



The Legal 500 & The In-House Lawyer  
Comparative Legal Guide  
Mexico: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Mexico.

This Q&A is part of the global guide to Cartels. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/cartels/>



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## 1. **What is the relevant legislative framework?**

The Federal Competition Act (*Ley Federal de Competencia Económica* or “FCA”), together with the Federal Criminal Code (*Código Penal Federal* or “FCC”), punish collusion both as a violation of antitrust laws and a criminal offense.

Collusion, or cartel behaviour, is codified both in the FCA as “absolute monopolistic practices” which are illegal on a per se basis and may consist in contracts, agreements, arrangements, or combinations between or among competitors, the intent or effect of which is any of the following:

- (i) To fix, raise, agree upon or manipulate the purchase or sale price of goods or services supplied or demanded in the market, or to exchange information with the same intent or effect;
- (ii) To impose the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;
- (iii) To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces;
- (iv) To set, agree upon or coordinate bids or to abstain from bidding or tendering in public auctions or bidding processes; or
- (v) To exchange information for the purpose or effect in any of the above practices.

The FCC also describes the aforementioned conducts as criminally punishable. Generally speaking, the FCA and the FCC are the only statutes that codify and prohibit cartel conducts, although bid-rigging is also an offense under the Anticorruption Act (*Ley General de Responsabilidades Administrativas*). Thus, the agencies enforcing this statute may impose fines to those who engage in this conduct, even if the agencies empowered to enforce the FCA and/or Federal Prosecutors (pursuant to the FCA) have not investigated and fined the conspiracy themselves.

The FCA and the FCC would apply to cartels in any industry, except that the activities exclusively reserved to the Mexican Government (nuclear power, currency, etc.), unions, IP rights, and associations for the sale of Mexican products abroad, are exempt from antitrust scrutiny. No other general exemptions from antitrust laws would prevent the investigation of a

cartel in any industry or activity.

## 2. **To establish an infringement, does there need to have been an effect on the market?**

Anticompetitive behaviour under the FCA is divided into two main categories: (i) per se practices or *prácticas monopólicas absolutas* which, as noted above, are considered illegal per se and are pursued and punished in all cases solely upon demonstration of the forbidden conduct, without the need for economic analysis or a show of harm, although a damages or effects analysis may also be done; and (ii) rule of reason practices or *prácticas monopólicas relativas*, which are either arrangements and combinations between or among economic agents which are not competitors (i.e., vertical restraints) or unilateral conducts which entail an abuse of market power, and are only illegal to the extent (a) the same are performed by economic agents having market power; (b) the conducts have as an object or effect in the relevant market or other related markets to displace or otherwise substantially impede other market participants to enter the relevant or related markets or establish exclusive advantages to some market participants; and (c) the' anticompetitive effects related to such practices are not outweighed by the efficiencies arising from the same.

While the FCA does not condition the investigation and sanction of a cartel to the prior demonstration that there has been an effect on the market, the amount of the fines that the competition agencies can impose must take into account the harm to the market caused by the cartel.

## 3. **Does the law apply to conduct that occurs outside the jurisdiction?**

While the FCA is territorial in reach, it vests upon the enforcing agencies the ability to pursue conduct that has effects in the Mexican markets. Thus, conduct occurring abroad but having tangible effects in Mexico may still be pursuable under the FCA, although from a practical perspective and due to procedural rights in Mexico, enforcers may face challenges in pursuing companies or individuals with no meaningful ties with Mexico.

#### 4. Which authorities can investigate cartels?

The general antitrust enforcer is the Federal Competition Commission (*Comisión Federal de Competencia Económica*, or “COFECE”), which is empowered to enforce the FCA and bring criminal complaints for cartel behaviour before federal prosecutors across all industries except broadcasting and telecommunications. Conversely, the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones* or “IFT”) is a regulator that also acts as antitrust enforcer in the broadcasting and telecommunications industries.

Both agencies are organised internally so that each has an Investigative Authority (an “IA”), which is an independent body within each of COFECE and IFT, vested with powers to launch and conduct investigations and issue letters of objections to agents presumptively involved in cartel activity.

#### 5. What are the key steps in a cartel investigation?

*Internal steps. Launching a probe*

An investigation formally starts with the issuance of an order by the competent IA, mandating a probe for a term of no less than 30 business days and no more than 120 business days (which term may be extended up to 4 times for additional periods of 120 business days each), into a specifically identified market. The IA must establish an objective cause to launch the probe, identify an affected market or markets, and the presumptive anticompetitive behaviour that it suspects has occurred. This order is usually not made public until after initial requests for information (“RFIs”) and/or dawn raids have been conducted.

