

Cartel Regulation 2020

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Contributing editor

Neil Campbell
McMillan LLP

Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Cartel Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.



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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The legal basis of competition policy and law enforcement is provided by article 28 of the Constitution, which prohibits monopolies and monopolistic practices.

The Federal Law of Economic Competition (LFCE) provides a detailed regulation on, inter alia, merger control, relative monopolistic practices (abuse of dominance practices and vertical restraints) and absolute monopolistic practices (cartel conduct) with the aim of promoting competition and preventing anticompetitive conduct.

Cartels are covered by article 53 of the LFCE, which prohibits absolute monopolistic practices. Criminal responsibility for a cartel is established in article 254-bis of the Federal Criminal Code and is prosecuted according to the National Code of Criminal Proceedings, while civil responsibility is regulated by the Federal Civil Code, the Federal Code of Civil Proceedings and article 134 of the LFCE.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Federal Economic Competition Commission (COFECE) enforces the LFCE and is in charge of preventing, investigating and sanctioning administrative infringements derived from cartel conduct. The COFECE has jurisdiction over all industries, with the exception of the broadcasting and telecommunications industries, where the Federal Telecommunications Institute (IFT) enforces the LFCE.

COFECE and IFT decisions may be challenged before competition, broadcasting and telecommunications specialised federal courts, through an *amparo* proceeding.

The COFECE and IFT may bring criminal charges before the public prosecutor. Criminal prosecution and adjudication correspond to the Mexican Attorney-General and the federal criminal courts, respectively.

Federal specialised courts in competition, broadcasting and telecommunications have jurisdiction over individual and collective damages' claims.

Please note, except as mentioned otherwise, any references made in this chapter to the COFECE will also apply to the IFT in the context of the broadcasting and telecommunications industries.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Article 28 of the Constitution was amended in June 2013 (in force since 12 June 2013) to strengthen competition policy and law enforcement as well as to increase the effectiveness of the telecommunications regulatory framework. Derived from this constitutional amendment, a new LFCE was enacted and the Federal Criminal Code was amended. Both legislative changes were published in the Federal Official Gazette on 23 May 2014 and came into force on 7 July 2014.

Some of the relevant changes contained in these constitutional and legislative reforms are the following:

- executive branch agencies, the Federal Competition Commission (CFC) and the Federal Telecommunications Commission were replaced by new autonomous constitutional entities: the COFECE and the IFT, respectively;
- the five former commissioners were replaced by seven new commissioners for each entity;
- the power to apply the LFCE in the broadcasting and telecommunications industries was transferred to the IFT;
- the COFECE and the IFT are empowered to issue law regulations;
- new federal courts specialised in competition, broadcasting and telecommunications were created;
- the scope of exchanging information as a cartel conduct was extended. Under the former LFCE, the exchange of information was illegal only when its purpose or effect was to fix prices. Under the new LFCE, the exchange of information is illegal also when its purpose or effect is to commit any of the other absolute monopolistic practices (ie, restriction of output, allocation of markets or bid rigging);
- the minimum sanction for criminal offences increased from three to five years. Thus, cartel conduct may be sanctioned with five to 10 years' imprisonment;
- obstructing COFECE or IFT dawn raids is sanctioned with one to three years of prison whenever such obstruction consists of destroying information and documents; and
- COFECE and IFT decisions may be challenged only through an *amparo*, which is a proceeding followed before federal courts. *Amparos* against said authorities will be decided by the specialised district judges and circuit courts.

In November 2014, the COFECE issued its Regulations of the LFCE. Also, the IFT issued its Regulations of the LFCE in January 2015. Mostly, the aim of the aforesaid regulations is to detail procedural aspects, but they also regulate cartel conduct *indicia* (see question 4).

In June 2015, the COFECE issued its guidelines regarding the Immunity and Reduction of Sanctions Programme and the initiation of investigations. Those guidelines are not binding; their purpose

is to explain the proceedings to the public using practical and clear language. Also, at the end of 2015, the COFECE published its Guidelines for Information Exchange among Competitors and regarding the Cartel Investigation Procedure.

