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GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors

Nicholas Heaton and Benjamin Holt

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This article was first published in December 2019

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Published in the United Kingdom by Global Competition Review

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

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www.globalcompetitionreview.com

First edition

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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher - clare.bolton@globalcompetitionreview.com

ISBN 978-1-83862-216-9

Printed in Great Britain by Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE

ALLEN & OVERY LLP

BAKER MCKENZIE

CDC CARTEL DAMAGE CLAIMS CONSULTING SCRL

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PART II
COMPARISON
ACROSS
JURISDICTIONS

Mexico Q&A

Omar Guerrero Rodríguez, Martin Michaus-Fernandez and Ana Paula Zorrilla Prieto de San Martin¹

Effect of public proceedings

1 What is your country's primary competition authority?

Mexico has two competition authorities: the Federal Economic Competition Commission (Cofece) in charge of enforcing competition law in all markets and industries other than telecommunications and broadcasting, and the Federal Telecommunications Institute (IFT), with exclusive authority to enforce Mexico's competition law only with respect to the telecommunications and broadcasting sectors in addition to other regulatory powers. Both authorities were created in 2013 as a result of a crucial constitutional amendment to Section 28 of the Federal Constitution, which granted both the status of constitutionally autonomous bodies making them independent from any governmental branch.

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

Both Cofece and the IFT also comprise investigating authorities that were created as a result of the 2013 constitutional amendment to Section 28 of the Federal Constitution. These investigating authorities are independent from the decision-making bodies (i.e., the plenary), and are entrusted with robust investigatory powers under the provisions of the Federal Economic Competition Act (Competition Act).

Under the Competition Act, the Cofece and IFT investigating authorities can instigate administrative investigations that once completed, may give rise to a statement of objections (SoO) to respect due process rights against its addressees. Once the administrative proceedings are concluded and addressees have had the right to a hearing and offer exculpatory evidence, Cofece and IFT decision-making bodies may impose severe sanctions against offenders.

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Parallel to such administrative proceedings, and after the SoO has been rendered, both Cofece and the IFT are the only entities with the authority to file a formal complaint before the Federal General Prosecutor of the Republic to bring criminal proceedings against individuals based on competition violations against the same offenders. This implies that any company or individual under scrutiny by any of the competition authorities might face administrative liability and harsh sanctions, but only individuals may face criminal liability (five to 10 years' imprisonment terms as set forth in Section 254-bis of the Federal Criminal Code).

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

No. Private antitrust claims can only be initiated once a decision from either authority has become final and *res judicata*. For a decision to be final, offenders should have exhausted all means of challenge against the decision rendered by either authority before the judiciary or have to accept the decision that grants leniency benefits as final. The only available means of challenge after a Cofece and IFT decision is the indirect *amparo*, which is a type of constitutional challenge, and its federal appeal to be heard by specialised telecommunications or competition federal tribunals, which act as constitutional tribunals.

Private claims are also limited in their scope, as interested parties can only sue offenders for the specific direct and immediate damages and lost profits that were caused to the aggrieved parties. Such private claims would be processed under federal civil law before federal courts specialised in telecommunications and competition matters acting as trial court. Therefore, private antitrust claims in Mexico are limited to only one purpose: recovering direct and immediate damages and lost profits once illegal behaviour has been declared and recognised by a *res judicata* decision.

To summarise, a violation of the Competition Act in Mexico can be investigated by either Cofece or the IFT, as applicable, leading to severe administrative sanctions; in addition to administrative sanctions, there can be criminal prosecutions against individuals, but not companies, in parallel after the SoO (upon request of such authorities); and once the administrative procedure is completed through a *res judicata* decision, private antitrust claims before competent courts can be instigated to recover damages under federal civil law.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

As explained in question 3, private claims are tied to the prior existence of a final and *res judicata* decision rendered by any of the competition authorities that sanctions (or at least recognises) a violation of the Competition Act. Thus, no private actions can be instated beforehand based on a competition law offence. However, once a decision is *res judicata*, and as explained in question 3, private claims could be initiated without further substantial restrictions (follow-on civil actions).

