

Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Cartels

Second Edition

Mexico

Nader, Hayaux y Goebel, S.C.

[chambers.com](https://www.chambers.com)

2019

Law and Practice

Contributed by Nader, Hayaux y Goebel, S.C.

Contents

1. Basic Legal Framework	p.5	3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds	p.8
1.1 Statutory Bases for Challenging Cartel Behaviour/Effects	p.5	3.1 Obtaining Information Directly from Employees	p.8
1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards	p.5	3.2 Obtaining Documentary Information from Target Company	p.8
1.3 Private Challenges of Cartel Behaviour/Effects	p.5	3.3 Obtaining Information from Entities Located Outside this Jurisdiction	p.9
1.4 Definition of ‘Cartel Conduct’	p.5	3.4 Inter-Agency Co-operation/Co-ordination	p.9
1.5 Limitation Periods	p.5	3.5 Co-operation with Foreign Enforcement Agencies	p.9
1.6 Extent of Jurisdiction	p.5	3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases	p.9
1.7 Principles of Comity	p.6	3.7 Procedure for Issuing Complaints/Indictments in Civil Cases	p.9
2. Procedural Framework for Cartel Enforcement – Initial Steps	p.6	3.8 Enforcement Against Multiple Parties	p.9
2.1 Initial Investigatory Steps	p.6	3.9 Burden of Proof	p.10
2.2 Dawn Raids	p.6	3.10 Finders of Fact	p.10
2.3 Restrictions on Dawn Raids	p.6	3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings	p.10
2.4 Spoliation of Information	p.6	3.12 Rules of Evidence	p.10
2.5 Procedure of Dawn Raids	p.7	3.13 Role of Experts	p.10
2.6 Role of Counsel	p.7	3.14 Recognition of Privileges	p.10
2.7 Requirement to Obtain Separate Counsel	p.7	3.15 Possibility for Multiple Proceedings Involving the Same Facts	p.10
2.8 Initial Steps Taken by Defence Counsel	p.7	4. Sanctions and Remedies in Government Cartel Enforcement	p.10
2.9 Enforcement Agency’s Procedure for Obtaining Evidence/Testimony	p.7	4.1 Imposition of Sanctions	p.10
2.10 Procedure for Obtaining Other Types of Information	p.7	4.2 Procedure for Plea Bargaining or Settlement	p.10
2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions	p.7	4.3 Collateral Effects of Establishing Liability/Responsibility	p.10
2.12 Attorney-client Privilege	p.8	4.4 Sanctions and Penalties Available in Criminal Proceedings	p.10
2.13 Other Relevant Privileges	p.8	4.5 Sanctions and Penalties Available in Civil Proceedings	p.10
2.14 Non-co-operation with Enforcement Agencies	p.8	4.6 Relevance of ‘Effective Compliance Programmes’	p.11
2.15 Protection of Confidential/Proprietary Information	p.8	4.7 Mandatory Consumer Redress	p.11
2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement	p.8	4.8 Available Forms of Judicial Review or Appeal	p.11
2.17 Leniency, Immunity and/or Amnesty Regime	p.8		

5. Private Civil Litigation Involving Alleged Cartels	p.11
5.1 Private Right of Action	p.11
5.2 Collective Action	p.11
5.3 Indirect Purchasers and 'Passing-on' Defences	p.11
5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings	p.11
5.5 Frequency of Completion of Litigation	p.11
5.6 Compensation of Legal Representatives	p.11
5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees	p.11
5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation	p.11
6. Supplementary Information	p.11
6.1 Other Pertinent Information	p.11
6.2 Guides Published by Governmental Authorities	p.11

Nader, Hayaux y Goebel, S.C. is a market leader in mergers and acquisitions, banking and finance, securities and capital markets, structured finance, telecom, tax, insurance and reinsurance, project finance, real estate, energy and infrastructure, restructurings and workouts, real estate, government procurement and antitrust. NHG is formed of 18 partners and more than 30 associates, and represents one of the largest groups of corporate finance experts in the

Mexican market, who have been working together for more than 30 years. NHG is the only Mexican law firm with an office in London, with a strong focus on developing and pursuing business opportunities in Mexico, the UK and other European countries. The firm also enjoys excellent working relationships with law firms in all major cities around the world.

