LATIN LAWYER REFERENCE ANTITRUST 2019

Mexico

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JULY 2019

LATIN LAWYER INSIGHT

Competition law enforcement

1 What is the relevant legislation and which authority is responsible for competition law enforcement?

The Mexican competition statutory framework is governed by §28 of the Mexican Political Constitution, which, in broad terms, forbids "monopolies and monopolistic practices". Moreover, §28 of the Constitution stipulates that "the law will severely punish, and the authorities will effectively prosecute (…) any agreement, procedure or combination of producers, industrialists, merchants or service entrepreneurs, who in any way do, to avoid free competition or competition among themselves or to compel consumers to pay exaggerated prices (…)".

Although a general prohibition against "monopolies and monopolistic practices" has been contemplated in the Mexican constitution since 1857, in June 2013, §28 underwent a mayor constitutional amendment to considerably strengthen the application of the local competition policy.

In consequence to the constitutional stipulations, the Mexican competition regime is currently ruled by the July 2014 Federal Economic Competition Law (FECL). In addition, the following statutes and regulations are also applicable in concordance with the FECL:

- the Federal Telecommunications and Broadcasting Law (Telecom Law);
- the Regulatory Provisions of the FECL (issued by the Federal Competition Commission and the Federal Telecommunications Institute) and the Regulatory Provisions to the Telecom Law;
- the Organic Statutes of both competition enforcers (as explained below);
- the Federal Criminal Code;
- the Federal Civil Proceedings Code; and
- additional non-binding guidelines and technical criteria per the interpretation and application of the previous regulations.

As a result of the June 2013 constitutional amendment to §28, the current competition enforcers in charge of enforcing the local competition regime, which are constitutionally autonomous bodies (i.e. non-dependent from any power branch of the Mexican Republic), are (i) the Federal Economic Competition Commission (commonly known as Cofece) and the (ii) the Federal Telecommunications Institute (commonly known as the IFT).

The IFT is the enforcer and regulator in charge of the competition regimen exclusively in the telecom and broadcasting (including TV) arena and Cofece manages the rest of the industries, markets and sectors in Mexico.

In addition, Cofece and the IFT have federal jurisdiction and competition enforcement is exclusively limited to their authority.

Merger control

2 Which types of transactions must be notified? Is change of control a requirement?

Concentration reaching the statutory thresholds must be notified. The FLEC defines concentrations very broadly including any merger, acquisition of control or any other act whereby corporations, associations, shares, equity parts, trusts or assets in general are joined by and among competitors, suppliers, clients or any other economic agents. Therefore, this definition includes joint ventures and acquisition of non-controlling interests, or similar commercial arrangements. Acquisition of non-controlling shareholder may be exempted from filing obligations.

As for the licensing of intellectual property rights, if a strict interpretation of the definition of concentration is made, the licensing of a patent, for instance, may also be considered as a concentration. Patent licensing involves the granting of the right for a licensee to use or exploit the patent for a specific period of time in a particular territory. Personal rights under Mexican law (such as a patent licence) are considered moveable goods (assets, if defined from an economic standpoint). As mentioned before, the authorities consider as a concentration, among others, the acquisition of control (without making reference as to whether this control is temporary) of assets.

Similarly, if one makes a strict interpretation of the definition of a concentration, a long-term supply agreement may be considered as one if, as a result thereof, one of the parties acquires control of the other. However, it would not be easy to make such an argument, and as far as we know, no filing has been made of a supply agreement as a concentration. This needs to be reviewed on a case-by-case basis.

The FLEC includes the following exceptions to the filing obligations:

