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Treatment of legally privileged information in competition proceedings – Note by Mexico (IFT)

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More documents related to this discussion can be found at

www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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Mexico (IFT)

1. Introduction

1. In Mexico, there is no specific regulation regarding professional privilege before competition authorities. Nevertheless, article 73 of the Federal Law on Economic Competition (LFCE) states that the Investigative Authority of both the Federal Economic Competition Commission and the Federal Telecommunications Institute (IFT) is entitled to require any information or documents related to their investigations, through requirements and dawn raids. However, the exercise of this power must be in accordance with several constitutional rights in order to protect legal privileged information. Therefore, the reach of the investigative powers is subject to the interpretation that each competition authority provides within its sphere of competence and considering judiciary criteria.

2. Although the IFT has not yet issue general criteria on this matter, this contribution presents relevant judiciary precedents and a systemic review of the standard that prevails when defining and identifying client-attorney communications that can be claimed as privileged (protected) within antitrust investigations.

2. Main features of the competition procedure

3. In Mexico, the IFT investigates and sanctions wrongful acts according to the competition law, as the only competition authority in the telecommunications and broadcasting sectors.¹ Pursuant to the powers granted by the 2013 Constitutional amendment and the 2014 LFCE, the Investigative Authority has full autonomy and a wide range of tools to pursue anticompetitive conducts, including formal requirements, subpoenas and dawn raids.²

4. Additionally, the Constitutional amendment do not allow suspension orders in competition law cases. Moreover, in competition cases, only the final determination of the subject matter issued by the IFT may be challenged before the judiciary. It is in this stage in which alleged trespasses of procedural rules can be claimed, including those challenging information orders or requests.

3. Criteria regarding client-attorney privilege

5. In Mexico, Specialized Courts are in charge of dispute resolutions in antitrust, broadcasting and telecommunications, and in recent case law, such Courts have issued precedents about privileged information in competition proceedings. This ruling has grounds on several constitutional rights.

¹ Including anticompetitive mergers and conducts (unilateral and collusive), but also false declarations and failure to disclose required information.

² Article 28 of the LFCE.

3.1. Private Communications

6. Pursuant to article 16 of the Mexican Constitution, private communications are inviolable. Within civil disputes, the intervention of private communications is barred without exceptions. Whereas in criminal investigations, there are only two exceptions to this rule:

- Federal judiciary authorities can authorize requests to intervene private communications when competent authorities request it. Those will be valid when their issuance occurs within the context of a criminal investigation and it has a defined purpose. As Mexican courts only authorize interventions in exceptional circumstances, the requests must also state the persons authorized to intervene, the duration of the intervention and the specific cases in which an extension will be necessary.
- Personal communications' owners can voluntarily hand them to the authority. They can also waive their right to confidentiality of personal communications. There are no specific provisions to waive this right and the authority assesses them on a case-by-case basis.

3.2. Professional Secrecy

7. Article 5 of the Mexican Constitution refers to the exercise of professions. The legislation deriving from it specifically states that every professional is obligated to keep absolute secrecy of the cases trusted by their clients.³ In this sense, no attorney can be compelled to reveal privileged legal information used to provide adequate legal defense and the authorities shall respect the privacy of these communications. These provisions do not distinguish between in house professionals (subject to an employer—employee relationship) or independent ones.

8. Mexican Specialized Courts have found that confidentiality of private communications and attorney-client privilege have a strong bond with due process. They consider that freedom and secrecy of client-attorney communications is essential to an adequate counseling and to the standing of fair trial.

9. During this time, criminal and administrative law have evolved in different paths. The judiciary has been in charge of analyzing differences and similarities between the meanings of due process in criminal and administrative sanctioning procedures. Similarities arise when administrative procedure aims at sanctioning wrongful acts because in such circumstance the State is applying its punitive powers, just like in a criminal case. In such cases, Courts have deemed valid to “import” criminal law principles to administrative procedures when they are compatible with the circumstance or the rules applicable in the procedure stage.

10. Thus, when the IFT is in use of the State's punitive powers it can apply criminal law principles to competition law, according to judiciary criteria. These are the grounds to determine that confidentiality of personal communications and client-attorney privilege is applicable to competition law.

³ Article 36 of the Regulatory Law of article 5 of the Mexican Constitution, pursuant to exercise of professions in Mexico City.

11. In this context, the judiciary has resolved claims⁴ setting precedents on legal professional privilege and defining that professional secrecy is a part of procedural rights, not only in criminal law, but also in administrative law including competition procedures. Additionally, the judiciary established that confidentiality of independent attorney-client communications is essential for the legal professional privilege to exist, so attorneys can exercise its profession effectively, and provide clients with an adequate defense. This criterion does not include the relationship between in house attorneys-client.

4. The scope of the precedents

12. According to Mexican law, the mere existence of judicial precedents will not have immediate effects, as an *amparo* suit is required in order to claim its application. However, the client-attorney precedents are disruptive in at least two circumstances.

4.1. Admission

13. Specialized Courts have determined that confidentiality of private communications and client-attorney privilege are of utmost importance, even in competition cases. These rights are of such weight that a claim based on them in competition cases is a good reason to set aside the general rule excluding the admission of *amparo* suits against procedural acts in competition cases.

