MEXICO

Court proceedings in key jurisdictions
This chapter is part of the ICC Compendium of Antitrust Damages Actions (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
PRIVATE ANTITRUST LITIGATION IN MEXICO

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Private antitrust litigation is still in an early stage of development in Mexico. Based on the concept of civil liability, private antitrust litigation is regulated under the Federal Civil Code (“FCC”) and the Federal Code of Civil Procedures (“FCCP”). As of today, only two claims have been filed in Federal Courts. However, recent developments may enhance this practice: (i) the 2012 reform to civil legislation (FCC and FCCP) introduced and regulated class actions, and (ii) the issuance in 2014 of a new Federal Law on Economic Competition included, for the first time, provisions related to the claim of damages arising from anti-competitive conducts.

1. Jurisdiction

In 2013, the Federal Government decided to conduct a full revision of the constitutional, legal and institutional framework of the Mexican antitrust system. A completely new antitrust legal and regulatory framework was developed in 2014, and the following pieces of legislation entered into force:

- amendments to Article 28 of the Federal Political Constitution of the United Mexican States (“Mexican Constitution”) regarding monopolies and monopolistic practices, which, among others, ordered the creation of two new constitutionally autonomous regulatory and enforcing agencies: (i) the Federal Economic Competition Commission (“COFECE”) for all antitrust issues, except for telecommunications and broadcasting, and (ii) the Federal Institute of Telecommunications (“IFT”) for all issues relating to telecommunications and broadcasting in Mexico (the “Antitrust Agencies”);

- the issuance of the new Federal Law on Economic Competition (“FLEC”);

- the issuance of a new Federal Law on Telecommunications and Broadcasting;

- the issuance of new sets of Regulatory Provisions of the FLEC and non-binding explanatory guidelines; and

- amendments to Article 94 of the Mexican Constitution, ordering the creation Circuit Collegiate Tribunals and District Courts specialised in Economic Competition, Broadcasting Services and Telecommunications matters were create (together, the “Specialized Federal Courts”).

As a result of the amendments to Article 94 of the Mexican Constitution, the Board of the Federal Judicial Council issued a decree which led to the creation of two Circuit Collegiate Tribunals (constitutional amparo trial court) and two District Courts (first instance), with exclusive authority to receive and resolve the claims on Economic Competition, Broadcasting Services and Telecommunications, including jurisdiction over amparo claims.
(i.e. constitutional appeals) versus the Antitrust Agencies resolutions. In 2018, the Board of the Federal Judicial Council also issued a decree creating two Circuit Unitary Tribunals in Civil, Administrative and Specialized in Economic Competition, Telecommunications and Broadcasting (second instance) with exclusive jurisdiction on hear and resolve appeals to the resolutions issued by the District Courts on private parties claims for damages.

Under Mexican legislation, civil actions for damages arising from anti-competitive conducts can only be filed after a resolution by an Antitrust Agency finding liability has been issued and such resolution has been declared final and conclusive.

2. Relevant legislation and legal grounds

As previously mentioned, the concept of damages in Mexico is based on civil liability principles. According to the FCC, individuals and undertakings are entitled to pursue direct damages actions based on contractual and non-contractual liability.

Article 134 of the FLEC confirms forth the possibility of private parties looking redress for the damages they suffered as a result of the anti-competitive conducts committed by third parties:

“Individuals that may have suffered damages or losses deriving from a monopolistic practice or an illicit concentration have the right to file judicial actions in defence of their rights before the specialised courts in matters of economic competition, broadcasting and telecommunications, once the Commission’s resolution is final and conclusive.

The statute of limitations for lodging damages claims shall be stayed by the decision to initiate an investigation.

The Economic Agent’s illegal actions shall be proven with the final resolution issued under the trial-like procedure, for the effects of lodging damages claims.”

3. What types of anti-competitive conduct are damages actions available for?

Article 134 of the FLEC sets forth that damages actions are available for those who have suffered damages as a result of either a monopolistic practice or an illicit concentration.

The FLEC differentiates between two different kinds of monopolistic practices:

- absolute Monopolistic Practices (similar to the “per se” conducts or hardcore cartel practices); and
- relative Monopolistic Practices (conducts to be evaluated under a “rule of reason analysis”).

Absolute monopolistic practices consist of contracts, agreements, arrangements or combinations amongst competing Economic Agents, which have as their purpose or effect any of the following: fixing prices, market allocation, output restrictions, bid-rigging and exchanging of information with the purpose or effect of any of the previously mentioned conducts.
Relative monopolistic practices are defined by the FLEC as those acts, contracts, agreements or combinations, carried on by one or more economic agents, that severally or jointly have substantial market power in the market affected by the relative monopolistic and which aim or effect is to (i) substantially impede the access, or (ii) to establish exclusive advantages in favour of one or several economic agents, improperly impeding or displacing, in this way, other economic agents in such a market. In Mexico, relative monopolistic practices relate almost exclusively to vertical restraints.

The illicit concentrations are those concentrations that did not request or received prior authorisation from the FECC and that have the purpose or the effect of obstructing, diminishing, harming or impeding free market access and economic competition.

4. What forms of relief may a private claimant seek?

The FCC sets forth that those who were harmed or injured because of the illicit acts of another, the perpetrator is obliged to repair it, unless it proves that the damage occurred as a result of guilt or inexcusable negligence of the victim.

The prior finding of infringement by the Antitrust Authorities is a condition precedent for bringing a damages action.