Author



Alejandro Mendiola Diaz is an antitrust specialist with 20 years of experience advising a range of companies in antitrust matters. He has advised clients involved in merger control clearances and investigations into abuse of dominance

and cartels, and has acted as counsel in proceedings, in special proceedings, and as a legal consultant. He has also developed antitrust compliance programmes for numerous companies. Alejandro served on the legal team of the former Mexican Antitrust Commission, where his involvement in high-profile cases afforded him insight into the commission's perspective. He has been recognised as a leading antitrust practitioner by the Latin American Corporate Counsel Association. He has additional experience with corporate law, having represented foreign companies doing business in Mexico when choosing business structures, negotiating contracts, undergoing mergers and acquisitions, performing due diligence, and in trust and general corporate matters, as well as in anti-corruption matters, including investigations into FCPA violations and during anti-corruption consulting and training. The organisations of which Alejandro is a member include the United States-Mexico Chamber of Commerce, the American Bar Association, and the International Chamber of Commerce. He also advises non-profit organisations and provides pro bono legal advice and consulting for the Mexican Ad Council, in his position as secretary. He is a social investment programme mentor and an elections panel member of New Ventures México. He currently serves as an antitrust professor in Universidad Anáhuac México's LLM in Corporate Law. He is fluent in English.

1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The Mexican legal framework for competition is comprised of the following binding instruments:

- the Federal Constitution, as the foundation of the legal system and the enforcement agencies;
- Federal Economic Competition Law; and
- Regulations of the Federal Economic Competition Law.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

In recent reforms to the Mexican Constitution, two autonomous government agencies with federal jurisdiction were created to enforce the legal framework for competition, The Federal Economic Competition Commission (Commission) and the Federal Telecommunications Institute (Institute). The Institute is in charge of enforcing competition law in the telecommunications and broadcasting sectors, and the Commission is responsible for enforcing the law in any other sectors or markets.

The procedure is of an administrative nature and can only be implemented or carried out by such governmental agencies. It is not possible to exercise legal actions of a civil nature in order to enforce competition laws.

As part of the competition system, specialised courts for competition, telecommunications and broadcasting exist. These courts are the judicial authority in charge of any challenges filed by parties effected by the resolutions of the enforcement agencies. Also appeals against the resolutions issued by specialised lower courts should be filed with specialised courts of appeal.

The maximum administrative fine that can be imposed by the enforcement agencies for cartel conduct is up to 10% of the economic agent's annual income. These agencies can obtain the tax information of the relevant economic agent from the tax authorities in order to determine the amount of the fine. In cases of recidivism fines can be doubled.

The Commission and the Institute are the only agencies allowed to file criminal complaints with the Office of the Attorney General. Criminal liability exists for cartel-like conduct and is punishable by imprisonment of five to ten years, regardless of the corresponding economic sanction.

Once the Commission or the Institute resolutions become final, the affected entities or individuals are authorised to claim damages and lost profits with the specialised courts on competition, telecommunications and broadcasting.

Private entities and individuals have no legal right to claim damages or lost profits without first having the final resolution from either the Commission or the Institute.

1.3 Private Challenges of Cartel Behaviour/Effects

There is no private right of action for challenging cartel conduct. As mentioned above, challenging of cartel conduct can only be implemented by the Commission or the Institute.

