



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Cartels 2022

Mexico: Law & Practice

Alejandro Mendiola Diaz and Daniella Ramirez Aguilar

Nader Hayaux & Goebel

practiceguides.chambers.com

Law and Practice

Contributed by:

*Alejandro Mendiola Diaz and Daniella Ramirez Aguilar
Nader Hayaux & Goebel see p.17*



CONTENTS

1. Basic Legal Framework	p.4	3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds	p.11
1.1 Statutory Bases for Challenging Cartel Behaviour/Effects	p.4	3.1 Obtaining Information Directly From Employees	p.11
1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards	p.4	3.2 Obtaining Documentary Information From the Target Company	p.11
1.3 Private Challenges of Cartel Behaviour/Effects	p.4	3.3 Obtaining Information From Entities Located Outside This Jurisdiction	p.11
1.4 Definition of “Cartel Conduct”	p.5	3.4 Inter-agency Co-operation/Co-ordination	p.11
1.5 Limitation Periods	p.5	3.5 Co-operation With Foreign Enforcement Agencies	p.12
1.6 Extent of Jurisdiction	p.5	3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases	p.12
1.7 Principles of Comity	p.5	3.7 Procedure for Issuing Complaints/Indictments in Civil Cases	p.12
1.8 COVID-19	p.5	3.8 Enforcement Against Multiple Parties	p.13
2. Procedural Framework for Cartel Enforcement – Initial Steps	p.6	3.9 Burden of Proof	p.13
2.1 Initial Investigatory Steps	p.6	3.10 Finders of Fact	p.13
2.2 Dawn Raids	p.7	3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings	p.13
2.3 Spoliation of Information	p.8	3.12 Rules of Evidence	p.13
2.4 Role of Counsel	p.8	3.13 Role of Experts	p.14
2.5 Enforcement Agency’s Procedure for Obtaining Evidence/Testimony	p.8	3.14 Recognition of Privileges	p.14
2.6 Obligation to Produce Documents/Evidence Located in Other Jurisdictions	p.9	3.15 Possibility for Multiple Proceedings Involving the Same Facts	p.14
2.7 Attorney-Client Privilege	p.9	4. Sanctions and Remedies in Government Cartel Enforcement	p.14
2.8 Non-cooperation With Enforcement Agencies	p.10	4.1 Imposition of Sanctions	p.14
2.9 Protection of Confidential/Proprietary Information	p.10	4.2 Procedure for Plea Bargaining or Settlement	p.14
2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement	p.10	4.3 Collateral Effects of Establishing Liability/Responsibility	p.14
2.11 Leniency and/or Immunity Regime	p.10	4.4 Sanctions and Penalties Available in Criminal Proceedings	p.14
2.12 Amnesty Regime	p.11		

4.5	Sanctions and Penalties Available in Civil Proceedings	p.15
4.6	Relevance of “Effective Compliance Programmes”	p.15
4.7	Mandatory Consumer Redress	p.15
4.8	Available Forms of Judicial Review or Appeal	p.15
5.	Private Civil Litigation Involving Alleged Cartels	p.15
5.1	Private Right of Action	p.15
5.2	Collective Action	p.15
5.3	Indirect Purchasers and “Passing-On” Defences	p.15
5.4	Admissibility of Evidence Obtained From Governmental Investigations/Proceedings	p.16
5.5	Frequency of Completion of Litigation	p.16
5.6	Compensation of Legal Representatives	p.16
5.7	Obligation of Unsuccessful Claimants to Pay Costs/Fees	p.16
5.8	Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation	p.16
6.	Supplementary Information	p.16
6.1	Other Pertinent Information	p.16
6.2	Guides Published by Governmental Authorities	p.16

1. BASIC LEGAL FRAMEWORK

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

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

- the Federal Mexican Constitution, as the foundation of the competition legal framework and the enforcement agencies;
- the Federal Economic Competition Law;
- the Regulations to the Federal Economic Competition Law;
- the Regulatory Provisions for the Immunity and Sanction Reduction Programme provided for in Article 103 of the Federal Economic Competition Law; and
- the Regulatory Provisions for the Qualification of Information Derived from Legal Counsel Provided to Economic Agents.

