National and International Developments

The Right to a Fair Defense: The Impact of Antitrust Recent Developments on Legal Privilege in Mexico

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Introduction

Legal privilege provides an enhanced form of protection over the confidentiality of communications exchanged between a lawyer and her client under specific circumstances contemplated by law.[1] Nonetheless, the differences between the litigation process in Mexico and other jurisdictions[2], together with a weak judicial precedent system,[3] inhibited the appearance of a clear jurisdictional definition on attorney-client privilege.

Until very recently, the law of privilege was considerably underdeveloped in Mexico. The few statutory provisions delineating the principles of privilege were limited to the obligation of professionals -including lawyers- to protect the confidentiality of their client's information. Statutory law or precedents failed to recognise the right to have legal secrecy and its impact on the fair and adequate defense of the prosecuted.[4]

Fortunately, antitrust has operated as an unintended game-changer for the law of privilege in Mexico. In 2014, an extensive amendment to the Mexican Competition Law afforded enhanced prosecution capacities to the Federal Commission of Economic Competition ('COFECE'), including -for example- the ability to perform dawn raids without a warrant. In this context, the need for an adequate defense for economic agents subject to investigation, fostered lawyers' claims to have attorney-client privilege respected in communications extracted during such dawn raids.

Key Points

- After years of absence of a clear jurisdictional definition, courts are starting to recognise the protection of legal privilege for external lawyers in antitrust procedures carried out in Mexico, following in certain aspects, the relevant precedents of the European Union ('EU').
- The tension between the provision of greater investigative powers to the competition authorities, and the entry into force of the new criminal justice system in Mexico, is resulting in interesting legal decisions such as the recent precedents on attorney-client privilege.
- Recent antitrust precedents only refer to the legal privilege of external counsels. For *in-house* counsels, the admissibility of the constitutional protection, remains uncertain, influenced by the European precedents.
- Further developments in attorney-client privilege in Mexico can be expected. Motivated by the recent legal precedents and the *United States-Mexico-Canada Agreement* ('USMCA'), the antitrust authority recently released draft guidelines on attorney-privilege regulation, for public consultation. Such guidelines are being heavily debated among practitioners and stakeholders in Mexico.

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1 Passmore, Colin. Privilege, United Kingdom: Sweet & Maxwell, 3rd Edition 2013, p. 1.

2 Please note that in Mexico, litigation procedures do not include a discovery stage as in other countries.

3 As further explained below, judicial precedents in Mexico are only binding if they meet specific standards imposed by the law.

4 As Alford notes, '*confidentiality is different from privilege in that the focus is not the communication itself, but rather, the attorney's duty not to disclose client confidences. And in some jurisdictions the confidentiality duty only applies to outside counsel, leaving in-house counsel less able to provide full and frank legal advice without the risk of disclosure.*' Alford, Roger *Attorney-Client Privilege in Global Antitrust Enforcement; remarks as Prepared for the Federal Economic Competition Commission*, Department of Justice, Mexico City, 2018, available at: https://www.justice.gov/opa/speech/ file/1066916/download

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The following is a brief review on recent precedents of the matter, and the emerging recognition by courts of the legal privilege in Mexico. Such precedents are highly influenced by the *Akzo Nobel* case of the European Union[5 6 7 8] as it will be set forth herein. Section I, discusses the current status of the law of privilege in Mexico. Section II revisits the changes in antitrust enforcement as a result of the recognition of the legal privilege in Mexico. In Section III, we describe the antitrust precedents and their implications for legal privilege. Section IV highlights the international influence in the legal privilege discussion in Mexico. Finally, Section V delineates the challenges for the future of legal privilege regulation in Mexico.

