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GCR INSIGHT

PRIVATE LITIGATION GUIDE

SECOND EDITION

Editors

Nicholas Heaton and Benjamin Holt

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This article was first published in December 2020

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Published in the United Kingdom by Global Competition Review

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

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www.globalcompetitionreview.com

Second edition

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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-83862-262-6

Printed in Great Britain by Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE

ALLEN & OVERY LLP

CAMINATI BUENO ADVOGADOS

CDC CARTEL DAMAGE CLAIMS CONSULTING SCRL

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PART 2

OVERVIEWS

Mexico Overview

Fernando Carreño Núñez de Álvarez and Gerardo Enrique Rodríguez Aguilar¹

The Mexican statutes and their regulations prevent anticompetitive practices through different proceedings. As may be presumed, the most important act governing these illegal activities is the Mexican Federal Competition Act (the FCA).

As we will point out later, the FCA sanctions three types of monopolistic behaviours: cartels; abuse of dominance conducts; and illegal mergers. As a consequence, these are the private causes of action for plaintiffs to recover damages and losses.

Illegal cartels are conducts sanctioned per se under the FCA, but they are also considered crimes under the National Criminal Code, punishable by imprisonment up to 10 years and fines. In addition, those responsible for engaging in the referred behaviours may face civil actions for damages and losses. These civil actions are also available to claimants who have been harmed by abuse of dominance conducts and illegal mergers.

As far as we know, Sections 1 and 2 of the Sherman Act, and Section 4 of the Clayton Act, make no express distinction with regard to the nature of the lawsuit that brings an antitrust question before the courts. In other words, it seems that the Sherman Act and the Clayton Act put public-private and civil-criminal complaints on the same footing. In contrast, in Mexico, the prerequisite for criminal offences or civil relief is the opening of an official investigation by any of the competition authorities in Mexico.

This kind of approach is consistent with the aim of the FCA, which is championing the competitive process by preventing monopolies and anticompetitive conducts, instead of protecting consumers and competition.

¹ Fernando Carreño Núñez de Álvarez is a partner and Gerardo Enrique Rodríguez Aguilar is a senior associate at Von Wobeser y Sierra.

With the above as preface, this article provides an overview of: applicable legislation; legal standing; the standard of proof; applicable statute of limitations and tolling; fines and the basis for calculation; and the development of private litigation in Mexico.

Applicable legislation

As we stated before, the private cause of action to recover damages and losses will be triggered only if the competition authorities in Mexico have launched an official investigation; otherwise, the private parties would not have standing before the federal courts in Mexico. In this regard, we first go over the administrative procedure in accordance with the FCA.

Administrative proceeding

The authorities in charge of enforcing the FCA and its regulations are the Federal Telecommunications Institute (FTI), which is the competition agency focusing only on the telecommunications and broadcasting industries, and the Federal Competition Commission (the Commission or the FCC) (the Agencies)), which is the agency for all the other industries.

These Agencies investigate and sanction monopolistic practices through an investigation which may be opened at the initiative of the authority or with a lawsuit brought by a third party.

The applicable regulations sanction two types of monopolistic conduct: cartels (e.g., price fixing, market allocation, bid rigging); and abuse of dominance conducts (e.g., resale price maintenance, exclusive dealings, tying, boycotts, predatory pricing, margin squeeze). An essential element for carrying out cartels is that it takes place between competitors, while abuse of dominance is identified as conduct that takes place between entities that are at different levels of the chain, in other words, non-competing entities.

Cartels are collusive arrangements or horizontal practices, which are considered per se illegal. In this regard, the only element that must be proven is an arrangement or agreement of any kind with the purpose or effect of engaging in any of the five anticompetitive conducts listed in the FCA. In contrast, abuse of dominance conducts are governed under the rule of reason. The FCA provides a list of thirteen conducts, that may be illegal to the extent the following is proven: (1) that the conducts are carried out by one or more entities that individually or jointly exert substantial market power in the same relevant market in which the conduct is carried out; and (2) that such practice has or may have as its purpose or effect, in the relevant market or a related market thereof, to unduly displace other entities, substantially impeding their access or establishing exclusive advantages in favour of one or more entities.

To start an investigation to demonstrate the existence of any monopolistic behaviour is a difficult task for the Agencies. The chief prosecutor of the Investigative Authority (IA) needs to obtain sufficient evidence or receive a complaint backed up with enough evidence to do so

The investigation may last up to 120 business days. This period may be extended four times. As a consequence, the investigation may last up to 600 business days. During the investigation, the Agencies may exercise any of the following powers: issue requests for information; summon and depose any individual; and execute dawn raids.

Once the investigation is finished, the IA has two options: close the investigation, or issue a statement of objections and summon all those responsible for engaging in the practice.