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

There are two autonomous government agencies with federal jurisdiction to enforce the competition legal framework. These entities are:

- the Federal Economic Competition Commission (the Commission); and
- the Federal Telecommunications Institute (the Institute, together with the Commission of Agencies).

The Institute oversees enforcing the law in the telecommunications and broadcasting sectors, while the Commission is responsible for enforcing the law in any other sector or market in Mexico.

The procedure is administrative and can only be implemented or carried out by such Agencies. It is not possible to exercise legal actions of a

civil nature to enforce competition law, except for claiming damages and lost profits.

Specialised courts in competition, telecommunications and broadcasting exist as part of the competition system. These courts are the judicial authority in charge of any challenges filed by parties affected by the resolutions of the enforcement Agencies. Also, appeals against the decisions issued by specialised lower courts can be filed with specialised courts of appeal.

The maximum administrative fine that the enforcement Agencies for cartel conduct can impose is up to 10% of the enterprise's annual income. The Agencies can obtain the tax information from the corresponding authorities to determine the amount of the fine to be imposed. In case of recidivism, penalties 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 imposed by the Agencies.

Once the Agencies become final, the affected entities or individuals can 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 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 in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**,

the challenging of cartel conduct can only be implemented by the Commission or the Institute, either ex officio or by means of a claim filed by any third party.

1.4 Definition of “Cartel Conduct”

There are five types 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 per se and consist of contracts, agreements, arrangements or combinations among competitors, with the following purposes or effects:

- 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 co-ordinate 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 paragraphs.

Cartels or absolute monopolistic practices are considered serious violations of 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 law can only be enforced within Mexico; however, the Commission has specifically entered into co-operative agreements with foreign agencies, namely those of the EU and the US. Thus, if the conduct occurs entirely in a foreign jurisdiction, the conduct cannot be enforced by the Agencies unless it occurs within the country. However, regarding investigations in which the possible cartel participated in multiple jurisdictions including Mexico, the Agencies have the authority to participate in international cartel investigations and co-operate with other countries to tackle the international cartel conduct.

1.7 Principles of Comity

Mexico has entered into different free trade agreements containing competition provisions that should be implemented; for instance, the revised United States–Mexico–Canada Agreement. Please refer to **1.6 Extent of Jurisdiction** and **3.5 Co-operation With Foreign Enforcement Agencies**.

1.8 COVID-19

At the beginning of the pandemic, the Commission established a set of criteria to allow certain types of collaboration agreements between economic agents (either competitors or non-competitors) to maintain or increase supply, satisfy demand, protect supply chains, avoid shortages or hoarding of goods, provided that such collaboration was temporary and focused on addressing the pandemic, without having negative effects on consumers. Such collaboration is still permitted since the Commission has not issued a communication stating otherwise.

In order to prevent a cartel investigation, the economic agents need to inform the Commission of such agreements so it can authorise them.

The number of cases filed with the Commission under such statement is confidential.

2. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – INITIAL STEPS

2.1 Initial Investigatory Steps

The Agencies are required to have an objective cause to start an investigation. 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 to the Federal Economic Competition Law list certain conducts that could drive an investigation either ex officio or prompted by a claim filed by a third party. These conducts include:

- the invitation (or recommendation) to other entities or individuals to co-ordinate 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
- two or more competitors establishing maximum or minimum prices, or adhering to prices issued by business associations or commercial chambers.

There are different ways in which an investigation can be initiated:

- claims filed by any entity or individual even if the claimant is not the affected party;
- a requirement by the executive branch, the Ministry of the Economy or the Consumer Protection Agency;
- ex officio; and
- investigations deriving from information obtained from leniency applicants.

Once the Commission or the Institute, through its investigative units, decides to start an investigation, it is required to publish a so-called Initial Ruling in the Federal Official Gazette noting the beginning of a cartel investigation proceeding, the relevant market and the type of alleged conduct on which the investigation will be carried out.

After the publication of the Initial Ruling, the investigative process provides the corresponding enforcement Agency with a timeframe that runs 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 confidential without the possibility of identifying the target entities or individuals.