Therefore, damages actions in Mexico are only intended to repair the direct damage caused by the anti-competitive conduct. Additionally, in case of contractual relationships, claimants may also seek to declare the contract or specific clauses of a determined contract null and void directly in courts without the necessity of having to wait for the resolution of the Antitrust Agencies.

Damages actions on antitrust issues can be pursued either as private actions or as class actions (described below). A private claimant seeking damages may rely on the Antitrust Authorities’ finding of infringement to establish the defendant’s liability but must prove beyond reasonable doubt that a causal link exists between the infringement and the loss suffered, as well as the extent of the loss itself, as general rule the burden of proof rests on the claimant.

Moreover, any evidence relevant to proving loss is admissible, such as accounts showing a decrease in income. However, losses resulting from infringements of competition law are often very difficult to quantify. Specialized Federal Courts are entitled to ask the Antitrust Authorities for an opinion to estimate the loss caused by the infringement. However, the Specialized Federal Courts are not obliged to ask for the estimate nor are they bound to accept it if provided by the Antitrust Authorities.

However, some of the latest court-issued criteria in Mexico contemplate a new form of interpretation of the concept of damages: “punitive damages”, under which it has been considered that the compensation to the victim is not only intended to repair the direct damage suffered in its assets, property, feelings, emotions, beliefs, honour, reputation, private life, physical appearance, or the consideration that others have of the victim, but also to punish the misconduct or neglect of duty of care which the liable person has incurred.
In other words, the Mexican Courts set also that the defendant should not only be ordered to compensate the actual damage caused to the claimant but shall also be punished for his carelessness when he has a duty of care.

5. Burden of proof/Passing-on defence

Under Mexican legislation, the defendant will be considered liable only in relation to those damages that are the immediate and direct consequence of its anticompetitive conduct. Thus, it might be raised since the claimant can only be indemnified for the damage that he or she actually suffered.

Therefore, “passing-on” defence looks reasonable in relation to civil and competition law, given that if the FCC establishes for there to be an indemnity, there shall be a direct damage if the claimant “passed-on” that damage to its own purchasers, the claimant did not suffer any damage. As a result, there is no causation between the anti-competitive practice and the damage claimed and the claimant should not be entitled to an indemnity from the defendant. Consequently, the “passing-on defence” has not yet been formally recognised in Mexico.

6. Pre-trial discovery and disclosure, treatment of confidential information

In Mexico, there is very limited access to information since there are no rules or rights to carry out a pre-trial discovery; the only sources of information available are the non-confidential documents of the administrative proceeding before the Antitrust Agencies.

However, there are two exceptions to this rule: (i) once the damages proceeding has begun, the Specialized Federal Courts may issue an order requesting either the respective Antitrust Agency or the defendant to disclose certain information; and/or, (ii) if there is a substantial risk that the other party might destroy or modify a document that is relevant to be used as evidence, the Specialized Federal Courts may order the defendant to provide all relevant evidence or to produce any piece of documentation.

All confidential information given by/obtained from the investigated agents during the investigation carried on by the Antitrust Authorities will be kept as confidential. The Court will only disclose the information that is strictly necessary for bringing the claim or establishing the damage.

7. Limitation Periods

The statute limitation period for bringing a civil action (the individual actions) for damages is two years from the date on which the damage was caused. But as established by Article 134 of the FLEC, the statute of limitations could be suspended by the decision to initiate an investigation.

In class actions, the limitation period is three and a half years from the date on which the damage was caused (Article 584 of the FCCP).
8. Appeal

COFECE decisions may only be challenged by way of a constitutional bi-instance trial (amparo indirecto).

Resolutions of District Courts (first instance), which would rule on any action for damages, can be challenged or appealed before the Unitary Tribunals (second instance). The resolution rendered in the appeal may in turn be challenged through a constitutional single instance trial (amparo directo) before a Circuit Collegiate Tribunal, on grounds that fundamental rights of the parties have been breached.

9. Class actions and collective representation

The procedure, requirements and formalities of class actions are regulated in the Federal Code of Civil Procedures; the three different types of class actions that the FCCP considers are the following:

- Diffuse actions: Restitution of things to the state where they were prior to the affectation or the substitute compliance in their case to be determined by the judge.
- Collectively in the strict sense actions: the repair of the damage caused by the conduct of an action or refrain from doing so, as well as to cover the damage for each of those affected.
- Individual actions: they are individuals grouped based on common circumstances, whose objective is the judicial claim of a third party of the forced fulfilment of a contract or its termination with its consequences and effects, but they have the same interest as the collectivity.

In order to start and certify a class action, the following requirements shall be met:

- Acts that harm consumers or users of public or private goods or services or the environment or acts that have harmed the consumer due to the existence of illicit concentrations or monopolistic practices declared a final resolution issued by the Antitrust Agencies.
- That there are at least 30 members in the collectivity to be considered a class action and it would be up to them to demonstrate the actual damages and losses originated by the defendant.
- Reasonable doubt that a causal link exists between the infringement and the loss suffered.
- That the damages suffered have not yet been analysed in previous processes.

Note: As of 2020, a few class actions have been started in Mexico and only one of them was related to cartel infringements in the health market in the State of Jalisco (started in 2019). This is why there are no legal precedents available to fully understand how private antitrust litigation will develop in this regard and what the criteria will be applied by the judiciary to quantify the damages.
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