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

Decisions rendered by either Cofece or the IFT, which have become final and *res judicata*, are binding in follow-on private antitrust claims only in connection to the existence of the offence. In the private civil claims, affected parties need to prove the existence of direct and immediate damages and lost profits and a causal relationship between the offence and damages. Hence, because a private action will be supported by a final and *res judicata* decision, affected parties do not need to prove the existence of the violation, or the actual involvement of the sanctioned offenders. Thus, the final decision serves as irrefutable evidence that a violation occurred. Even if Cofece and IFT could have considered damages for the sole purpose of the administrative fine, that finding does not bind the judiciary in the private civil action since it served one sole purpose: fining. A civil action has its own burden of proof that must be complied with during the relevant proceedings.

Nonetheless, decisions rendered by foreign enforcers face a different treatment. Because such decisions would not have been rendered, and cannot be validated by either Cofece or the IFT, enforcing them to recover damages would imply a substantial challenge since they cannot be considered follow-on actions under Mexican competition law. In addition, such foreign decisions would have a limited persuasion effect in local proceedings.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

No. Immunity or leniency applicants, for whom immunity or leniency benefits are confirmed in the final decision rendered by either Cofece or the IFT, are only covered against the administrative sanctions imposed by the relevant competition authority and from criminal prosecution. Hence, immunity or leniency applicants will be subject to the same treatment as other non-leniency offenders in all follow-on private civil antitrust claims.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

In general terms, plaintiffs acting on follow-on private damages claims can only have access to files, documents or evidence obtained over the course of an investigation that are not classified as confidential by the relevant competition authority. Nonetheless, because plaintiffs acting on follow-on private damages claims will base their relief on a final decision, plaintiffs will not need to prove the existence and elements surrounding the illegal conduct. Rather, plaintiffs will only have to prove the existence of direct and immediate damages and lost profits, and a causal relationship between the offence and the damages. As a result, normally, not having access to such information is not a substantial disadvantage since plaintiffs will file follow-on rather than stand-alone private actions.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

In general terms, information submitted by leniency applicants to support a leniency application is classified as strictly confidential. In fact, that information is part of a separate and different docket to the one used to support the investigation. Therefore, leniency-application information will never be disclosed either during the course of the investigation or to private claimants. The main document to commence a private civil action will be the *res judicata* decision confirming the offence. Thus, the plaintiff may request to the civil federal specialist or competition federal court to request to Cofece and IFT all non-confidential information of the relevant docket and the essential information that could assist the plaintiff to prove its damages action.

9 Is information submitted in a cartel settlement protected from disclosure?

The Competition Act does not allow settlement agreements in connection to an investigation against cartel behaviour (cartels are locally sanctioned as ‘absolute monopolistic practices’). Thus, once a cartel investigation has been launched, the investigation must end either through the closing of the investigation for lack of evidence to sustain a conviction or in an SoO that could end up in an adverse decision.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

As explained under question 7, information that is classified as confidential under the Competition Act during the course of an investigation (which will most certainly cover commercially sensitive information), should never be disclosed or produced either in future private antitrust damages claims nor in any other type of claim.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

As explained above, private antitrust causes of actions in Mexico have been exceptional and during the legislative story of the Competition Act there has been a trend away from stand-alone to follow-on actions with the same result: almost no damages judgments against offenders have been secured except for possibly one case (see: *Juzgado Cuarto de Distrito en Materia Civil de la Ciudad de México*, Docket: 175/2014). Because enforcement of the Competition Act is exclusive to the relevant competition authority depending on the relevant market or industry (i.e., Cofece or the IFT), private parties can only commence private follow-on actions.

Moreover, as explained in questions 3 and 5 above, the only mechanism available to private parties to commence a private civil actions related to violations of competition law requires that the Cofece or IFT had found a company or individual liable for an offence under competition law (i.e., an absolute or relative monopolistic practice or illegal concentrations).