In January 2017, the IFT published its Guidelines on the Immunity and Reduction of Sanctions Programme.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 53 of the LFCE prohibits absolute monopolistic practices (cartels), which are defined as any contract, arrangement or combination between competitors, whenever its purpose or effect is one of the following:

- to fix, raise, coordinate or manipulate the purchase or sale price of goods or services (price fixing);
- to limit the production, processing, distribution, marketing or purchasing of goods, or to limit services, including their frequency (restriction of output);
- to divide, distribute, allocate or impose specific portions or segments of a current or potential market of goods or services by means of clients, suppliers, time spans or certain territories (allocation of markets);
- to establish, arrange or coordinate bids or abstentions in tenders, contests, auctions or purchase calls (bid rigging); or
- to exchange information having as a purpose or effect any of the above-mentioned conducts.

According to the LFCE, cartels are per se illegal. Thus, the authority does not need to assess market power or any adverse effect over the market. In other words, the restriction of competition is presumed whenever the above conduct takes place, without the opportunity to demonstrate efficiencies.

According to COFECE's Regulations, the following will be considered cartel conduct *indicia* and, as such, may be used for initiating a cartel conduct investigation:

- the invitation or recommendation addressed to one or more competitors to coordinate prices, output, or production, distribution and commercialisation terms and conditions, or to exchange information with the same purpose or effect;
- a situation where the price offered in Mexico by two or more competitors regarding internationally interchangeable goods or services is considerably superior or inferior to the international reference price, as well as a situation where the tendency of its evolution in a specific time span is considerably distinct to the tendency of international prices in the same period, except when such difference derives from the application of tax laws, or from transport or distribution costs;
- the instructions, recommendations or business standards adopted by chambers of commerce or professional associations to coordinate prices, output, or production, distribution and commercialisation terms and conditions of a certain product or service, or to exchange information with the same purpose or effect;
- a situation where two or more competitors establish the same maximum or minimum prices for certain good or service; as well as a situation where those competitors adhere to the prices issued by a competitor, certain chambers of commerce or associations; and
- regarding broadcasting and telecommunications industries, a situation where two or more competitors refrain from participating, or coordinate their bids in certain geographic areas.

With respect to information exchange, the Guidelines for Information Exchange among Competitors establish some criteria under which such conduct will be assessed. First, the Guidelines point out the relevance

of the nature and characteristics of the information to be exchanged: strategic, detailed and recent information, exchanged in a frequent basis, is more likely to restrain competition and, as such, the exchange of the aforesaid information is more likely to be investigated by the COFECE. Likewise, the Guidelines explain that the market structure is also a key element to take into consideration: concentrated and more static markets, with symmetric participants and homogeneous products, are more propitious to collusion and, as such, strategic information exchange in those markets is riskier and more likely to be investigated by the COFECE.

Also, the Guidelines for Information Exchange among Competitors include the following recommendations regarding information exchange in a due diligence process in the context of a horizontal concentration:

- each economic agent must identify the strategic information. Therefore, all non-public information that would not be shared normally with third parties regarding prices, discounts, sales and purchase terms and conditions, clients and suppliers, must be identified;
- the use of strategic information must be limited to indispensable matters and as long as it is strictly needed for an adequate evaluation of the transaction. Such an exchange is indispensable when the information is reasonably related to the parties' understanding of the future profits of the concentration and to determine the value of the transaction;
- when possible, the use of historic and aggregated information to evaluate the relevant aspects of the transaction and for planning the final integration should be preferred;
- the economic agents must establish protocols or strict rules regarding access to strategic information and sign a confidentiality agreement regarding such information. Such rules must:
 - limit the use of information only to previous audits; and
 - indicate that access to strategic information will only be granted to employees that must know such information and whose functions do not contemplate strategic operational decision-making and/or sales;
- the integration of an isolated and compact team in charge of the concentration. Such team will control the use and generation of the information. It is recommended for this team:
 - to be integrated by persons that do not work for the commercial areas of the economic agents and to avoid contact with such areas; and
 - to sign confidentiality agreements to oblige themselves to protect and maintain confidentiality of the information;
- if possible, delegate the collection, management and use of the strategic information to an independent third party that will evaluate such information in the most disaggregated level to then aggregate it for its analysis in the concentration;
- maintain real-time records of all information exchanges and contact between the parties. Such records must be sequential and detailed to the extent that it is possible to rebuild in a reliable way the source of information, the moment in which the information was sent and received by the parties, and the use that was given to the information;
- whenever it becomes necessary to impose restrictions regarding the use and disposal of certain assets or to increase liabilities, in the phase that goes from the execution of the purchase agreement to the closing of the transaction, restrictions shall be minimal to protect the value of the assets that will be transferred;
- parties must not coordinate prices, output, allocate markets or bid rig before closing, nor impose future decisions to the other party; and
- inform the individuals involved in the concentrations the legal framework regarding merger control and cartel conduct.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

