

Goodbye to client-attorney privilege in Mexico?

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Authors: [Henri Capin-Gally CFA](#), [Román González Melo](#), [Germán Ricardo Macías](#)

On September 5th, the Panel of the Mexican Economic Competition Commission (“Cofece”) met to decide whether to approve new regulations on client-attorney rights and privileges in antitrust proceedings (“Regulations”)¹

If approved by Cofece’s Panel –in analogous terms to the revised draft disclosed in July 2019²– the Regulations will:

- Permit Cofece to exercise its subpoena powers to obtain information from clients that includes attorney-client communications in all investigation proceedings under its jurisdiction.
- Allow the Commission to use information extracted from attorney-client communications against the corresponding client; *unless* such communications or information was generated (i) by a licensed attorney; and (ii) with the purpose of obtaining legal advice (“**Exclusion Criteria**”).
- Create two non-independent Committees with members appointed by Cofece’s Investigation Authority or Technical Secretary (depending on the type of proceeding), which will wield broad powers to determine *ex post* whether any submitted communication or legal advice meets the Exclusion Criteria.
- Grant standing only to clients (not to attorneys) to provide reasons and evidence showing the information submitted pursuant to a subpoena meets the Exclusion Criteria.

In Mexico, the question on whether an autonomous authority such as Cofece enjoys constitutional powers to issue regulations that govern professional secrecy and client-attorney privileges or that limit fundamental rights is unsettled. Currently, State Law governs professional secrecy; Federal and State Law govern privileges in court and administrative proceedings, while limitations to fundamental rights are set forth in the Constitution itself.

If approved, Cofece will apply the Regulations in antitrust proceedings that are still ongoing on the date they become effective, *i.e.*, a day after the Regulations are published in the *Federal Official Gazette*.

¹ *Disposiciones regulatorias de la comisión federal de competencia económica para el manejo de la información derivada de la asesoría legal que se proporcione a los agentes económicos.*

² Available at: <https://www.cofece.mx/wp-content/uploads/2019/07/Anteproyecto-DRs-Privilegio-legal-para-consulta-publica.pdf>.

White & Case, S.C.
Torre del Bosque - PH
Blvd. Manuel Avila Camacho #24
11000 Ciudad de México
Mexico

T +52 55 5540 96 00

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