Once the corresponding Agencies' investigative unit considers that it has sufficient grounds, it submits the case to the Board of Commissioners to determine whether the alleged responsible participants are formally served with a document called the Statement of Probable Liability or the case is to be closed if the corresponding Agencies' investigative unit gathered insufficient evidence. After the alleged responsible entities or individuals are served with the Statement of Probable Liability, a trial-like administrative proceeding starts. The parties to the trial are the investigative unit as plaintiff and the defendants. The defendants have 45 business days to answer every allegation and provide as much evidence as possible. Other steps are followed

during the trial-like procedure, and once the steps are completed, the resolution should be issued by the Board of Commissioners.

2.2 Dawn Raids

Dawn raids are possible and common during cartel investigations and, in some cases, are performed before the Initial Ruling mentioned in **2.1 Initial Investigatory Steps**. Dawn raids are carried out by the investigative unit.

The obligations of a firm or individual facing a dawn raid are to allow the visit to take place without any obstructions and provide all necessary support to the visiting officials. If the firm or individual rejects or obstructs the visit in any manner, then the officials may use security forces to access the firm's facilities, and the officials will include the fact in the corresponding minutes, and the alleged fact will be true.

It is possible for the visited firm or individual to include comments or arguments in the minutes and attach evidence or supporting documents to their arguments. The visited entities will be entitled to appoint two witnesses who will sign the dawn raid's minutes.

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 videos and copy any documentation, by any means, documents, books, files, or information generated by any technology (including computers and emails) or material support, provided that they are related to the investigation. Seizure of the relevant documents is not allowed. Furthermore, the Commission or the Institute cannot have access to information protected by the attorney-client privilege, as will

be explained in detail under **2.7 Attorney-Client Privilege**.

Procedure of Dawn Raids

The procedure of dawn raids 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;
- 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 (such as penalties) 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 investigative 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 entity'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, whose 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 normally be included.

2.3 Spoliation of Information

The firms or individuals visited in a dawn raid are warned of certain measures, such as the imposition of fines. However, if spoliation of information occurs, the enforcement Agencies' allegations may be considered proved, and criminal liability may be imposed.

2.4 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 entity, will also be subject to the warnings made by the visiting officials.

Requirement to Obtain Separate Counsel

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

Initial Steps Taken by Defence Counsel

The procedure to determine a violation of the Mexican competition law is divided into two stages. The first stage comprises the investigation procedure and the second stage involves a trial-like administrative process as described in **2.1 Initial Investigatory Steps**. Both steps are carried out by the Commission or the Institute, however, the first stage is carried out by the investigative authority that is an independent entity within the Agencies. The investigation procedure is confidential, so it is not possible to know if the economic agent is considered 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. Even though the investigations are confidential and it is not possible to determine who is under investigation, a visit or a request for information can provide sufficient background to carry out an assessment to prepare all the arguments and supporting evidence if a Statement of Probable Liability is to be served on the economic agents.

2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

Evidence and testimony are obtained from diverse sources such as:

- dawn raids;
- official requests to any firm or individuals, including authorities;
- information gathered from claims filed before the enforcement Agencies;
- intelligence investigations performed by the Commission or the Institute;
- appearances of any individual related in any way to 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 applicants.

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 and public sources,

among others. The enforcement Agencies can also request information from other governmental agencies or foreign competition authorities.

2.6 Obligation to Produce Documents/ Evidence Located in Other Jurisdictions

The companies or individuals can be obligated to produce documents or evidence if formally required to do so. The Mexican competition law does 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.

2.7 Attorney-Client Privilege

The attorney-client privilege is only applicable to the external counsel of the economic agents and communications among the target entity; the external counsel communications 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 firm or an individual. Recent judicial criteria have confirmed the attorney-client privilege in competition matters.

In addition, the Commission has published rules applicable to attorney-client privilege in which it establishes what type of information can be considered an attorney-client privilege and the procedure to request the Commission to treat the information gathered as such.

The rules on attorney-client privilege provide that the Commission will not use or grant evidential value to the communications if the economic agent proves that the communications with the external counsel had the purpose of seeking legal advice. The procedure to request the information be treated as attorney-client privilege is the following.