- 5 | Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific infringements, defences or exemptions for cartel conduct. The LFCE has transversal effect and includes all branches of economic activity, whether regulated or not.

Application of the law

- 6 | Does the law apply to individuals, corporations and other entities?

The LFCE applies to individuals, corporations and other entities. Moreover, if the COFECE determines that a corporation has been party to a cartel, individuals who have contributed to or represented the corporation can be sanctioned for those actions, in addition to the fine imposed on the corporation.

Government entities are also subject to the LFCE, and government officials may be sanctioned if they contribute to anticompetitive practices. For example, the Rural Development Minister of the state of Jalisco was sanctioned by the COFECE owing to his alleged collaboration with tortilla producers and retailers to fix the price of tortillas (COFECE decision DE-009-2016).

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

This matter has hardly been addressed by Mexican authorities, but there are some precedents in which the CFC intervened with respect to conduct that took place abroad. In *10-09-99*, the CFC learned that two foreign companies had pleaded guilty before a Texas court to participating in an agreement to fix the price of various types of vitamins, with international scope. Since the companies had affiliates and subsidiaries in Mexico, the CFC initiated a cartel investigation, given the possible extensive effects of the cartel in national territory.

In *10-002-2009*, the COFECE learned, through the leniency programme, that several non-Mexican companies fixed prices globally in the market of production, distribution and commercialisation of hermetic compressors through the information exchange between their executives in emails, telephone calls and meetings outside Mexican territory (Brazil and Europe). The COFECE determined that the Mexican hermetic compressors market was affected by the global cartel as such products were imported to Mexico for their commercialisation. The COFECE fined the non-Mexican companies and their Mexican subsidiaries.

In another recent precedent (*10-001-2013*) the COFECE learned, through the leniency programme, that several non-Mexican companies rigged bids globally in the market of production, distribution and integration of air conditioned compressors for automobiles. The COFECE determined that the Mexican air conditioning compressors for the automobile market was affected by the global cartel as such products were used in the manufacture of cars that were produced and sold in Mexico. The COFECE fined the non-Mexican companies.

Export cartels

- 8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

If an export cartel agreement has been reached within the Mexican territory but does not produce effects within this territory, the economic agents may argue lack of jurisdiction.

INVESTIGATIONS

Steps in an investigation

- 9 | What are the typical steps in an investigation?

An investigation can be initiated by the investigative authority of the COFECE, ex officio or through a complaint that can be lodged by any person.

The investigation may last up to 120 business days. This period can be extended by the COFECE up to four times, but only for justified causes.

During this time, the COFECE can issue information requests as well as subpoenas and may practise dawn raids and obtain all the information it needs to prosecute a suspected infringer of the LFCE. During the investigation, case files may not be accessed.

Once the investigation has finished, if the COFECE's investigative authority considers there is enough evidence to presume the responsibility of a party, it submits to the COFECE's plenary a statement of probable responsibility (DPR) describing the charges. The defendant is summoned with the DPR and, thereafter, the proceeding follows the basic rules of a trial, in which the defendant has the constitutional rights of due process; the investigative authority acts as a prosecutor and the complainant may cooperate with the latter. The LFCE grants 45 business days to the defendant to respond to the DPR and enclose the proof in his or her possession to rebut the accusation. After all evidence is submitted, the defendant and the investigative authority may present written arguments in a 10-business-day term. Also, the defendant and the complainant have the right to ask for a hearing before the plenary of the COFECE. Once this proceeding is concluded, the COFECE's plenary issues its final decision.

At any time, the investigative authority may ask the plenary to issue a precautionary measure. The investigated party or defendant may ask the plenary to determine a caution to avoid the precautionary measure, and the amount should be enough to compensate for possible damages caused to the competition process by the anticompetitive conduct.