- corporate reorganisations, where the economic agents belong to the same controlled economic group and no third party participates in the concentrations;
- in the event the holder of shares or equity units or equity parts increases its relative participation in the capital stock of a company controlled by such holder since incorporation or since approved by the competition authority;
- when creating administration or guarantee trusts or any other where the contribution of assets or shares has no purpose or consequence of transferring such assets or shares to a different company. However, the execution of a guarantee trust must be notified if the filing thresholds are met;
- acts on shares performed abroad, related with non-residents in Mexico for tax purposes, as long as the companies involved do not acquire the control of Mexican companies, nor accumulate in Mexico shares, equity or assets in general, in addition to those already possessed, directly or indirectly, before the transaction;
- when the acquirer is a variable income investment firm and the transaction has as its purpose the acquisition of shares or other instruments with resources from the placement with the public of shares representing the capital stock of the investment firm, except when, as a result of the operations of the investment firm, it may have a significant influence in the decisions of the concentrated economic agent;
- in the acquisition of shares, equity or other documents representing (directly or indirectly) the capital stock of companies listed on a stock exchange in Mexico or abroad, when the acts or successive acts do not allow the purchaser to hold 10 per cent or more of such shares, equity or other instruments, and, in addition, the purchaser has no authority to:
- appoint or revoke members of the board of directors, or managers of the issuer;
- impose, directly or indirectly, decisions in stockholders meetings or similar bodies;
- maintain the holding of rights allowing it to, directly or indirectly, exercise the vote of 10 per cent or more of the company in question; or
- instruct or influence, directly or indirectly, the management, operation, strategy or the main policies of a company, whether through ownership, through contract or in any other manner; and
- when the acquisition of shares or equity or participation in trusts is performed by one or more investment funds with speculative purposes only, and have no other investments in companies or assets that participate or are employed in the same relevant market of the concentrated agent.

The regulatory provisions to be issued by the FCEC will include details as to how these exceptions should be considered.

In addition, the transitory articles of the Telecomm Law provide that as long as there is a preponderant agent in the telecomm and Radio/TV sectors, with the purpose of fostering competition and developing long term viable competitors, concentrations with the following characteristics, shall not require the prior authorisation of IFT:

- if they generate a sectorial reduction of the Dominance index, as long as the HHI does not increase in more than 200 points;
- it results in an economic agent having a sectorial market shares lower than 20 per cent;
- that a preponderant economic agent in the sector does not participate in the concentration; and
- its effect is not to reduce, diminish or imped free competition in the corresponding sector.

To this end, a notice needs to be filed within 10 business days following closing for the analysis by the IFT.

The IFT has declared one preponderant agent in the telecommunications sector, as well as one preponderant agent in the radio/TV sector.

3 What thresholds apply for determining whether a transaction must be notified?

The FLEC provides that there are certain concentrations that are subject to prior authorisation before the regulators (depending on the particular sector), prior to their closing. These concentrations include those falling under any of the following thresholds:

- those transactions involving an act or a series of acts, regardless of the place of execution, amounting in Mexico the equivalent of 18 million times the measure units or more;
- transactions involving an act or a series of acts with an accumulation of at least 35 per cent of the assets or capital stock of an economic agent, whose assets in Mexico or annual sales originated in Mexico involve more than the equivalent to 18 million times the measure unit; or
- transactions involving an act or series of acts with an accumulation in Mexico of assets or capital stock higher than 8.4 million times the measure unit, and the transaction involves the participation of two or more economic agents with assets in Mexico or annual sales originated in Mexico, jointly or separately, of 48 million times the measure unit.

The first two thresholds are referred to the target's assets located in Mexico, target's companies with direct operation in Mexico (mainly Mexican subsidiaries or branches) or target's sales originated in Mexico. The third threshold considers a combination of sales or assets of the parties in Mexico, and an additional accumulation of assets or sales in Mexico of the target company only.

There is no filing obligation if the target or seller company has no presence (assets and sales) in (or into) Mexico. However, there is no de minimis doctrine. If any of the thresholds is met, then the transaction must be filed, even if one of the parties has insignificant presence or sales in (or into) the country. Economic groups are indeed considered for purposes of the threshold.

4 Who must file the notification and when? Are there filing fees?

The general rule is that a joint filing is required. In fact, the FLEC provides that all economic agents directly participating in the transaction shall make the filing. However, the FLEC allow for the acquirer to make the filing independently if it can demonstrate:

- the other parties are unable to do so (legally or de facto), and this is proved to the enforcer; or
- a simplified filing is made.

Filing fees are applicable of around US$10,000.

5 Is there an obligation not to close the transaction pending review? If so, is there any alternative available to allow closing before formal clearance?

Yes, the parties are not allowed to close a transaction pending the review by the regulators.

Formally speaking, the FLEC does not provide for an alternative. In practice, we have seen discussions in several cases to execute a hold separate agreement with respect to Mexico, where the parties would not give material effects to the international transaction in Mexico until the enforcer issues its resolution. However, in discussing this issue with the staff of Cofece, they have confirmed that this is not an alternative that Cofece wishes to pursue; and that if this is done, Cofece may consider this approach a violation of the FECL.