14. Thus, client-attorney privilege is disruptive to the extent of overriding the general rule of competition procedure. For that reason, Specialized Courts set several safeguards in order to admit an *amparo* suit against procedural acts with the mere claim that such privilege has been breached by such acts, and admit it only in very specific cases and upon fulfillment of certain requirements.

4.2. Requirements

15. The precedents are not applicable to every case; they aim only to protect the client-attorney privilege. The professional privilege will not protect documents or information if the attorney itself was (or could be) involved in the anticompetitive conduct.

16. Additionally, the judicial precedents state that in this kind of claims, affected parties must fulfill two characteristics:

- To be an attorney, and
- To be an external party or an independent, i.e. hired exclusively for defense purposes.

⁴ The main files are the following: Q.A. 41/2016 and R.A. 88/2017, of “*Primer Tribunal Colegiado en Materia Administrativa Especializado en Competencia Económica, Radiodifusión y Telecomunicaciones*” Court, as well as C.T. 7/2016, of “*Pleno de Circuito en Materia Administrativa Especializado en Competencia Económica, Radiodifusión y Telecomunicaciones*” Court. A redacted version is available in Spanish at: <https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralScroll.aspx?id=27603&Clase=DetalleTesisEjecutorias&IdTe=2016180>.

17. Such independent attorney must point out the documents or the information upon which confidentiality is considered breached. Therefore, legal professional privilege cannot protect documents or information that are not part of legal defense rights.

5. Treatment of legal privileged information

18. The precedents set the competition authority to disregard client-attorney privilege information as soon as such information is acquired during the course of an investigation. However, the competition authority may consider that the information acquired does not fall within the scope of client-attorney privilege and may use it as evidence to press charges against an anticompetitive conduct.

19. In that case, once the competition authority has obtained legal privileged information, the attorney (as a third party) has 15 days to file its legal professional privilege claim before the judiciary. If the judiciary considers that certain information fulfill the characteristics of legal professional privilege, it may order the competition authority to give such information the proper treatment in order to exclude it from the investigation.

20. Pursuant to the precedents, any other act seeking to widen the investigation on the grounds of privileged information will be deprived of any legal effect. This also means that no legal privileged information can be used as evidence to press charges or sanction an anticompetitive conduct.

21. Hence, if the competition authority seeks to have access to privileged information or communications between stakeholders and their attorneys, it can be obtained only with a waiver of the client-attorney privilege or if the attorney or the company render such information.

6. *Privileged information in international mergers and leniency cases*

22. The waivers submitted to the IFT never imply the permission for other economic agents to have access to confidential information. On the other hand, in international mergers or cartel cases –under leniency programs- it is a common practice that economic agents sign waivers allowing the IFT to exchange confidential information with other authorities, which might include communications protected under legal professional privilege.

23. The IFT does not have a specific request or clauses for waivers in international mergers or cartel cases. Nevertheless, the economic agents usually allow the IFT to give and request all kind of confidential information with other antitrust authorities, due to their interest to close as soon as possible each case. In this regard, if an economic agent waived privileged information in another jurisdiction, the IFT has the power to review it only if the economic agent signs a waiver before the IFT allowing it to have access to such information.

24. In cases conducted by the IFT, when incumbents waive legal privileged information, the IFT acts under the assumption that the waiver only applies to Mexican jurisdiction and that it is to be used within the powers conferred to the IFT. Consequently, if an economic agent wants to allow the IFT to share privileged information with other authorities, this permission has to be outlined in the original waiver; otherwise, the stakeholder has to sign a new waiver making clear the extent of the authorization.

25. As stated above, in overseas cases, economic agents commonly submit waivers allowing the IFT to have and permit access to privileged information in the relevant jurisdictions. However, in case the stakeholders do not initially sign waivers, the IFT only requests them when deemed necessary to make a proper assessment of each case. The waivers required by the IFT are as wide as possible in order to include all kind of confidential information, and if an economic agent wants to leave certain information out of the waiver, this condition has to be explicit.

7. Conclusions

26. There is no regulation to the treatment of client-attorney privileged information in antitrust cases. However, from the Mexican Constitution and judiciary precedents it is possible to establish some references to identify when those communications could be privileged and the rights they convey.

27. The state-of-the art on this matter provides useful referential criteria to identify client-attorney communications protected in administrative sanctioning procedures, such as LFCE enforcement: to be an independent attorney hired exclusively for defense purposes. Thus, documents and information emanating from an attorney bound to a client by a relevant relationship (e.g. employment or in-house counseling) are not protected by this privilege.

28. In this regard, the IFT is bound to protect and grant rights of professional secrecy, privacy, confidentiality of communication and due process, established in articles 5, 6, 7, 14 and 16 of the Mexican Constitution.

29. Therefore, if the IFT has access to client-attorney privileged communications through a dawn raid, it has to disregard that information and classify it as confidential. Nevertheless, there are specific circumstances under which the IFT can access privileged information and use it as evidence. These cases are mostly related to:

1. International mergers and leniency program cases, if the stakeholders willingly submit the information or if they sign waivers for that purpose;
2. Proceedings where the attorney could have aided and abetted the unlawful conduct.

30. In any case, the IFT has the power to determine by itself, when and in which cases it can use privileged legal information, in accordance to constitutional provisions and case law.