Investigative powers of the authorities

- 10 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The COFECE is empowered to perform dawn raids, which cannot last more than four months. If the implicated party is not at the corresponding place, these proceedings can be carried out with any person found at the premises; there is no need to leave any kind of subpoena.

It is also empowered to request any person to provide the information and documents deemed necessary to carry out the investigation. The authority can subpoena any person as well, to testify about facts under investigation. The implications of being requested or subpoenaed as the 'denounced agent', as a 'third adjuvant' or as a 'person related to the investigated market' are unclear, and thus it is unclear what rights these requested or summoned people have. There are no judicial binding specific criteria for competition and antitrust that suggests that requested or deponents' information may not be used to incriminate them. Notwithstanding, the Supreme Court determined that the principle of presumption of innocence is applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by the COFECE's investigative authority without the COFECE's plenary or any court approval.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Yes. Inter-agency cooperation usually takes place through provisions established in international free trade agreements or in cooperation agreements between agencies.

Interplay between jurisdictions

12 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Rules regarding cooperation between jurisdictions are contained in specific chapters of various free trade agreements that Mexico has entered into (with Chile, Colombia, European Free Trade Association, the EU, Israel, Japan, North America, Uruguay and Venezuela). They are also contained in bilateral antitrust treaties with Canada, Chile, Korea and the US. Among these jurisdictions, the most significant interplay takes place with the US.

People cooperating under the leniency programme established in article 103 of the LFCE are entitled to object to the COFECE about sharing their data and the information provided under this programme. COFECE may ask some economic agents under the leniency programme to grant an authorisation or waiver to share information with other agencies.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Cartel cases are determined by the plenary of the COFECE. This body consists of seven commissioners, and decisions are taken by a simple majority. Damages and criminal responsibility are adjudicated under the terms mentioned in questions 1 and 2.

Burden of proof

14 | Which party has the burden of proof? What is the level of proof required?

A systematic interpretation of articles 73 and 79 of the LFCE indicates that the COFECE has the burden of proof in cartel cases. Indeed, the law empowers it to issue requests for information and documents, to perform dawn raids and to subpoena parties to testify with the purpose of gathering evidence to prove the responsibility of the alleged infringers. Moreover, article 79 establishes that the DPR shall contain the evidence that the COFECE considered to subpoena the party to the administrative trial. In short, the COFECE must not issue a DPR without sufficient evidence.

As explained in question 9, defendants have 45 business days to answer the DPR and submit the necessary evidence to rebut the accusation. It should not, however, be understood that the burden of proof is thus passed on to the defendant; rather, defendants have the opportunity to prove a different theory of the case.

Certainly, not presenting evidence does not entitle the COFECE to presume responsibility. Nevertheless, *amparo* trials do not allow parties to submit different evidence from that provided to the administrative

authority – hence the importance of taking advantage of this opportunity when answering the DPR (however, evidence can be submitted in *amparo* trial against the final decision of the COFECE).

The LFCE does not establish standards of proof to be satisfied by the COFECE. Nevertheless, there are precedents in which the CFC has acknowledged the existence of such standards (*DE-22-2006* and *IO-01-2007*). In terms of these resolutions, the evidence contained in the file must dismiss alternative hypothesis that could reasonably explain the situations observed in the market.

Circumstantial evidence

15 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Considering all participants in a cartel have the incentive to hide or destroy any proof of their conduct, courts have established a binding criterion stating that there is no need to prove the arrangement through direct evidence. Accordingly, a presumption of the existence of a cartel is enough to sanction it under the terms of the LFCE, as long as such presumption relies on facts that have been proven through direct evidence; in other words, a cartel can be sanctioned using circumstantial evidence.

Appeal process

16 | What is the appeal process?

Against the decision of the COFECE, the parties can initiate an *amparo* trial before a federal district judge, who will rule on violations to fundamental rights during the administrative proceeding or in the adjudication. The *amparo* ruling may be appealed before the circuit courts. Only after this latter decision can the cartel case be considered legally settled.

SANCTIONS

Criminal sanctions

17 | What, if any, criminal sanctions are there for cartel activity?

