is subject to any antitrust investigation or sanction (e.g., termination of employment, internal sanctions), or both.

When an issuer's employee is being prosecuted by the corresponding authorities, the relationship between the issuer and the responsible party will depend on the circumstances of each case. Issuers are entitled to assume the positions they consider most convenient for the interests of the entity and its shareholders or any related third party depending on each situation, provided that law does not set forth any kind of limitation or prohibition with regards to the relationship between the responsible party and the issuer in such cases. It can either coordinate with the individuals' counsel (including paying the legal fees), cooperate with the Public Prosecutor's office (in cases where the company may be considered one of the victims of the crime), or simply do nothing.

Notwithstanding the foregoing, if the issuer believes that there may be a conflict of interest if it assists the responsible party in any manner, it may decide to terminate its relationship and refuse to grant assistance to the employee. In any event, if the employee has carried out unlawful acts, breached any employee obligations, or acted against the internal policies of the issuer, the issuer is entitled to terminate the relationship without any liability.

Regardless of the effects corrupt practices may have on a company, the FCC considers the giver of money, gifts or other benefits to public officials as directly responsible for bribery, and subject to the criminal liabilities said practices may entail. However, companies may internally sanction any employee or agent that engages in corrupt practices, with sanctions that can range from warnings to termination of the labour relationship.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Mexican law is only applicable within the limits of Mexican territory, and the jurisdiction of the Mexican authorities is limited by territory. This also applies to investigations and sanctions imposed by the Commission pursuant to the fact that the jurisdiction of said entity is restricted to Mexico. However, the LFCE states that companies that sell their products abroad will not be considered monopolies (with certain restrictions, particularly that the products delivered by said companies are not distributed or sold in Mexico and that these products are the main source of wealth of the region in which they are produced).

The same basic principle is applicable with regard to securities and stock market activities; for instance, the General Regulations for the International Trade System

state that the supervisory faculties of the CNBV will not be effective on foreign stock markets or foreign issuers, unless otherwise stated in international treaties or cooperation agreements between Mexico and the corresponding country.

The FCPA and other similar legislation provide extraterritorial jurisdiction within subsidiary companies in Mexico with the parent companies abroad. However, Mexican corruption-related legislation is not enforceable outside of Mexican territory.

ii International cooperation

Under Mexican antitrust legislation, during the investigations engaged in by the Commission, the Commission is entitled to request information or proof that monopolistic activities have been committed in Mexico from foreign government agencies as an act of cooperation between government authorities to ensure compliance with antitrust law. Furthermore, the Commission is specifically empowered to execute and negotiate all sorts of agreements and international treaties regarding antitrust and free competition.

Mexico has negotiated agreements with the United States and Canada that deepen their cooperation to ensure the prevention and prohibition of monopolistic activities, including various issues such as consultations, technical cooperation, meetings, notifications and conflict resolution.

Under Mexican law, the CNBV is entitled to enter into cooperation agreements with other similar authorities in order to improve the operation of the international stock markets. One of these cooperation agreements is the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information for securities regulatory enforcement purposes entered into with the International Organization of Securities Commissions, which sets out the specific requirements on what kind of information can be exchanged and the forms of exchange and permissible uses of said information. It also states specific requirements regarding the confidentiality of information exchanged, and ensures that no domestic banking secrecy or blocking laws or regulations prevent securities regulators, authorities, private or public entities or individuals from sharing this information with their counterparts in other jurisdictions.

The Mexican government certainly has the obligation to cooperate with other countries to prevent, detect, punish and eradicate corruption. This obligation arises from various international treaties. The Inter-American Convention against Corruption ('the IACAC') and the United Nations Convention against Corruption establish cooperation among the states to ensure the effectiveness of cooperative measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and other acts of corruption specifically related to such duties. There is a broad spectrum of preventive measures taken into consideration, from the establishment of a correct standard of conduct to the implementation of certain deterrents of corrupt activities, as well as preventive measures to prevent any corruption-related activities.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions requires each party to take measures to ensure applicable jurisdiction over the bribery of a foreign public official when the offence is committed within its territory. It also states that the party has the jurisdiction to prosecute nationals for offences committed abroad. This convention may be considered the legal

basis for extradition of accused parties to ensure the prosecution of those suspected of bribing a foreign official.

iii Local law considerations

The Commission is authorised to provide information requested by competent authorities from other countries regarding antitrust compliance and free competition, provided that agreements have been executed for the exchange of information and as long as said information is not considered confidential by the applicable legislation, and in the clear understanding that the information provided will remain confidential at all times and any disclosure to third parties is not allowed. Finally, such agreements are clear in stating that no act or omission regarding the agreements that represents an incompatibility with the applicable legislation, including any reforms to said legislation, shall be carried out.

The CNBV is authorised to provide to foreign authorities all kinds of documentation, certificates, records, files and other information that it receives by virtue of the performance of its duties, provided that the CNBV has agreements for the exchange of information in which the reciprocity principle is adhered to, and abstaining from providing information that in its opinion may be used for purposes other than those agreed under said agreements (or else for causes of public order, national security or any other cause agreed under the corresponding agreements). For such purposes, the CNBV, as requested by foreign authorities, may carry out inspections on foreign issuers or subsidiaries that have securities registered at the National Securities Registry.