As long as the transaction is not cleared and closed, the parties shall act independently, as competitors.

6 Are local effects part of the test? In what conditions must transactions between foreign companies be notified?

If a transaction between foreign companies involves the indirect acquisition of Mexican subsidiaries or assets located in Mexico, the transaction must be notified, provided any of the referred statutory thresholds is met. An indirect acquisition is deemed to exist if, for instance, a company abroad is acquired and the acquired company has subsidiaries in Mexico.

7 What is the timeline for review and clearance?

Normal process. The enforcer must issue its resolution within 60 business days counted from the date of receipt of the notification or the submission of the additional information requested by the enforcer. If the enforcer has not issued a resolution at the end of this term, it shall be understood that the enforcer has tacitly approved the proposed transaction (afirmativa ficta). The period mentioned above may be extended once in exceptional cases for another 40 business-days. In practice, the enforcer normally issues requests of information, which interrupts the 60-day term. Requests of information are made in two different stages:

- within 10 business days from filing, the enforcer may issue a request of basic information, granting the parties another ten business days to respond; and
- within 15 business days following filing (if no basic information request has been made), or following the date the parties submit the basic information requested by the enforcer, the enforcer may request additional information.

This second request of information normally involves data required for substantive analysis. The enforcer grants 15 business days to respond, although extensions to this term are common. In complex cases, the enforcer would normally extend the term to resolve for an additional 40-business-day period.

The FLEC provides for a fast-track process if the parties prove to the enforcer that it is notorious that a concentration does not have as its purpose or its consequences to have the effect of diminishing, damaging or impeding competition. In these cases, the enforcer must resolve the filing within a term of 15 business days from the date the enforcer formally acknowledges receipt of the filing through a resolution (which must be made within five business days following the date of the filing). The following are the cases eligible for the fast-track process, provided the acquirer does not participate in any related market and it is not an actual or potential competitor of the target:

- if the transaction implies the first participation of the purchaser in the relevant market. To this end, the structure of the relevant market should not be modified and should only involve the substitution of the economic agent;
- if, before the transaction, the purchaser holds no control of the acquired agent, and with the transaction it increases its relative participation in such agent, without having additional power to influence the operation, management, strategy and main policies of the company, including the appointment of members of the board and managers; or
- if the purchaser has the control of a company and increases in relative participation in the capital stock of such company.
- Contacts with the authority are common prior to actually making a notification and during the process. Contacts will depend on the confidentiality and complexity of the transaction, but the authority is open to these discussions. The FLEC allows for interviews with the Commissioners, When an interview is requested, all Commissioners must be invited thereto, and all scheduled interviews are listed in the FCEC's webpage.

8 Is there a simplified notification procedure with accelerated review periods? What types of transactions qualify?

Yes. Please refer to respond to question 7.

9 What are the risks if the parties do not file, if the transaction is closed before clearance or if notification is untimely? What type of behaviour can be considered gun-jumping?

Failing to file a transaction reaching the thresholds may result in significant fines for the parties. In addition, if during the investigation process it is determined that the transaction is an illegal concentration, additional fines may be imposed, as well as conditions (eg, undoing of specific legal acts) or the order to divest or unwind the corresponding concentration. Penalties may be imposed to both parties under the transaction, as well as to those individuals ordering or executing the transaction.

The parties are bound to act independently as long as clearance and closing does not occur. Exchange of sensitive information among the parties, which may lead to anticompetitive conduct is also prohibited and would be investigated as a cartel violation.

10 Are there special rules applicable for public takeover bids, private equity transactions, corporate restructuring under bankruptcy procedures or acquisitions of convertible non-voting securities or options?

The exemptions to the filing obligations are described in question 3.

11 Is notification and its content publicised?

The notification itself is not publicised. However, whenever there is an interim resolution (eg, a request of information) during the process, the file number and the name of the parties are listed in the website of the enforcer. Once the filing process has concluded, third parties may have access to the file, except for confidential information. In addition, a public version of the final resolution is published. In some cases, the authority has issued press releases on the general aspects of a resolution.