The administrative trial procedure initiates with the issuance of the statement of objections. Through this procedure the IA and the accused submit evidence in support of the allegations or in response thereto. After the Agencies discuss the allegations and the responses of the accused regarding the anticompetitive behaviour, the outcome will be stated in the judgment, which will be notified to all the interested parties.

The interested parties will have 15 business days to appeal the Agencies' judgment through a judicial challenge to be submitted before the Federal Courts Specialised in Competition, Telecommunications and Broadcasting. This trial may last approximately 15 months.

As stated before, all other procedures for prosecuting any competition violation in Mexico are subject to issuance of the statement of objections (for criminal investigations) or the judgment entered by the competition authority (for civil claims). Thus, it is relevant to bear in mind that only the action of the Agencies will trigger the criminal and civil procedures.

Civil proceeding

It is our understanding that Section 4 of the Sherman Act and Section 15 of the Clayton Act set forth that the federal courts 'are invested with jurisdiction to prevent and restrain violations' of the referred acts. Therefore, we understand that the US Federal Courts may: forbid the continuation of illegal acts, but also force the defendant to surrender the fruits of its wrong and restore competitive conditions. As part of the latter, private persons injured by any antitrust violation may seek treble damages.

In Mexico, private persons may only seek relief from damages and losses caused by anticompetitive behaviours through federal courts. The Federal Civil Code and Federal Civil Procedure Code in Mexico sets forth two different procedures for seeking this: (1) private actions and (2) class actions.

Private actions

As stated before, in Mexico, the Federal Courts only have jurisdiction to issue a judgment related to the damages and losses suffered as a result of illegal behaviour sanctioned in the FCA. This is set forth in Section 134 of the FCA, which confers jurisdiction to the Federal Courts Specialised in Competition, Telecommunications and Broadcasting for resolving civil lawsuits submitted by private parties who have suffered damages and losses as a consequence of monopolistic practices or illegal concentrations.

These kinds of lawsuits would be admitted once the Commission's judgment is final. This may be construed as when Federal Courts Specialised in Competition, Telecommunication and Broadcasting have upheld the Commission's judgment.

Class actions

Another way to request damages and losses for harm caused by an absolute monopolistic practice is through a class action, which is regulated under the Federal Civil Procedure Code.

Class actions are relatively new in Mexico. These suits were incorporated for the first time on 29 July 2010, through a constitutional amendment.

A class action is the right of certain groups to request before federal courts the protection of rights related to consumer goods and services and the environment.

Private competition actions are authorised only under federal law. The causes of action are contained only in the FCA. The procedures are also contained in federal statutes: the Federal Civil Code and Federal Civil Procedure Code. Finally, the FCA sets forth that the competent court to enter a decision for damages and losses as a consequence of an anticompetitive conduct are the Federal Courts Specialised in Competition, Telecommunications and Broadcasting.

Legal standing

The FCA sets forth that any entity or individual may bring a competition complaint before the Agencies; it is not necessary to prove any economic injury as a result of the anticompetitive conduct. However, the legal standing is not the same for civil claims. In these cases, only the persons who have been injured are entitled to bring a damages and losses suit.

Private actions

Any entity or individual who has been harmed by a cartel, abuse of dominance or an illegal merger has legal standing to bring a claim to recover damages and losses before the federal courts.

The federal statutes make no distinction between categories of persons entitled to recover damages. That being said, direct or indirect purchasers who acquired the goods or services subject to the anticompetitive conduct or competitors of those markets may bring the civil suits.

The only prerequisite to having legal standing is to have a final decision by means of which an entity or individual is found liable for any anticompetitive conduct or an illegal merger; otherwise, the suit would be dismissed.

Class actions

The Federal Civil Procedure Code sets forth that the following entities have legal standing: the Commission, as well as other government entities that champion consumers' interests; the common representative of a community made up of at least 30 members; non-profit associations legally incorporated at least one year prior to the moment of the class action submission; and the Attorney General.

As in the private actions, one of the main requisites for admitting a class action is that there is a final and binding decision issued by the Agencies.

Elements that must be proven to establish the existence of damages and losses

It is a general principle of Mexican law that whoever has unjustly caused damages or losses must indemnify them. This obligation, also called civil liability, has application in both contractual matters and non-contractual matters (e.g., violations of the FCA).

In the case of breach of a non-contractual obligation, the affected party has the right to claim the payment of damages and losses. For this purpose, the affected party must demonstrate in the civil proceedings the three following elements: (1) an illicit behaviour carried out by the accused, (2) the existence of damages and losses suffered by the plaintiff, and (3) that the illicit behaviour was the sole, direct, immediate and necessary cause of the damages and losses; that is, that a causal relationship exists between the illicit behaviour and the damages.

To prove (1), Section 134 of the FCA provides that the Agencies' decision by itself proves the wrongfulness of the accused for purposes of the compensatory action. Therefore, it is not necessary to bring any additional element to prove this one.

