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PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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Mexico Overview

Omar Guerrero Rodríguez, Martin Michaus-Fernandez and Ana Paula Zorrilla Prieto de San Martin[1]

Over the past 26 years, only four private damages actions arising from a competition law infringement have been formally filed in Mexico. As of the time of writing, only one has led to an adverse judgment awarding damages. In fact, since Mexico introduced its first robust competition act back in 1993, many investigations for competition law infringements have ended in severe administrative sanctions. However, consumers and competitors still have not succeeded in recovering damages in private actions.

As a civil law jurisdiction, Mexico's private antitrust actions are more limited in scope when compared to other more permissive jurisdictions like the United States. In Mexico, a private antitrust action is a follow-on action limited to one objective: suing offenders for direct and immediate damages once the Federal Economic Competition Commission (Cofece) or the Federal Telecommunications Institute (IFT) (as competition authorities) have decided in a final and *res judicata* decision that there was a violation to the Federal Economic Competition Law (Competition Act).

Under Section 28 of the Federal Constitution and the Federal Competition Act, Mexico's antitrust enforcement is under the exclusive jurisdiction of the competition authorities. As of 2013, Mexico revamped its competition regime and created – at constitutional level – its competition authorities. On the one hand, Cofece is entrusted with the enforcement of the Competition Act over all markets and sectors other than telecommunications and broadcasting. On the other, the IFT is also tasked with the enforcement of the Competition Act but only for the telecommunications and broadcasting sectors, in addition to other regulatory powers.

Both Cofece and the IFT were created as a result of an unprecedented amendment to Section 28 of the Federal Constitution that took place in 2013 , which had three major consequences.

1 Omar Guerrero Rodríguez is a partner, Martin Michaus-Fernandez is an associate and Ana Paula Zorrilla Prieto de San Martin is a law clerk at Hogan Lovells.

First, Cofece and the IFT replaced the former competition authority in Mexico that was created in 1992 (CFC). Second, both Cofece and the IFT were granted the status of constitutionally autonomous bodies, which means that both are independent from any branch of the federal government and are governed only by the Federal Constitution with certain reporting obligations to the Senate. Third, both authorities were institutionally designed to have a separation between the decision-making body (i.e., the plenary composed of seven commissioners) and the investigating authority (i.e., the internal prosecutor composed of one chief prosecutor and several subdirectors).

As a result, enforcement of the Competition Act, and any determination as to what constitutes a violation to that legislation, is under the exclusive, non-delegable authority of Cofece or the IFT depending on the affected market.

There are several implications associated with this structural design which centralises the powers to declare a competition law infringement. Most importantly, parties that suffer a damage resulting from anticompetitive behaviour are banned from recovering unless such behaviour has been determined by the competition authority. Consequently, private antitrust action in the country is tied to an absolute, *ex-ante* requirement: the existence of a decision formally issued by the competition authority, which recognises that a violation to the Competition Act exists. Mexico has a follow-on system of private antitrust injury.

More importantly, for a decision rendered by the corresponding competition authority to be sufficient to support a damages private action, that decision needs to become 'final' under the *res judicata* principle (Competition Act, Section 134). This implies that one of the competition authorities not only investigated and recognised as unlawful specific conduct, but also that any alleged offender targeted in that decision either has exhausted all means of challenge against it before the judiciary, or has accepted that decision as final in exchange for leniency or immunity benefits.

Other considerable implications of this structural design relate to the type of damages that injured parties can recover, and the types of procedural paths available. Unlike in other jurisdictions, under the Federal Civil Code (FCC) and the Federal Code of Civil Procedures (FCCP), which govern all damages suits, damages recovery in Mexico only allows recovery of direct and immediate damages (i.e., actual monetary loss or impairment), but never indirect, consequential or punitive damages. Further, damages suits can be brought either on an individual basis by the injured party, or through an opt-in class action (which as of the time of writing has never been done in Mexico).

Additionally, injured parties (i.e., plaintiffs) acquire the burden of proof to establish the existence of such direct and immediate damage, as well as the causal connection between the damage suffered and the specific conduct sanctioned. As a result, a damages action in Mexico will have three core objectives. The plaintiff must prove that the actual damaged suffered was a direct and immediate consequence of the illegal conduct (i.e., the monetary loss or impairment of profit); quantify that loss into a specific monetary amount; and show a causal relationship between the damage and the offence.