12 What are the investigative powers of the authority?

There are two processes under which the enforcer may investigate concentrations: the filing process; and the investigation of concentrations the purpose or effect of which may be to reduce, damage or impede competition. During the filing process, the enforcer may request additional information. (See question 19 for details on these requests and the effects on timing to resolve.) Information requests are normally made to the parties, but in complex cases, third parties such as competitors, suppliers or clients may be requested to produce information that the enforcer deems required to complete its analysis. In addition to the filing process, the enforcer may investigate concentrations the purpose or effect of which may be to reduce, damage or impede competition. These investigations may be initiated:

- within one year from closing, if the transaction was not subject to filing;
- within 10 years, if the transaction was subject to filing, but the parties failed to make the filing; or
- within 10 years if clearance was obtained through false information, or if the parties fail to comply with conditions imposed by the enforcer.

During this investigation process, the enforcer (through the Investigative Authority) may request information to the parties or third parties, and request interviews with key officers. In addition, the enforcer may perform surprise (unannounced) verification visits.

In recent cases, information has been requested to competitors to assess and confirm the size of markets subject to review, general market conditions (including potential barriers to entry), the effects of a particular transaction to the competition process and market share data. This information plays a heavy role on the authority's assessment of a transaction.

13 Are parties required to disclose internal documents during the review?

Yes. The enforcers are allowed to request any information required for their analysis. This may include internal presentations of a particular transaction, market analysis and surveys among other documents.

14 What rights do third parties such as competitors, suppliers or customers have to intervene and participate in the investigation process, including rights to access the investigation file?

During the filing process, third parties are not allowed to participate. The economic agents may assist the enforcer by submitting data and documents that they consider relevant to the case. In addition, the claimant does not have access to the file. Notwithstanding the foregoing, at least in a couple of cases (Televisa/Radio Acir and Ferromex/Ferrosur), third parties have been able to intervene in the process as a result of constitutional control proceedings (amparo) before federal courts, claiming that the articles that based the dismissals were unconstitutional as they violated fundamental due process rights. Very recently, the media has reported that Televisa made constitutional challenges to resolutions issued by Cofece with respect to the Disney/Fox merger as it requested to be part of the process.

On the other hand, third parties may file claims requesting the enforcer to investigate alleged illegal concentrations, only if these have not (or are not) the subject matter of a filing.

15 What are the prevailing theories of competitive harm and analysis, and how are they typically applied?

The authority focuses on different aspects (both unilateral and coordinated effects). First, on the combined market shares of the parties and whether the acquirer, as a result of the transaction, may result in market power or increase such power with which it may diminish or damage the competition process. Second, the authority would analyse whether the transaction may have an exclusionary purpose or effect, establish barriers to entry, and impede access to related markets or to essential facilities. To this end, the enforcer analyses both the relevant and related markets. Third, the enforcer would look into whether the transaction may have as its purpose or effect to substantially facilitate the commission of a monopolistic practice (whether horizontal cartels, or vertical restraints). If the parties submit an analysis of efficiencies, this shall also be considered by the enforcer.

In addition, in recent cases Cofece has also review in more depth potential vertical issues arising from a particular transaction.

16 Are there safe harbours and what are they?

A transaction with no horizontal or vertical overlaps should be cleared without any questioning by the authority (except, maybe, with respect to limitations to non-compete provisions). In addition, transactions where combined market shares are lower than 30 per cent should not raise any concerns, but must be analysed on a case-by-case basis.

The FLEC includes the notion of collective dominance, so this factor is also applied in the analysis of concentrations.

17 To what extent are economic efficiencies and non-competition issues taken into account in the review process?

Economic efficiencies are an integral part of the analysis. However, the parties have the burden to prove efficiencies. If the parties do not argue efficiencies during the process, the authority will not include them as part of the analysis. The analysis is based only on competition issues, so no transaction is rejected on the grounds of job protection, national security or other national interests.

National interests are considered by foreign investment authorities when authorisations are required because a de-mexicanisation of a company exceeding certain asset values.

18 Can remedies be negotiated and, if so, at what stage in the process? How are they enforced? Can they be challenged by third parties?

Remedies can be negotiated during the process prior to the enforcer issuing a resolution. The process under the new FLEC require for the regulator to communicate the parties the concerns they might have on the specific transaction. This communication must be made at least 10 business days prior to the date the matter is to be listed for discussion by the commissioners, to allow the parties to propose remedies. The proposal of remedies interrupts the 60-day term for the authorities to resolve.