12 What forms of monetary relief may private claimants seek?

Once a final decision is rendered by Cofece or the IFT, under the *res judicata* principle, private claimants may seek monetary relief based on a follow-on action under Section 134 of the Competition Act. Such monetary relief relates only to direct and immediate damages and lost profits and not to indirect, consequential or punitive damages. The Federal Civil Code (FCC) and the Federal Code of Civil Proceedings (FCCP) govern the substantive and procedural aspects respectively. There are only two courts in the entire Mexican territory – sitting in Mexico City – that retain jurisdiction over any follow-on private damages antitrust claims: federal district courts specialist in antitrust matters and telecommunication matters. Moreover, these two courts also have jurisdiction to hear – as *amparo* courts – the challenge against the decisions taken by Cofece and IFT as to the existence of a competition offence.

The purpose of private civil actions will be to prove the actual monetary loss or impairment, which must be a direct and immediate cause of the illegal conduct; to quantify damages into a specific monetary amount; and to obtain compensation for the affected party.

Although not explored yet under the Mexican competition law, aggrieved parties also have available a class action to seek monetary relief arising out of a competition law offence determined in a *res judicata* decision.

13 What forms of non-monetary relief may private claimants seek?

Section 134 of the Competition Act seems to limit the relief that aggrieved parties may seek to a monetary relief (i.e., recover damages). However, Cofece or the IFT, when rendering a final decision, are empowered not only to order fines but also additional sanctions. Examples of such sanctions are cease-and-desist orders, and measures to restore competition in the affected markets (divestment of assets, undue transactions, disqualification of individuals, among others).

14 Who has standing to bring claims?

Pursuant to Section 134 of the Competition Act, any individual or company that suffered damages from the sanctioned conduct will have standing to bring a damages action before a federal competent court. Therefore, under the broad description provided by Section 134 of the Competition Act, anyone who is able to demonstrate a direct, personal and immediate damage suffered has standing to sue. This standing includes competitors and consumers, as long as the plaintiff can actually prove the existence of the damages, and direct and immediate causation between the sanctioned conduct and their loss or impairment. Moreover, Cofece has universal standing for filing class actions.

15 In what forums can private antitrust claims be brought in your country?

This is a matter of controversy. There are some cases that, in the past, have allowed civil federal district courts to hear a damages suit arising from a competition offence, as private antitrust claims are strictly treated as federal civil actions. Yet, under the provisions of Section 134 of the Competition Act, damages suits should fall under the jurisdiction of a federal district court specialist in telecommunications and antitrust matters. Currently, there are only two federal district courts with such specialisation (each composed of one federal judge), which implies

that the district court that could eventually rule on a damages claim might have also previously ruled on an indirect *amparo* filed by the offender (now being sued) against the administrative decision rendered by Cofece or the IFT that empowered such a damages claim.

A unitary circuit tribunal (composed of one federal magistrate) serves as the appeal court. Due to a recent amendment (General Agreement 57/2018, Federal Judicial Council), there are only three unitary circuit courts – all seated in Mexico City – that have been vested with jurisdiction to hear appeals arising out of trial court decisions rendered by one out of the two federal specialist district courts. After the unitary circuit court specialist in civil, administrative, telecommunications and competition matters has rendered its appeal decision, the resort available is a direct *amparo* to be filed before one of the two federal collegiate tribunals specialist in telecommunications and competition matters (composed of three magistrates), although certain civil federal collegiate tribunals could also have jurisdiction in particular cases.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

As previously explained, under Section 134 of the Competition Act, any private antitrust claim (i.e., a damages claim) would initially fall under the jurisdiction of a federal district court specialist in antitrust matters. Yet, in particular scenarios, a civil federal district court could eventually hear the case. However, this is not the standard especially after the implementation of the new Competition Act and the amendment to Section 28 of the Federal Constitution.

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

No. Damages claims that arise from a violation of the Competition Act can only be brought based on a final decision rendered by either Cofece or the IFT, which will be rendered according to domestic law exclusively. In addition, the claim would be governed only by domestic laws as applicable to civil procedure. However, although it would be challenging, a court judgment (but not a claim) issued by a foreign court might be able to be recognised and executed in Mexico by a Mexican court under the general rules provided by the Federal Constitution and other applicable laws to recognise and enforce foreign judgments.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

Under the Section 17 of the Federal Constitution, access to courts must be gratuitous. Thus, there is no need to pay a filing fee or post a security, except, in the latter, that plaintiff request provisional or precautionary measures.

