

Legal privilege stands: FECC must guarantee its applicability

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Introduction

On December 8 2016 the First Collegiate Tribunal on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications recognised the concept of attorney-client privilege and the attorney-client work product doctrine in an antitrust context for the first time (for further details please see "[Courts recognise attorney-client privilege in antitrust matter for first time](#)"). However, the tribunal's ruling was non-binding and could be used by specialised judges only as a guide.

Following the tribunal's decision, the specialised courts issued two rulings reinforcing the applicability of attorney-client privilege in Mexico:

- The first decision recognised attorney-client privilege as a mandatory criterion. Therefore, all specialised judges must admit *amparo* trials (ie, federal trials in which the complainant alleges a violation of its constitutional rights by an authority) against the antitrust authorities in case of a breach of attorney-client privilege in the context of a dawn-raid, in accordance with specific rules.
- The second decision ordered the Federal Economic Competition Commission (FECC) to overturn all tainted acts derived from the removal of a privileged communication in a cartel investigation.

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Pursuant to Article 28 of the Federal Constitution, any legal claim against the FECC or the Federal Institute of Telecommunications in the context of an investigation is inadmissible (only final rulings are subject to judicial review). However, following an *amparo* trial brought directly by a legal firm, the First Collegiate Tribunal on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications established an exception to this rule in the context of attorney-client privilege.

In December 2016 the tribunal considered that an *amparo* trial should be admitted, as an exception to Article 28 of the Federal Constitution, if:

- the competition authority obtained privileged information during a dawn raid; and
- the claimant is the attorney itself, acting as a third uninvolved party in an antitrust investigation.

However, in a previous case (also brought by a law firm), the Second Specialised Collegiate Tribunal had argued that even if a competition authority obtained information protected by attorney-client privilege during a dawn raid, there could be no exception to Article 28 of the Federal Constitution.

AUTHORS

[Lucía Ojeda Cárdenas](#)



[Ernesto Álvarez Castillo](#)



In February 2018 the Specialised Plenum of the Circuit Court analysed both arguments and held that the exemption rule should be binding on all specialised judges. Given the specific case, this exemption is valid only if:

- a claim is brought by external counsel as co-owner of the subtracted information; and
- the attorney identifies in its *amparo* suit all of the information for which protection is claimed.

Notably, this decision considered a specific case in which privileged information created by external counsel was seized during a dawn raid. As such, the decision did not establish the final scope of attorney-client privilege.

FECC must guarantee attorney-client privilege

After two years of litigation, the First Collegiate Tribunal on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications has finally issued a final ruling acknowledging that the FECC breached the attorney-client privilege principle during a dawn raid. In light of the ruling, it is possible that the FECC's infringement may have transcended the investigation and corrupted the entire procedure.

The tribunal's ruling is relevant, as it demonstrates the possible outcomes of a violation of attorney-client privilege by the antitrust authorities. In this regard, the effects of the *amparo* trial were that the FECC had to:

- destroy the privileged information and any copies thereof;
- refrain from accessing privileged documents or using information contained therein; and
- overturn any subsequent acts which derived from FECC officers seeing or using privileged information.

Discussions with the first tribunal concerning whether the FECC has complied with all of the orders included in the ruling are ongoing.

Comment

Attorney-client privilege is a fundamental legal pillar, as it enables due process guarantees to be fulfilled. In this regard, it is fundamental that antitrust authorities, particularly the FECC, issue public, clear and transparent procedures in order to assure economic agents and practitioners that they use privileged information only for evidentiary purposes.

It is clear that the FECC will not formally use privileged information during an investigation. However, in the absence of clear protocols, there are insufficient guarantees that FECC officials will not use privileged information to identify cause for new investigations or discover evidence that would otherwise not have been found. If this happens, the specialised courts may overturn such investigations. As such, the competition authorities should self-regulate this matter in line with international best practices.

For further information on this topic please contact [Lucía Ojeda Cárdenas](#) or [Ernesto Álvarez Castillo](#) at SAI Consultores SC by telephone (+52 55 59 85 6618) or email (loc@sai.com.mx or eac@sai.com.mx). The SAI Consultores website can be accessed at www.sai.com.mx.

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