

Courts recognise attorney-client privilege in antitrust matter for first time

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Introduction

Facts

Relevant judging criteria

Comment

Introduction

On December 8 2016 the First Collegiate Tribunal on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications ordered the admission of an *amparo* trial (ie, a federal trial in which the complainant alleges a violation of his or her constitutional rights by an authority) against the Federal Economic Competition Commission (FECC) for the actions of its representatives, who had obtained confidential documents protected by attorney-client privilege during a dawn raid.

The tribunal's decision is the first in which a Mexican court has accepted the challenge of a dawn raid since the 2013 constitutional amendment establishing the FECC and the Federal Institute of Telecommunications (IFT) was adopted. Pursuant to Article 28 of the Constitution, any legal claim against the FECC or the IFT within the framework of an investigation is inadmissible. Until this ruling, the Mexican courts had systematically rejected any *amparo* trial or legal challenge regarding the FECC's actions in dawn raids, including those claiming a violation of attorney-client privilege regarding confidential information or private communications.

This landmark judgment recognises attorney-client privilege and the attorney-client work product doctrine in an antitrust context for the first time and opens the door for FECC and IFT actions breaching such privilege – including the obtainment of privileged information – to be challenged.

Facts

In May 2016 the FECC conducted a dawn raid on an economic agent as part of a cartel investigation. During the raid, FECC officials copied the hard drive of one of the company's managers, including all communications with lawyers regarding the investigation.

The company's attorney – as a third, uninvolved party in the investigation – brought an *amparo* trial against the FECC's actions, claiming a direct violation of its rights to privacy, professional secrecy and the free exercise of legal practice, which had ultimately harmed its client's right to a due defence.

The trial was deemed inadmissible at the first instance. Therefore, the claimant legally challenged the decision before the first collegiate tribunal, which declared the *amparo* trial against the FECC's actions to be admissible. As such, the first-instance judge had to admit the *amparo* trial, which is ongoing. If a breach of attorney-client privilege is proven, the judge will have to rule in the claimant's favour.

Relevant judging criteria

In its decision, the tribunal established the following relevant criteria:

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- As a general rule, the obtainment of information and documents within an FECC or IFT investigation can be challenged only after the final ruling in the administrative procedure that such authorities have conducted against an economic agent has been issued.
- However, if the FECC or the IFT breach human rights directly through an irreparable act of execution, these actions can be challenged by the affected person directly through an *amparo* trial.
- The obtainment of attorney-client privileged information is deemed to be an irreparable act of execution, which enables economic agents subject to investigation, or their lawyers, to challenge the FECC's or the IFT's actions.
- Attorney-client privilege covers all written materials created by lawyers regarding their clients' exercise of their right to defence.
- In principle, communications with internal lawyers are not covered by attorney-client privilege.
- In order for a challenge to be admissible, the claimant must identify the information protected by attorney-client privilege and submit it as part of the claim.

Comment

In order to avoid economic agents bringing future legal challenges or trials, the FECC and the IFT should establish clear and objective criteria for the treatment of confidential information or documents that can be obtained during a dawn raid. If FECC officials access attorney-client privileged information obtained during a dawn raid, this could corrupt the entire procedure and render it illegal.

Further, it is highly recommended that economic agents subject to a dawn raid obtain a forensic image of hard drives copied by the FECC or the IFT, so that they can identify all of the privileged information obtained by the authorities during the raid.

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