Procedural aspects for filing a damages suit in a specialist federal district court are mainly governed by the FCCP. Under Chapter II of the FCCP (mainly Sections 322 to 326), a claim must comply with some mandatory requirements, such as:

- it must contain a written brief of the claim (complaint);
- it should be addressed to the competent court in which it is filed;

- it must provide clear facts that sustain the claim;
 - it must identify all supporting applicable legal provisions; and
 - it must include a request for relief.

The claim must also include all original and certified documents that support the action. Expert witnesses, fact witnesses or any additional evidence will be filed in a subsequent stage of the proceedings. Mexican civil proceedings are still very formalistic and, for instance, there are no opportunities to subsequently amend the complaint, amplify legal terms or be flexible to mandatory rules.

Service of process is one of the most fundamental and formalistic steps in a civil procedure under Mexican law. Service of process is governed under the FCCP (Sections 327 and 328), whereby once a suit is admitted by the specialist federal district court, a court server (not the plaintiff) will serve process to any named defendant or its legal representative with copies of the suit. Defendants have nine business days to respond to the claim and produce a defence. The period can only be extended if the respondents have their domicile outside Mexico City depending on their location.

19 What is the limitation period for private antitrust claims?

There is a certain level of uncertainty on computation of limitation periods to sue for damages in Mexico, but in broad terms, there is a general two-year statute of limitations period for individual suits (FCC, Section 1161-V, Section 1934) and a three-and-a-half year period for class actions (FCCP, Section 584), although some exceptions might apply depending on the merits of each particular case.

Section 134 of the Competition Act provides that once an investigation is launched by the investigative authority of either Cofece or the IFT, the limitation period is interrupted. Furthermore, Section 1175 of the FCC also provides that when a limitation period is interrupted, any time that lapsed between the illegal act up to the time of interruption, would not be considered for purposes of further counting.

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

Limitation limits are considered to be of a substantive nature, and, therefore, governed under substantive law (i.e., FCC and the Competition Act). Once the period expires, interested parties lose the right to bring a damages private action.

21 When does the limitation period start to run?

As explained in question 19, limitation periods start to run after the damage was caused, but are interrupted with the decision from the investigating authority that orders the commencement of the investigation. Once there is a final decision by either Cofece or the IFT, as provided under Section 134 of the Competition Act, the plaintiff is entitled to commence its civil private action for damages.

22 What, if anything, can suspend the running of the limitation period?

See questions 19 and 21.

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

Pleading standards are not as challenging as they can be in other jurisdictions for a claim to be admitted. Under Section 322 of the FCCP, the plaintiff must only state the facts that support his or her claim, providing a clear narrative of them with enough clarity and precision that would allow the defendant to address each, and produce a defence. Moreover, because the suit will be based on a final and *res judicata* decision already litigated and rendered by either one of the competition authorities, the claim must include a damages theory that evidences a direct and immediate damage, and causation between the sanctioned offence and the actual harm suffered by the plaintiff. Therefore, because a private action can only relate to damages, the plaintiff does not have the burden of proof to show a competition law infringement, but only needs to prove the existence of a *res judicata* decision.

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

Yes. Under Chapter IV of the FCCP (Sections 379 to 399), a federal court may grant certain interim remedies. These remedies can be, among others, arraignment, measures to maintain the status quo, and attachment of assets (which can be granted *ex parte*, or without a preliminary hearing or notice to the counterparty). Nevertheless, when, how and which remedies can be granted will vary depending on the merits of each particular case. The common requirements to show before a court to obtain interim relief are: urgency; the need of the interim relief; the appearance of legal standing; a danger in delay; and posting a bond.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

Once served with process, defendants have the right to respond to the claim and produce a defence within nine business days (FCCP, Section 327). Within this period, it is also necessary to produce a counterclaim, which although feasible may prove impractical. This term may only be extended considering the location of the defendant, especially if located abroad where it would have to be served through a letter rotatory, applying one of the two relevant international conventions executed by Mexico.