1.4 Definition of 'Cartel Conduct'

There are five instances of cartel conduct (also known as absolute monopolistic practices) specifically defined and catalogued by the Federal Economic Competition Law. Absolute monopolistic practices are considered illegal and consist of contracts, agreements, arrangements or combinations among competitors, whose purpose or effect is:

- *price-fixing* – to fix, raise, co-ordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the market;
- *output restriction* – to establish an obligation not to produce, process, distribute, market (or acquire only a restricted or limited amount of) goods, or the provision or transaction of a limited or restricted number, volume or frequency of services;
- *market allocation* – to divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services, by a determined or determinable group of customers, suppliers, timespans or spaces;
- *bid-rigging* – to establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls; and
- *exchange of information* – to exchange information for the purposes referred to in the preceding subsections.

Cartels or absolute monopolistic practices are considered serious violations to the law, consequently, they are null and void and do not give rise to legal effects.

1.5 Limitation Periods

The statute of limitations is ten years, beginning on the date the prohibited conduct ends.

1.6 Extent of Jurisdiction

Mexican competition laws can only be enforced within Mexico; however, the Commission has specifically entered into co-operative agreements with foreign agencies such as the European Union. If a conduct occurs entirely in foreign jurisdictions, it will not be reached by enforcement in Mexico, unless its purpose or effect occurs within the country. The Mexican enforcement agencies have the authority to participate in international cartel investigations and to co-operate with other countries in order to fight cartel conduct.

1.7 Principles of Comity

Mexico has entered into different free trade agreements which contain competition provisions that should be implemented, for instance the North America Free Trade Agreement. Please refer to **3.5 Co-operation with Foreign Enforcement Agencies** below.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

The enforcement agencies are required to have an objective cause in order to start an investigation, in law an objective cause is any indication of the existence of cartel conduct. According to the principles of the Mexican legal system, the investigative authority should clearly and duly justify its allegations.

Furthermore, the regulations of the Federal Economic Competition Law, list certain conduct that could drive an investigation either ex-officio or prompted by a claim filed by third parties. This conduct includes:

- the invitation (or recommendation to other entities or individuals) to coordinate practice offers and conditions of production, marketing or distribution of goods and services, or to exchange information with such purpose or effect;
- the fixing of the sale price offered by two or more competitors in Mexico considerably above or below the international reference price;
- instructions or recommendations adopted by business associations, business chambers or similar organisations to perform any of the conduct described above; and
- that two or more competitors establish maximum or minimum prices, or that they adhere to prices issued by business associations or commercial chambers.

There are different ways in which an investigation can be started or requested: claims filed by any entity or individual even if the claimant is not the affected party; requirement by the executive branch, the Ministry of the Economy or the Consumer Protection Agency, ex officio investigations; and investigations deriving from information obtained by leniency program applicants.

Once the Commission or the Institute have decided to start an investigation they are required to publish a notice in the Federal Official Gazette noting the beginning of proceedings, the relevant market and the type of alleged conduct. After said publication the investigative process provides the corresponding enforcement agency with a time frame that goes from 30 to 120 business days (with the possibility to extend the investigative stage up to four times for 120 business days each time). The investigation process is of a confidential

nature without the possibility to identify the target entities or individuals. Once the investigative authority considers it has sufficient grounds it submits the case to the Commissioners' Board to determine whether the alleged responsible participants are formally served with a document called the statement of probable responsibility, or to close the case in the event that insufficient evidence was obtained. After the alleged responsible entities or individuals are served with the statement of probable responsibility an administrative proceeding in the form of a judicial trial starts. The parties to such a trial are the investigative authority as plaintiff and the defendants. The defendants have a term of 45 business days to answer every allegation and provide as much evidence as possible to persuade the enforcement agencies of their innocence. Other steps are followed during the administrative procedure in the form of judicial trial and once said steps are completed the final resolution should be issued.

2.2 Dawn Raids

Dawn raids are possible and common during cartel investigations, and in some cases are performed before the public notice mentioned in **2.1 Initial Investigatory Steps** is published.