Legal privilege in Mexico

Legal privilege in Mexico is not provided for in a specific piece of legislation. The few existing provisions are scattered throughout different statutes such as the General Law of Professions of Mexico City which requires professionals to *'keep strict secret of the matters entrusted by the clients, except for any information mandatory requested by the law'*.[6-8] From a more procedural angle, the Federal Code of Civil Procedures establishes that those *'persons who must maintain professional secrecy'* shall be exempt from giving testimony to the authorities.[9]

Accordingly, legal privilege in Mexico has been predominantly understood as a duty of confidentiality. The scarce regulation fundamentally refers to the duty of confidentiality of professionals in general -including lawyers- towards their clients, rather than recognising the right of lawyers to provide an adequate defense. One of the few statutory references to privilege as it applies to attorneys is set forth in the Federal Civil Code which states that *'the prosecutor or attorney who reveals to the opposing party the secrets of his principal or client orprovides him with documents or data that harm him, shall be liable for all damages, and shall also be subject to the provisions of the Criminal Code for these cases.'*[10 11 * *]

However, in the context of recent reforms to the criminal justice system in Mexico, various statutory provisions that refer to communications' intervention have been established in the criminal codes. The basis of a new adversarial system involves a clearer recognition of the right to an adequate defense. Therefore, as part of the reform to the Mexican Constitution (the 'Constitution'), Article 16 provides that private communications are inviolable and that in no case will communications extracted by breaching such protection be admitted as evidence. [11-14]

The Mexican Supreme Court of Justice has imposed similar due process standards on criminal prosecutions and administrative sanction proceedings, as both are the result of the punitive power of the State, or *ius puniendi*.[15,16] As a consequence, courts have determined that criminal principles are likewise applied in antitrust proceedings, constraining the antitrust authority to the same rules in their investigations (*i.e. nullum crimen sine lege scripta, praevia, certa* and *stricta*) to the extent that they are compatible with the specific case. Therefore, the rules on the inviolability of communications and the right to a fair defense were recognised to be applicable in antitrust investigation procedures.[17]

Mexico lags behind the EU in the development of judicial precedents dealing with legal privilege. This is mostly attributable to Mexico's civil law system where court precedents have persuasive authority and are binding only when judicial decisions meet certain specific thresholds.[18] Another possible cause is the absence of legal tools such as *discovery* in litigation proceedings. Accordingly, very few precedents have been generated in relation to attorney-client privilege in Mexico.[19]

5 Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission Case C-550/07 ('EU Akzo Nobel').

6 General Law of Professions of Mexico City Article 36.

7 The Federal Code of Civil Procedures states the following *'Article 90.- [...] Ascendants, descendants, spouses and persons who must maintain professional secrecy are exempt from the aforementioned obligation, in cases in which it is a question of proving against the party with whom they are related. '*

8 As indicated by Garcia-Cuellar and Narcia, *'(...) this provision is applicable only in Mexico City, but the same obligation has been replicated by the majority of local state laws in Mexico.*' Garcia-Cuellar, Samuel and Narcia Martinez, Michel (Creel, Garcia-Cuellar, Aiza y Enriquez S.C.) 'Mexico' in *Attorney-Client Privilege in the Americas Professional Secrecy of Lawyers*, United Kingdom: Cambridge University Press, 2017, p. 384.

9 Federal Civil Code Article 2590.

10 *Idem*

11 Constitution Article 16 *'(...) Private communications shall not be breached. (...Communications that violate confidentiality established by law shall not be admitted in any case. (.)*'.

14 The general principles of the new accusatory criminal justice system in Mexico are established in Article 20 of the Constitution as follows: *'**Article 20**. (...) [Any defendant]: VIII. **Shall have the right to an adequate defense by a lawyer**, whom he shall choose freely even from the moment of his arrest'.*

15 *Tesis: 1a. CCCXVI/2014 (10a.);*

16 *Tesis: 1a. CCCXVI/2014 (10a.)*

17 *Tesis: P./J. 43/2014 (10a.)*

18 There are three ways in which a binding precedent (*jurisprudencia*) can be created in Mexico: (i) by reiteration of criteria, (ii) by contradiction of precedents, and (iii) by substitution. *Reiteration of criteria* needs five subsequent decisions with the same criterion not interrupted by another one to the contrary. *Contradiction of precedents* is established by elucidating the discrepant criterion held between two jurisdictional bodies. Please note that the jurisprudences created by reiteration of criteria, contradiction of thesis and substitution are mandatory.

