

CPI's North America Column Presents:

Criminal Sanctions for Cartel Conduct in Mexico

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1. Introduction

The fight against cartel conduct is, and has been for many years, a priority for the Mexican competition agency.

Recent reforms in Mexico provide an opportunity for more effective and efficient enforcement of anti-cartel laws and the imposition of criminal sanctions for cartel conduct with various implications that I will try to describe and analyze here.

2. Amendments that shaped the new Mexican competition policy

Since 1992, the law in Mexico established that cartel conduct, such as price fixing, market allocation, restriction of supply and bid rigging were to be considered as “absolute monopolistic practices” and *per se* violations.

In 2006 and 2011 major reforms gave more powers and increased sanctions under the competition law. Along those, in 2011 there were also amendments to the Federal Criminal Code. This reform included the criminalization of hard-core cartels; until then, the legislation did not foresee specific criminal sanctions for cartel conduct in Mexico, there were only certain offenses set forth in the Federal Criminal Code related to market harm, but the elements of the legal descriptions were poorly defined and out-dated.

In this 2011 reform, the Federal Criminal Code was harmonized with the competition law and established that there would be no criminal responsibility for those to whom the competition commission grants the benefits of leniency. This important correlation ensured that the administrative and criminal systems would work well and increased the incentives to participate in the leniency program dramatically.

A recent constitutional reform in 2013 and a new competition law enacted in 2014 resulted in an overhaul of the competition system in Mexico. Among several changes, these reforms transformed the authority (the Commission or COFECE) into a constitutionally independent body with new powers². The reforms also introduced new monopolistic practices, provided the Commission with more checks and balances for it is functioning, created specialized courts and provided autonomy to a “prosecutor” called the Investigative Authority.

The Investigative Authority is an independent body within the Commission for its functioning and decision-making, and it is in charge of the initiation and conduction of all investigations. Once the investigation concludes, there are two ways to proceed: In the absence of elements that suggest the existence of wrongdoing the Investigative Authority can propose the Plenum of Commissioners the closure of the file. On the other hand, if the Investigative Authority reaches the conclusion that there are elements suggesting the possible responsibility of certain firms or individuals, it will issue a Statement of Objections and then start a trial-like procedure before the commissioners. In this context, the criminal investigation can only start if the Investigative Authority refers the case to the Office of the Attorney General and this can only take place after the issuance of the Statement of Objections.

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² It also created a telecommunications regulator with powers to exclusive enforce competition laws in the telecommunications and broadcasting sectors.

3. Regulation of cartel conduct

a) The competition law

Hard-core cartels are considered “absolute monopolistic practices” which are defined by the law as those contracts, agreements, arrangements, or combinations among competitors, which have as an aim or effect: price fixing or price manipulation, market allocation, restriction of supply or bid rigging. According to the new law, the exchange of information is also considered a monopolistic practice when it has the object or effect of price fixing, supply restriction, market allocation or bid rigging conducts.

b) The Federal Criminal Code

From 2011, when competition criminal offenses were introduced, and until 2014, no cases were referred for criminal prosecution. Thus, aiming to enhance criminal provisions in 2014, the Federal Criminal Code was amended jointly with the new competition law.

The main reasons behind criminalization in Mexico is the recognition of cartels as a big evil that causes harm and losses to consumers, as well as the necessity of creating the right incentives to deter cartel activity.

The Criminal Code establishes a sanction of 5 to 10 years of imprisonment for those individuals directly involved in the cartel, which includes those who entered into, ordered or implemented an agreement among competitors.

Both administrative and criminal competition systems are explicitly interrelated. As mentioned, a criminal complaint from the Investigative Authority is a necessary pre-requisite for the Office of the Attorney General in order to prosecute a cartel case. The laws give the Investigative Authority discretionary power to file a complaint. This means that both the administrative (during the trial-like procedure stage) and criminal procedures will be parallel, as the Office of Attorney General will have to prosecute the case, even if the Plenum of Commissioners has not reached a resolution regarding the same case.

4. Cartel Enforcement Agenda

Cartel cases are at the center of the enforcement agenda and a clear priority. As part of its duties, the Investigative Authority aims to timely detect and conduct the investigation of monopolistic practices with or without leniency. Therefore, a new Intelligence Division is in charge of monitoring and analysing indicators in different markets according to the set of priorities established in the Commission’s Strategic Plan.

In this sense, the proactivity is becoming noticeable since ex officio cases have increased *vis-à-vis* the numbers of recent years. During 2015, the Investigative Authority started 4 ex-officio cartel investigations, particularly in strategic sectors such as the financial, agro-food, transport and public procurement sectors. Moreover, given an enhanced advocacy effort, several complaints were also received.

In addition, the Commission has experienced an increase in cooperation during investigations. What is more, COFECE has reached a significant upturn in the number of leniency applications received per year. During 2015, the Investigative Authority received 18 leniency applications,

which is 3 times higher than the number received in 2014. Only during the first months of 2016, the Commission received 17 leniency applications.

Moreover, dawn raids have become an effective tool to obtain new information for investigations. During 2015, the Investigative Authority conducted 16 dawn raids in 7 different cases.

These efforts have been worthwhile to successfully conclude cartel investigations. As of today, the Investigative Authority has concluded 11 cartel investigations, and has issued statement of objections in 64% of the cases.

5. Challenges in implementing criminal sanctions

The changes are not free of challenges. Since the Office of the Attorney General is the authority in charge of prosecuting all criminal offenses and COFECE is the administrative competition authority but with powers limited to the imposition of administrative fines and the referral of cases for criminal prosecution, several concerns have arisen from the imminent interaction of both authorities for sanctioning competition offenses. Criminal prosecutions are considered a great tool and power that should be thoughtfully exercised.

Finally, multi-jurisdictional investigations also pose an important challenge to competition criminal prosecution. Coordination is of the utmost importance in order to come up with the best possible solution to solve controversies arising from possible double jeopardy. It could be complicated to have “criminal tourists” that need to go around the world serving time for sentences in many jurisdictions for the same conduct.

6. Conclusion

Authorities have recognized cartels as a top enforcement priority around the world. Even more in North America with the vast experience of anti-cartel enforcement in the United States and Canada.

Anti-cartel enforcement has been a growing priority for COFECE. A new law in Mexico has enabled the Commission to enhance its effectiveness in the detection, investigation and sanctioning of cartel conduct but today one of the most important issues is the implementation of the criminal procedures. COFECE will take advantage of the legislation enacted in order to increase deterrence by going beyond administrative sanctions when needed. For this, the Authority will try to be wise and patient.

Criminal sanctions for cartels are a real trend. More than 30 jurisdictions have criminal sanctions for cartel conduct and more than 60 jurisdictions now have leniency programs. This is both an opportunity and a challenge because it will be harder to coordinate and to enforce the laws and sanctions imposed. Extradition and coordination in sentencing can become a reality.

Having criminal sanctions and procedures in the three North American countries opens the possibility of even more collaboration in the region for cartel enforcement and we should make the most of this opportunity.