The obligations of a firm or individual facing a dawn raid, or a surprise visit, are to allow the visit to be performed with ease and to provide all necessary support to the visiting officials. If the firm or individual rejects or obstructs the visit in any manner then the officials will include the fact in the corresponding minutes and the alleged fact will be considered to be true.

It is possible for the visited firm or individual to include comments or arguments in the minutes as well as to attach evidence or supporting documents to their arguments. The visited economic agents will be entitled to appoint two witnesses who will sign the minutes.

2.3 Restrictions on Dawn Raids

The scope of the dawn raids is broad. The officials are authorised to access facilities, means of transportation, computers, electronic devices, storage devices, files or any other elements that might contain evidence. The officials may also take pictures or record video and copy, by any means, documents, books, files, or information generated by any type of technology (including computers and emails) or material support, provided that they are related to the investigation.

Seizure of the relevant documents is not allowed.

2.4 Spoliation of Information

The firms or individuals visited are warned by certain measures such as the imposition of fines. However, if spoliation of information occurs, then the enforcement agencies' allegations may be considered as proved.

2.5 Procedure of Dawn Raids

The procedure of dawn raids or surprises visits is quite formal and must follow specific rules, as follows:

- the investigative authority will issue an order containing the purpose, scope and term of the visit as well as the name and address of the visited economic agents and the official information;
- the visited economic agent is warned that in the event of access denial, hindering the visit or refusing to provide the documents or information requested the enforcement measures established in the corresponding law shall be imposed;
- the visits are carried out with the purpose of obtaining information and documents related to the investigation;
- the visits cannot exceed two months (with the possibility to extend them for two additional months);
- the visits can be performed on business days and during business hours, provided that the authority may allow an inspection to be initiated on non-business days and during non-business hours or for an inspection to be continued into non-business days and hours;
- the visited economic agent's officers, representatives or employees must allow the on-site inspection, providing access to the facilities and information as mentioned above;
- the visiting officers may request explanations regarding the facts, information or documents related to the purpose of the visit from the economic agent's officers, representatives or personnel, which answers will be recorded and included in the visit's minutes;
- the visits can be conducted simultaneously in two or more places at a time; and
- the visiting officials will draft minutes, in the presence of two witnesses, and a detailed description of the facts or omissions noted during the visit will be included in most of them.

2.6 Role of Counsel

The visited economic agent has the right to counsel, nevertheless, the visit can start without the presence of counsel. The counsel is authorised to speak or provide comments that will also be recorded in the minutes. The counsel, like any other officer or representative of the visited economic agent, will also be subject to the warnings made by the visiting officials.

2.7 Requirement to Obtain Separate Counsel

Because the competition laws are a specialised legal framework the economic agents typically engage separate counsels to address the investigations. For certain investigations it is also important to have an economist if some of the arguments to be used by the defendant rely on economic analysis. It is important to point out that there is no obligation to engage a separate counsel.

2.8 Initial Steps Taken by Defence Counsel

The procedure to determine a violation of the Mexican competition laws is divided into two stages. The first is the investigation procedure and the second an administrative procedure in the manner of a judicial trial as described above. Both steps are carried out by the Commission or the Institute, however, the first steps are carried out by an investigative authority which is an independent entity within the enforcement agencies. The investigation procedure is confidential, so it is not possible to know if the economic agent is considered as the target of an investigation or only as a third party to the process.

Therefore, the initial steps for the defence counsel are to work together with the economic agent to internally determine if responsibility exists. Regardless of the fact that the investigations are confidential and there are no possibilities to determine who is under investigation, a visit or the official requirement for information can provide sufficient background to carry out an assessment to prepare all the arguments and supporting evidence if a statement of probable responsibility is to be served to the economic agents.