Investigations may be the result of a complaint (from an agency or a private party) or a leniency application, but may also be launched *ex officio* by the IAs. Prior to launching an investigation, the agencies usually conduct internal research and may request information from other agencies, such as the Banking Commission or the Tax Administration Service. They may also get information from affected government bodies, which may be critical in cases involving bid-rigging, for instance. To the extent the investigation is the result of a leniency application, a substantive information gathering (generally from the applicant) process is usually conducted by the IA prior to launching the investigation.

*Statements of objections*

Within 60 business days after the investigation period concludes, the competent IA must submit a report to the Plenum the relevant agency (COFECE or IFT) proposing to either (i) close the matter on the grounds that it lacks elements to pursue a cartel or (ii) summon presumptively responsible parties by issuing statements of objections (*dictamen de probable responsabilidad* or “SO”) with cartel charges. If the IA proposes to issue SOs, the competent agency must summon the charged agents to a trial-type proceeding. If the IA proposes to close the matter, the Plenum may accept such recommendation or, if it deems that there are sufficient elements to establish the existence of anticompetitive behaviour, agree to the issuance of SOs (which powers certainly call into question the independence of the IAs).

#### *Trial-type proceedings*

The agents served with SOs are summoned to a trial-type proceeding where the IA is the prosecutor and said agents the defendants. During this proceeding, the charged agents will have the opportunity to challenge the findings of the IA or the evidence in which it grounded the SO, offer and produce evidence and argue in favour of their case. Charged agents have a 45 business day window to produce their response to the SO and offer evidence. Substantially all evidence admissible under the rules of the civil procedure may be offered, including witnesses, experts, documents and recordings, among others.

Once all admitted evidence has been heard, the competent agency will grant the IA and the charged agents a 10 business day window to file closing arguments. After such term expires, the file is deemed substantiated and the parties have a 10 business day window to request an oral hearing before the Commissioners of COFECE or IFT, as applicable, to present oral argument directly to them.

#### *Final decision*

Within 40 business days following the last oral hearing or after the expiration of the term to request it (if no agent so requests), the Plenum of the competent agency must issue a final decision either confirming the findings of the IA and imposing fines and other remedies (disqualification, order to refrain from certain conduct, etc.) or rejecting the charges in the SO. Those agents affected by such decision may petition for judicial review within 15 business days following notice thereof, before the Federal Courts Specialized on Telecommunications, Broadcasting and Competition, through an *amparo* claim.

## 6. **What are the key investigative powers that are available to the relevant authorities?**

Under the FCA, the investigation powers of the enforcers have a 10-year statute of limitations period, from the date in which the alleged cartel ceased to exist.

### *Dawn raids*

Dawn raids are usually ordered at the outset of the investigation so as to maintain an element of surprise. Under the FCA, visited firms and individuals are required to cooperate with the agency performing the inspection, and the agencies are empowered to review and make copies of all physical and electronic information specified in said order. Authorized officials from agencies are also allowed to seal property, documents and records to prevent that the same are altered or destroyed, and the economic agents may not access or use the same unless they show that the use thereof is necessary in their ordinary course of business. The agencies, however, are specifically prohibited from seizing documents or information.

Along the same lines, the agencies may ask questions to representatives, officers and employees of the raided agents, provided that such questions relate to the documents, information or facts subject matter of the visit order.

Obstructing a dawn raid (either by denying access to the agency personnel or deleting or destroying records) may result in criminal liability.

### *RFIs*

During the investigation, the IAs may issue RFIs (to persons of interest, market participants, government agencies, among others), conduct dawn raids, and summon and depose witnesses. RFIs are subject to a very low legal grounding threshold as agencies are only required to make a *prima facie* showing of relevance of the requested information to their investigation. As a result of this, it is customary that the IAs issue lengthy RFIs to the aforementioned parties, which in turn only have a 10 business day term (extendable for an additional even period) to reply to the same and produce the requested information. Failure to produce such information may result in fines per day of non-compliance.