19 Cruz Barney, Oscar *El Secreto Profesional del Abogado en Mexico*, Mexico: UNAM, Instituto de Investigaciones Juridicas, 2018.

Antitrust enforcement as a *Game-Changer* on legal privilege recognition in Mexico

As a result of antitrust cases in recent years, there have been interesting developments for legal privilege in Mexico. A couple of recent rulings of the Mexican Supreme Court have fundamentally adopted the European legal reasoning to justify the need to protect attorney-client communications in proceedings in which the authority acts as a sanctioning body.

Antitrust enforcement procedures evidenced the necessity of a clear understanding of legal privilege in Mexico. As explained above, virtually all the legislation on the matter was limited to the duty of confidentiality in professional services. Nonetheless, the recent enforcement powers granted to COFECE in connection to dawn raids during investigations, encouraged lawyers to demand the protection of their client's rights of defense.

The tension between antitrust law and criminal reform in Mexico

The process to reform the antitrust framework in 2014[20] [21] [22] [23] ran in parallel with profound changes in Mexican criminal procedural legislation. On the one hand, strong arguments were made by antitrust authorities to (i) increase the authority of the prosecutors to perform *dawn raids*[21] without warrants, and (ii) to avoid the common practice of economic agents of delaying antitrust investigations by activating the constitutional procedure *(Amparo trial* (see below)) during the course of the antitrust process, as a matter of client strategy. The antitrust authorities succeeded to advance a reform on these two fronts, while creating a direct tension with the underlying principles of the criminal justice reform, which provided the defendant with enhanced protection from the arbitrary use of the sanction powers of the authority.

In this regard, the criminal justice reform of 2008 enhanced the principle of the inviolability of private communications. The reformed National Code of Criminal Procedures provided that for a private communication to be *intercepted*, the competent authority is required to request an order from a Federal Control Judge to authorise the intervention expressing the duration, type of intervention, and the subjects. The National Code of Criminal Procedures also broadly provides that the relevant judicial authority may not grant these authorisations when dealing with communications between the client and his defense attorney.[22]

In addition, the Constitution states both the right of the defendant *'to declare or remain silent'* and the right to *'be informed about the charges brought against him and his right to keep silent (...)'*.[23,24] Recent precedents have extended the scope of such right to include the requirement to testify in the presence of a lawyer and extend its applicability to administrative procedures.[25-27] Nonetheless, the antitrust reform of 2014 allowed COFECE's to carry out dawn raids without a warrant and to perform dawn raids without publishing that an investigation has been initiated in the relevant market.[28,29] Moreover, since 2014 the economic agents are prevented from challenging potential abuses of the competition authorities during dawn raids or at any stage of the process as the *Amparo* trial can only initiated for final resolutions.

In Mexico an *Amparo trial (habeas corpus)* is a trial conducted before Federal Courts, with the purpose of protecting constitutional rights of individuals that have been interfered with by public authorities[30], whether by the issuance of a final resolution that concludes a procedure or any other actions or omissions that may affect their interests. In most of the cases, the plaintiff can

20 Amendments to the Mexican Constitution in 2013, with the main objective of leveling the landscape of the telecom industry in Mexico, resulted in a significant revision of Mexico's competition law framework and the creation of two new autonomous agencies with jurisdiction over competition matters.: The Federal Institute of Telecommunications (IFT), and COFECE. As a consequence, a substantially new Federal Economic Competition Law (Competition Law) was enacted that became effective on July 7, 2014.

21 In Mexico, *dawn raids* are procedures ordered and conducted by the Investigative Authority of COFECE (the 'Investigative Authority'). As in other jurisdictions, the main purpose is to obtain data and documents at the places where the authority presumes it can find elements for the investigation on probable violations of the Competition Law.

22 National Code of Criminal Procedures '*Article 244. Communications and any information generated or exchanged between the accused and persons who are not obliged to testify as witnesses by reason of kinship, professional secrecy or any other shall not be subject to intervention. In any case, they shall be inadmissible as a source of information or means of evidence.*

23 Constitution Article 20 A. II

24 Such right is then reiterated by the National Code of Criminal Procedures in its Article 113 III that states the right to '*declare or remain silence, in the understanding that silence must not be used against him*', being considered a right in any criminal procedure.