2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

Evidence and testimony are obtained from diverse sources such as dawn raids or visits; official requests to any firm or individuals, including authorities; information gathered from claims filed with the enforcement agencies; intelligence investigations performed by the Commission or the Institute; appearances of any individual related in any way with the purpose of the investigation; anonymous claims filed on the Commission's website; public sources of information; economic analysis of market studies; co-operation with other authorities; information gathered in other procedures carried out with enforcement agencies; and information obtained from leniency program applicants.

2.10 Procedure for Obtaining Other Types of Information

The agencies, and specifically the Commission, have an intelligence unit in charge of gathering information from different sources such as surveys, internal analysis, etc. The enforcement agencies can also request information from other governmental agencies or foreign competition authorities.

2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

The companies or individuals can be obliged to produce documents or evidence if formally requested to do so. The Mexican competition laws do not have extraterritorial effect, however, in certain cases, companies or individuals located in Mexico must produce documents related to activities or facts of an international nature.

2.12 Attorney-client Privilege

The attorney-client privilege is applicable for external counsel admitted to practice and communications among the target entity and the external counsel cannot be used as evidence during the process. For instance, if during a dawn raid the enforcement agency officials find communications between the external counsel and his or her client that information cannot be included, or even considered, for the purposes of pursuing the agencies' allegations against the target company. Recent judicial criteria have confirmed the attorney-client privilege in competition matters.

In addition, certain rules applicable to attorney-client privilege are in the process of being issued by the Commission. These rules are under public consideration and could be issued in the future.

2.13 Other Relevant Privileges

All entities and individuals are protected by formal rules contained in the Mexican Federal Constitution such as the privileges of due process; they should not be disturbed in their goods, domicile, papers or possessions, except through the written order of an authority with jurisdiction, which should be duly supported.

2.14 Non-co-operation with Enforcement Agencies

In general terms both entities and individuals co-operate with enforcement agencies. However, the consequences of non-co-operation with the Commission or the Institute may give rise to fines imposed on the economic agents, for instance a fine of approximately USD12,000 can be imposed for each day of non-compliance with an order or requirement imposed by the enforcement agencies.

2.15 Protection of Confidential/Proprietary Information

The information obtained by the enforcement agencies can be considered public, confidential or reserved. Information deemed public or reserved can be accessed by economic agents who are part of an administrative procedure in the form of a judicial trial, information deemed confidential cannot. In order to classify information as confidential an economic agent is required to show and justify that the information is actually confidential in nature, as well as to file a summary thereof. Included as bases for confidential classification are the following cases: information that, were it to be disclosed would cause damage or lost profits; information that contains personal data that requires consent for disclosure; information that would put security at risk; or information whose disclosure is prohibited by any legal provision.

2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Legal and factual arguments are raised in two different stages of the process. During the investigation stage mentioned above, arguments can be raised through the responses and

evidence provided to the official requests of the agencies, regardless of the fact that during this stage it is not possible to know if the economic agent is a target or not.

The second stage of the process, taking the form of a judicial trial, is the appropriate procedural moment to raise all arguments, file evidence, provide economic analysis and to include arguments to persuade the enforcement agencies.

2.17 Leniency, Immunity and/or Amnesty Regime

A leniency program does exist in Mexican competition law and is available to any economic agent that has participated in cartel conduct (either directly or indirectly). The general rules applicable to the leniency program are that:

- the applicant is the first to provide enough evidence to allow the enforcement agency to presume cartel conduct;
- the applicant should fully and continuously co-operate throughout the investigation stage and, if required, during the administrative procedure in the form of a judicial trial; and
- the applicant must cease its participation in the cartel conduct.

If said requests are fulfilled then the agency will impose a minimum fine. Applicants that do not comply with all the requests may receive a fine reduction of as much as 50%, 30% or 20% of the maximum permitted fine (depending on the chronological order in which requirements are submitted and the supporting evidence is provided).

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly from Employees

The enforcement agencies demand information from company employees of all levels of seniority through official requests and interviews performed by experienced interviewers of the enforcement agencies. Former employees or officers can also be required to provide information or to appear for interviews or hearings.