- During a dawn raid, the visited economic agent can request the visiting officials to classify certain documents or information as attorney-client privilege. The visiting officials must detail the request of the visited economic agent in the draft minutes.
- Once the authority concludes the dawn raid, the visited economic agent has 20 business days to submit a formal request to the Commission. Even if the economic agent failed to file the request during the dawn raid, it has the right to submit the request once the dawn raid has finished.
- The information subject to the privilege must be described, eg, if the information is digital, the exact location, name and type of document (agreement, letter, email, and memorandum), the name of the author and date.
- A small description of the legal advice and the reasons for the information being considered attorney-client privilege must be provided.
- Proof that the external counsel is legally authorised to practice law must also be included.

Other Relevant Privileges

All entities and individuals are protected by formal rules in the Mexican Federal Constitution. Some relevant privileges granted to individuals are the following:

- due process; and
- the presumption of innocence for defendants.

The due process privilege states that individuals should not be disturbed in their goods, domicile, papers or possessions without a written order of a competent authority, which should be duly supported.

On the other side, the presumption of innocence for defendants provides that if the Commission or the Institute do not gather enough evidence to accuse the defendants of cartel behaviour, the

defendants should be considered innocent, and the investigation should be closed.

2.8 Non-cooperation With Enforcement Agencies

In general terms, both the 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 that fail to co-operate. For instance, a fine of approximately USD18,000 can be imposed for each day of non-compliance with an order or requirement from the enforcement agencies.

2.9 Protection of Confidential/ Proprietary Information

The information obtained by the enforcement Agencies can be considered public, confidential or reserved as set out below:

- information deemed public can be accessed by everybody or even published on the authority's webpage;
- reserved information can be accessed by economic agents who are part of the trial-like procedure; and
- information deemed confidential can only be accessed by the economic agent which provided the information.

In order to classify information as confidential, an economic agent is required to show and justify that the information is, in fact, confidential in nature and file a summary thereof. The following are included as bases for confidential classification:

- 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 which disclosure is prohibited by any legal provision.

2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Legal and factual arguments are raised at two different stages of the process. During the investigation stage, arguments can be raised through the responses and evidence provided to the official requests issued by the investigative authorities of the Agencies, regardless of the fact that it is not possible to know if the economic agent is a target or not at this stage.

The second stage of the process - the trial-like procedure - is the appropriate procedural moment to raise all arguments, file evidence, provide economic analysis and include arguments to persuade the enforcement agencies that the economic agent is not responsible for the execution of a cartel.

2.11 Leniency and/or Immunity Regime

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

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

If said requests are fulfilled, the Agency will impose a minimum fine. The first applicant to the leniency programme will receive a total reduction of the fine. Further applicants who are not the first to provide evidence can also request such

benefit, but they will only receive a reduction of 50%, 30% or 20% of the maximum permitted fine (depending on the chronological order in which requirements are submitted and on the supporting evidence provided).

The Commission published Guidelines on the Leniency and Fines Reduction Programme that provides details on the steps an applicant should follow to apply for leniency, what an applicant should understand as full and continuous co-operation, and the procedure to revoke the benefit granted.

2.12 Amnesty Regime

No information is available in this jurisdiction.

3. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – WHEN ENFORCEMENT ACTIVITY PROCEEDS

3.1 Obtaining Information Directly From Employees

The enforcement agencies may demand information from company employees of all levels of seniority. The requests for information can be through:

- official requests; and
- a requirement to appear in the enforcement Agencies offices, where officials perform interviews with company employees.

Former employees or officers can also be required to provide information or appear for interviews or hearings.

3.2 Obtaining Documentary Information From the Target Company

The enforcement agencies can acquire the information directly from the target company

or others (including governmental entities). To acquire the information desired, the Agencies normally issue official requests that should be fully answered within ten business days (a term that can be extended for another ten business days). The Agencies are authorised to issue as many official requests as they deem proper. Typically, the official requests contain a significant amount of information to be addressed, filed or produced. If 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 founded at four different levels:

- with public authorities;
- with academic institutions;
- with international institutions; and
- with the social and the private sector.

Within the public authorities' co-operation, the Commission has co-operation agreements with the Bank of Mexico, the Mexican Tax Administration, the Ministry of Economy (SE), the Ministry of Finance and Public Credit, the Energy Regulatory Commission, and the Consumer Protection Agency (CPA), among others.

