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Mexico
Competition Litigation

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Mexico.

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Mexico: Competition Litigation

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

The Mexican Constitution expressly prohibits a series of conducts considered anticompetitive, which are expressly provided for in the Federal Economic Competition Law ("**LFCE**") and classified into three main categories:

1. *Absolute* monopolistic practices: Also called collusions or economic cartels, these are agreements between competitors to fix prices, limit the production or distribution of goods or services, divide markets, or coordinate tenders in bidding processes.
2. *Relative* monopolistic practices: These are conducts carried out by economic agents that dominate a given market and use their position of power to prevent the access of other competitors to said market or to displace those who are already competing in it.
3. Unlawful concentrations: Referring to mergers or acquisitions of companies that have the objective or effect of hindering, diminishing, damaging, or preventing free competition.

Persons who consider themselves affected by any of these conducts can file a competition damages claim.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

The LFCE stablishes that a competition damages claim can only be exercised until the Federal Economic Competition Commission ("**COFECE**") or the Federal Institute of Telecommunications ("**IFT**") –authorities responsible for preventing, investigating, and sanctioning anticompetitive conducts in Mexico– have issued a definitive resolution that establishes the occurrence of the monopolistic practice or unlawful concentration in question.

Such a resolution must be res judicata in order to enable claimants to sue.

3. What remedies are available to claimants in competition damages claims?

Although the LFCE does not expressly provide for the type of remedies that may be awarded in a competition damages claim, the Federal Civil Code does provide that, in the case of unlawful conduct (such as anticompetitive conducts), the remedy will consist, at the choice of the injured party, in the reestablishment of the previous situation or the economic payment of damages (compensatory damages).

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

The law does not establish how damages will be quantified in this type of claims. Nor does it indicate whether the judge is obliged to consider the quantification of damages made by the COFECE or the IFT in its resolutions, which must consider several circumstances such as the seriousness of the infringement, the damage caused, evidence of intent, the infringer's participation in the markets, the size of the affected market, and the duration of the anticompetitive conduct.

However, we believe that given the regulatory nature of these authorities, the judge should consider this estimation and individualize it according to the plaintiff.

Regarding liability, the Federal Civil Code provides that individuals who have jointly caused damage are jointly and severally liable to the victim.

Finally, while the LFCE establishes the possibility for an economic agent under investigation for anticompetitive conduct to benefit from a waiver or reduction in the payment of fines (leniency, for absolute monopolistic practices, and commitments adoption for relative monopolistic practices), it expressly states for commitments adoption that such a possibility will be without prejudice to any actions that may be taken by affected third parties claiming damages and losses arising from civil liability for the commission of the relative monopolistic practice or illicit concentration.

Although there is no similar specific rule for leniency applicants, it should also be noted that leniency beneficiaries are not disclosed by competition authorities and, thus, in principle, no legal or factual reason preventing claimants to sue leniency beneficiaries.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

The statute of limitation for a competition damages claim under the LFCE is not predetermined but, actually, uncertain as per the applicable law.

For instance, as stated, a competition damages claim may only be filed until the COFECE or the IFT has issued its resolution determining the existence of an anticompetitive conduct (and that such resolution has become res judicata).

On the other, according to the Federal Civil Code, the Statute of Limitation to claim damages is two years from the date these were caused.

The logic interpretation would be that such two-year term should start when the respective resolution becomes res judicata. However, in an apparent contradictory manner, the LFCE provides that the statute of limitations of the competition damages claim is interrupted with the initiation of the investigation, which must necessarily occur before the final resolution is issued. Why would the Statute of Limitations be interrupted if it the period hasn't begun?

To further complicate matters, the investigatory powers of the COFECE and the IFT expire in ten years, starting from the date the unlawful concentration occurred or from the date the corresponding monopolistic practice ceased.

As if this were not enough, absolute monopolistic practices are considered a crime under the Federal Criminal Code. According to the Federal Civil Code, the statute of limitations for claims for damages resulting from the commission of a crime expires after ten years (if such a crime was declared by a court).

6. Which local courts and/or tribunals deal with competition damages claims?

The LFCE provides that competition damages claims must be filed before federal district judges specialized in competition, broadcasting and telecommunications.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

Per the Mexican Constitution, Competition is a Federal exclusive matter and, accordingly, competition is solely regulated in the LFCE. Thus, per the LFCE, the specialized district judges have exclusive jurisdiction on such claims.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

Again, given that, in México, competition is a Federal exclusive matter, LFCE is the only substantive applicable law in competition cases. Similarly, regarding competition damages claim, given that federal courts have exclusive jurisdiction, the substantive federal law will be immediately applicable: Federal Civil Code, Commercial Code and Federal Civil Proceedings Code (CFPC). Pursuant to the CFPC, state procedural law might be applied when federal law is insufficient, i.e. only in a subsidiary manner.