3.2 Obtaining Documentary Information from Target Company

The enforcement agencies can acquire information directly from the target company or others (including governmental entities).

The enforcement agency normally issues official requests that should be fully answered within a period of ten business days (term that can be extended). The agencies are authorised to issue as many official requests as they deem proper. Typically, the official requests contain a significant amount

information to be addressed, filed or produced. In the event official requests are not fully addressed, then the governmental agencies can either reiterate their request or impose a fine for every day of non-compliance.

3.3 Obtaining Information from Entities Located Outside this Jurisdiction

The enforcement agencies do not typically seek information from companies or individuals outside Mexico. However, there are legal instruments that allow the enforcement agencies to obtain information located abroad.

3.4 Inter-Agency Co-operation/Co-ordination

There is inter-agency co-operation and co-ordination within Mexico. For instance, there is an important relationship between the Consumer Protection Attorney (CPA) and the Commission as well as the Energy Regulatory Commission. Several cases have started by means of co-operation or information provided by other government agencies. In addition, the Mexican competition law provides that the Ministry of Economy and the CPA can file claims for cartel conduct. Also, if the enforcement agencies learn that a cartel conduct may result in damages or lost profits to consumers then the CPA should be informed so it can start the corresponding investigation.

3.5 Co-operation with Foreign Enforcement Agencies

The Commission is quite active in its relationship with foreign enforcement agencies. For instance, it is committed to adopt the best international practices through participation with international organisations such as the Organisation for Economic Co-operation and Development, the International Competition Network, the United Nations Conference on Trade and Development, the Regional Competition Centre for Latin America and the Caribbean and Asia-Pacific Economic Cooperation.

There are also international treaties and international cooperative instruments that require it to comply with mechanisms of co-operation with other agencies. In addition, the Commission has entered into co-operative agreements with other agencies, such as the one executed with the European Commission for co-operation to enforce the competition law or also in merger control cases. The co-operation agreement with the European Commission includes the possibility that either agency remit a case to the other when potential law violations exist. Also, training and exchange of officials between both authorities exists. In the past for instance, US and British authorities have participated with the Commission in order to train their officials.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

Criminal cases for cartel conduct can be filed with the Attorney General's Office by the Commission or the Insti-

tute, without necessarily having a final resolution. Therefore, enforcement agencies are allowed to file criminal claims at any stage of the process. Third parties or other agencies cannot bring criminal cases for cartel conduct, it is not common for a cartel investigation to give rise to criminal procedures.

Once the Attorney General's Office is aware of the claim, it will apply the criminal law rules to determine whether or not a crime was committed, these rules and principles are quite different from the administrative procedure. If the Attorney General's investigation results in an alleged cartel crime it will then file the case with a criminal court for the fining process. The defendant has the right to due process and to know the basis and rationale on which the accusation is supported.

3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

The procedure to enforce competitions laws in Mexico is of an administrative nature and no civil actions to enforce such laws can be brought other than damages or lost profits civil procedures. In order to file a complaint for cartel conduct the plaintiff needs to file a written document containing: the specifics of the alleged responsible entity or individual; the address and contact information of the plaintiff as well as the instrument evidencing the legal authority; a description of the facts considered illegal, market structure, description of the goods and services involved; how the conduct affects the market. As well as list of documents and supporting evidence which may include, minutes, communications, videos, audio recordings, statistics, market surveys and any other evidence or information that might help enforcement agencies to analyse the case.

The complaints are filed with either the Commission or the Institute and the investigation and analysis of the claim will be carried out by the independent investigative authority, which eventually will issue an official communication marking the beginning of the investigation; or an official request in order to petition fulfilment of the requests; or issue an official communication refusing the claim, either due to the lack of the necessary requests or because the behaviour cannot be considered as cartel conduct.