According to article 254-bis of the Federal Criminal Code, individuals face sanctions of between five and 10 years' imprisonment for entering, ordering or executing any contract or arrangement between competitors for one or more of the purposes or effects listed in question 4.

For a criminal action to be lodged, the COFECE must bring charges before the public prosecutor. Charges may be pressed with the DPR (see question 9). The term in which the criminal action expires is seven-and-a-half years.

Considering criminal sanctions for cartel conduct were enacted in 2011 and that the main procedural obstacle to pressing charges was recently removed (previous to 2014, in order for COFECE to press charges, a final judgment of administrative responsibility was needed), there is no experience in Mexico regarding criminal sanctions for cartel conduct. There are only two cases in which the COFECE has brought charges before the public prosecutor, which are currently under way.

Civil and administrative sanctions

18 | What civil or administrative sanctions are there for cartel activity?

Cartel conduct is sanctioned with a fine of up to the equivalent of 10 per cent of the infringer's income. In case of recidivism, the COFECE may impose a fine of up to two times the applicable fine or order the divestiture of assets.

Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive fines of up

to 16.9 million pesos. Such individuals also face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years.

Individuals that contributed, facilitated or instigated the execution of cartel conduct are liable to receive a fine of up to 15.2 million pesos.

Per COFECE's 2018 annual report regarding fines, 31 fines were imposed to economic agents for cartel conduct for approximately 244.53 million pesos. Also, the COFECE applied reductions to fines related to the leniency programme that amounts to 128.26 million pesos.

Guidelines for sanction levels

19 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to article 130 of the LFCE, when determining the fine to be imposed for anticompetitive conduct, the COFECE must consider the infringer's economic capacity as well as the gravity of the conduct. To determine the latter, CFCE shall assess the following elements:

- the damage derived from the conduct;
- the indicia of intention;
- the defendant's market share;
- the size of the affected market;
- the duration of the conduct; and
- possible obstruction of the COFECE actions.

In the case of recidivism, the COFECE may impose a penalty of up to two times the applicable fine or order the divestiture of assets. Alternatively, in 2018, a collegiate court solved that the unenforceability of another conduct as a defence against criminal liability may also apply in antitrust matters. Also, the court pointed out that such defence may only apply when the unenforceability of another conduct was proven sufficiently.

Criminal sanctions shall be imposed by the corresponding federal criminal judge. As provided by the Federal Criminal Code, prison punishments will range from five to 10 years, depending on the aggravating or mitigating circumstances of each case.

According to article 134 of the LFCE, monetary relief equivalent to the actual damages and losses caused by the defendants may be claimed by the affected parties before the specialised courts.

Consideration of the elements listed in article 130 of the LFCE is binding upon the COFECE, and the range of imprisonment time established by the Federal Criminal Code is binding upon the judge.

Compliance programmes

20 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Although the LFCE does not explicitly state that a compliance programme can reduce the sanction, article 130 of this law (see question 19) states that one of the criteria for the imposition of a sanction can be the intention of the conduct. The COFECE's Regulation in its article 182 states that to analyse the indicia of intention, the following circumstances shall be taken into account:

- The moment of termination of the conduct, whether it was before, during or after the investigation or before, during or after the proceeding.
- The validation that said illegal conduct was committed as a result of suggestion, instigation or encouragement of any public authority.
- The actions taken to hide the conduct.
- The validation that said illegal conduct was committed as a result of instigation of another economic agent, clearing the fact that the offender played a leadership role in the adoption of the conduct.

In the decision issued on file *10-004-2012*, an economic agent that was sanctioned for participating in a cartel claimed to have taken measures to prevent activities that imply or that may imply the execution of an absolute monopolistic practice; to have implemented a series of actions to capacitate the staff; and improve their procedures and internal controls to monitor the enforcement of the law. However, the economic agent did not present evidence of these actions, thus the COFECE pointed out that it was not possible to consider that element to calculate the applicable sanctions. This consideration was formulated in the section in which the indicium of intention was analysed as an element to individualise the corresponding sanction.

In this respect, it would seem that the existence of a compliance programme might be taken into account by the COFECE when imposing a fine on the economic agent that implemented the programme.

Director disqualification

21 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Yes. See question 18.

