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The International Comparative Legal Guide to: Cartels & Leniency 2011

A practical cross-border insight
into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis is both civil and administrative; although since April 2009, the parliamentary coordinators of the three main Mexican political parties are preparing a draft bill reforming the Competition Law aiming at toughening sanctions against cartels, relative or absolute monopolistic practices and unlawful concentrations. Infringers could face maximum pecuniary penalties of up to 10% of their annual income and even imprisonment.

1.2 What are the specific substantive provisions for the cartel prohibition?

The Mexican Constitution, the Federal Economic Competition Law ('the Law'), the Code of Regulations and the legal framework applicable to regulated sectors form the legal body providing the relevant provisions for cartel prohibition.

The Law regulates Article 28 of the 1917 Mexican Constitution on economic competition, monopolies and free market access. It is binding to all sectors of the economic activity in Mexico and all economic agents are subject to its provisions, whether individuals or corporations, agencies or entities of the federal, state or local administration, associations, professional groups, trusts or any other form of participation in economic activities with the exception of the strategic sectors indicated in the fourth paragraph of Article 28 of said Constitution which do not constitute monopolies –although from an economic standpoint they are–.

The Law developed an effective and enforceable regime to punish cartels and monopolistic practices and control mergers, which afford protection to the competition process and the free market access, by also preventing other restrictions that deter the efficient operation of the goods and services market that may have a negative impact on the relevant market.

Monopolistic practices are divided into two categories: absolute; and relative. Absolute monopolistic practices are contracts, agreements, arrangements, or combinations among competitive economic agents, whose aim or effect are any of the following:

- I. to fix, raise, agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect;
- II. to establish the obligation to produce, process, distribute or

market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;

- III. to divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or
- IV. to establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding.

Absolute monopolistic practices are '*per se*' violations of the Law and in their analysis no consideration is given to any efficiency gain. Relative monopolistic practices, on the other hand, are deemed to be those acts, contracts, agreements or combinations amongst economic agents that do not compete among themselves, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favour of one or several entities or individuals, which include tied sales, boycotts and price fixing, predatory pricing, discounts for exclusivity, cross subsidies, and discrimination in sale conditions, amongst others.

Relative monopolistic practices are punishable if and when the economic agent has substantial power in the relevant market and abuses its dominant position. The common test to determine whether the latter has such power is when, due to its market share, it can unilaterally set the prices or restrict the supply or volume in the relevant market without the competitive agents being able to act or to potentially counteract that power.

1.3 Who enforces the cartel prohibition?

The Law created the Federal Competition Commission which is a semi-autonomous administrative agency in charge of the enforcement of the Law and its Code of Regulations as well as the crafting of competition policies and advocacies implemented by such. The Competition Commission is finally dependant of the Secretariat of Economy.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Proceedings before the Competition Commission begin *ex-officio* or at the request of a party.

When exercising its powers, the Competition Commission may request the necessary information or documents in order to carry out investigations, as well as to summon those involved in the corresponding cases. The information and documents obtained directly by the Competition Commission when carrying out its

investigations, and also those filed before it shall be strictly confidential. Public servants shall be held responsible in case of disclosure of that information, except when disclosed by order of a competent authority.

All persons, in the event of absolute monopolistic practices, or the party affected by the other practices or concentrations forbidden hereunder, may file a written complaint before the Competition Commission against the alleged responsible, describing the nature of that practice or concentration.

In the case of monopolistic practices or concentrations, the complainant shall include the elements that constitute those practices or concentrations, or as the case may be, the concepts that prove that the complainant has suffered or may suffer a substantial damage.

The Competition Commission may reject the claims that are notoriously unfounded.

Proceedings before the Competition Commission shall abide by the following:

- I. the alleged responsible party shall be summoned, and shall be notified of the nature of the investigation, and shall attach, where applicable, a copy of the complaint;
- II. the party summoned shall have a thirty calendar-day term to submit an affidavit of defence and to attach the documentary evidence in his possession and shall submit all evidence that should be reviewed;
- III. when the evidence has been reviewed, the Competition Commission shall set a term not longer than 30 calendar-days to submit the verbal or written pleas; and
- IV. upon integration of the file, the Competition Commission shall issue a resolution within the following 60 calendar days.

Any matter not covered herein shall be governed by the regulations of this law.

In order to efficiently execute its powers, the Competition Commission may use the following legal pressure:

- I. admonition; or
- II. a fine up to the equivalent of 1,500 times the minimum wage in effect in the Federal District. This amount may be imposed per day of non-compliance with the Competition Commission's order.