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

Federal civil procedure in Mexico does not allow discovery to the extent permitted by some foreign jurisdictions, and, therefore, depositions, interrogatories and extended productions of documents are not permissible. Mexico has a very limited discovery for producing documents. Parties do not have any mandatory disclosure, discovery or document production obligations as in other jurisdictions. However, under Sections 323 and 324 of the FCCP, the parties must attach to complaints or responses any documents and evidence available to support their arguments; identify any evidence that might be offered during trial; and identify any document not in possession so the court can order its production, if admissible. Likewise, only in connection

to class actions, under Sections 598 and 599 of the FCCP, the federal judge managing a damages claim can request the production of information and evidence related to the illegal conduct, as the court deems required, and the judge can also request the production of information and evidence from third parties who do not have a conflict of interest in the litigation.

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

Information that is considered to be confidential or sensitive, and offered by any of the parties, can be secured by the court outside the trial docket, limiting its access only to parties authorised to view it and the court itself. Under no circumstances, would the court have an obligation to produce or disclose that information to a third party.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Legal privilege has been a matter of recent debate in Mexico. Legal privilege is not contemplated under a specific statutory provision and has been the subject of a specific decision by one of the federal collegiate circuit courts in competition and telecommunications matters within the context of a dawn raid. To this end, communications between an outside counsel and his or her client, within the context of an antitrust investigation, and that are associated with an antitrust defence, are protected under privilege. In addition, on 30 September 2019, Cofece published its own Regulatory Dispositions to regulate attorney–client communications. The new Dispositions regulate the manner in which Cofece will treat privileged communications obtained over the course of any of its proceedings, with the final objective of excluding those communications that are protected, if privilege is proven and recognised by the authority.

Trial

29 Describe the trial process.

According to the FCC and FCCP, in general terms, the trial formally begins when a complaint has been filed, admitted and served, and the defendant has responded and produced a defence, whereby each party has stated its factual assertions and the relief sought. Once service of process has been performed and a response received by the court, there will be a period of time to offer evidence (different from documents that were filed with the complaint and response). The court will rule on whether such evidence is admissible or not (factual witnesses, inspections, expert witnesses and the like) and hold an oral hearing to examine witnesses and, if relevant, expert witnesses. After the evidentiary stage (which must last a maximum of 30 days), parties are allowed to formulate closing written arguments (including a hearing), which will then allow the court to render a final judgment.

Although the procedure appears quite straightforward, in practice, it becomes more complex owing to ancillary challenges that may delay significantly the proceedings.

30 How is evidence given or admitted at trial?

Under the FCC and FCCP, each party will offer the evidence that it considers relevant to its claim or defence, and objections from the other party as to admissibility are not permitted. This evidentiary stage will last for 30 days. Moreover, depending on the type of evidence offered (documents, witness experts, expert reports), requirements for offering evidence will vary. For instance, when offering party-witnesses as evidence, parties can only offer as evidence the confession from the other party, but cannot offer their own confession as evidence in support of its own claim. Cross-examination is quite formalistic and usually (as a matter of custom rather than law) carried out before a court clerk rather than the judge.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Yes. Experts are essential in private damages litigation especially, inter alia, for the creation of damages theories and calculations, or the defence against such calculations. Required expertise will vary according to the needs of every case, but generally economists or accountants serve as experts. If party expert reports differ, a third independent expert chosen by the court will be appointed from a court-approved short-list, which is quite limited. Although a foreign experienced expert would be ideal in this type of cases, the fact that he or she will need a Mexican professional licence and to render his or her report in Spanish has limited the use of such experts. From the practical standpoint, parties file written reports by foreign experts as private documents rather than true expert evidence, and this is supplemented by a Mexican expert with proper credentials and licences.

32 What must private claimants prove to obtain a final judgment in their favour?

Plaintiffs have the full burden of proof to show the existence of actual monetary loss or impairment, which must be directly and immediately caused by the illegal conduct sanctioned by the relevant competition authority, and its quantification into a specific monetary amount. Yet, the final determination of the amount, if any, is within the exclusive authority of the judge based on all evidence available.