### *Depositions and interviews*



The agencies may also resort to depositions and compulsory interviews of persons of interest, such as employees, directors and representatives. The threshold for calling a witness is substantially the same (pertinence for the investigation) to the threshold applicable to RFIs. Deposed individuals have the right to be accompanied by counsel but the ability of the latter is greatly restricted, as counsel is only allowed to object to questions which do not conform to the rules of the Federal Code of Civil Procedure.

7. **On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?**

Mexican law does not have a general concept of privilege as it may be available in other jurisdictions. Having said that, the ability of the agencies to impose antitrust liability is subject, *mutatis mutandi*, to the general principles of criminal law which, among other, include the right against self-incrimination, presumption of innocence and the right to an adequate defence by counsel. Along the same lines, Mexican law prohibits prosecutorial bodies to access private communications unless such access is authorized by a court order. Also, under Mexican law, independent external counsel is subject to a duty of secrecy with respect to information obtained or prepared in the course of their engagement. Taking these elements into consideration, isolated court precedents have ordered the exclusion from the review of the agencies documents prepared by counsel.

Finally, certain information may be subject to banking, securities, or tax secrecy obligations, for the production of which a court order is required.

Thus, only under these grounds could requested parties withhold the production of information required by the agencies. A much more difficult task would be to have the agencies exclude documents or information gathered in the course of dawn-raids or from other sources which falls within these categories.

8. **What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal**

**admission required?**

N/A

**9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?**

N/A

**10. Are markers available and, if so, in what circumstances?**

N/A

**11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?**

Applications to the leniency program and information provided in connection therewith are confidential.

**12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

N/A

**13. Is there an 'amnesty plus' programme?**

Under the FCA, a leniency program is available whether an investigation has been launched or

not (in the former case, provided that the investigation term has not expired).

#### *What are the benefits of leniency?*

A granting of leniency entitles the recipient to a reduction in the fine: 100% (a nominal fine is imposed) for the first applicant, 50% for the second, 30% for the third applicant and 20% for subsequent applicants. All recipients of leniency also receive immunity from criminal prosecution and from disqualification to engage in business or act as director or representative (in the case of individuals).

#### *Who can request leniency?*

Leniency is available to any agent that participated in a cartel and the individuals who ordered or facilitated the same. Economic Agents can include in their immunity applications their employees, representatives and officers (a specific mention of this inclusion has to be made as these individuals would not be automatically covered). Covered individuals would be subject to the same obligation of continued cooperation to maintain leniency.

#### *Process, admissions and evidence*

An application requires an explicit acknowledgment of having engaged in anticompetitive behaviour and the identification of the statutory violation committed by the applicant. Applicants receive markers, provisionally granting the benefits described above, based on the date and time on which their respective application is filed.

The marker and the subsequent confirmation of the benefits of leniency is subject to the production of evidence of the cartel which is, in the view of the relevant IA, novel (i.e., the IA was not aware of the facts or is sufficient to reinforce the facts already known to the agency) and sufficient to establish the existence of anticompetitive behaviour.

Once the benefits are confirmed (i.e., the marker is perfected), the same are conditioned to the ongoing cooperation throughout the investigation and the trial-type proceeding following the same. In practice, the agencies view the obligation to cooperate as an estoppel to questioning or challenging the formal admissions (to participating in illegal practices) made by the applicant. While maintaining the leniency program is viewed as critical by the agencies, COFECE has already withdrawn the benefit of leniency in cases where it came to the conclusion that the applicants had failed to meet their obligation of continued cooperation.

## *Confidentiality*

The FCA requires that the agencies maintain the confidentiality of the information gathered in the context of a leniency application, to the extent that the applicants establish that such information is confidential in nature. The identity of the applicant, the fact that it applied for leniency and the benefits granted to it must be maintained as strictly confidential both during the investigation period as well as during the trial-type proceeding.

Information that is afforded confidential treatment is maintained in files that are not available to other agents and that may only be accessed by the relevant applicant.

14. **Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

Plea bargaining is not a concept of Mexican law generally and is certainly not available in the context of antitrust violations. Along the same lines, the agencies are not allowed to settle the amount of fines or accept remedies or commitments in exchange for not imposing fines for per se conduct. As noted above, any agent that participated in a cartel may apply for leniency before an investigation is launched or once the same is ongoing, provided that the investigation term has not expired, but all that an applicant obtains in return is a discount of the potential fine.

