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Chapter 12

MEXICO

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I INTRODUCTION

The subject of the interaction between the protection of intellectual property rights and the protection of a sound competition environment for commerce is of the utmost importance in Mexico, as it is worldwide. This subject has acquired particular significance as a result of the development of sophisticated inventions and processes, primarily associated with technology and telecommunication industries.

As a member of the World Trade Organization (WTO) since 1 January 1995, Mexico has enacted laws and regulations that protect intellectual property (IP) consistent with the principles, guidance and best practices applicable to the members of the WTO. Mexico is also a party to various international treaties that seek to protect intellectual property rights (the Paris Convention for the Protection of Industrial Property, the Convention establishing the World Intellectual Property Organization and the Patent Cooperation Treaty, among many others) and has adhered to the principles of the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights).

The Mexican Federal Constitution (the Mexican Constitution) generally prohibits monopolies, antitrust practices and other activities that hinder competition among market participants. However, the Mexican Constitution includes a specific exclusion, providing that privileges granted to authors and artists in the production of their works and other privileges granted to the creators of inventions shall not constitute monopolies.

Consistent with the constitutional mandate, the Mexican Congress enacted the current Industrial Property Law on 27 June 1991 (as amended, the IP Law). The matters subject to the IP Law are further governed by additional enabling regulations issued by the Ministry of Economy.

From an antitrust perspective, Mexico enacted its first antitrust law on 24 December 1992, as part of the agreements and consequences of entering into the North American Free Trade Agreement. This first antitrust law created the Federal Competition Commission (as of 2013, the Federal Economic Competition Commission (COFECE)), which was originally an autonomous administrative entity of the Ministry of Economy (part of the executive branch) but has been constitutionally autonomous since 2013.

Most importantly, on 11 June 2013, a new constitutional reform was enacted on the subjects of antitrust and telecommunications (the Constitutional Reform). As a result of the Constitutional Reform, the Mexican Congress enacted a new Federal Economic Competition Law (FECL), which became effective on 7 July 2014.

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This Constitutional Reform is considered one of the structural reforms submitted by President Enrique Peña Nieto, in an effort to incentivise the Mexican economy, and set a new standard of competitiveness in a country where, despite the existence of competition and antitrust statutes and regulation, monopolies continue to exist in various areas of the economy.

While the Constitutional Reform is relevant on many levels, for the purposes of this chapter, there are three major reforms that have already started to show their impact on market dynamics, regulatory policy and judicial precedents:

a the creation of two constitutionally autonomous agencies with powers in competition and antitrust matters: (1) the Federal Institute of Telecommunications (IFETEL), with exclusive jurisdiction to resolve on telecommunications and broadcasting antitrust and competition matters; and (2) COFECE, with jurisdiction on antitrust and competition matters in all other areas of the economy;[2]

b the creation of specialised courts for the judicial review – through *amparo* trials – of antitrust and telecommunications matters. Under the Constitutional Reform and the new FECL, the *amparo* trial is now the only judicial means available to contest the resolutions of IFETEL and COFECE. This reform was introduced with the purpose of preventing the involvement of any other judge or court in these specialised processes; and

c the introduction of a constitutional prohibition on specialised courts granting injunctions in *amparo* trials against resolutions issued by IFETEL and COFECE, which in practice permits these agencies to enforce a monetary sanction or even effect a divestiture of the plaintiff during the *amparo* trial.

The Constitutional Reform constitutes a substantive turnaround in antitrust public policy and its relationship with IP (particularly related to the telecommunications industry), among others, because with the new constitutional and legal framework, newly created autonomous agencies and specialised courts are in charge of resolving and establishing precedents on those particular matters.

II YEAR IN REVIEW

While the Constitutional Reform and its legislative and administrative enabling rules are still recent (and are in the early stages of being fully tested) there have been a few recent decisions in which the new antitrust framework has been put into practice.

In a recent case involving a public-access television concessionaire as plaintiff against a restricted television concessionaire, a local commercial judge with jurisdiction in Mexico City issued an injunction, ordering IFETEL to refrain from issuing the 'must carry and must

2 IFETEL is a newly created agency, while COFECE replaced the former Federal Competition Commission, which was an agency of the Ministry of Economy. The purpose of granting constitutional autonomy to these agencies is to ensure the independence and technical authority of their decisions. From a practical perspective, there are several markets where it is still unclear whether IFETEL or COFECE has jurisdiction. The ultimate decision on the applicable jurisdiction of these agencies lies with the newly created specialised courts. For example, in a recent merger control matter where the affiliates of Nokia and Alcatel-Lucent in Mexico submitted an antitrust application for merger authorisation, both IFETEL and COFECE claimed authority. Ultimately, a specialised court determined that jurisdiction in this matter lay with IFETEL.