The enforcer prefers to impose structural remedies rather than behavioural. Structural remedies are easy to enforce as the enforcer requires the parties to file a divestment programme and report on compliance. Considering this, behavioural remedies are less common, but in some instances have been imposed. Enforcement of behavioural remedies has included the appointment and report of independent auditors, strict policies as to the exchange of information between officers or directors, or the filing by the parties of documents evidencing compliance.

19 Can a decision from the regulator be appealed and, if so, what is the timetable for review to take place?

Resolutions of the competition enforcers may only be challenged through an amparo proceeding before federal courts. As part of the constitutional reforms, specialised competition tribunals have been created that will hear and resolve of any challenges to resolutions issued by Cofece and the IFT. The amparo proceedings are to be resolved by specialised district judges, the resolutions of which would be resolved by specialised circuit courts. If constitutionality issues are to be resolved, the Supreme Court may be competent. The term for a final and definitive decision varies from case to case, but it may it will take several months to be resolved.

Cartel Enforcement

20 What interactions between competitors rise to the level of a competition law infringement in your jurisdiction?

Any agreements or combinations whose purpose or effect is to:

- Fix or manipulate prices;
- Divide markets;
- Restrict output;
- Bid rigging
- Exchange of information with any of the foregoing purposes or effects;

are considered as absolute monopolistic practices and are per se prohibited by the FLEC.

21 Are cartel violations infringements by object or effect?

As mentioned in question 20, the FLEC considers both the purse and the effect of a potential practice.

Conducts executed abroad that have an impact in the Mexican markets or consumers, could be investigated and sanctioned per the effects occurred in Mexico.

22 What powers do authorities have to investigate cartel infringements or other types of competitor contacts? How are these types of infringements usually uncovered? What is the applicable limitation period?

Current investigative powers of the Investigative Authority of both enforcers, which is independent and autonomous to the decision-making body of each enforcer (ie, the Board or Plenary of Commissioners), include the following:

- Written requests for information and documents, which can be address either potential offenders or any third party that might or could be involved with the conducts under investigation;
- Dawn raids, which can be performed at the offender's business (ie, offices, headquarters, plants, etc) and do not need to be previously announced nor require a judicial approval. Dawn raids can last up to two months (which can be prorogued

for additional two months in case of need), although standard practice is for dawn raids to be performed in one single day; and
- Formal appearances or depositions of any individuals that could or might be related with the investigated conduct, where constitutional rights to no-self-incrimination or due defence are limited.

In addition, it is worth highlighting that the investigative phase of a cartel investigation can last up to approximately 600 business days and the statutory framework contemplates relevant sanctions in case of non-compliance to this investigation tools such as, among others, (i) accumulative monetary fines per each day the requested party fails to comply with the request and (ii) during dawn raids, criminal sanctions to those who oppose, impede or obstruct the raid or destroy, alter or hide documents and information (ie, the Criminal Federal Code contemplates a one-to-three-year imprisonment penalty) and the presumption that any accusation formulated in the Statement of Objections will be assumed as true by enforcers.

23 What sanctions apply to the participants in cartel conduct?

The local statutory framework (§127, FECL) contemplates that corporations can receive a fine up to the 10 per cent of the corporation's annual revenue when found guilty of charges for cartel behaviour.

Therefore, the variation as to whether enforcers apply the 10 per cent fine or impose a reduce portion will depend on specific factors contemplated also by the regulations (§130, FECL), which include the damage caused, the signs of intentionality, the participation of the offender in the affected markets (ie, market share), the size of the affected market, the duration of the practice, as well as the economic capacity of the offender.

Moreover, in cases of recidivism (second or more offenses and subject to further requirements met), the local statutory framework (§127, FECL) also contemplates the possibility of the enforcers for doubling the corresponding fine or, at the discretion of the enforcer, a potential order to divest assets, which has never been applied in Mexico.

In addition, corporations who indirectly intervened in the conducts by means of contribution, encouragement, facilitation or induction, may also receive fines.

Finally, once an investigation has been terminated and offenders have executed all means of extraordinary legal defence before the judiciary, the local statuary framework, along with civil legislation applicable in Mexico, allow third parties (ie, consumers, competitors, etc), to initiate either individual or collective actions (class actions) against offenders per the damages caused.