25 Tesis: 1a. CXXIII/2004

26 Tesis: 169880. XVII.1o.P.A.50 P

27 Tesis: 1a. CCXXIII/2015 (10a.)

28 Federal Economic Competition Law, Articles, 28 II, 73, 75, and 119, and Chapter Four, Section Fourth of the Regulations.

29 As in other jurisdictions during a dawn raid, the economic agent (as well as its officers or representatives) have the obligation to allow the inspection to take place and to facilitate the actions of the officers of the Investigative Authority. Preventing access to the Investigative Authority's officers, refusing to provide them with the requested documents and information, not answering their questions, or opposing in any way to the inspection, results in a *prima facie* presumption that the facts attributed to the potential offender are true, based upon the best available information.

30 Fix-Zamudio, *Estudio de la defensa de la constitucion en el ordenamiento mexicano*, Edicion 2ª, Editorial Porrua, Mexico, 2011.

request the Federal Courts to suspend the act that is being challenged through the Amparo trial, until the same is resolved *(suspension)*.

However, in antitrust matters since 2014, resolutions are not *suspended* during the Amparo except in case of fines and/or divestiture remedies.[31] [32] [33] [34] The *intra-procedural Amparo* was eliminated from the new antitrust legislation arguing its previous strategical overuse by the economic agents. Therefore, the antitrust reform of 2014 granted strong legal powers to COFECE while also diminishing the previous checks and balances, allegedly to enhance COFECE's ability to investigate antitrust infringements.

Accordingly, the antitrust reform might have created tensions with the principles of the new criminal justice system. Providing unprecedented powers to the Investigative Authority while limiting the capacity of the economic agents to challenge *intra-procedural* abuses, soon resulted in allegations of violations to the constitutional rights of confidentiality, defense, and inviolability of communications. Attorney-client privilege was one of the first issues that were trapped in such tension, and thus, the courts started to receive claims from economic agents.[32]

New antitrust precedents of legal privilege in Mexico

In 2016, courts determined that attorney-client communications in an antitrust investigation must be protected by the human rights of privacy, inviolability of communications, and professional secrecy. Accordingly, courts resolved that attorney-client communications are protected as confidential, even if said information was obtained as a result of dawn raids in compliance with the Law.[33,34]

The most significant recent precedent on legal privilege, the *Complaint 41/2016*[35] formally established the *admissibility* of the *Amparo* initiated by an external counsel who challenged the extraction of client-attorney documentation carried out by COFECE in an investigation. The decision was influenced by EU precedents, with the distinction that unlike EU *Akzo Nobel* ruling, the Mexican courts did not expressly refuse to extend legal professional privilege to in-house lawyers.

In this paradigmatic precedent, it was resolved that the extraction of information and/or documents during an investigation process conducted by COFECE (which may be considered confidential as a result from the assessment of an outside counsel to his client) can be exceptionally challenged through an *Amparo* trial **as the external counsel has the right to provide an adequate defense to the investigated agent and she is a third party to the process**. The foregoing, in application of due process and protection against self-incrimination, as well as *the protection of the legal privilege in communications between a lawyer and his client* when the latter is facing an antitrust process.[36]

The *Complaint 41/2016* is a landmark decision in the Mexican legal system, since it distinguishes between having the right to professional privilege, and the correlative obligation of confidentiality. It also points towards a specific regulation of attorney-client privilege in Mexico, recognising it as a fundamental human right enshrined at a constitutional level, consistently with international trends. Finally, it represents an analogous application of criminal process rules, thus extending the application of constitutional principles beyond the realm of criminal law, to administrative law.[37]

As a result of the criterion set forth in *Complaint 41/2016*, and after analysing several previous non-binding precedents of different courts, in 2017 a Plenum of Circuit in *Contradiction of Precedents 7/2016*[38,39] *(Plenum of Circuit)*, bindingly concluded the admissibility of an *Amparo* action initiated by an outside counsel who challenged the extraction of client-attorney documentation carried out by COFECE on a dawn raid. Although constitutional protection through an *Amparo*

31 Pursuant to the Constitution, *Amparo* actions are not admissible against intra-procedural acts carried out by any competition authority. Article 28 of the Constitution -the core of the antitrust regulation in Mexico- establishes that '(...) *VII. The general regulations, acts or omissions by the Federal Economic Competition Commission and the Federal Telecommunications Institute may only be subject to challenge through* indirect Amparo trial, *and shall not have the benefit of an injunction* (...)'. This limits the capacity of economic agents to challenge such acts until the end of the process when a final resolution is issued.

