

Reproduced with permission from Antitrust & Trade Regulation Report, 107 ATRR 157, 8/1/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**ENFORCEMENT****Cartelization****Changing Landscape of Competition Law Enforcement in Mexico**

BY **KATHRYN HELLINGS, OMAR GUERRERO RODRIGUEZ AND RICARDO PONS MESTRE**

**A**s competition law becomes increasingly global, corporate executives and antitrust practitioners must take heed of legal changes to antitrust laws both in the U.S. and abroad.

On July 7, 2014, several important changes to Mexican competition law took effect—changes that have serious implications for corporations doing business in Mexico. In particular, given the increasingly close business and economic ties between the U.S. and Mexico, American businesses with current or future plans for cross-border work must be especially cognizant of the criminal cartel regime in Mexico.

The risks and potential penalties for cartel conduct are severe in Mexico, and, without appropriate compliance and training efforts, companies can find themselves facing severe corporate fines and imprisonment for their executives.

***The Change in Law***

In 2013, Mexico proposed an historic Amendment to the Federal Constitution which dissolved the then-existing competition authority and changed the entire competition regime.

This constitutional reform gave birth to a subsequent secondary legislation (the “New Mexican Competition Law”) which was enacted by the president on May 23, 2014, and took effect on July 7, 2014, making incredibly important substantive amendments to the entire competition landscape in Mexico.

Corporations doing business in Mexico should take note of some key changes in Mexican competition law.

***The Competition Authorities: IFT and Cofece***

The New Mexican Competition Law created two new competition authorities in Mexico: the IFT, with responsibility for the telecommunications, radio and television sectors; and Cofece, which will handle all other sectors of the economy (*i.e.*, financial, energy, and retail).

Together, Cofece and the IFT are responsible for merger control, unilateral conduct cases, and cartel enforcement—including administration of the Mexican leniency program in their respective areas or sectors.

Both Cofece and the IFT are independent and autonomous competition authorities that do not rely on any branch of Mexico’s government. Cofece has an investigative authority, which is separate and distinct from its decision-making authority. This investigative authority is responsible for investigating alleged anticompetitive

conduct. Cofece has seven federal commissioners—six attorneys and one economist—who serve as the decision-making authority. The IFT is similarly structured, with a separate investigative authority and seven federal commissioners—this time made-up of five economists-engineers and two attorneys—charged with decision-making authority.

### **Courts and Class Actions**

The 2013 amendment established new federal district courts (amparo courts) that are exclusively devoted to hearing competition cases. These courts will hear competition and telecommunications matters, as well as preside over private antitrust actions or class actions.

Section 134 of the New Mexican Competition Law permits any party to bring a private antitrust action or class action in these specialized courts, acting in these cases as civil courts. Civil actions, however, cannot commence until the administrative process is finished.

Thus, while, historically, Mexico has been an inhospitable place for private antitrust claims and class actions, it is possible that these recent legal changes may breathe new life into these types of cases.

### **Corporate Criminal Liability**

Historically, there was no corporate criminal liability in Mexico; a corporation could not be held responsible for the illegal cartel conduct of its employees.

While the New Mexican Competition Law has not codified corporate criminal liability for illicit anticompetitive conduct, under Articles 421 and 425 of the National Code of Criminal Procedure, to be finally effective June 2016, the Public Prosecutor will have the power to file charges against a legal entity for the actions of an individual who is part of or represents such entity, so long as that individual committed a crime under the legal entity's name or for the benefit of the legal entity.

While corporations in Mexico once could completely avoid prosecution for cartel conduct, in the very near future, they will potentially be on the hook for the anticompetitive conduct of their employees.

### **Penalties**

The New Mexican Competition Law, pursuant to an instruction in the June 2013 Constitutional Amendment to “severely” punish anticompetitive behavior, increased the penalties for cartel conduct. The Federal Criminal Code was amended to provide a *minimum* imprisonment term—an increase from three years to five years. The maximum prison sentence is 10 years.

Mexico is the only country with a minimum prison sentence of five years, and its prescribed penalties are among the harshest penalties globally (compared with, for example, Canada at 14 years' maximum imprisonment and the United States with 10 years maximum imprisonment).

Moreover, under the New Mexican Competition Law, if an individual is tried and convicted of criminal cartel conduct, that individual is required to serve time in prison. In contrast, if an individual cooperates or enters into “informal” plea bargains with the competition authorities, that individual can avoid jail time altogether.

Thus, there is now a great incentive for individuals to cooperate in criminal cartel investigations in Mexico.

Of course, in a system where the incentives weigh heavily in favor of individual cooperation, there is a danger that individuals may fabricate facts or accept responsibility for conduct that is mischaracterized or untrue in order to avoid prison time.