24 Can individuals be liable for cartel infringements or other contacts with competitors?

In addition to corporations, individuals involved in the sanctioned conducts can also be subject to administrative fines as follows:
- Those individuals who intervene directly in the conduct, or on behalf of corporations, can receive fines and an up-to five years disqualification sanction; and
- those individuals who intervene indirectly in the conduct by means of contribution, encouragement, facilitation or induction, may also receive a fine.

Likewise, individuals can also be held responsible and be sued by civil actions individually, so as similar to the potential consequences for corporations, once an investigation has been terminated and offenders have executed all means of legal defence before the judiciary, the local statuary framework, along with civil legislation applicable in Mexico, allow third parties (ie, consumers, competitors, etc), to initiate either individual or collective actions (class actions) against offenders per the damages caused.

The Federal Criminal Code (§254, bis) contemplates a minimum five, maximum 10-year imprisonment term for offenders.

Criminal prosecution is relevant in Mexico due to the fact that criminal actions can be initiated at the sole discretion of the enforcers, once the Statement of Objections is issued (ie, the initial accusation through which the investigative phase is terminated), so offenders will have to defend themselves not only before administrative charges with the enforcers, but, at the same time but in a different arena, from criminal prosecution before the Attorney-General.

25 Is there an immunity or leniency programme for the investigated parties to cooperate with the authority? What are the criteria to apply? What are the fine reductions granted?

The local statutory framework contemplates a relevant leniency programme, which was introduced around 10 years ago in Mexico and has been recognised by Cofece as the most effective tool to identify cartel behaviour.

Local leniency programme is similar to programmes from other jurisdictions such as the US or Europe. Basically, local leniency programme provides immunity to those offenders (to corporations or any other individual that apply individually or collectively) who self-report the conduct before the enforcer and benefits will depend on the place leniency was requested.

In general terms, the first applicant will receive a reduction of the fine equivalent to around 75 pesos and immunity over other sanctions such as criminal prosecution or disqualification. The rest of the applications will receive proportionate fine reductions (ie, 50 per cent to the second place, 40 per cent to the third place, etc), but will also receive immunity over other sanctions such as criminal prosecution or disqualification.

The leniency programme does not provide immunity over civil actions, which once the afore-mentioned requirements are completed, can be imitated against offenders subject to the leniency program.

Finally, leniency can be requested at all times during the investigation but before the investigation docket is formally closed.

26 Is there an immunity plus or amnesty plus option? Or other opportunities to reduce fines?

No, each cartel offence is reviewed separately and so is each particular leniency application.

27 Is there a settlement procedure? What are the corresponding requirements and benefits? Is settlement a possibility in addition to immunity or leniency?

No, the FLEC does not contemplate any settlement possibility.

28 What are the procedural steps and timeline followed by authorities when investigating cartels?

The investigation period cannot be less than 30 business days or exceed 120 business days. However, the investigation may be extended up to four times for periods up to 120 business days each.

Once the investigation is over, the Investigative Authority of the regulators will have 60 business days to present its conclusion of the investigation (whether to close the investigation or issue a statement of objections) to the Commissioners. If the Commissioners agree that a statement of objection shall be issued, the SO shall be served within 30 business days following the date the recommendation was presented to the Commissioners.

With the notification of the SO, served parties have the opportunity to defend themselves and provide evidence.

Once a final resolution is issued, it can be challenged through a constitutional challenge (formally known as amparo indirecto), which needs to be filed with 15 business days following the notification of the final resolution.

In fact, also a result of the 2013 constitutional amendment, specialised courts (2) and tribunals (2) in competition, broadcasting and telecom matters were created, and the aforementioned constitutional challenged needs to be filed, exclusively, before such courts. Finally, in extraordinary circumstances, constitutional challenges might also be resolved by the Supreme Court of Justice.

29 Is any information about the investigation made public? Can third parties cooperate with the investigation and access the authority's files?

Information in the file cannot be made public during the investigation, and no party has access to the file during the investigation period. Once a SO is issued and served, the parties involve may access the file; however, information that is considered sensitive and confidential can only be accessed by the party that provided such information.

Third parties do not have access to the file.

Any third party may cooperate during the process either through formal requests of information made by the authority or voluntarily by providing information.

30 Is a decision finding a cartel infringement subject to appeal? What is the timetable for review to take place?

See question 28.

31 Can third parties claim damages for losses suffered as a result of a cartel infringement? Please describe the relevant procedure.