32 It will be interesting to see in the following years if evidentiary elements obtained during the visit could be challenged on these grounds. Precedents are not available for now, as the criminal justice reform is very recent, and the economic agents investigated cannot dispute the dawn raids until the end of the procedure.

33 Tesis: I.1o.A.E.194 A (10a.)

34 Tesis: I.1o.A.E.193 A (10a.)

35 Complaint 41/2016, resolved by the First Collegiate Circuit Court in Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications on November 10th, 2016.

36 In alignment with *Hilti AG v Commission of the European Communities*.

37 Likewise, having great influence with *AM & S Europe Limited v. Commission of the European Communities* by recognising the confidentiality of communications as *'a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognised, and that as such that right should be recognised and applied.'*

38 Contradiction of Precedents 7/2016 of the Plenum Circuit Court for Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications.

39 *Contradiction of Precedents 7/2016* **incorporated the precedent of** *Complaint 41/2016* **to the contested criteria, as it was considered to be materially relevant for the discussion.**

action is not available against such intra-procedural acts, the extraction of information and/or documents carried out by COFECE on a dawn raid was challenged by the outside counsel to one of the investigated economic agents, which is a third party in the process, through an *Amparo* lawsuit. The rationale for the admissibility of such *Amparo* was that the affectation suffered by the outside counsel on its obligation and commitment to protect professional secrecy, cannot be deferred until the final resolution is issued, since the outside counsel would be left vulnerable in relation to such obligation.[40]

In Mexico a contradiction of precedents *(contradiction de tesis)* arises when two or more Federal Courts hold dissenting judicial criteria over a same matter of law, regardless the similarity of the factual circumstances.[41][42][43][44][45][46]* In this sense, said legal figure resolves dissenting judicial criteria, shaping a single decision over the matter. The dissenting judicial precedents under the *Contradiction of Precedents 7/2016,* were (i) the *Complaints 44/2016*[42] and *25/2015*[43], *vis-a-vis* (ii) the *Complaint 61/2016*[44] and *Judicial Review 124/2015*[45].

On the one hand, *Complaints 44/2016* and *25/2015,* essentially indicated that the *Amparo* lawsuit was *clearly inadmissible*, when the challenged act is derived from a dawn raid order and its application by COFECE, since such acts do not constitute a final resolution and do not cause *per se* irreversible damages to substantive rights, and hence shall be deemed considered an 'intraprocedural' act.

Conversely, in *Complaint 61/2016* and *Judicial Review 124/2015,* the court resolved that a dawn raid order **does not constitute an** *intra-procedural* **act since it could be the execution of a definitive act**, and thus, an *Amparo* lawsuit cannot be disposed of as *clearly inadmissible*. Therefore, the Amparo lawsuit should be support the damages that the dawn raid order may cause. Therefore, the court should not determine *ex-ante* inadmissibility of the constitutional protection.

The influence of international law in the legal privilege discussion

Interestingly, the court cited the EU *Akzo Nobel* precedent in the resolution of the *Complaint 41/2016*. In EU *Akzo Nobel*, the Court of Justice of the European Union, determined that the benefit of professional privilege (professional secrecy in relation to attorney-client communications) is subject to two conditions: (i) the exchange of information must be connected with the client's right of defense; and, (ii) the exchange must arise from or emanate from 'independent lawyers', i.e. lawyers who are not linked to the client by an employment relationship.[46,47]