1.5 Are there any sector-specific offences or exemptions?

The Law and economic competition regime is binding to all sectors of the economic activity in Mexico and all economic agents are subject to its provisions, whether individuals or corporations, agencies or entities of the federal, state or local administration, associations, professional groups, trusts or any other form of participation in economic activities with the exception of the strategic sectors indicated in the fourth paragraph of Article 28 of the Mexican Constitution which do not constitute monopolies –although from an economic standpoint they are–, such as mints, the mail system, telegraph, and radiotelegraphy, issuance of paper money by a single bank to be controlled by the Federal Government, and to the privileges which for a specified time are granted to authors and artists for the reproduction of their works, and to those which, for the exclusive use of their inventions, may be granted to inventors and those who perfect some improvement.

Associations of workers, formed to protect their own interests, do not constitute monopolies.

Nor do cooperative associations or societies of producers constitute monopolies, which in defence of their interests or of the general

interest, sell directly in foreign markets the domestic or industrial products which are the main source of wealth in the region in which they are produced, and which are goods of prime necessity, provided that such associations are under the supervision and protection of the Federal or State Governments and that they were previously duly authorised for the purpose by the respective legislatures, or on proposal of the Executive branch may, when the public need so requires, repeal the authorisations granted for the formation of the associations in question.

1.6 Is cartel conduct outside Mexico covered by the prohibition?

No. Mexico does not have a long-arm statute or extraterritorial regime.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	No	N/A
Carry out an unannounced search of residential premises	No	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes	N/A
■ Right to retain original documents	No	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	No	N/A

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

Prior to the constitutional ruling issued by the Supreme Court of Justice on 12 July 2007 several investigatory powers referred to in the summary table required prior court authorisation; however, the Competition Commission is no longer dependent upon such authorisation as the Supreme Court of Justice ruled and confirmed that the Competition Commission was the only specialised agency in charge of the competition regime and that the Mexican Constitution could not be construed in such a way to subject the Competition Commission's power to judicial authorisation.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are not.

2.4 Are there any other significant powers of investigation?

No, there are not.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Officers of the Competition Commission, who are under no obligation to wait for legal advisors to arrive, carry out the searches.

2.6 Is in-house legal advice protected by the rules of privilege?

Yes. In-house legal advice, as with any other advice provided by lawyers, is protected and exempt from certain criminal or administrative sanctions in relation to the clients or beneficiaries of such advice.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The Law provides for several statutes of limitations in connection with investigations.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

There are no express provisions in the Law applicable to the obstruction of investigations; however, criminal and administrative sanctions provided for in other laws may apply in such cases.

The approach of the Competition Commission has changed in fact due to the amendments to the Law approved in June 2006, which provided the latter with additional tools to carry out investigations. However, sanctions provided for in specific laws are still to be reviewed and amended in order for the Competition Commission to apply stricter sanctions for obstruction of investigations.

3 Sanctions on Companies and Individuals**3.1 What are the sanctions for companies?**

The Competition Commission may assess the following sanctions:

- I. order to suspend, correct or eliminate the concentration or monopolistic practice in question;
- II. order the partial or total divestiture of what has been unduly concentrated notwithstanding the applicable fine, as the case may be;
- III. a fine of up to the equivalent of 30,500 times the general minimum wage in the Federal District for having declared falsely or submitting false information to the Competition Commission, regardless of any criminal liability incurred therein;
- IV. a fine of up to the equivalent of 1,500,000 times the general minimum wage in the Federal District for having engaged in absolute monopolistic practices;
- V. a fine for the equivalent of up to 900,000 times the general minimum wage in the Federal District, for having engaged in relative monopolistic practices;
- VI. a fine up to the equivalent to 900,000 times the general minimum wage in the Federal District, for having engaged in

concentrations forbidden by the Law; and a fine up to the equivalent of 400,000,000 times the general minimum wage in the Federal District for failing to notify a concentration when it should legally be done;

- VII. a fine up to the equivalent to 28,000 times the general minimum wage in the Federal District, to those economic agents or individuals who have participated, promoted, induced or caused the commission of monopolistic practices, forbidden concentrations or other restrictions to the efficient operation of the markets; and
- VIII. in the event of a repeated offence, an additional fine may be assessed up to twice the initial amount, or a fine up to the equivalent of 10% of the annual sales obtained by the infringer during the previous fiscal year, or a fine up to the equivalent of 10% of the value of the assets of the infringer, whichever is higher.