With academic institutions, there are agreements between the Commission and *Instituto Panamericano de Alta Dirección de Empresa* and *Centro de Investigación y Docencia Económicas*.

Regarding co-operation agreements with international institutions, the Commission has such agreement with the Inter-American Development Bank, and finally, with the social and the private sector, the Commission has a co-operation agreement with the *Consejo Coordinador Empresarial*.

These interagency co-operation instruments are relevant since 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 SE and the CPA can file claims for cartel conduct. Also, if the enforcement agencies learn that cartel conduct may result in damages or lost profits to consumers, the CPA should be informed so it can start an investigation accordingly.

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 adopting the best international practices through participation with international organisations such as the OECD, the International Competition Network, and the United Nations Conference on Trade and Development.

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

sion to train their officials. For more information, see **1.6 Extent of Jurisdiction**.

3.6 Procedure for Issuing Complaints/ Indictments in Criminal Cases

Criminal cases for cartel conducts can be filed with the Attorney General's Office by the Agencies without necessarily having a final resolution. Therefore, enforcement agencies can file criminal claims once the investigative authority issues the Statement of Probable Liability. Third parties or other agencies cannot bring criminal cases for cartel conduct; however, 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 has been committed. These rules and principles are quite different from the administrative procedure carried out by the Agencies. 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

As mentioned in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, the procedure to enforce competition laws in Mexico is of an administrative nature, and no civil actions to enforce such laws can be brought (other than damages or loss of profits civil procedures). Regarding the right to third parties to file claims in order for the Agencies to start a cartel investigation, the third party may submit a plaintiff before such authorities through a written document containing:

- the specifics of the alleged responsible entity or individual;

- a description of the facts considered illegal, the market structure, and the goods and services involved;
- how the conduct affects the market;
- a 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 are carried out by the independent investigative authority of the applicable Agency, which will eventually do one of the following:

- issue an official communication marking the beginning of the investigation, previously described as the Initial Ruling;
- issue an official request to the claimant to petition fulfilment of the requirements of a complaint; or
- issue an official communication refusing the claim, either due to the lack of the necessary requirements or because the behaviour cannot be considered as cartel conduct.

Defendants do not have access to the information in possession of the investigative authority while the confidential investigation is in process. Once the Statement of Probable Liability is served on the defendant, it is 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 are considered to be competitors. Therefore, the enforcement 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 complete and the alleged responsible parties are served with the Statement of Probable Liability.

3.9 Burden of Proof

Depending on the type of procedure (ex officio or following a claim) the burden of proof to initiate the cartel investigation is on the plaintiff or applicable Agency. Once the investigation procedure is completed and the investigative authority gathers enough evidence (ie, from the claimant, information gathered during dawn raids, previous investigations, and 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 Liability.

3.10 Finders of Fact

The enforcement proceedings carried out by the Commission or the Institute are of an administrative nature. The finders of facts are both the plaintiff and the enforcement Agency. The Agencies 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 criminal 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 if it is related to the facts and the target company. Information provided by applicants for the leniency programme is only used in the proceeding for which the information is provided.

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. Therefore, the enforcement Agencies should 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 could still challenge the decision by means of an *amparo* proceeding before specialised courts on competition, telecommunications and broadcasting. Such courts will analyse whether the procedure performed by the enforcement Agencies followed legal standards and principles; if it did not, the resolution could be amended or revoked. For more information, see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **4.8 Available Forms of Judicial Review or Appeal**.

3.13 Role of Experts

Experts are, in some cases, fundamental to a proper defence. Economists, in particular, as independent experts, produce an important part of the argument and evidence presented to the Agencies. Furthermore, if a communication is not written in Spanish, translation experts are necessary to translate into Spanish relevant communications or translate the appearance of a given person who does not speak Spanish, and who is necessary for the cartel procedure.

Likewise, in the case of the *amparo*, other kinds of experts may be necessary depending on the market of the cartel investigation. Experts of the sort needed depends greatly on the kind of evidence that is part of the cartel procedure.

3.14 Recognition of Privileges

The attorney-client privilege is recognised and cannot be used as evidence. See **2.7 Attorney-Client Privilege**.