To do so, injured parties (i.e., plaintiffs) have some pertinent tools available. Tools that, however, have a limited reach if compared to those used in other jurisdictions, such as discovery in the United States. In Mexico, under the FCC and FCCP, plaintiffs instituting a damages

suit need to support their claims by any evidence available to them, as depositions and interrogatories are not allowed; nor do the applicable laws provide for any mandatory disclosure or document production obligations.

Plaintiffs are allowed to offer expert testimony as evidence, as well as witnesses of fact. Only for class actions, can a judge order the production of certain types of documentary evidence, which must be necessary and related to the illegal conduct as the court deems appropriate, including the production of information and evidence from third parties who do not have a conflict of interest in the litigation (FCCP, Sections 598 and 599). Furthermore, once a suit has been brought to court and served to any defendants, there are no opportunities to subsequently amend the complaint, amplify legal terms or be flexible to mandatory rules.

The foregoing illustrates that evidence available to plaintiffs in Mexico is somehow more limited than what is available in other jurisdictions, and its submission before the court along with how the trial is conducted, is still very formalistic.

Although from a theoretical standpoint it could be argued that Mexico has a well-designed mechanism to recover damages, a practical approach shows the contrary. Few cases can be referenced that illustrate the procedural complexities injured parties face to recover damages from a competition infringement. From the cases cited below, apparently only one might have been successful and the remaining three were either dismissed because of the absence of actual damages or are ongoing cases. Still, all of them are examples of one particular aspect that characterises litigation in Mexico in general: the procedural hardships imposed by the law are considerable.

Canel's v. Cadbury Adams

Back in 2006, Canel's, SA de CV (Canel's), a gum manufacturer, filed a suit against competitor Cadbury Adams Mexico, S de R. de CV (Cadbury Adams) trying to recover damages before the Superior Court of Justice of Mexico City. Canel's argued that Cadbury Adams had adopted certain aggressive commercial strategies that unlawfully displaced Canel's from the market (predatory pricing). Although there was no adverse *res judicata* decision from the competition authority recognising a violation of the Competition Act, Canel's sued for damages under a direct interpretation of Section 28 of the Federal Constitution.

This suit had its origins in a prior investigation conducted by Cofece's predecessor, the CFC, and was related to conduct that was scrutinised as relative monopolistic practices. However, that investigation was dismissed by the Supreme Court of the Nation, when the highest court in the federal system declared the unconstitutionality of certain provisions of the former Competition Act. Therefore, in the absence of a specific predatory pricing provision, the Supreme Court struck down the 'catch-all' provision that founded the investigation and decision. Upon this declaration of unconstitutionality, Canel's requested the court to make a court recognition that the defendant had incurred civil liability as a result of its commercial strategy, and the court should order Cadbury Adams to pay Canel's for the damages suffered.

Despite this, Canel's suit was dismissed by a civil federal collegiate tribunal on the basis that Canel's had failed to comply with the requirements imposed by Section 38 of the former Competition Act as no previous final decision recognising a competition offence was available. Moreover, the Collegiate Civil Circuit Court decided that the authority to determine whether a violation of the Competition Act exists or not is reserved to the corresponding competition authority and not to the judiciary, as Section 28 of the Federal Constitution does not empower courts to determine violations of the Competition Act.

Ajemex v. Coca-Cola

Between late 2010 and early 2011, Ajemex, SA de CV (Ajemex), Mexican subsidiary of AJE, a major international beverages company owner of 'Big Cola', among other brands, filed a suit against several companies of the Coca-Cola group and its bottlers in Mexico. Ajemex was trying to recover alleged millions in damages as a result of a decision rendered by Cofece's predecessor, the CFC, sanctioning several companies of the Coca-Cola group and its bottlers in Mexico for violations of the Competition Act in connection with certain exclusivities Coca-Cola had in retail and end-sale stores.

However, the *Ajemex* action was submitted before the Superior Court of Justice of Mexico City as a commercial lawsuit and not as a civil action. Consequently, the Superior Court dismissed the *Ajemex* action on the basis that although a final decision recognised a violation of the Competition Act, the *Ajemex* damages suit should had been filed as civil matter even if the act that originated the damages (i.e., unlawful conduct) was of a commercial nature. That dismissal was later confirmed by a civil federal collegiate tribunal.