When assessing fines, the Competition Commission shall consider the seriousness of the violation, the damage caused, the degree of premeditation, the participation in the markets of the infringer, the size of the market affected, the length of the practice or concentration and the recurrence or background of the infringer, and also his financial status.

In the event the violations under Sections IV to VII above are, in the opinion of the Competition Commission, specially serious, it may levy, instead of the fines contemplated in them, a fine of up to ten per cent of the annual sales of the infringer during the previous fiscal year or up to ten per cent of the value of the assets of the infringer, whichever is higher.

3.2 What are the sanctions for individuals?

The sanctions are a fine up to the equivalent of 30,000 times the general minimum wage in the Federal District to individuals who directly participate in forbidden monopolistic practices or concentrations, on behalf of or on account of corporations.

In the event of repeated offence, an additional fine may be assessed up to twice the initial amount.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

No. The Competition Commission, in the imposition of fines, shall only consider the seriousness of the infringement, damage, evidence of intentionality, the participation of the economic agent in the markets, the size of the market concerned, the duration of the practice or violation and the recurrence or background of the offender, as well as the latter's economic capacity.

3.4 What are the applicable limitation periods?

The limitation period is 5 years from the date the relevant violation of the Law occurred.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Penalties are imposed on companies or individuals who commit any of the monopolistic practices prohibited by the Law and such penalties cannot be transferred; however, nothing prevents a company from paying the legal costs and/or financial penalties imposed on an employee.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes, by means of a civil action against the employee seeking payment of damages and losses based on the violation or infringement of the Law incurred by the employee.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The leniency programme in Mexico is one of the most relevant although recent tools which has strengthened the Competition Commission's ability to combat hard-core cartels under which the authority may grant leniency to cartel members who have breached the Law or continue to be in violation of same by engaging in absolute monopolistic practices as long as a final resolution has not yet been issued closing an investigation procedure.

The programme is based on the idea that strategic interactions between the cartel members can be used by reducing the fine for the first self-reporter ('whistle-blower') while imposing higher fines for all other cartel members, each one having an incentive to be the first one who comes forward (often described as 'race to the courtroom' by legal scholars).

To that end, the Competition Commission will grant full leniency to the first economic agent who approaches the latter and provides convincing and sufficient evidence to allow it to determine the existence of the monopolistic practice. The economic agent must fully and continuously cooperate with the agency throughout the whole investigation and in the corresponding procedure; additionally, it must also take the necessary actions to end its participation in the monopolistic practice. If the foregoing is fulfilled, the Competition Commission shall impose the minimum fine and no judicial or administrative action may be instituted.

Those economic agents that do not fulfill the aforementioned requirements may still benefit from a partial leniency and be subject to reduced fines of up to fifty, thirty or twenty of the maximum permitted when the latter provides additional but convincing evidence for the investigation. To determine the reduction in the fine the Competition Commission must consider the chronological order in which the requests for leniency were filed and the evidence tendered to that end.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The Code of Regulations provides that the Competition Commission has a 15-day period (which can be extended) to analyse and ponder the information and documentation provided by the company or the individual trying to benefit from the leniency programme. During said period of time, no other company or individual may leap-frog the first whistle-blower as the Competition Commission is prevented from analysing a second, third or ulterior application until it has issued a resolution.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes. They can also be submitted by email or formally by filing a written application.

4.4 To what extent will a leniency application be treated confidentially and for how long?

A leniency application will be treated as confidential if the applicant makes a formal request to that end and proves the confidential nature of the information or documentation being submitted.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The economic agent must fully and continuously cooperate with the agency throughout the whole investigation and in the corresponding procedure; additionally, it must also take the necessary actions to end its participation in the monopolistic practice.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is a 'leniency plus' policy for the first economic agent who approaches the Competition Commission and provides convincing and sufficient evidence to allow it to determine the existence of the monopolistic practice.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No; the leniency programme procedural rules apply equally to individual employees or employers alike.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Yes, the economic agent may file an application for settlement or plea bargaining request during any stage of the proceedings but always prior to the issuance of the final ruling. The Competition Commission will then have 15 days to issue a resolution. The economic agent must offer sufficient and reliable means that the latter will suspend, correct or suppress the monopolistic practice or concentration/merger. The economic agent may only apply for this benefit every 5 years.

The Competition Commission's policy and advocacy in cases of early resolution or settlements has not changed substantially. It will always depend on the merits of the case and the intention of the economic agent involved in the procedure.

7 Appeal Process

7.1 What is the appeal process?

Pursuant to the Law and contrary to the resolutions issued by the Competition Commission, an appeal for reversal may be filed before the Competition Commission within the 30 working days following the date in which those resolutions are notified.