offer' guidelines governing the obligations of public-access television concessionaires to grant, on a no-fee basis, their audiovisual content to restricted television concessionaires, as required under the Constitutional Reform.[3]

This case resulted in a constitutional controversy between IFETEL and the local commercial judge, which was ultimately resolved by the Supreme Court. The Supreme Court resolved in favour of protecting IFETEL's authority to issue the implementing antitrust rules applicable in the telecommunications industry, and further resolved that the local judge lacked jurisdiction to order IFETEL to perform a specific act.

In a separate but related dispute, a specialised court resolved in favour of the constitutionality of the obligation of public-access television concessionaires to rebroadcast (on a no-fee basis) audiovisual content under the new 'must-carry must-offer' guidelines, alleging that, pursuant to the Constitutional Reform, the competition process is more relevant in this particular case than the protection of any legitimate potential IP rights over the audiovisual contents.[4]

In summary, the main precedents where the Constitutional Reform has had an impact have shown the priority granted from a public policy standpoint to the competitive process in the telecommunications industry (an industry where typically competition has been very limited in Mexico) even if the defence and establishment of competition conditions result in the obstruction of dominant public-access television concessionaires' IP rights.

III LICENSING AND ANTITRUST

i Anticompetitive restraints

Consistent with the Mexican Constitution prohibition on monopolies, the FECL prohibits both absolute monopolistic practices (horizontal conduct) and relative monopolistic practices (vertical conduct).

Generally, absolute monopolistic practices constitute contracts, agreements, arrangements or combinations of the same among competing economic agents, whose purpose or effect is, generally: (1) to fix prices of goods or services offered in the market; (2) to restrict supply (obligation to produce, process, distribute, sell or render only a limited or restricted amount of goods or services); (3) to create market segmentation (division, distribution, allocation or imposition of portions or segments of a current or potential market of goods and services, whether by clients, suppliers, seasons or spaces); or (4) to create private agreements in public bids or auctions.

Absolute monopolistic practices are considered *per se* violations; in other words, the conduct is prohibited regardless of the market power of the economic agents involved or of other circumstances.

3 These Guidelines constitute enabling regulation establishing the obligation of public-access television concessionaires to permit the rebroadcast of their proprietary contents – subject to copyright laws – to restricted television concessionaires that are not declared to have a dominant position, on a no-fee basis. The main argument raised by the public-access television concessionaire plaintiff in the litigation was precisely that this provision violated its IP right over its content required to be freely broadcast.

4 Judicial precedent reference: 'Lineamientos sobre Must Carry y Must Offer emitidos por el Pleno del Instituto Federal de Telecomunicaciones. Los concesionarios de televisión restringida terrena carecen de interés para reclamar en *amparo* la restricción que, aducen, aquéllos imponen a los titulares de los derechos de autor, consistente en entregar gratuitamente el contenido que les pertenece.'

On the other hand, relative monopolistic practices include a list of various acts or behaviours between economic agents that participate in the commercial chain (manufacturers, distributors, merchandisers, and ultimately, final costumers). Whereas absolute monopolistic practices are sanctioned *per se*, relative monopolistic practices are penalised only if carried out by an economic agent considered by COFECE to be dominant in the relevant market.

ii Refusals to license

The IP Law governs patents, trademarks, industrial designs and other IP rights. By their nature, IP rights grant an exclusive right to their holders, who are also granted the right to license them under a contractual agreement.

Neither the IP Law nor the FECL includes specific provisions governing the terms under which an IP right shall be licensed. Thus, the Mexican legal framework does not include a particular statute or guideline in connection with what contractual arrangements in a licence agreement could specifically constitute violations or impediments to a free competition environment.

Considering the above, and in the absence of a particular statute or set of guidelines in this regard, the general prohibitions of monopolistic practices under the FECL are applicable to the licensing of IP rights. The analysis of whether a particular act or behaviour in connection with licensing, or a particular contractual arrangement is contrary to antitrust provisions should be made in the light of the specific circumstances, including among others, the market position of the licensor and licensee, the relevant market, the type of IP right subject to the licence, and the ability of the licensee to alternate options to access the specific technology, invention or right being licensed.

The FECL includes among the prohibited relative monopolistic practices the 'unilateral action consisting in refusing to sell, commercialise or provide to specific persons goods or services available and regularly offered to third parties'.