Debarment

22 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is not explicitly covered by competition law. Notwithstanding, if cartel conduct (more likely bid rigging) is committed against government entities, the Ministry of Public Services may debar the infringers under article 60 of the Law of Procurement, Leasing and Services for the Public Sector.

Parallel proceedings

23 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Yes. As stated in question 17, once the CFCE's investigative authority has issued the DPR, it may bring criminal charges before the public prosecutor.

According to article 134, administrative responsibility is a condition to initiate individual or class actions before civil courts, in order to claim compensation for the damages derived from the anticompetitive practice.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Yes, private damage claims are available on the terms mentioned above.

Damages claims for antitrust infringements have not been frequent in Mexico, since a decision from the competition authority judging a party to be responsible (as a legally settled matter) is necessary for initiating a civil process on the matter. Thus, private antitrust tort practice is still under development.

Administrative responsibility is a condition to initiate individual or class actions before civil courts, which means that, according to article 134, it is not possible to claim damages to economic agents that have not been a part of a cartel.

Class actions

25 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

As provided in article 585 of the Federal Code of Civil Proceedings, class actions can be lodged by:

- the CFCE;
- no fewer than 30 members of a class;
- not-for-profit civil associations whose purpose is the defence of rights and interests in antitrust matters; and
- the Attorney-General of Mexico.

This regime came into force in February 2012 and there have been no class actions since then. Therefore, the efficiency of its implementation, such as the balance of its advantages and disadvantages, is still pending.

COOPERATING PARTIES

Immunity

26 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Article 103 of the LFCE, as well as articles 114 to 116 of the CFCE's Regulations contemplate the leniency, immunity or amnesty programme. In June 2015 the CFCE issued the Immunity and Reduction of Sanctions Programme Guidelines. These guidelines show the criteria upon which the CFCE applies the law and regulations regarding leniency.

Any corporation or individual who has been or is involved in cartel activity may apply for leniency.

In order to qualify for the programme, the applicant must submit evidence, fully and continuously cooperate with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity.

One of the benefits of the programme consists of reductions in the applicable administrative fines. The fines may be fixed at the symbolic amount of one unit of measurement and update (the basis for calculating fines in Mexico) – which, in practice, is equivalent to being awarded 'full immunity' – for the first applicant or may be reduced by up to 50, 30 or 20 per cent of the applicable fine for the second and subsequent applicants. The level of the reduction also depends on the sufficiency of the evidence provided to the CFCE and the cooperation during the proceedings.

Likewise, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, but will still be subject to private monetary damage claims through individual or class actions.

Subsequent cooperating parties

27 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes. See question 26.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Second and subsequent applicants who provide the COFECE with additional evidence may get reductions of up to 50, 30 or 20 per cent of the applicable fine, considering the timing of the application and the sufficiency of the evidence they provide to the authority. Also, as previously stated, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, notwithstanding the time in which they applied.

Approaching the authorities

29 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Leniency may be sought at any moment before the COFECE has ended the cartel investigation proceeding. Since only the first applicant may obtain full immunity, and the order in which subsequent applicants approach the COFECE will be considered to fix the percentage of the fine reduction, time is crucial in applying for leniency. The COFECE uses markers in order to determine who the first applicant is and who the subsequent applicants are.

Cooperation

30 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The applicant must submit evidence, cooperate fully and continuously with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity. All applicants, in order to qualify, must submit more information than the one that is available in the records of the investigation.

Confidentiality

31 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CFCE will keep confidential the identity of all (ie, first and subsequent) leniency applicants during the proceeding and even after the cartel is sanctioned. In addition, the CFCE will not share the identity of or the information provided by the applicants with other jurisdictions unless it is authorised to do so in writing by the applicant.

Settlements

32 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

If the requirements are fulfilled by the applicant, the CFCE issues a resolution expressing the applicant's place in line and the corresponding fine reduction. The benefit will be conditional upon the cooperation of the applicant during the investigation and sanction proceedings. If applicants fail to cooperate (eg, if the applicant destroys or hides evidence

or alerts other cartel participants to the investigation), they will lose the benefits of the leniency programme (see question 26).