Requisite (2) can be divided into two sections: (1) damages, which can be understood as the harm suffered to the assets of a person by the breach of an obligation, and (2) losses, which can be understood as the deprivation of any lawful gain that would have been obtained if the obligation had been complied with.

Finally, to contextualise requisite (3), it is relevant to bear in mind that the obligation to pay damages and losses arising from the illicit behaviour is limited under the Federal Civil Code. This limitation sets forth that a party may only be liable for actual damages and losses that directly and immediately arise from the illicit behaviour; and that no indirect, consequential, punitive, exemplary or any damages other than direct and immediate damages are available to the party affected by the illicit behaviour.

A direct, immediate and necessary causal relationship is needed. This principle requires that the illicit act be the cause of the damages and losses. Thus, there must be a causal link between the conduct of the accused (illicit behaviour) and the result (damages and losses).

The need for a causal relationship is twofold: (1) to determine if the accused is the transgressor and therefore liable for the damages; and (2) to determine the extent or limit of the obligation to compensate them.

Therefore, in Mexican law, the governing principle is that the person who behaved illicitly should not bear all the series of damages and losses that occur as a consequence of the noncompliance, but only those that are a direct and immediate consequence of his conduct.

No provision in Mexican law authorises the awarding of exemplary, punitive or any other similar damages, even in the case of intentionally caused damages or losses, and irrespective of whether the alleged misconduct was wilful, grossly negligent, reckless or otherwise.

Notwithstanding the foregoing, there is a recent judgment² of the Mexican Supreme Court that suggested that punitive damages may be applicable. In accordance with this interpretation, the judge should not only consider those aspects necessary to erase the damage suffered by the victim, but also study aggravating factors to assess the degree of responsibility of the person who caused the damage. That said, this is the only precedent that encompasses an award that goes beyond the classic limits or the direct and immediate damages theory.

The evidentiary aspects indicated before are equally applicable in class actions, but only with the clarification that the damages and losses would be estimated taking into consideration the particular circumstances of each member of the community in question.

Applicable statute of limitations and tolling

This section briefly provides the statute of limitations for the administrative procedure and civil claims, as well as the tolling of the statute of limitations, if applicable.

In the administrative procedure, the Agencies have the power to investigate possible anti-competitive behaviour that took place in the last 10 years, counted from the date on which the illegal merger was carried out or, in other cases, from when the conduct ceased.

2 The referred precedent is available through the following website: <https://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/2006/2006959.pdf>.

The statute of limitations in private actions for claiming damages and losses is two years. This period starts from the day on which the damage was caused. Notwithstanding, there are judicial precedents that state that the period may start from the day on which the affected party becomes aware of the damage suffered. In relation to the tolling of the statute of limitations, the period is suspended when the Agencies officially initiate the investigation.

In the case of class actions, the statute of limitations for claiming damages and losses is three and a half years. Similar to private actions, the period starts from the day on which the damage was caused. If they are ongoing damages, the term for the statute of limitations will begin to run from the last day on which the damages were caused. In relation to the tolling of the statute of limitations, again, the period is suspended when the Agencies officially initiate the investigation.

Overview of types of sanctions

In terms of the FCA, the monopolistic practices can be subject to the following sanctions:

- a fine of up to the equivalent to 10 per cent of the income of the economic agents involved, for engaging in a cartel activity, apart from any civil or criminal liability that may be applicable;
- a fine of up to the equivalent to 8 per cent of the income of the economic agents involved, for engaging in abuse of dominance, apart from any civil liability that may be applicable;
- a fine of up to the equivalent to 8 per cent of the income of the economic agents involved, for engaging in an illegal merger, apart from any civil liability that may be applicable;
- the total or partial divestment of the illegal merger;
- disqualification for acting as board member, administrator, director, manager, executive, agent, representative or attorney-in-fact in an entity for up to five years;
- a fine of up to the equivalent to 200,000 times the UMA (US\$800,000)³ on anyone who participates directly or indirectly in monopolistic practices, in representation or on behalf and upon instructions of entities; and
- a fine of up to the equivalent to 180,000 times the UMA (US\$720,000) on anyone who has assisted, propitiated or induced the commission of monopolistic practices.

The aforementioned income will be cumulative for the economic agent involved in the illegal conduct excluding those obtained from a source of wealth located abroad.

In the imposition of fines the following elements are considered:

- the damage caused;
- the intentionality;
- the participation of the offender in the market;
- the size of the affected market;
- the length of the practice;
- the offender's economic capacity; and
- where applicable, the bar on the exercise of the powers of the Commission.

3 The amounts expressed in this memorandum are calculated based on the current value of the UMA (86.88 Mexican pesos) and using the daily exchange rate published by the Mexico's central bank on 1 September 2020 (21.7 Mexican pesos per US dollar).