A requirement for civil actions to proceed against cartel violations is that such violations need to be sanctioned by the enforcers and then later confirmed by the judiciary (in case appeals are filed) under the res iudicata principle.

In such terms, any third party that has suffered a damage as a result of the illegal conduct, may initiate (either individually or collectively) a civil action. However, civil legislation in Mexico provides that damages need to be "real" (ie, material) and "direct", and cannot be assumed nor multiplied in any sort of manner. Likewise, claimants have the obligation to prove the existence of the damage despite the fact that the illegal conduct has already been evidenced by enforcers, in order to have the right to be compensated in the proper way.

Moreover, each offender will need to be sued specifically.

32 Can third parties have access to documents submitted in the context of a leniency application or settlement for private enforcement purposes?

No. Because of legal restrictions provided in the statutory framework, enforcers have the undisputable obligation to guarantee confidentially of the leniency applicants at all times and even when the matter is terminated, which includes the identity of the applicant and all information and documentation provided.

Recent practice has been that, in some cases, the Investigative Authority requests leniency applicants to formally submit evidence within the formal investigation docket but without making any kind of reference to the leniency docket or application.

Abuse of dominance/unilateral conduct

33 How is dominance determined?

Once the relevant market has been defined, the regulators shall consider the following elements to determine whether a specific economic agent has substantial power in that specific relevant market:

- market share of the specific economic agent and of its competitors, and whether the economic agent in question has the ability to fix prices or restrict output without its competitors being able to counteract such power. There is no specific market share that would be indicative of market power, as this needs to be analysed on a case-by-case basis;
- the existence of barriers to entry;
- the existence and power of competitors;
- possibility of access of the economic agent in question and its competitors to sources of raw materials; and
- recent behaviour.

34 How is an abuse of dominance identified?

To determine an infringement to the law as a result of a conduct of an economic agent with substantial power (equivalent to an abuse of a dominant position – known under the FLEC as relative monopolistic practices), the following elements shall be determined:

- the economic agent in question has market power (whether individual or joint);
- that the conduct in question is one set forth in the FLEC as a relative monopolistic practice (including, for instance, predatory pricing, cross-subsidies, exclusivities, etc);
- that it has as its purpose or effect, in the relevant market or in a related market, to foreclose or displace other agents or grant undue exclusive advantages in favour of one or several economic agents; and
- that the practice does not generate net efficiencies.

35 What types of conduct can be considered as an abuse of dominance? Can there be a per se infringement? Does the law prohibit both exclusionary and exploitative practices?

Only the following conducts may be considered relative monopolistic practices:

- Exclusivities;
- Resale price maintenance;
- Tying;
- Sale or purchase subject to the condition of not using, selling or buying products/services of other economic agents;

- Refusal to deal/supply;
- Boycotts;
- Predatory pricing;
- Discounts for exclusivity;
- Cross subsidies;
- Price discrimination;
- Increase costs of competitors or obstructing its productive process or reducing its demand;
- Discriminatory access to an essential facility; and
- Margin squeeze.

As explained before, the regulators may determine the existence of individual or collective/joint dominance (substantial power). These conducts are not per se illegal, and are reviewed under a standard similar to the Rule of Reason applied in the US.

36 What broad criteria should a dominant company observe to grant discounts or rebates that comply with competition law?

The most relevant point to consider on discounts is whether exclusivity is requested as a condition for such discount.

37 What powers do authorities have to investigate abuse of dominance? What is the applicable limitation period?

Current investigative powers of the Investigative Authority of both enforcers, which is independent and autonomous to the decision-making body of each enforcer (ie, the Board or Plenary of Commissioners), include the following:

- Written requests for information and documents, which can be address either potential offenders or any third party that might or could be involved with the conducts under investigation;
- Dawn raids, which can be performed at the offender's business (ie, offices, headquarters, plants, etc) and do not need to be previously announced nor require a judicial approval. Dawn raids can last up to two months (which can be prorogued for additional two months in case of need), although standard practice is for dawn raids to be performed in one single day. However, dawn raids have not been used in investigations related to abuse of dominance;
- Formal appearances or depositions of any individuals that could or might be related with the investigated conduct, where constitutional rights to no-autoincrimination or due defence are limited.