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

Not in particular, or at least not yet as explored as in other jurisdictions. In Mexico, general defences applicable to all kinds of federal civil procedures will apply to private damages claims. However, the final determination of the offence has already been determined by the competition authority in respect of the specific offenders, who will be the ones potentially liable for damages.

34 How long do private antitrust cases usually last (not counting appeals)?

To date, there has not been any successful private antitrust case that allows us to provide a credible time estimation. For instance, one of the first (and most plausible) cases, which was first filed back in 2016, related to cartel behaviour in the pharmaceutical industry, and it is still

at district court level, without a reasonable time-frame to be decided owing to ancillary challenges and proceedings. Another case where a damages award could have been secured (see: *Juzgado Cuarto de Distrito en Materia Civil de la Ciudad de México*, Docket: 175/2014), was first filed in 2014 and ultimately decided in July 2019.

35 Who is the decision-maker at trial?

The federal specialist competition and telecommunications judge considers all available evidence produced during trial.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

As previously discussed, plaintiffs have the evidentiary burden to prove the existence of immediate and direct damages. This burden implies demonstrating that the claimed damage was a direct and immediate consequence from the actual conduct sanctioned by the competition authority beforehand. No consequential, indirect or punitive damages are to be considered in the court's judgment.

37 How are damages calculated?

Damages calculations will vary case-by-case upon the merits of each particular claim.

38 Does your country recognise joint and several liabilities for private antitrust claims?

No. The plaintiff must demonstrate damages per each offender identified as a defendant, evidencing a direct and immediate cause between the damage and the actual conduct sanctioned beforehand.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Affected private parties can only seek indemnification from those specific offenders identified by either Cofece or the IFT in their final decision. That indemnity is quantified in terms of damages, which need to be a direct and immediate consequence of the actual conduct sanctioned.

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

Under Sections 7 and 8 of the FCCP, prevailing parties can recover expenses and attorney's fees associated with the trial. However, the FCCP does not provide a specific rule to assess how to calculate attorney's fees. Section 617 of the FCCP provides additional limitations that apply to class actions and remuneration to attorneys representing or assisting the class.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

In general terms, no.

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Attorneys' fees in Mexico, even for class actions, is not as regulated as in other jurisdictions. There are no formal restrictions as to how attorneys can be compensated, so both contingency and conditional fees arrangements would be permissible. Yet, as to individual actions, the Code of Ethics of the Mexican Bar Association imposes a restriction that attorney's contingency fees should never surpass the economic benefit received by the client (Code of Ethics, Mexican Bar Association, Section 29). Moreover, as to class actions, compensation is limited under Sections 617 and 618 of the FCCP. Similarly, Sections 624 and 625 of the FCCP also provide certain regulations as to the management of the funds obtained from offenders through paying a class, which also includes certain restrictions as to how those funds can be used to pay legal representatives.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Litigation funding in Mexico is not a subject as regulated as in other jurisdictions. However, in broad general terms, there are no restrictions on litigation funding. Moreover, there are no formal restrictions as to the possibility to assign or sell litigation rights that result from the existence of a final decision rendered by a relevant competition authority.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

In broad general terms, there are no legal restrictions that would limit any defendant to obtain insurance against a risk of potential antitrust claims. However, this is not a common practice in Mexico.

Appeal

45 Is there a right to appeal or is permission required?

Yes. Parties that have received an adverse decision from a specialist federal district court in a damages claim have an immediate, unrestricted right to appeal without permission from any court as provided in question 15.

46 Who hears appeals? Is further appeal possible?

As provided in question 15, a unitary circuit tribunal specialist in civil, administrative, telecommunications and competition matters will serve as appeal court. There are only three appeal courts for the entire country. So far there has not been any such appeal. After the unitary circuit court has given its appeal decision, a further resort is available. Non-prevailing parties may file a direct *amparo* before one out of the two specialist federal collegiate tribunals in telecommunications and competition matters.