As to the standard of proof, under the LFCE, as the resolution of the competition authority serves as full legal evidence of the unlawfulness of the anticompetitive conduct in competition damages claims, claimants do not need to meet any other standard of proof regarding those conducts but only regarding the damages that arise therefrom.

Moreover, it should also be noted that for relative monopolistic practices, one of the legal elements of its description is that, in essence, the conduct has the effect or intention to harm competitors, so in many cases damages might even be implied in the competition authority resolution. While such a resolution, pursuant to the LFCE, will serve as full evidence of the unlawfulness of the conduct, the LFCE does not state the same for damages, and thus courts may not arrive to the same conclusion.

Claimants must demonstrate that there is a direct causation relationship between the anticompetitive conduct and the alleged damages, which implies that they must provide evidence that: (i) the alleged damages exist; and (ii) that those damages were the direct consequence of the anticompetitive conduct. There is no law established standard of proof of those 2 specific items, and claimants are entitled to present any evidence that might convince the court of their existence.

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

As stated before, while, pursuant to the LFCE, the competition authority's resolution will serve as full evidence of the unlawfulness of the conduct, the LFCE does not state the same for damages, and thus courts may not arrive to the same conclusion. Accordingly, courts have full jurisdiction to decide on the existence of the damages and, more importantly, on whether such alleged damages are a consequence of the anticompetitive conduct.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

As it was emphasized, a competition damages claim can only be pursued once the resolution of the COFECE or the IFT has become res judicata. Consequently, a private action cannot be initiated until the public action has been exercised and, most importantly, definitively concluded.

Economic agents that are sanctioned by such authorities may challenge such resolution through an *amparo* proceeding. If this happens, whoever wishes to file a competition damages claim must wait until the *amparo* is resolved in order to exercise it.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation of claims through case management)? What, if any, threshold criteria have to be met?

During the investigation stage, if the COFECE or the IFT find evidence suggesting that consumers may be affected, they are required to inform and ask the opinion of the Attorney General.

Both COFECE and the Attorney General's Office have the necessary legal standing to bring class actions for the defense and protection of the rights and interests of consumers.

Class actions are provided for in the Federal Code of Civil Procedures and entail specific procedural requirements, including: (i) demonstrating harm to consumers resulting from undue concentrations or monopolistic practices, (ii) addressing common factual or legal issues among the affected group members, (iii) that there's at least thirty members of the collectivity, (iv) establishing a connection between the object of the action and the harm suffered, and (v) adhering to the statute of limitations, which is three years and six months.

The judge must certify compliance with these requirements and admit or dismiss the claim.

Lastly, in the judgment issued in a class action, the defendant may be ordered to repair the damage, through the performance of one or more actions or to refrain from performing them, as well as to cover the damages individually to the members of the group.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

The LFCE does not establish or recognize any defense specifically applicable to competition damages cases. Case Law has neither defined any unique defense.

Generally, the party that makes an allegation bears the burden of proof of demonstrating it (that applies for both claimant and respondent). Case Law has defined some exceptions, namely the principle of evidentiary facilitation, that in México entails that the party who has easier access to evidence or a stronger position to prove or disprove a fact should bear the burden of proof.

As was said before, while the resolution of the authority is sufficient to prove the existence of anticompetitive conduct, evidentiary-wise, the subject matter of competition damages claim is to demonstrate the existence of damages and them being direct consequence of the anticompetitive conduct. Considering that, in principle, the burden of proof corresponds to claimant, as it seems illogic to ask defendant to demonstrate the inexistence of damages or its link with the conduct.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Yes. As the CFPC is applicable, each party has the right to appoint an expert, a person specialized in a particular subject, profession, or field, to provide his opinion. It is also possible for the parties to agree and appoint a single

expert.

In relation to the procedure, the party wishing to present expert evidence must make the request within a ten-day period from the start of the legal term, through a written document in which he must: (**i**) formulate the questions or specify the points on which the expert opinion will be based; (**ii**) designate his expert; and (**iii**) propose a third expert in case of disagreement.

Upon receiving this document, the judge must provide the other parties with a five-day period to add relevant questions to the questionnaire and appoint their own expert if they deem it necessary.