In addition, it is worth highlighting that the investigative phase of an investigation can last up to approximately 600 business days and the statutory framework contemplates relevant sanctions in case of non-compliance to this investigation tools such as, among others, (i) accumulative monetary fines per each day the requested party fails to comply with the request and (ii) during dawn raids, criminal sanctions to those who oppose, impede or obstruct the raid or destroy, alter or hide documents and information (ie, the Criminal Federal Code contemplates a one-to-three-year imprisonment penalty) and the presumption that any accusation formulated in the Statement of Objections will be assumed as true by enforcers.

38 What sanctions apply to abuse of dominance?

The local statutory framework (§127, FECL) contemplates that corporations can receive a fine up to the 8 per cent of the corporation's annual revenue in Mexico when found guilty of charges for cartel behaviour.

Therefore, the variation as to whether enforcers apply the 8 per cent fine or impose a reduce portion will depend on specific factors contemplated also by the regulations (§130, FECL), which include the damage caused, the signs of intentionality, the participation of the offender in the affected markets (ie, market share), the size of the affected market, the duration of the practice, as well as the economic capacity of the offender.

Moreover, in cases of recidivism (second or more offenses and subject to further requirements met), the local statutory framework (§127, FECL) also contemplates the possibility of the enforcers for doubling the corresponding fine or, at the discretion of the enforcer, a potential order to divest assets, which has never been applied in Mexico.

In addition, corporations who indirectly intervened in the conducts by means of contribution, encouragement, facilitation or induction, may also receive a fine.

39 What are the procedural steps and timeline followed by authorities when investigating abuse of dominance?

Please refer to question 28.

40 Can efficiencies be used as defence arguments to justify an abuse of dominance? Are there any exemptions from abuse of dominance rules?

As explained before, the analysis carried out when determining the possible abuse of dominance is similar to the Rule of Reason analysis applied in the US, and thus efficiencies favourably affecting the competition process can be argued. It is, however, the burden of the defence to prove any such efficiency.

Normally, abuse of dominance cases are defended by using the following arguments (in addition to potential procedural defences):

- wrong definition of the relevant market;
- absence of market/substantial power;
- that the elements of the specific practice are not present in the case;
- existence of efficiencies;
- lack of actual damage.

41 Is it possible to cooperate with the relevant authorities to obtain a fine reduction?

Yes. Before the issuance of a statement of objections, the economic agent in question may request the reduction of a fine if it evidences:

- its compromise to suspend, conclude or correct the practice to restore the competition process; and
- that the proposed means are legally and economically viable, ideal and sufficient to avoid or concluding the effects of the practice.

This request may only be used once every five years.

42 Is any information about the investigation made public? Can third parties cooperate with the investigation and access the authority's files?

See question 29.

43 Is an abuse of dominance finding subject to appeal? What is the timetable for review to take place?

See question 28.

44 Can third parties claim damages for losses suffered as a result of an abuse of dominance infringement? Describe the procedure.

See question 31.

Cooperation with other authorities

45 Are there agreements in place to exchange information with foreign competition authorities?

Considering that a portion of cartel cases and merger control filing include an international impact or effect that involves Mexico, local enforcers have executed cooperation agreements with mayor competition enforcers around the world and have the legal authority (with certain limitations as explained further on), to coordinate efforts per the investigation and sanction of cartel behaviour and merger control analysis.

Some examples of inter-agency cooperation agreements between local enforcers (especially Cofece) include US antitrust authorities and the Canada Competition Bureau. In fact, Cofece has conducted certain trainings, especially for criminal cartel enforcement, with the Antitrust Division of the US Department of Justice.

Cooperation agreements executed by the Mexican authorities are limited to local legal boundaries and restrictions. Non-public information and evidence that the Mexican competition authorities obtain directly from the cartel members during their prosecution cannot be shared with other authorities if such information or evidence is protected under local confidentiality laws or without gaining the consent or waiver of the investigated party (which will be highly unlikely to occur).

A similar circumstance arises in the context of, for example, extradition cases. Although Mexico could eventually agree to extradition requests, as its local legislation and international treaties formally contemplate such authority, there are several hurdles, such as: (i) complying with the statuary formalities under the extradition principles and rules, (ii) the complexity of local procedure to endorse the extradition, (iii) the inconsistency between international treaties and local and foreign legislation; and (iv) the lack of formal legal binding obligations between nations to force extradition.

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