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 related to the same facts to have a single procedure.

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, if the cartel investigation has led to a criminal complaint, these complaints are resolved by criminal courts, which impose sanctions.

4.2 Procedure for Plea Bargaining or Settlement

Other than the leniency programme mentioned in **2.11 Leniency, Immunity and/or Amnesty Regime**, there are no plea bargaining or settlement procedures for cartel conduct.

4.3 Collateral Effects of Establishing Liability/Responsibility

No collateral effects (other than criminal complaints or civil 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 public bids of entities or individuals sanctioned for cartel conducts.

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 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 will determine 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 competition 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 on 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 programmes as a preventative measure to avoid violations of the Mexican competition law. Nevertheless, no specific rules or benefits are included in the competition 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 above-mentioned indirect *amparo*.

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, which will be brought before the specialised courts on competition, telecommunications and broadcasting.

5.2 Collective Action

Class actions for competition cases are allowed in Mexico when led by the enforcement Agencies; however, 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 of claims. 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 for 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 obligated to pay defence costs for counsel. Nevertheless, in a procedure to claim damages and loss of 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

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 on this regard. It is possible to challenge decisions issued by the specialised courts on 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 and the Institute, there are markets or sectors that will be given specific attention and may be the subject of future cartel investigations. On the Commission's side, they published a project for its 2022-2025 strategic plan, and its priority sectors include food and beverage, transportation and logistics, financial markets, construction and real estate markets, energy, health, public procurement and digital markets. For the Institute, its strategic plan for 2019-2023 includes as priority sectors the digital ecosystem and new technologies.

6.2 Guides Published by Governmental Authorities

The following guidelines have been published by the Commission and are non-binding; however, important criteria and interpretations are included therein:

- Guidelines on information exchange between economic agents;
- Guidelines on initiating an investigation regarding anti-competitive practices;
- Guidelines on investigations regarding absolute monopolistic practices; and
- Guidelines on the Leniency and Fines Reduction Programme.

Nader Hayaux & Goebel is a market leader in competition, anti-corruption, M&A, banking and finance, fintech, securities and capital markets, structured finance, telecommunications, tax, insurance and reinsurance, project finance, real estate, energy and infrastructure, restructuring and insolvency and government procurement. The firm consists of 18 partners and more than 35 associates and represents one of the

largest groups of corporate finance experts in the Mexican market, which has worked together for more than 30 years. It is the only Mexican law firm with an office in London; it has a strong focus on developing and pursuing business opportunities in Mexico, the UK and other European countries and enjoys excellent working relationships with law firms in all major cities internationally.

AUTHORS



Alejandro Mendiola Diaz is a competition specialist with extensive experience advising a range of companies on antitrust matters. He has advised clients involved in merger control

clearances and investigations into abuse of dominance and cartels. He has also developed antitrust compliance programmes for numerous companies. Alejandro served on the legal team of the former Federal Economic Competition Commission. He is a member of the United States–Mexico Chamber of Commerce, the American Bar Association and the International Chamber of Commerce. He currently serves as Vice-president of the International Chamber of Commerce Competition Committee. Alejandro earned his LLM in International Business Law from Queen Mary University of London and his law degree from Universidad Latinoamericana. He is fluent in English.



Daniella Ramirez Aguilar is a competition specialist with ten years of experience. She previously worked at the Federal Economic Competition Commission and the Federal

Telecommunications Institute's Competition Unit, and has been involved in cases regarding abuse of dominance, cartels and unlawful mergers, as well as the verification of compliance with conditions imposed on mergers. Daniella has solid experience in the trial-like procedure before the Mexican competition authorities. She has been involved in procedures to determine market conditions and collaborated in drafting regulations for the Federal Telecommunications Institute. She conducted interlocutory proceedings regarding compliance and enforcement of the decisions of the Board of Commissioners. Daniella earned her LLM in Competition Law from King's College London and her law degree from Universidad Iberoamericana.

Nader, Hayaux & Goebel

Paseo de los Tamarindos
400 B, 7th Floor
Col. Bosques de las Lomas
Mexico City
CP 05120
Mexico

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





Chambers Global Practice Guides

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe.

Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com

practiceguides.chambers.com