Mexico has an obligation to assist in investigations and proceedings initiated by foreign authorities for the prosecution of crimes in their own jurisdiction. This obligation derives from, among other agreements, the Inter-American Convention on Mutual Assistance in Criminal Matters. The obligations for international assistance are set out by international treaties. International assistance can be lent to a foreign investigation if ordered by a judge in the exercise of the powers conferred by the treaty. However, the assistance may be limited to criteria determined by the assisting party; this means that other authorities may only request those in Mexico to perform a duty that already exists in the pursuit of a felony recognised by Mexican legislation.

Other legal considerations that must be taken into account are the limited access to restricted information (among others, for national security purposes), bank secrecy provisions and attorney–client privilege.

V YEAR IN REVIEW

The Mexican government continues to provide the Commission with more resources and means to enforce the LFCE. Furthermore, the Commission has fined prominent companies in the past year, such as Cemex Mexico, Teléfonos de México and Cablevisión, for the commission of monopolistic activities. However, the Commission also filed controversial resolutions during this past year, regarding an unauthorised concentration between Televisa and Iusacell in the mobile phone market, as well as the revocation of the biggest fine in the Commission's history on Radiomovil Dipsa (the largest mobile phone company in Mexico) in exchange for several fair trade-related activities, which may have affected the Commission's credibility with the Mexican population.

A bill regarding the Federal Anti-Corruption Act is currently subject to approval. This Act seeks, *inter alia*, to penalise private citizens that foster corruption. The sanctions are similar to those set out in the regulations previously outlined but consider liability for persons other than public officials.

Furthermore, investigations by the American Department of Justice regarding corrupt practices by Walmart de Mexico with several government officials has had a significant negative impact on said company both among consumers and in the stock market.

VI CONCLUSIONS AND OUTLOOK

The Mexican authorities are continuing several investigations on various markets that are largely controlled by one or two big companies, which, if found responsible, will suffer major consequences in both their businesses and in the perceptions consumers hold of them. Furthermore, the Commission is drafting new Regulations to the LFCE, as well as several guidelines regarding how monopolistic practices will be detected, determined, analysed and sanctioned; it is expected that these documents will enter into full force at some point in 2012. Mexican companies are becoming more aware of the importance of antitrust law and of the Commission, which helps maintain fair trade and free competition. Based on the fact that international trade in Mexico continues to increase, and that the country is beginning to put the global economic crisis behind it, international governmental cooperation will be necessary to ensure a healthy market, to the benefit of consumers.

Mexican authorities and private entities have been working to improve the Mexican securities market and its regulation. One of the most important recent legal developments has been the amendment to the LMV in 2006, the main purpose of which was to allow small and medium companies access to the securities market; define the corporate governance obligations, attributions and responsibilities of issuers; strengthen the CNBV's authority and powers; and bring Mexican law in line with international standards.

There is, however, still work to do, principally with regard to internal control and corporate governance practice and ethics. Despite the fact that issuers must clearly be considered public entities in certain events, they still maintain their nature as private entities with regards to internal organisation. Mexican law still limits the authorities' intervention in the internal corporate governance of issuers to the basic regulations set out in the LMV, and the corporate governance practices and ethics are only recommendations. This represents a challenge, given that while Mexican law has developed considerably in recent years, there are still a lot of grey areas in internal corporate control, such as in relation to secrecy and internal control of information, self-reporting, whistle-blowers; and product privileges.

Mexico has made consistent efforts against corruption; however, corruption is still a major concern among companies and the population, and the requirement to provide the authorities with more methods to investigate and fine corruption has not been met.

There is still a long way to go for Mexican law to be in total accord with the international situation. The efforts that the Mexican government and institutions have made over the past several years are considerable, but not enough.

Appendix 1

ABOUT THE AUTHORS

CLAUS VON WOBESER

Von Wobeser y Sierra SC

Claus von Wobeser studied at the Escuela Libre de Derecho, and obtained his doctorate in law at the University of Paris.

He is vice chairman of the ICC International Court of Arbitration, a member of the board of directors of several Mexican companies, president of the board of the Mexican–German Chamber of Commerce and Industry, a member of the Mexican Institute of Mediation and of the LCIA Latin American Council.

He is former president of the Mexican Bar Association and of the Advisory Board of the Mexican Immigration Institute and former co-chair of the Arbitration Committee of the International Bar Association.

He has served as arbitrator and represented several companies in many arbitrations under the rules of the ICC, AAA, Inter-American Commercial Arbitration Commission, NAFTA chapter XI, ICSID and ICSID Additional Facility Mechanism. He was *ad hoc* judge at the Inter-American Human Rights Court (*Jorge Castañeda v. United Mexican States*).

Dr Von Wobeser speaks fluent Spanish, German, English and French and has been managing partner of Von Wobeser y Sierra SC since 1986.

FERNANDO CARREÑO

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Fernando Carreño graduated *cum laude* from the Escuela Libre de Derecho, where he obtained his law degree and obtained his master's degree from Northwestern University School of Law. Mr Carreño worked as visiting attorney at Arent Fox LLP in Washington DC. He was head professor of alternative dispute resolution at the Universidad Iberoamericana in Mexico City.

Currently Mr Carreño is the head of the antitrust practice at Von Wobeser y Sierra. He provides antitrust advice in both competition/antitrust aspects of corporate deals as

well as litigation matters before the Mexican Antitrust Commission and the Mexican courts. Mr Carreño regularly advises clients in many different industries, including the aerospace, telecommunications, energy, health-care and technology sectors, as well as financial institutions in national and cross-border transactions. He also engages in mergers and acquisitions and financial transactions.

Mr Carreño is fluent in Spanish and English and has been a partner of Von Wobeser y Sierra since 2009.

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