47 What are the grounds for appeal against a decision of a private enforcement action?

There is an immediate right of appeal to challenge decisions in a private damages claim for court errors, lack of proper reasoning, lack of legal grounds, mischaracterisation or misinterpretation of facts, improper assessment of evidence, abuse of discretion or violation of a constitutional right. The grounds for each appeal will vary case-by-case.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Yes. Damages claims can be filed either individually or through an opt-in class action (FCCP, Chapter V). At the time of writing, however, no class action has ever been filed for this particular purpose.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Under Section 585 of the FCCP, class actions can be brought by, among others: Cofece (but no reference to the IFT is made by the FCCP); a common representative of a class composed of at least 30 members; the Federal General Prosecutor of the Republic; or non-profit civil associations legally incorporated at least one year prior to filing the complaint for damages, which has the business purpose of promoting and defending the rights and interests of the class of members. Therefore, consumer, trade or professional associations could bring a damages claim, but only if the requirements of Section 585 of the FCCP are satisfied.

50 What is the standard for establishing a class or group?

A class or group can only bring a class action against offenders under the requirements provided in Section 585 of the FCCP as set out above. In addition, under Section 588 of the FCCP, for a class action to proceed, a final decision from the competition authority must exist.

51 Are there any other threshold criteria that have to be met?

Sections 585 and 588 of the FCCP provide the requirements for establishing a class action. The most relevant of these requirements is that the potential representative plaintiff should have capability to file the class action and that a final decision from the competition authority should exist. In addition, pursuant to Section 586 of the FCCP, the representative of the class must act diligently and professionally, without conflicts of interest, political interests or negligence.

52 How are damages assessed in these types of actions?

As explained above, damages calculations will vary case-by-case upon the merits of each particular claim, where plaintiffs assume the burden of proof. However, the specialist district court managing the damages claim can also request the relevant competition authority to issue an estimation of damages for purposes of its determination. Likewise, only in connection with class actions, under Sections 598 and 599 of the FCCP, can the federal judge managing a damages

claim request for the production of information and evidence related to the illegal conduct as the court deems required, including the production of information and evidence from third parties that have no conflict of interest.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

Settlement negotiations and agreements can be reached by the interested parties. However, the FCC and the FCCP do not provide for a specific process to settle such claims, and apportion and distribute damages or settlement amounts. As previously explained, this will vary case-by-case upon the merits of each particular claim.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

No. Private parties that were affected from a particular sanctioned conduct that violated the Competition Act must demand their indemnity right to damages on court or otherwise forfeit any right each might have.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

No. There are no mandatory or voluntary redress schemes associated with private antitrust enforcement in Mexico.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

As explained above, any determination regarding the violation of the Competition Act is under the exclusive authority of either Cofece or the IFT, as applicable. Section 134 of the Competition Act gives exclusive authority to federal competition and telecommunications courts to hear damages actions and, therefore, it is debatable whether arbitration would be appropriate to address damages actions arising out of competition offences. Courts may interpret those subjects as non-arbitrable, and could annul any award so rendered. There is no practical experience in Mexico in that regard.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

As explained above, any determination regarding the violation of the Competition Act is under the exclusive authority of either Cofece or the IFT as applicable. See question 56.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

No. Once a claim is filed before a court, that court will make no referral to ADR procedures.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

One such attempt was an interesting study prepared by the Organisation for Economic Cooperation and Development in 2018, which compares Mexico to other leading private antitrust jurisdictions. That report, in which one of the authors of this chapter participated, provides an insightful picture of how things are going in Mexico, and includes relevant recommendations.² As private antitrust actions in Mexico are still in a development stage, they are open to a lot of debate and court interpretation, and are characterised by the uncertainty of the applicable laws.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

There have been four private damages actions in 26 years. Although still not confirmed, only one of them has led to a damages award. This case (see: *Juzgado Cuarto de Distrito en Materia Civil de la Ciudad de México*, Docket: 175/2014) could be the first-ever case in Mexico in which a competition infringement decision allowed competitors to recover damages.

² www.oecd.org/daf/competition/individual-and-collective-private-enforcement-of-competition-law-insights-for-mexico-2018.htm.

Appendix 1

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, ‘litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.’

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ISBN 978-1-83862-216-9