Additionally, the new law provides antitrust enforcers with an additional stick to punish anticompetitive conduct. Under the New Mexican Competition Law, professional disqualification is now a possible sanction for anticompetitive conduct. Article 127 of the New Mexican Competition Law provides for the penalty of professional disqualification for up to five years for every possible anticompetitive offense, including, for example, monopolistic practices and illegal mergers. Anticompetitive conduct then can be punished in myriad ways, with penalties lasting many years.

### **Change in the Legal Standard**

In Mexico, prior to the recent change in law, only intentional cartel conduct could be prosecuted. Now, cartel enforcers in Mexico can investigate and prosecute both intentional (purpose) and negligent (effect) cartel conduct.

This lower legal standard means that Mexican competition authorities can now investigate and prosecute more cases than ever before. While competition authorities were forced in the past to forego investigating cases where the conduct was merely “negligent,” they can now pursue these cases with vigor.

### **New Cartel Offense: Information Exchange**

Prior to the New Mexican Competition Law, only information exchanges that had the purpose or effect of price fixing were outlawed in Mexico. The New Mexican Competition Law, however, outlaws exchanges of information that have the purpose or effect of price fixing, market allocation, output restriction and bid rigging.

Additional guidance is expected on this topic no later than January 2015, but undoubtedly the scope of conduct that has been codified as illegal is much broader than in the past. Indeed, under the new competition law, any information exchange whatsoever with competitors in the marketplace is risky and could run afoul of Mexican cartel laws.

### **Dawn Raids**

Under the New Mexican Competition Law, there have been several significant changes to the laws and procedures relating to dawn raids.

Dawn raids are important tools for investigators, usually giving them an opportunity to gather relevant evidence from subjects of an investigation without notice, thereby capitalizing on the element of surprise and reducing the risk that evidence will be altered or destroyed.

Most experts agree that, as a result of these changes to Mexico's cartel regime, dawn raids will occur more frequently in Mexico.

### A. The Element of Surprise

Dawn raids, although infrequent in Mexico prior to the New Mexican Competition Law, were nevertheless a part of the enforcers' authority, although without a surprise element.

Previously an excerpt of an investigation was published in the Federal Official Journal prior to the commencement of dawn raids, completely destroying the element of surprise. Under Article 75 of the New Mexican Competition Law there is a new procedural rule that allows the commencement of investigations, including dawn raids, to remain secret.

Thus, in the future, dawn raids in Mexico will truly be a surprise, just as they are in many other jurisdictions.

### B. Powers to Investigate

Once dawn raids have commenced, investigators in Mexico will be armed with new powers to obtain evidence.

The New Mexican Competition Law empowers relevant enforcement personnel to perform on-site interviews of employees and corporate officers during dawn raids. Additionally, the New Mexican Competition Law empowers the investigative authority to have access to electronic devices (i.e., laptops, computers, cell phones, i-pads, tablets, etc.) during the dawn raid.

It is important to note that Mexico recognizes no attorney-client privilege. Thus, the competition authority can become aware of secret information between a client and outside counsel while conducting the dawn raid.

### C. Possibility of Obstruction Charge

Additionally, as of July 7, 2014, there are strong penalties for certain acts that impede or obstruct a cartel investigation.

Article 254 bis of the Federal Criminal Code now mandates a one-year to three-year prison sentence for, "partially or totally altering, destroying, or disturbing documents, images, or electronic files or dockets with the objective to divert, block or impede the investigation/inspection."

Thus, investigators in Mexico now have a strong weapon for fighting obstruction in cartel investigations,

a weapon their U.S. colleagues have been increasingly and effectively employing in criminal cartel investigations.

## Advice Moving Forward

The New Mexican Competition Law arms Mexican competition authorities with greater powers, harsher penalties, and broader authority.

The Mexican cartel authorities can investigate traditional *per se* anticompetitive cartel conduct and information exchanges that have the purpose or effect of fixing prices, rigging bids, allocating markets or restricting output. They have greater investigatory power under the new laws. Dawn raids will almost certainly occur more frequently in Mexico moving forward. They will now be surprise inspections and investigators have more power than ever before to gather evidence during the dawn raids.

Moreover, there are real risks associated with a failure to respond appropriately during a dawn raid, including imprisonment of executives. The penalties for cartel conduct are harsher than ever before, and corporations are now facing criminal liability for the conduct of employees. The competition law landscape has shifted drastically in Mexico, and companies and anti-trust practitioners must be prepared for the changes.

It is crucial that companies currently doing or planning to do business in Mexico take compliance and training efforts seriously. New compliance and training efforts must be made quickly to address these changes and avoid legal missteps. It is also very important for companies to properly prepare and train their employees for dawn raids. While companies may hope to avoid an investigation altogether, preparation can prevent additional problems for companies and executives unexpectedly ensnared in an investigation. Education is key to prevention, and companies should be educated on the law and how to respond to law enforcement.

Additionally, companies should conduct regular audits to ensure that the guidance provided to employees is being followed. If a problem is discovered, this should be reported immediately to outside counsel. Together, outside counsel and the company can determine the best course of action.