As mentioned above, the FECL does not include a particular prohibition in connection with the refusal to license IP rights as an antitrust infringement. However, conduct of this nature by a dominant participant in the market could probably be categorised as one of the relative monopolistic practices described in the paragraph above. It is clear from the statute that the prohibited conduct only includes an active 'refusal' to deal, and not a constructive refusal. Therefore, the imposition on the licensee of prohibitive royalty fees or other excessive obligations would not necessarily qualify as this type of monopolistic practice.

Conduct also characterised as a relative monopolistic practice is 'the establishment of different prices or sale or purchase conditions for different purchasers or sellers under equivalent conditions.' While this prohibition does not make specific reference to the licensing of IP rights, in certain circumstances, it is possible that conduct consisting in the imposition of an excessive licence fee (when a lower licence fee was granted to a different party) could be categorised within this prohibited relative monopolistic practice.

In any case, the prohibited conduct makes reference only to 'different prices' or 'conditions', without any reference to excessive, prohibitive or other qualifications that could automatically render the imposition of an extremely burdensome contractual condition as a vertical monopolistic practice.

Particularly with respect to patents, the IP Law governs the legal framework applicable to this type of IP right, by granting an exclusive right to exploit the patent for a term of 20 years. After the 20-year term, the patent shall become available for public use. A patent holder is entitled – as with any other IP right – to license its use to one or more third parties. As discussed above, the IP Law does not include any particular rule in connection with the terms and conditions under which such licences should be granted.

As a particular legal framework for patents, the IP Law provides for 'mandatory patent licences'. These mandatory licences may be granted to applicants by the Mexican Institute of Industrial Property (IMPI) if, after three years of the grant of a patent, the owner has not exploited it. An applicant for the mandatory patent licence must show the IMPI that it has the technical and economic skills to efficiently exploit the patent. If the IMPI decides to grant the mandatory patent licence to the applicant, the IMPI will determine the term, conditions, scope and amount of royalties applicable to this licence.

No similar mandatory licensing exists for IP rights other than patents.

This mandatory patent licence framework appears to be a response to the existing tension between two competing rights: on the one hand, the exclusive right of the patent holder to exploit its protected invention, and on the other, the principle that the use of inventions in the industry is in the public interest – as a means to foster innovation, and grant consumers access to the newest technologies and discoveries – and therefore, failure of a patent holder to exploit that invention for the benefit of the industry during a certain period entitles willing third parties to do so under the mandatory patent licence regime.

iii Unfair and discriminatory licensing

As discussed above, conduct by a dominant player in a relevant market consisting in refusing to license an IP right, or in the imposition of licensing conditions that are 'different' – while not necessarily excessive or prohibitive – compared with those offered to different parties, could constitute a prohibited relative monopolistic practice.

Conduct such as this may result in the imposition of monetary sanctions under the FECL, up to 8 per cent of the economic agent's revenues, in addition to potential damages directly related to the performance of the prohibited behaviour.

As discussed above, the imposition of such sanctions may only be challenged by the alleged violator through an *amparo* trial.

iv Patent pooling

Patent pooling can be defined as 'an agreement between two or more patent owners to license one or more of their patents to one another or to third parties'.[5]

Mexican law does not include any specific regulation governing patent pooling. However, the IP Law generally provides for the right of a patent-holder to license the patent to one or various licensees, therefore leaving the possibility open for a patent pooling arrangement. Thus, a patent-pooling arrangement in Mexico would not be anticompetitive or illegal *per se*.

However, as a potential agreement among competitors, patent pooling arrangements should be subject to strict scrutiny, as they could eventually lead to the commission of absolute monopolistic practices; for example, if the arrangement involves price-fixing between the patent holders or other prohibited conduct categorised as an absolute monopolistic practice (see Section III.i, *supra*). As discussed above, absolute monopolistic practices are considered unlawful *per se*.

5 www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf.

v Software licensing

Software is considered a copyright protected by the Federal Copyright Law (the Copyright Law). Under the Copyright Law, the economic rights over copyright (including software) may be licensed by its owner to third parties.

From an antitrust perspective, software licensing is not subject to any particular regulation under the IP Law, the Copyright Law or the FECL, different from the general regulation applicable to licensing of IP rights. Therefore, the restrictions described in Sections III.i to III.iii, above, are similarly applicable to software licensing for the purpose of determining the potential commission of a prohibited relative monopolistic practice.

vi Trademark licensing

Trademarks are protected under the IP Law and the various international treaties entered into by Mexico. Under the IP Law, the owner of a trademark may validly license its rights to the trademark to third parties, and the licensee shall be required to pay a licence fee to the licensor. Trademark licences must be registered with the IMPI.