As stated before, the purpose of civil actions for competition violations in Mexico is only to recover damages and losses, which will be estimated in money for private persons that suffered the consequences of the anticompetitive behaviour.

The amount to be granted for each private person will be estimated on a case-by-case basis.

It is customary that the Commission's judgments calculate the damages (estimated in money) caused in the market as a result of the anticompetitive conduct.

The development of private litigation

The legal framework established in Mexico to recover damages and losses for persons harmed by anticompetitive behaviour has been responsible for the slow pace in the development of this practice.

As stated before, if any affected individual or corporation wants to pursue a damages recovery for being harmed by any anticompetitive conduct or illegal merger, a long path awaits them.

The first step would be to navigate the administrative procedure. The investigation may last up to 30 months; subsequently, the administrative trial may continue for 18 months. After that, if everything looks good for the plaintiffs, they have to face the judicial trial before the Federal Courts Specialised in Competition, Telecommunications and Broadcasting, which may last approximately 15 months.

If the decision so far has been favourable for the plaintiffs, they would have dedicated more than five years of proceedings, trials, and resources to this previous, but mandatory stage of the civil claim.

Finally, the last step may appear not to be problematic for the plaintiffs, since the FCA states that the final decision issued by the Agencies would be enough to prove the wrongdoing of the anticompetitive conduct. Therefore, it seems that the federal courts would be limited to estimating the amount to be granted as payment for the damages and losses and, hence, the affected persons would expect an expedited process. Nonetheless, reality has shown us that this is not necessary true; there are different recourses available for the wrongdoers, which may cause notable delays in this civil trial.

That being said, there are not enough cases so far to produce a reliable average for the period of time that this civil proceeding may last, but a good estimation would be 16 months for granting the recovery of damages and losses.

Finally, we would like to share with you some of the most relevant civil claims, which have passed through all the processes herein described:

Public health procurement

The predecessor of the Commission charged as responsible for bid rigging in the procurement of insulin to be acquired by the Mexican Social Security Institute from different corporations that used to appear constantly in public bids as suppliers. The Mexican Social Security Institute is claiming damages for US\$8 million.

Cab services in Mexico City Airport

In 2014, the Commission launched a cartel investigation in the market of taxi services offered in the Mexico City Airport. The Board of the Commission sanctioned five taxi companies for price fixing. The civil suit for damages was admitted during August 2020.

Private hospitals in Guadalajara

The board of the Commission issued a decision establishing liability on six hospitals for price fixing and imposed a sanction of US\$700,000, which amounted to 25 per cent of the damage caused. Last year, a non-profit association, on behalf of the harmed entities and individuals, started a class action against these hospitals.

All these cases are still under the review of the federal courts. The decisions will be valuable precedents that will shed light on this new but relevant practice in Mexico. We would be delighted to update these cases in the next edition of this guide.

Appendix 1

About the Authors

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Fernando is the head partner of the competition and antitrust practice of Von Wobeser y Sierra.

His practice focuses on developing and implementing high-level antitrust strategies in connection with transactional matters, including advising on antitrust regulatory approvals in Mexico, cartel and market investigations, compliance, and general antitrust counselling.

Fernando has been widely and consistently recognised as one of the leading antitrust lawyers in Mexico. In 2018, he was awarded 'Lawyer of the Year - under 40' by *Global Competition Review* and in 2016 he was listed also by *Global Competition Review* in its special report '40 Under 40'. Additionally, he has been recognised by *Chambers and Partners Global*, *Chambers and Partners Latin America*, *The Legal 500*, *Latin Lawyer 250*, *Who's Who Legal* and *IFLR1000*, among others.

He serves as a non-government agent of the International Competition Network and acts as the Officer of the Antitrust Committee of the International Bar Association, vice president of the Antitrust Committee of the International Chamber of Commerce, and as chair of the Competition and Antitrust Section of the Barra Mexicana de Abogados, A.C.

He obtained his law degree from Escuela Libre de Derecho and his master of laws degree (LLM) from Northwestern University School of Law.

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Mr Rodríguez earned his JD from Centro de Investigación y Docencia Económicas and obtained his LLM from Indiana University.

About the Authors

He has deep knowledge of and experience with network industries, such as: telecommunications, broadcasting, railroad transportation and oil and gas; as well as other regulated sectors such as healthcare and life science, financial services and air transportation, among others.

He appears before the Mexican competition authorities and the Federal Courts.

He has been recognised as a 'Next Generation lawyer' (2019) and 'Rising Star in Competition and Antitrust' (2020 and 2021) by *The Legal 500*. He was also ranked in the last edition (2021) published by Chambers & Partners Latin America.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as Brazil, Japan and Mexico.

As the editors of this publication note, ‘litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.’

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ISBN 978-1-83862-262-6