Defendants do not have access to the information in the hands of the investigative authority while the confidential investigation is in process. Once the defendant is served with the statement of probable responsibility then it will be possible to know the specifics of the conduct attributed to the defendant.

3.8 Enforcement Against Multiple Parties

Cartel conduct always implies at least two involved parties considered competitors. Therefore, the enforcement carried out is typically brought against multiple parties within the same case. The identity of the parties involved in the conduct

will be disclosed once the investigation stage is ended and the alleged responsible parties are served with the statement of probable responsibility.

3.9 Burden of Proof

Depending of the type of procedure (*ex-officio* or by a claim) the burden of proof is on the side of the plaintiff or the agency. Once the investigation procedure is completed and the investigative authority gathers enough evidence (ie, from the claimant, the information gathered during visits and investigations, information provided by the target entities and other parties) then the investigative authority will have the burden of proof by means of the statement of probable responsibility.

3.10 Finders of Fact

The enforcement proceedings carried out by the Commission or the Institute are of administrative nature. The finders of facts are both the plaintiff and the enforcement agency. The agencies (either the Commission or the Institute) enforce the law for those facts. In the event of criminal cases, the finder of fact is the enforcement agency which files the claim with the Attorney General. The Attorney General's Office investigates the criminal case and the criminal courts apply the law to those facts.

3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

Evidence obtained in one proceeding can be used in another proceeding provided that it is related to the facts and the target company. Information provided by applicants for the leniency programme is typically used in the proceeding. The co-operation from the leniency applicants is fundamental to them keeping the benefits of the program.

3.12 Rules of Evidence

According to the legal principles applicable in Mexico the evidence should comply with constitutional standards which allow the defendant to have access to due process. The enforcement agencies should therefore produce and support their allegations with the highest standard of legal and economic analysis. If the defendant is fined by the Commission or the Institute, it will have the opportunity to challenge the decision by means of an *amparo* proceeding with the specialised courts of competition, telecommunication and broadcasting. Such courts will analyse whether the procedure performed by the enforcement agencies was in compliance with legal standards and principles, otherwise the resolution could be amended or revoked.

3.13 Role of Experts

Experts are, in some cases, fundamental for a proper defence. Economists, in particular, produce an important part of the argument and evidence presented to the agencies. The role of the economist is active and they are also involved with the counsel as part of the defendant's team. Information

provided by experts in the field of competition is, in general terms, well received by the agencies.

3.14 Recognition of Privileges

The attorney-client privilege is recognised and cannot be used as evidence. Please refer to 2.12 *Attorney-client Privilege* above.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

It is possible to have multiple or simultaneous enforcement proceedings involving the same or related facts. Nonetheless, the enforcement agencies typically order the joinder of files that are related by the same facts in order to have a single file or case.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

Sanctions are imposed directly by the Commission or the Institute, depending on the case. However, criminal sanctions are imposed by the criminal courts.

4.2 Procedure for Plea Bargaining or Settlement

Other than the leniency program mentioned above, there are no plea bargaining or settlement procedures for cartel conduct.

4.3 Collateral Effects of Establishing Liability/Responsibility

No collateral effects (other than the criminal complaints or cases to claim losses and damages) exist. The Commission has been actively pursuing a fight against corruption agenda and as part of this agenda there are initiatives to create collateral effects, for instance debarment in public procurement processes or in public bids of entities or individuals sanctioned for cartel conduct.

4.4 Sanctions and Penalties Available in Criminal Proceedings

Criminal proceedings can only be started by means of a formal complaint brought by the Commission or the Institute. Criminal law is quite formalistic and specific rules do apply, currently only a few cases have been brought before the Attorney General. If under criminal rules, the cartel conduct described in the Federal Criminal Code is carried out, then a specific unit of the Attorney General's office would require a criminal judge to start the fining process, provided that the corresponding judge determines the applicable sanction.