From an antitrust perspective, the terms and conditions of trademark licensing are not subject to any particular regulation under the IP Law or the FECL. Therefore, the restrictions described in Sections III.i to III.iii, above, are similarly applicable to trademark licensing for the purpose of determining the potential commission of a prohibited relative monopolistic practice.

In any case, trademarks do not grant an exclusive right over a specific product or a specific market, but rather grant their holders the exclusive right to use those trademarks as a distinction of their products or services. Given that any market participant in any industry is able to create and develop its own trademark, and that the use of trademarks *per se* does not restrict access to other potential entrants to a particular market, the use and licensing of trademarks appears to pose a lesser concern from an antitrust perspective.

It is interesting to mention that the IP Law enables the IMPI to declare the mandatory use of a trademark on any product or service, or even to prohibit or regulate the use of trademarks (registered or not), among others, when the use of the trademark has been associated with monopolistic practices that cause serious distortions to the manufacturing, distribution or merchandising of specific products or services.

IV STANDARD-ESSENTIAL PATENTS

i Dominance

COFECE and IFETEL (if the matter is of a telecommunications or broadcasting nature) may determine that an economic agent is a dominant participant in the market. For these purposes, the relevant agency shall generally consider the following elements: (1) the ability of the agent to fix prices or restrict the offer in the relevant market, where competitors are unable to impede this activity; (2) the existence of entry barriers in the relevant market; (3) the existence and power of competitors; and (4) the conditions of access of the relevant agent and other competitors to input sources.

As discussed above, patents are protected under the Mexican Constitution, the IP Law and the international treaties to which Mexico is a party.

Pursuant to the applicable law in Mexico, the following are protected through patents: (1) inventions for industrial application; (2) technical improvements and the transfer of technological knowledge for manufacturing purposes; and (3) generally, all inventions that foster a higher quality of goods and services in the industry.

Standard-essential patents (SEPs) are inventions or improvements subject to protection where standards are essential for functionality of the relevant commercial items or merchandise. SEPs are particularly relevant in information and communication technologies (ICT), since mobile telecommunications companies are required to comply with standards to allow intercommunication with telecommunications networks and terminal devices, either through communication protocols, or through standards for operation of devices within specific frequencies of the radio spectrum.

Thus, the creation and protection of new communications standards (or their improvements) through patents could constitute a competitive advantage in the market, allowing an SEP holder potentially to control this essential input, inhibit the entry of new competitors, inhibit innovation and unduly displace existing competitors, given that harmonising standards for ICT development is essential to allow interaction between these companies; this is particularly relevant considering that, in many cases, there are no substitutes for these technologies.[6]

The potential outcome of the above is the SEP holder gaining a dominant position, which may itself act as an incentive, but with the result that it engages in a prohibited monopolistic practice.

In this context, around the world, various companies that develop mobile devices have through the protection of their SEPs used strategic litigation and injunctions as a means of strengthening their market position.

To our knowledge, there is no antitrust issue or litigation in Mexico in connection with the holding of SEPs. This may be because the antitrust disputes raised by SEP-holding manufacturers have primarily been filed in other jurisdictions, and have focused primarily on the United States, Germany, Japan, the United Kingdom and South Korea.[7]

Mexico is in a particular situation regarding the final-consumer smartphone market, because of the existence of an economic agent (América Móvil) with substantial market power

6 All regulatory agencies in the world establish standards for devices (mostly privileging the neutrality of the technology). In Mexico, the regulation is issued through enabling administrative regulation issued by IFETEL (following the recommendations of the International Telecommunication Union) and other enabling administrative regulation issued by other administrative government agencies.

7 For example, Case AT39895 resolved by the European Commission related to the *Motorola Mobility Inc v. Apple Inc* case, where Motorola sued Apple in Germany for an alleged violation of an SEP registered by Motorola regarding the 'GPRS' or 2G standard. Motorola sought an injunction to prohibit Apple from selling iPhones and tablets during the term of the trial. Given Apple's urgent need to sell its inventories in the German market – and given the dynamics of the smartphone industry and that inventories become rapidly dated – Apple had to compromise in various negotiations and enter into settlement agreements with Motorola that were disadvantageous to Apple. The European Commission resolved that this was anticompetitive conduct on Motorola's part, since Motorola abused its dominant position as an SEP holder, which allowed it to maintain a privileged position in the negotiation with its competitors in Germany, affecting the competition process and, ultimately, smartphone and tablet consumers; as a result, the European Commission obliged Motorola to enter into agreements that included fair, reasonable, and non-discriminatory (FRAND) clauses.

in the relevant market. América Móvil currently has approximately 72 million clients, which in practice grants it high leverage in negotiations with other market participants, including developers of mobile devices intending to distribute their devices to final consumers.