Mexican Social Security Institute v. Probiomed, et al

Back in 2006, Cofece's predecessor, the CFC, conducted an investigation involving certain acquisitions done by the Mexican Social Security Institute (IMSS) for the procurement of human insulin and other products. After a thorough investigation, where the CFC issued indirect evidence for the first time to support a competition conviction, several pharmaceutical companies were sanctioned for bid-rigging (treated as an absolute monopolistic practice in Mexico). The alleged offenders challenged the CFC decision, but after long years of litigation, the Supreme Court of the Nation definitively confirmed the sanction against the pharmaceutical companies in 2015.

As a result of the Supreme Court's confirmation, IMSS sued the pharmaceutical companies before a federal district court specialist in antitrust and telecommunication matters, claiming damages around 660 million pesos (approximately US$34 million as of the time of writing). Although initially the suit was rejected several times by different civil and antitrust federal district courts claiming lack of proper jurisdiction, venue and other reasons, the case was finally admitted by the specialist district court in early 2017. Along with the admission of the suit, the specialist district court ordered certain injunctive relief (attachment of assets owned by the pharmaceutical companies to guarantee the damages claimed by IMSS).

This case has been considered to be a landmark case at least from a procedural standpoint, as it is the first case ever to have established, upon court precedent, that damages suits that result from competition violations recognised under a final, *res judicata* decision, can fall under the jurisdiction of a federal district court specialist in antitrust and telecommunications matters and need to be filed as a civil action under the FCC and FCCP. Moreover, this case has also confirmed, upon judicial precedent, that a unitary circuit tribunal, specialist in civil, administrative, telecommunications and competition matters, will serve as appeal court for any appeal filed within the trial, being the first precedent to clarify the uncertainty in the applicable laws.

Nevertheless, this case is also considered a landmark case from a substantive standpoint for three reasons. First, if the IMSS prevails, it would be the first case in which an injured customer (and not a competitor) can recover from a competition infringement. Second, it has also demonstrated the complexity of litigating these types of actions. Although the case was admitted almost two years ago by the specialist district court, the trial continues to be in its initial stages,

and there is no reasonable time-frame as to when it will be decided owing to ancillary challenges and proceedings available to both plaintiffs and defendants. Third, the competent court needs to rule on the issue of statute of limitations.

Wireless operators v. Radiomóvil Dipsa (Telcel)

This case has acquired particular relevance over the past couple of months. Although pursuant to the *IMSS v. Probiomed, et al.* case cited above, there seemed to be judicial clarification as to which courts have jurisdiction to resolve a damages action, this case indicates that possibly not only specialist courts in antitrust and telecommunications matters have jurisdiction over damages suits, but that civil courts might also have. This case appears to be the first case in which a damages award arising from a competition offence has been granted in Mexico.

Before the creation of Cofece and the IFT in 2013, Cofece's predecessor, the CFC, had authority to enforce the former Competition Act over the telecommunications sectors. Among its many investigations, in one of them, the CFC sanctioned Radiomóvil Dipsa, SA de CV (Radiomóvil Dipsa), which operates under the brand Telcel, a subsidiary of América Móvil, SAB de CV (América Móvil), the seventh largest mobile network operator worldwide (in terms of equity subscribers), part of the Slim-family conglomerate, for relative monopolistic practices.

According to the CFC, Radiomóvil Dipsa was guilty of increasing the costs of its competitors by imposing an interconnection rate (off-net) higher than the one that is self-charged in calls on its own network (on-net), sanctioning the firm for abusing its dominant position with an unprecedented fine of 11.9 billion pesos (around US$600 million at the time of writing).

This case has been challenging. Radiomóvil Dipsa was able to fight the CFC decision in courts for years with several successful appeals ordering the CFC to reverse both the sanction and the decision, allowing Radiomóvil Dipsa to avoid paying the fine by adopting and being compliant with several measures imposed by Cofece (who adopted the case after the disappearance of the CFC), as a result of certain leniency benefits under Section 33 *bis* 2 of the former Competition Act.

Notwithstanding, apparently Total Play and AT&T, among others, sued Radiomóvil Dipsa, arguing that even if Radiomóvil Dipsa adopted certain measures imposed by the competition authority to avoid the fine, the competitors still suffered damage from the alleged conduct between 2006 and 2011.