The *Complaint 41/2016* and the *Contradiction of Precedents 7/2016* explicitly includes the requirement of connection of the client's right of defense with the exchange of information, being said right of defense interpreted as a right of the client, and also a correlative obligation of the lawyer. This connection is interpreted in Mexico along with substantive rights within the framework of the exercise of the right to an adequate defense, including but not limited to the right of the client's privacy and the inviolability of communications applied both for the client and attorney.[48]

Moreover, the EU *Akzo Nobel* ruling specifically states that: *'legal professional privilege does not cover exchanges within a company or group with in-house lawyers'*. It also explains that *'the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations,*

40 The foregoing in alignment with the core purpose of the privilege, which is *'to encourage clients to make full disclosure to their attorneys' Fisher v. United States, 425 U.S. 391 (1976).*

41 Tesis: P./J. 72/2010.

42 Sustained by the First Collegiate Court for Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications on October 6th, 2016.

43 Sustained by the First Collegiate Court for Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications on April 23, 2015.

44 Sustained by the Second Collegiate Court for Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications on August 26, 2016.

45 Sustained by the Second Collegiate Court for Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications on January 28, 2016.

46 It is also worth to note that, in principle, communications with in-house lawyers in the European Union, are not protected by the *advice privilege.* For example *AM&S Europe Ltd. V. Commission of the European Communities* states that '*such communications are made for the purposes and in the interests of the clients rights of defense and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment*' It is difficult to argue such independence in the advice of in-house lawyers.

47 Unlike the United States, which conditions are: *'(1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice.' United States v. Construction Products Research Inc., 73 F.3d 464, 473 (2d. Cir 1996)* and *United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968).*

48 Even though it is a paradigmatic change in Mexico, no reference was made as to the needed qualifications of the lawyer for a client to be protected by the legal privilege, nor the extent of the same to lawyers of other jurisdictions.

but also negatively, by the absence of an employment relationship.[49,50]

As discussed above, in the *Complaint 41/2016*, the courts ruled on the admissibility of the *Amparo* action filed by the *outside* counsel, derived from the extraction of private attorney-client communications. The criterion clearly highlights the fact that the outside counsel has the character of a third party with respect to the dawn raid procedure conducted by COFECE. Therefore, the grounds of constitutional and legal inadmissibility of an *Amparo* action does not apply to external counsel, as the rights of the external counsel are jeopardised at the very moment of the information extraction and it makes no sense under these circumstances to wait until the end of the procedure to commence and *Amparo* action.

Although it remains an open question, in Mexico the reasoning seems to be substantially different for *in-house* counsel. As in Europe, the *ratio decidendi* of the precedent at hand focused on outside counsel, whilst providing no legal basis for the proposition that in-house lawyers have the benefit of legal privilege in Mexico.

The future of legal privilege in Mexico

As discussed in this paper, interesting developments on legal privilege are occurring in Mexico. Nevertheless, there is still a long way to go in order for attorneys and defendants to have a clear delineation on the matter. Below we discuss to recent documents which highlight the policy efforts in Mexico, to recognise and understand attorney-client privilege.

USMCA:fairness and competition law

The recently executed (pending to be ratified), USMCA, will likely be the most relevant instrument for Mexico regarding foreign trade. Under the USMCA, the signatory states would be bounded to recognise and protect the client-attorney privilege. Article 21.2, Section 2, paragraph (c), subparagraph (ii), related to the *Procedural Fairness in Competition Law Enforcement*, establishes the following:

'2. Each Party shall ensure that its national competition authorities:

[...]

(c) Afford to a person a reasonable opportunity to be represented by legal counsel, including by:

[.]

(ii) recognising a privilege, as acknowledged by its law, if not waived, for lawful confidential communications between the counsel and the person if the communications concern the soliciting or rendering of legal advice;[49*51]

In this spirit, the USMCA would be including the obligation of the signatory parties to recognise the fundamental right of a lawyer to protect the client's right of defense. Moreover, under Section 3, on the same article 21.2, each Party should also ensure that all information that its national competition authorities obtain during investigations and reviews, and that its laws protect such information as *confidential* or *privileged*, subject to applicable legal exceptions.