The objective of the appeal is to revoke, amend, modify or confirm the resolution appealed and the judgments issued shall contain the

assessment of the act challenged, the legal basis that support them and the resolution items. The regulations of the Law shall establish the terms and other requirements for the filing and substantiation of the appeal.

The appeal shall be filed through a document addressed to the Competition Commission's President, and it shall state the name and domicile of the appellant and the offences. It shall include the evidence deemed necessary, and also the documents crediting the legal status of the petitioner.

The filing of the appeal shall stay the enforcement of the resolution challenged. In the event of a stay of the sanctions under Sections I and II of Article 35 of the Law and where third parties may suffer damages, the appeal shall be granted if the petitioner provides sufficient guarantee to repair the damages and to compensate the losses if the resolution is not favourable to him.

The Competition Commission shall issue and notify the resolution within sixty days of the date in which the appeal was filed. It shall be understood that the act challenged is confirmed if the Competition Commission remains silent.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, as well as the enforcement of any resolution issued by the Competition Commission.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes, it does.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

The economic agents that have proven to have suffered damages during the proceeding resulting from the monopoly practice or illicit concentration, may file a legal claim to obtain compensation for the damages. In that event, the court may take into consideration the damages estimated by the Competition Commission.

Only the legal or administrative actions based on the Law shall proceed.

At least from a theoretical perspective, 'follow on' actions have increased chances to succeed *vis-à-vis* 'stand alone' actions, and the process for obtaining a favourable resolution in the first case is more expeditious.

8.2 Do your procedural rules allow for class-action or representative claims?

No, they do not.

8.3 What are the applicable limitation periods?

See above.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes. See question 8.1 above.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

See the answer to question 8.1 above. On the other hand, there are no specific cost rules for civil damages regarding follow-on claims in cartel cases.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Not available.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The existence of a massive global conspiracy, lasting for more than ten years, in which the major vitamins manufacturers and producers agreed to fix prices, allocate market shares and rig bids of most of the vitamins in the world. The defendants included both domestic and foreign vitamins manufacturers, such as F. Hoffmann La Roche Ltd (a Swiss defendant), BASF AG (a German defendant) and Rhone Poulenc S.A. (a French defendant). Most of the vitamins defendants entered guilty pleas or otherwise admitted (through their participation in leniency programmes in the United States and abroad) to conspiring to violate the U.S. and foreign antitrust laws, including those of Mexico. The defendants' anticompetitive practices were investigated in various jurisdictions including Mexico, by numerous regulatory and enforcement authorities, including the Mexican Competition Commission, the United States and Canadian Departments of Justice, the European Commission, the Australian Competition and Consumer Commission ("ACCC"), the Japan Fair Trade Commission, and competition authorities in New Zealand, Brazil and Switzerland. In connection with these investigations, many defendants provided significant information in the form of lawyer-drafted submissions to foreign regulatory authorities. The Mexican Competition Commission imposed hefty fines.

More recently, the Mexican Government announced in 2010 that it may release a third television from now, without having to wait to complete the transition to digital technology in this sector.

Said decree issued by President Felipe Calderon Hinojosa to advance the analogue switch in 2015 is one of the most important announcements made in telecommunications, because it opens the door to promote a very vigorous competition in television.

9.2 Please mention any other issues of particular interest in Mexico not covered by the above.

Before the enactment of the amendments the Competition Commission could: (i) comment on the adjustments to the federal public administration programmes and policies when their effects could be contrary to competition and free market access; (ii) when

requested by the Federal Executive, comment on the amendments to the drafts of laws and regulations, on those items dealing with competition and free market access, and when deemed pertinent; and (iii) render non-binding opinions on competition and free market access regarding the laws, regulations, agreements, circular letters and administrative acts, which did not have legal effects. These opinions are now binding to the agencies of the federal public administration with respect to secondary regulation by other public agencies that could have anticompetitive effects, policies and programmes and to proposals of laws, regulations, agreements and other administrative acts. Notwithstanding this new authority, the Federal Executive branch can veto any opinion so rendered.

As an example of this advisory authority, in 2005 the Competition Commission issued opinions on two projects to reduce entry barriers in the market of gasoline retail, issued opinions related to the telecommunications sector to promote competition in long-distance phone service, to reduce entry barriers for broadband services and other wireless uses and to enhance the competitive effects of telecomm network convergence. It also issued opinions in connection with Government initiatives for new legislation such as the Telecommunications Law and Radio and Television Law, Law to Promote the Book and Reading, commercial Practices Law and airport Law.



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