Also, the plenary of the CFCE is entitled to request the dismissal of the criminal case if the administrative sanctions are complied with by the economic agent, as long as the following criteria are met: absence of pending appeals against the CFCE's decisions; and the economic agent is a first-time offender in the terms provided by article 127 of the LFCE and in the terms provided by article 254-bis of the Federal Criminal Code.

Corporate defendant and employees

33 | When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Leniency or immunity granted to a corporation is extended to its employees to the extent that they apply and qualify for the programme and provide full and continuous cooperation with the CFCE. If the corporation fails to provide full and continuous cooperation but the employees who received the extension provide such cooperation, these employees will remain protected as if they were the applicants themselves.

Dealing with the enforcement agency

34 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

If a corporation detects potential cartel activity, it should conduct an internal investigation to assess the existence of enough elements to prove such activity. If so, it should move quickly to apply for the leniency programme. Since providing the CFCE with enough evidence is a requirement to qualify for the programme, in the absence of such evidence, it will be better to prepare a strong defence instead of applying for the programme.

According to the Guidelines on the Immunity and Reduction of Sanctions Programme, the following are examples of the information and documents that may be submitted during the application:

- detailed description of the good or service, including its use, characteristics and price;
- a narrative of the collusive agreement or information exchange, describing the conduct or conducts that are being performed or that were performed. In this narrative, it must be admitted that the applicant participated in such conduct. Also, to back up such narrative the applicant can provide agreements, memoranda, minutes, activity reports, correspondence, emails, telephone records, personal reports and signed testimonies of the participants, among other documents. When the applicant provides digital evidence from computers, laptops, smart phones and other electronic devices, the source and extraction method of the information must be provided;
- identification of the individuals and/or legal entities involved in the collusive agreement or in the information exchange;
- duration of the conduct, the geographical reach of such conduct and specific time of the agreements including the status of the applicant's participation (whether its participation has ceased or not);
- a narrative regarding how the agreements worked. In other words, how the participants communicated, the methods for the information exchange, etc;
- details of the meetings, communications and agreements, including dates, places, participants, objectives and the achieved results;
- actions taken to ensure, follow up and verify compliance of the agreements entered into by competitors;

- a statement about the existence of hard copies of information exchange or agreements, if applicable; and
- identification of the relevant information that is not available for the applicant and the reasons that explain its unavailability (eg, the company is not the owner or has been destroyed).

Likewise, the guidelines establish that cooperation during investigation proceedings includes:

- terminating the cartel conduct;
- keeping confidentiality regarding the information that was delivered to the CFCE during its application, at least until the publication of the investigation notice;
- delivering all requested information within the terms granted by the CFCE;
- cooperating during the investigation errands;
- implementing all possible actions in order to make the involved individuals to participate in the investigation (ie, when they are subpoenaed); and
- refrain from destroying, falsifying or hiding information.

Also, according to the guidelines cooperation during the sanction proceeding includes:

- refrain from denying, directly or through the submission of evidence, the participation in the cartel;
- submitting useful new evidence;
- refrain from destroying, falsifying or hiding information; and
- cooperating during the procedural errands.

DEFENDING A CASE

Disclosure

35 | What information or evidence is disclosed to a defendant by the enforcement authorities?

According to article 79 of the LFCE, the following information or evidence should be contained in the authority's DPR:

- the identification of the economic agents under investigation and, if possible, the corresponding persons;
- the matter under investigation and the probable purpose or effects on the market;
- the evidence and other elements of conviction available on the file and its analysis; and
- the elements that support the DPR and the legal provisions that are considered infringed, as well as the consequences that may result of such infringement.

Representing employees

36 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Counsel may represent both the corporation and its employees if a conflict of interest does not exist or a potential conflict of interest is not foreseeable.

Multiple corporate defendants

37 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants to the extent a conflict of interest does not exist or a potential conflict of interest is not foreseeable. If evidence of the cartel activity exists, counsel should not

represent multiple defendants, since each of them will be interested in applying for the leniency programme.

Payment of penalties and legal costs

38 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes, if it is not prohibited by the corporation's policies.

Taxes

39 | Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Private damages awards are tax-deductible while fines are not.