N/A

15. **What are the key pros and cons for a party that is considering entering into settlement?**

Outside of the scope of cartel, investigations regarding illegal mergers and abuse of dominance investigations do allow that before the SO is issued, agents are entitled to propose in writing effective remedies that are legally and economically feasible and appropriate to avoid or eliminate the relative monopolistic practice or unlawful merger/concentration under investigation, and the agency may accept such commitments in lieu of a fine.

**16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The agencies, and especially COFECE, do cooperate with international agencies in cartel investigations, as Mexico is party to different agreements that enable international cooperation in the enforcement of competition laws.

From a practical perspective, COFECE does weigh leniency applications or settlements reached abroad, especially if the relevant cartels are truly global in nature and the effects in Mexico are incidental or secondary to those taking place elsewhere.

**17. What are the potential civil and criminal sanctions if cartel activity is established?**

Except for criminal responsibilities, both the COFECE and the IFT have the authority to impose sanctions directly. Criminal liability, on the other hand, can only be prosecuted by a federal prosecutor if the competent agency presses charges.

Fines cannot exceed 10% of the taxable revenue of the relevant economic agent in Mexico. Individuals involved in such conduct may face criminal liability (5 to 10 years), as well as fines and being disqualified to serve as director, officer or representative of a corporation (up to 5 years).

**18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?**

In applying these fines and penalties, the agencies must weigh a number of factors, such as (i) the actual harm; (ii) recidivism (that is, a prior fine in final form for an antitrust violation, which may result in a duplication of the otherwise applicable fine); (iii) wilful intent to engage in

anticompetitive conduct; (iv) the duration of the illegal behaviour; and (v) the financial capacity of the responsible party.

The largest fines imposed to date by COFECE following a finding of per se anticompetitive behaviour were imposed in the recent pension-fund managers case (*afores*). In such matter, total fines amounted to approximately US\$61.1 million, and the single largest fine amounted to USD\$23.62 million. In such case, the fine to one of the *afores* was initially assessed at a higher amount based on estimated damage to the market but further reduced so as to not to exceed 10% of the income for tax purposes of the relevant agent.

19. **Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

Parent liability is not presumed under Mexican antitrust laws and therefore parent entities may only be fined to the extent such entities themselves are found to have breached antitrust laws.

20. **Are private actions and/or class actions available for infringement of the cartel rules?**

Private litigation for antitrust cases is not common in Mexico.

21. **What type of damages can be recovered by claimants and how are they quantified?**

Mexican law allows the recovery of direct damages arising from illegal behaviour. A final finding of a cartel by the competent agency is undisputable evidence of such illegal behaviour and therefore claimants would only need to show that they have suffered damages and that the same were directly caused by said conduct (but not the illegality of the conduct itself).



**On what grounds can a decision of the relevant authority be appealed?**

Final decisions of the competition authorities are subject to judicial review through an *amparo* claim, which claim is predicated on the basis that the actions of a governmental agency violated constitutional rights of the claimant. In practice, this petition for judicial review allows claimants to challenge all aspects of the proceedings before the agencies (both form and substance), from the actions of the IA during the investigation phase, to the admission and weighing of evidence and the substantive analysis on which the resolution of the agency is grounded.

23. **What is the process for filing an appeal?**

This petition for judicial review must be filed in writing within 15 business days after notice of the adverse decision from IFT or COFECE is received.

24. **What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?**

*Legal privilege*

COFECE has called for public comment on proposed regulation for the assertion of privilege in the context of proceedings before it. The proposed rules set forth a process where privilege needs to be asserted and established by the parties (who would bear the burden of proof) whereas a panel within COFECE would rule on the matter. As this would, in the view of several practitioners, restrict the right to legal defence set forth in the Constitution, more developments are expected in connection with this topic.

*Pharma*

In 2016, COFECE launched an investigation into the production, commercialization and distribution of drugs in the country. The investigation has already concluded and the findings of the IA could be released as early as April 2019. Given that back in 2017 COFECE released a study where it concluded that there was a lack of competition with respect to expired-patent branded drugs, the findings of the investigation could be of great relevance for the pharma industry.

### *Financial services*

In 2016, COFECE launched a probe into the trading with Mexican sovereign debt securities market. While the investigation period is still in its final term, this investigation follows a 2017 decision of COFECE imposing significant fines on pension fund managers for collusion and a recent 2019 declaring that a credit bureau had abused its dominant position in refusing to deal with a competing credit information institution. These investigations show that financial services is among the industries in which COFECE will focus in the coming years.

25. **What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?**

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26. **What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**

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