4.5 Sanctions and Penalties Available in Civil Proceedings

The cartel investigations performed by the enforcement agencies are of an administrative nature. The Mexican com-

petition law allows companies and individuals to be fined after an adversarial procedure in the form of a judicial trial. The enforcement agencies are the only entities authorised to apply sanctions (other than criminal charges and resolutions determining damages and loss of profits). In the event of civil actions to claim damages and loss of profits, the specialised courts for competition, telecommunications and broadcasting will determine the corresponding amount to be paid, if applicable.

Sanctions are of an economic nature; however, the enforcement agencies can order the correction or suppression of certain types of conduct in the future.

4.6 Relevance of ‘Effective Compliance Programmes’

The Commission specifically encourages economic agents to implement competition compliance programs as a preventative measure to avoid violations to the Mexican competition law. Nevertheless, no specific rules or benefits are included in the corresponding law.

4.7 Mandatory Consumer Redress

Sanctions imposed by the enforcement agencies are for the benefit of the government and are not intended to provide consumer redress or any benefit to other affected parties.

4.8 Available Forms of Judicial Review or Appeal

A judicial review is the only procedure available to challenge the enforcement agencies’ resolutions. The judicial challenge (known as indirect amparo) should be filed with the specialised courts on competition, telecommunications and broadcasting. Appeals against the decisions of a lower court are lodged with specialised courts or appeal courts on competition, telecommunications and broadcasting. No other remedies are available to challenge either inner process resolutions or acts or final resolutions other than the indirect amparo mentioned above.

Nader, Hayaux & Goebel

Mexico D.F.: Torre Arcos,
Paseo de los Tamarindos
400 B, 7th Floor
Col. Bosques de las Lomas 05120

Tel: + 52 55 4170 3000
Fax: + 52 55 2167 3099
Email: info@nhg.com.mx
Web: www.nhg.com.mx



5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

No private right of action exists for cartel conduct in Mexico. However, once the final resolution from either the Commission or the Institute is issued, any affected third party can file civil actions to claim damages and loss of profits, these will be brought with the specialised courts for competition, telecommunications and broadcasting.

5.2 Collective Action

Class actions for competition cases are allowed in Mexico when led by the enforcement agencies. Competition class actions are not common in Mexico.

5.3 Indirect Purchasers and ‘Passing-on’ Defences

No private right of action exists for cartel conduct in Mexico. Nevertheless, civil actions exist for damages and loss of profits.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

Evidence obtained from government investigations is admissible and, in some cases, can be considered as an indication of cartel conduct.

5.5 Frequency of Completion of Litigation

Because there is no private civil litigation to enforce competition law related to cartel conduct there is no describable frequency. Also, it is not common in Mexico to file civil actions to claim damages or loss of profits.

5.6 Compensation of Legal Representatives

The compensation for successful attorneys is agreed upon between clients and their counsel on a case-by-case basis. The resolutions issued by the enforcement agencies do not provide the compensation of legal representatives.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

The resolutions issued by the Commission or the Institute, do not mandate that unsuccessful claimants be obliged to pay defence costs for counsels. Nevertheless, in a procedure to claim damages and lost profits, and depending on the case, costs can be included as part of those damages.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

The Mexican competition law does not allow for private civil litigation, except for civil cases related to damages and loss of profits, consequently there are no appeals. With respect to appeals, it is possible challenge resolutions issued by the specialised courts for competition, telecommunications and broadcasting with the corresponding specialised courts of appeal.

6. Supplementary Information

6.1 Other Pertinent Information

According to the strategic plans of the Commission, the following markets or sectors will be given specific attention and may be the subject of future cartel investigations: energy, finance, health, public bids, agriculture and transportation.

6.2 Guides Published by Governmental Authorities

The following guidelines were issued by the Commission and are non-binding; however important criteria and interpretations are included therein.

- Exchange of information among economic guidelines
- Start of investigations guidelines
- Cartel conduct procedure guidelines
- Leniency program guidelines