Comment on COFECE's draft of the technical criteria

Even when courts recognise that attorney-client communications cannot be violated or used against the defendant, in practice there are no mechanisms to ensure that such communications will not be obtained and influence the judgement of the authority. In that regard, on December 11, 2018 COFECE published for public consultation the draft of *'Technical Criteria of the Federal Economic Competition Commission for the management of information resulting from the legal advisory to economic agents'* (the 'Technical Criteria'). Unfortunately, and despite of the fact that it is highly questionable that COFECE has the legal authority to regulate this subject, the document still dedicates most of its length to establish limitations in the attorney client-privilege and very little to describe the mechanisms in which the authority will comply with the constitutional obligation to protect this fundamental right.

Although the efforts from COFECE to provide legal certainty are laudable, the text of the Technical Criteria is predictably receiving criticism from stakeholders. Among other things, the first draft limits the scope to *external* counsels, provides a small period to identify privileged information after inspections, and the arrangement of the *hearing committee* seems far from resulting in an independent body. Unlike EU *hearing officer*, the *hearing*

49 '(....) *The benefit of legal professional privilege with respect to communications between lawyers and their clients is subject to two cumulative conditions. First, the exchange with the lawyers must be connected to the client's rights of defense and, second, the exchange must emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.* (...) *An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence of his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client'*. EU *Akzo Nobel*.

50 Summary of Judgment EU *Akzo Nobel*, paragraphs 2, 6 and 8.

51 United States-Mexico-Canada Agreement (USMCA), Charter 21 'Competition Policy', Article 21.1, Section 2, Competition Law Authorities.

committee in COFECE's draft does not meet the mandate to *'decide impartially and independently whether a document is privileged'* or since such committee is not integrated by *'an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings*'.[52] In the absence of a definition of legal privilege in Mexico, the grounds under which such committee would decide if the information is protected by attorney-client privilege, remains uncertain.

On a larger perspective, the fear of economic agents and practitioners revolves around the tone of the Technical Criteria. It is arguable that fundamental rights such as the legal privilege, should be protected *ex officio* by public authorities, contrary to the Technical Criteria design which demand for an actual request from the parties involved in the procedure conducted by COFECE. The Technical Criteria would hardly pass the judicial test in its current version, as it seems that the comments made by the American Bar Association (ABA) to COFECE's most recent attempt to regulate legal privilege in 2017 are still applicable as the it still does not *'encourages necessary candor [from economic agents] and thereby [does not] enhances the attorney's ability to accurately assess the client's legal posture'*.[52] [53]

Advice privilege and practical guidance

Finally, third-party communications in non-litigation contexts also pose a big question mark on the scope of the law of privilege in Mexico. As Passmore notes, in common law countries, '[legal] *advice* privilege cannot protect from disclosure a communication between either a client or his lawyer and a third party', those of which are only protected in a litigation context.[54] Nonetheless, considering the significant risks in non-litigation procedures before COFECE in Mexico, it is submitted that all attorney-client communications generated in the context of an investigation procedure as well as in the context of an authorisation process before COFECE should be granted unambiguous privileged protection to ensure that the client will receive an accurate and clear advice from her lawyer, without such communications being used against him on a later stage or a different procedure.

As there are still no binding regulations in Mexico on the process to assure that an attorney-client communication is protected by the legal privilege, in practice it is common to attend to the following recommendations: (i) insert in both the matter and the content of correspondence *'Privileged and Confidential - Right of Defense*'; and (ii) be precise in the content of the information, and specify that it derives from an external assessment. By virtue of the foregoing, in the event of a dawn raid in Mexico, the client can identify protected information and inform COFECE of his/her right of defense.

52 European Commission (2011), *Decision on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695/EU).*

53 For any additional information see: *Comments of the American Bar Association's Section of Antitrust Law on Attorney-Client Privilege in response to the Consultation on Amendment to Competition Law Regulations issued by the Federal Economic Commission*, Section of Antitrust Law of the American Bar Association, 2017.

54 Passmore, Colin. *Privilege*, United Kingdom: Sweet & Maxwell, 3rd Edition 2013, p. 144.