The suit, which was initially admitted by a federal civil district court, was later appealed before a unitary circuit tribunal specialist in civil, administrative, telecommunications and competition matters, which finally resolved in September 2018 that although Radiomóvil Dipsa was not forced to pay the fine for adopting certain commitments to correct the market, it still had to compensate its competitors for the damages caused, as a violation to the Competition Act was recognised, and the plaintiffs were able to demonstrate causation between the illicit conduct and damage suffered.

The decision issued by the specialised unitary circuit tribunal was challenged by Radiomóvil Dipsa through a direct *amparo* challenge before the Civil Federal Collegiate Tribunal, but was rejected confirming the decision from the unitary tribunal. This led Radiomóvil Dipsa to file an appeal against the rejection, which fell under the jurisdiction of the Supreme Court of the Nation. The Supreme Court, however, dismissed the appeal. Lastly, Radiomóvil Dipsa filed a last-resort additional appeal against that dismissal , which was finally also dismissed by the Supreme Court.

As a result, public records from the federal civil district court claim that as a result of the unsuccessful appeals, defendants have 'paid each and every one of the claims requested in this trial' by the plaintiff. Therefore, although to the current date there is no further access to the actual docket or decision of the trial, nor have Radiomóvil Dipsa or América Móvil admitted to have paid damages as consequence of this judicial determination, this case could be the first-ever damages award for a competition infringement, unless the parties agreed to settle the matter outside the court's jurisdiction.

Cofece v. Fernando Alanís Horn

Finally, although not originating from a damages claim, in an appeal filed by an individual against a decision issued by Cofece in the context of a cartel investigation, one of the federal collegiate tribunals specialist in telecommunication and competition matters resolved that information that allows the identification of infringers of the Competition Act should not be classified as confidential to protect the rights of third parties that might have standing to sue for damages.

The foregoing cases are evidence that private antitrust litigation in Mexico continues to be in its developing stages. Over a 26-year period since the inception of the first robust competition law in the country, the few attempts that have been made to recover damages arising from illegal behaviour have shown the challenges of surpassing the procedural hardships that characterise private antitrust litigation in the country.

In fact, even if Radiomóvil Dipsa competitors were successful in securing a damages award, this case shows several areas of concern, such as: the fact that competitors were able to recover damages in mid-2019 from conduct that took place between 2006 and 2011; and the fact that Radiomóvil Dipsa competitors have pursued a damages suit for more than four-and-a-half years to secure a victory. And although a damages award could be incentive enough, the reality is that there is still considerable uncertainty as to all the procedural limitations that characterise these types of actions.

Conversely, *IMSS v. Probiomed, et al.* could be a step towards clarifying the uncertainties created by the applicable laws. However, this case serves also as an example of the years of litigation required, as the suit was admitted almost two years ago and there is no reasonable time-frame as to when it will be decided.

This leads us to conclude that the development of private antitrust litigation in Mexico seems to be moving at a considerably slow pace. And whether we attribute this to the practical limitations imposed by civil law or the lack of sufficient incentives that surpass procedural hardships, Mexico's private antitrust litigation will still continue to face considerable challenges in the upcoming future.

Appendix 1

About the Authors

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Omar is a partner at Hogan Lovells based in the Mexico City office. He focuses on the areas of competition, commercial, and reorganisation and bankruptcy litigation as well as commercial arbitration. He secured his law degree *summa cum laude* and the best GPA of the Universidad Iberoamericana León (1987–1991). He holds an LLM with merits from the London School of Economics and Political Science (1996–97) and other post-graduates studies. He heads the commercial litigation and arbitration practices and co-heads the antitrust practice at Hogan Lovells Mexico. Omar joined Barrera, Siqueiros y Torres Landa in 1993 (now Hogan Lovells (Mexico)) as an associate and became partner in 2000. Omar was the chair of the antitrust and competition section of the Mexican Bar Association from October 2010 until March 2013. He was also appointed as a non-governmental adviser to the former Federal Competition Commission during the International Competition Network Annual Conferences held in The Hague (2011), Rio de Janeiro (2012), Warsaw (2013) and ICN-Cartel Workshop (Ottawa 2017).

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

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

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

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