The experts appointed by the parties must appear before the judge to accept and protest to perform their duties.

Once this is done, each expert must render their report. If their opinions differ on any essential point, the judge must request a report from the third expert.

The weight given to these expert opinions is at the discretion of the judge, who exercises the broadest and most cautious judicial discretion.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

Although the decision-maker is the specialized federal district judge, the parties are the ones who must initiate and impulse the proceeding. By virtue of the dispositive principle that governs civil trials, the judge cannot take the initiative to gather the evidence he deems necessary, since it is the parties who bear this burden, as it is in their own interest to do so.

Since Mexico follows the civil-law tradition, its procedures are eminently written and do not incorporate elements such as discovery or jury trial systems.

In a claim for damages, an individual plaintiff will submit their claim and evidence before the specialized federal district judge, outlining the factual basis for their action. Conversely, the defendant must present their exceptions and defenses against the claim.

The procedure generally consists of the following phases:

1. The plaintiff presents the claim and supporting evidence.
2. The claim is admitted, and the defendant is summoned.
3. The defendant responds to the claim, stating their exceptions and defenses, which can be procedural or substantive.
4. The court addresses any procedural defenses raised by the defendant.
5. The probatory phase begins, where each party presents their evidence.
6. A final hearing takes place, during which written arguments are made.
7. A judgment is rendered.
8. Execution of the judgment follows.

After a judgment is issued, either party may file an appeal to seek confirmation, revocation, or modification of the judgment by a higher court. Once the appeal period has expired without an appeal being filed or the appeal has confirmed the judgment, the judgment becomes final, and its execution can proceed.

The amount of damages awarded to the plaintiff is determined in a liquid manner during the execution of the judgment.

In relation to the cross-examination rules, the parties may freely, orally, and directly question their witnesses and their opposing party's witnesses.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

Unlike other legal systems, in Mexico the trial begins as soon as the lawsuit is admitted by the judge (with the exception, as we have seen, of class actions, which must be certified before the trial begins).

The duration of civil lawsuits cannot be predetermined or estimated as it varies depending on factors such as the judges' workload, the complexity of the case, the procedural progress of the parties, the types of evidence presented, the number of appeals filed during the trial, among others.

As mentioned above, there is the possibility for the parties to appeal the sentence issued by the judge, through which a higher court may confirm, modify, or revoke such determination.

Subsequently, an amparo proceeding can be filed against the judgment from the second instance, which has the potential to suspend its execution.

The purpose of this trial is to protect human rights and it

has become a sort of third instance since it also proceeds against judgments in which the law has been applied improperly or inaccurately.

16. Do leniency recipients receive any benefit in the damages litigation context?

No. As stated before, the benefits that may be granted to infringing economic agents (such as the waiver or reduction of the fines that should be imposed on them) are separate and distinct from the actions for damages that may be brought by third parties affected by the monopolistic practice or unlawful concentration.

This means that these economic agents might still be subject to competition damages claims and held liable for their actions.

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

The judge must take into account the anti-competitive effects that the monopolistic practice or the unlawful concentration have produced, making use of what has been assessed and considered by the competition authorities in their resolutions, since these are economic aspects whose analysis fall within the expertise of those authorities.

The LFCE does not recognize or contemplate the case in which economic agents benefit from the "umbrella effects" resulting from a collusion or economic cartel.

Finally, since this is a civil trial, the judge may adopt the resolution methodology of his choice, which will depend on the particularities of each case and, above all, on the parameters used by the experts in their opinions.

18. How is interest calculated in competition damages cases?

There are no specific guidelines on how interest should be calculated. Even so, this information might be included in the estimation of damages provided by the COFECE or the IFT, as well as in the opinions of the experts involved in the case.

19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

Yes. According to the Federal Civil Code, the plaintiff has the right to demand full or partial payment of damages from all joint debtors or from any individual debtor. If a joint and several debtor pays the damages in full, he has the right to seek reimbursement from the other co-debtors for their respective share.

20. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

The Federal Code of Civil Procedures allows for the dismissal of a claim in situations where the plaintiff fails to address any deficiencies or meet the requirements outlined by the judge within the given timeframe. Additionally, claims may be dismissed if they are found to be unfounded, frivolous, or reckless.

In addition, the parties may enter into a contract for the purpose of terminating the action or claim, provided that mutual concessions are made. In such contract, the defendant usually agrees to pay a certain amount (or to do or refrain from doing something) in exchange for the plaintiff withdrawing his claim.

21. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

In the case of class actions, once the complaint is certified, a preliminary hearing and conciliation process must take place, where the judge will personally propose solutions to the dispute and encourage the parties to resolve it. In doing so, the judge may seek assistance from experts deemed appropriate.

As a result, a class action can be settled through judicial agreement between the parties at any stage of the proceedings prior to the final judgment.

If the parties reach a total or partial agreement, the judge will review it to ensure its legality and the adequate protection of the collective interests involved.

Following this, the judge will hold a hearing involving various authorities, and after considering the opinions of all parties, the judge may approve the agreement, thereby making it legally binding (*res judicata*).

22. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

Confidential or proprietary information is safeguarded by the Constitution, various laws, including the LFCE and its Regulatory Provisions. As a result, information disclosed during court proceedings is accessible only to the parties involved and is not made public.

During the proceedings, the parties have the option to request that specific information provided be treated as confidential, providing valid justifications for their request. Furthermore, judges are obligated to uphold the rights of confidentiality and protection of personal data as established in the Federal Law of Transparency and Access to Public Information.

Generally, any document might be presented as evidence unless it is confidential or was acquired in violation of human rights (such as privacy). Exceptions to confidentiality may occur in specific cases, such as when the causes for classification no longer exist, when the classification term expires, when a competent authority determines that public interest prevails over information confidentiality, when the Transparency Committee deems declassification appropriate, or when the information pertains to serious human rights violations or crimes against humanity.

Regarding exceptions, the LFCE explicitly states that the identity of the Economic Agent and individuals seeking immunity under the program will be kept confidential.

23. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Yes. According to the Federal Code of Civil Procedure, the party that loses the case is responsible for reimbursing the other party for the costs incurred during the proceeding. A party is deemed to have lost when the court accepts, either fully or partially, the claims made by the opposing party.

The costs of the proceeding are determined by the court, considering the applicable tariff provisions, and represent the amount that the successful party should have paid or actually paid, excluding any unnecessary expenses or superfluous acts and forms of defense. The party that incurred unnecessary expenses will be responsible for bearing them.

In cases where multiple parties are considered to have lost, the court will distribute the costs proportionally among them, and the amount will be allocated proportionally among the successful parties as well.

In the specific context of class actions, the Federal Code of Civil Procedures stipulates that each party is responsible for their own expenses and costs related to the class action, including the fees of their representatives, which are subject to a maximum limit.

24. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

The concept of a third-party funder, commonly found in other countries or in arbitration proceedings, is not explicitly recognized in the context of competition damages claims. However, parties are free to seek financing from external sources to support their legal action. It's important to note that such financing arrangement would be independent of the litigation itself and, thus, third party funders are not, per the law, liable for the other party's costs.

The only way for a third party to participate in the litigation would be through an assignment of litigation rights. Under the Federal Civil Code, it is possible for a creditor to enter into an agreement to assign their litigation rights, including the transfer of the rights associated with the disputed relationship and, consequently, the procedural position of the assignor.

In terms of legal fees for lawyers representing plaintiffs and defendants, there is no specific regulation governing this matter. The fees will be determined based on the agreement between the lawyer and client, allowing for various fee structures such as hourly rates, milestone-based payments, contingency fees, or other mutually agreed arrangements.

25. What, in your opinion, are the main obstacles to litigating competition damages claims?

Ironically, the main obstacle to litigating competition damages claims lies within the LFCE itself. Upon reviewing the LFCE, one will notice that it only dedicates a single article to regulate these types of actions.

Some contradictions have already been noted between the provisions of the LFCE and the Federal Civil Code and the Federal Code of Civil Procedures, leaving both potential claimants and potential defendants in a vulnerable position.

Another challenge arises from the judges who preside over these lawsuits, as they lack familiarity with civil lawsuits or actions due to their extensive exposure to amparo lawsuits, if not exclusively.

Civil trials operate on different logics, dynamics, and objectives compared to amparo trials, featuring distinct rules, principles, stages, and standards.

This has been reflected in the small number of competition damages claims filed, of which even fewer have been resolved. Only a few lawsuits have been followed and no sufficiently relevant or solid precedents have been set that could serve as a basis for the future.

Finally, it cannot be overlooked that requiring that the resolution issued by competition authority be final for these actions to be exercised disregards the autonomy and independence of both.

This requirement unreasonably prolongs the process of seeking repair for damages and hampers timely access to justice for those affected by anticompetitive practices. The delay in obtaining resolution and subsequent reparations can further exacerbate the harm caused by anticompetitive acts.

26. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

As we anticipated in the previous edition, with the rapid advancement of artificial intelligence (AI), new services and products are continually emerging, leading to more sophisticated forms of monopolies. Several fundamental concepts of competition law need to be updated or, alternatively, reinterpreted. Digital players today may not hold traditional market power to fix prices or directly restrict supply, but through network effects, data control, and algorithmic collusion, they can establish market shares so dominantly that competition becomes almost impossible. This situation complicates the task of demonstrating the damage caused by such practices.

For instance, network effects refer to the phenomenon where a product or service gains additional value as more people use it. As an example, social media platforms like Facebook and Instagram become more valuable to users as their networks grow, creating high entry barriers for new competitors. Data control allows these companies to amass vast amounts of information on user behavior, preferences, and trends, which can be leveraged to maintain market dominance and stifle competition. Algorithmic collusion, where companies use sophisticated algorithms to set prices or manage supply in ways that would be illegal if done explicitly, poses a new challenge for regulators.

Also, the proliferation of AI will also introduce new debates and challenges in competition litigation. Smaller firms now have access to advanced and powerful tools, enabling them to craft more sophisticated arguments and gain a better understanding of evolving market scenarios. This democratization of AI-driven legal services will lead to a more dynamic and competitive legal landscape, where the interpretation and enforcement of competition laws will need to evolve rapidly to keep pace with technological advancements.

AI tools can analyze vast amounts of data to identify anti-competitive behavior, predict outcomes of litigation, and even suggest optimal legal strategies. This increased capability can level the playing field between smaller firms and larger, more established entities, fostering greater innovation and competition in the legal industry itself.

At the same time, regulatory bodies will need to adapt their frameworks to address the unique challenges posed by the digital economy. This includes developing clearer guidelines on what constitutes anti-competitive behavior in digital markets, ensuring that definitions of market power are updated to reflect the realities of the modern economy, and investing in the technological capabilities needed to effectively monitor and investigate these markets.

Regulators may need to develop new metrics for assessing market power that go beyond traditional measures like market share and pricing power. These could include factors such as control over data, the role of network effects, and the potential for algorithmic collusion. Additionally, collaboration with international regulatory bodies will be crucial, as many of these digital giants operate on a global scale, and inconsistent

regulations across borders can create enforcement challenges.

Digital markets pose a new challenge because, unlike physical economic markets, there is really no scarcity in them, or at least not in a pure sense. In a physical market, the component of scarcity defines the hoarding of a good (its availability or even its price), while in a digital market, since it does not manifest or operate in the same way, only the user or the demand itself can be hoarded.

For example, digital goods such as software, music, or movies can be replicated infinitely without significant additional cost.

However, as mentioned, there can be scarcity in terms of user attention, time, and computational resources, which is relevant for economic competition in digital markets.

This is already visible. Digital companies seek to monopolize user attention through strategies such as creating closed ecosystems (for example, Google, Facebook, Apple). This becomes relevant in how new monopolies will arise and, above all, practices different from traditional monopolistic ones.

These could include the preference for their own products on platforms (such as Amazon prioritizing its own products), the control and manipulation of algorithms to favor certain content or services, and the extensive use of personal data to maintain market dominance.

Therefore, the strict application of the concepts of the current law could ultimately generate an inhibitory effect that prevents people from accessing and taking advantage of valuable or useful offers. When the supply is much broader but, above all, more complex, the criteria for judging an anti-competitive effect must necessarily change.

Sanctioning participants in digital markets will undoubtedly produce different and possibly negative economic effects, as it could actually mean punishing creativity, development, and innovation of digital goods or products, which represents a delicate issue that must be kept in mind when addressing problems related to the digital market.

In these conditions, competition litigation will become even more complex and there is likely to be a stronger deference to the judgement and decisions of administrative regulatory bodies, such as COFECE and IFT, who, in theory, are closer to the developments in today's markets.

However, in the absence of an updated regulation, this may not be the most ideal regime, as it makes it impossible for judges in this kind of lawsuits to go beyond the interpretations that these authorities make in this regard, usually extending the scope of their powers.

In any case, it will be interesting to see the implications of the recent decision of the US Supreme Court to overturn the precedent set in *Chevron v. Natural Resources Defense Council, Inc* (1984), and, above all, to see the implications of this in our country, if it is at least received, since administrative deference was implicitly established, to a large extent, in our judicial system based on the ideas of that case.

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