International double jeopardy

40 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Competition law does not contemplate cases of double jeopardy, and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, sanctions for non-compliance of local legislation can coexist with sanctions imposed in other countries. Damages awarded and paid in another country should be taken into account whenever such damages include concepts that demand compensation in Mexico.

Getting the fine down

41 | What is the optimal way in which to get the fine down?

The best way to get the fine down is to apply for the leniency programme. However, for those who do not qualify for the programme, immediately ceasing participation in the alleged cartel and cooperating with the COFECE during the investigation and sanction proceedings may lead the authority to consider a lower fine. The existence of a compliance programme may help, as one of the elements that the COFECE may consider when imposing a fine is the indicia of intention (see question 19).

UPDATE AND TRENDS

Recent cases

42 | What were the key cases, judgments and other developments of the past year?

Valdés Abascal represented San Antonio in an *amparo* trial against an administrative ruling where COFECE sanctioned this economic agent for alleged cartel conduct. After a lower court decision upheld COFECE's ruling, the *amparo* was won before the Federal Circuit Court. This case represents an important precedent since it is the first time that a circuit court determined that COFECE's interpretation of the elements that configure cartel conduct were incorrect and established the elements that do configure such conduct. Also, it is important to mention that from all the indicted economic agents (five in total), San Antonio has been the only one that won on the merits of the case (another economic agent won an *amparo* trial due to a procedure error by COFECE).

In another case, in April 2019, a collegiate court determined that two companies that form part of the same group of economic interest may be considered as alleged offenders for the conduct of bid rigging when both of the companies filed independent bids. This is a relevant precedent since the members of the same group of economic interest have not been considered as competitors among themselves, which



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excludes one of the principal elements of absolute monopolistic practices. This precedent only analyses bid-rigging conduct.

Regime reviews and modifications

43 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 30 September 2019, COFECE published the Regulatory Provisions of the COFECE for the management of information derived from legal counsel provided to economic agents. These Regulatory Provisions establish the measures that COFECE must adopt when gathering documents that are protected by the attorney-client privilege. These Regulatory Provisions are applicable all proceedings carried out by COFECE, not only for proceedings regarding the investigation and sanction of absolute monopolistic practices.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Mexico	
Is the regime criminal, civil or administrative?	The regime is administrative, criminal and civil. Administrative sanctions are imposed by the Federal Economic Competition Commission (COFECE). Criminal sanctions are imposed by criminal courts. Compensation for damages is awarded by federal specialised courts in competition, broadcasting and telecommunications.
What is the maximum sanction?	An individual faces up to 10 years in prison for committing cartel conduct. Fines to direct offenders add up to 10 per cent of the offender's income. Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive, respectively, fines of approximately 18 million pesos. Also, those who acted on behalf of the company face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years. In cases of recidivism, the COFECE may impose a fine of up to two times the applicable fine or order the divestiture of assets. There is no limit for damages awarded as a result of anticompetitive conduct.
Are there immunity or leniency programmes?	Yes. The first in to apply for the programme may obtain full immunity (ie, the defendant will be fined a symbolic amount). Second and subsequent qualified applicants may obtain reductions of up to 50, 30 and 20 per cent of the applicable fine. All qualified applicants will obtain full immunity from criminal liability. Immunity does not reach civil liability for monetary damages.
Does the regime extend to conduct outside the jurisdiction?	Cartel conduct performed abroad will be sanctioned by the COFECE if it produces effects in Mexican territory. The existence of subsidiaries and affiliates in Mexico has been considered by the COFECE as indicia of the extensive effects of the practice in national territory.
Remarks	In June 2013, the Constitution was amended to transform the competition commission into an autonomous constitutional entity and to increase the effectiveness of competition policy and law enforcement. On 7 July 2014, a new Competition Law and modifications to the Federal Criminal Code came into force. In November 2014, the CFCE issued new Regulations of the LFCE. In January 2015, the Federal Telecommunications Institute issued new regulations of the LFCE, regarding broadcasting and telecommunications industries. In June 2015, the COFECE issued new guidelines regarding the amnesty programme and the initiation of investigations. In December 2015, the CFCE published guidelines for information exchange among competitors and regarding cartel investigation procedures. In September 2016, the IFT published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to public inquiry. In January 2017, the IFT published the Guidelines on the Immunity and Reduction of Sanctions Programme.

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