Given its dominant market position, América Móvil was subject to various stringent antitrust measures by the antitrust authorities in 2014, since it had used contractual exclusivities with developers, for periods of up to six months, for the distribution of smartphones to final consumers.

Additionally, until 2015, final consumers had to mandatorily remain with their telephone and mobile phone companies for at least 12 months; mobile phones were blocked when delivered to final consumers, therefore the mobile phone could only be used with the operator to which it was linked, which effectively inhibited competitors from selling smartphones independently of the mobile phone concessionaires.

This may explain the lack of IP disputes in Mexico in connection with these matters in comparison with other countries, since developer companies may not have had sufficient incentive to file sham IP disputes.

ii Injunctions

Mexican commercial and IP law allow plaintiffs to seek injunctions from a court. Therefore, it is possible that an SEP holder may eventually abuse the protection granted by the law to seek an action similar to those filed in the *Motorola Mobility, Inc v. Apple Inc* and *Samsung Electronics v. Apple, Inc* cases.

Nonetheless, we are not aware of any public information in connection with the determination of an abuse of a dominant position in Mexico as a result of an SEP holder seeking injunctions.

iii Licensing under FRAND terms

FRAND stands for 'fair, reasonable and non-discriminatory' licensing terms in the context of an SEP. In the *Samsung* and *Motorola* cases, the European Commission clarified that, in the standardisation context, where the SEPs holders have committed to (1) license their SEPs, and (2) do so on FRAND terms, it is anticompetitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs, if the licensee is willing to take a licence on FRAND terms.

Mexican law does not include any statute or regulation that requires an SEP holder to license its patent under FRAND terms. Additionally, we are not aware of any information regarding litigation or settlements in Mexico in connection with the application of FRAND licensing terms. In any case, there is no provision in Mexican law that would prevent a Mexican court from taking the position that the licensing of an SEP in Mexico should be made under FRAND terms, consistent with international best practices.

The FRAND concept is an excellent tool to reach a 'middle ground', on the one hand incentivising technological innovation by developers and fostering fair and reasonable arrangements in the payment of royalties to SEP holders and, on the other hand, preventing free raiding by competitors and the imposition of excessive royalties or limitations on sales volumes, and preventing time delays for new entrants to the 'pay-for-delay' market, all of which constitute anticompetitive conduct that ultimately affects consumers.

iv Anticompetitive or exclusionary royalties

As explained above, while there is no particular statute in Mexico that governs the terms under which royalties should be paid to an SEP or non-SEP holder, the existing conditions in certain markets in Mexico allow certain players with substantial power to impose certain conditions on their competitors that could be viewed as abusive. However, the framework established through the Constitutional Reform and the new FECL is expected to prevent and sanction these types of practices.

V INTELLECTUAL PROPERTY AND MERGERS

i Transfer of IP rights constituting a merger

Under the FECL, a merger is any concentration, control acquisition or any other act involving the concentration of companies, associations, shares, equity, trusts or assets in general, between competitors, suppliers, clients or any other economic agents.

This broad definition is designed to cover a wide range of transactions that involve the merger or concentration of any type of assets, thus covering both tangible and intangible property, such as trademarks and other IP rights.

Mergers that exceed certain thresholds set forth in the FECL shall only be effective if previously authorised by COFECE. The thresholds are established considering either the amount of the transaction, the amount of assets and sales of the parties involved in the transaction.

Therefore, a transaction that involves the transfer of IP rights that exceeds the thresholds set forth in the FECL will necessarily have to be previously authorised by COFECE to be effective.

ii Remedies involving divestitures of intellectual property

Prior to the enactment of the new FECL, the most relevant case in Mexico involving the divestiture of IP rights was the *Nestlé/Pfizer* transaction in 2013. In 2013, Pfizer entered into a worldwide agreement with Nestlé, whereby Pfizer would sell its infant formula business to Nestlé. The transaction involved the sale of all of the business assets, including real estate industrial plants, inventories, regulatory registrations and IP rights. The transaction was subject to the authorisation of the antitrust authorities of the various jurisdictions where the transaction would be effective.

In Mexico, COFECE found that the transaction could have anticompetitive effects in Mexico given Nestlé's position in the relevant market. After negotiations with COFECE, the transaction was ultimately approved, subject to Nestlé complying with the following remedies: (1) Nestlé would enter into a 10-year exclusive licence with a third party over Pfizer's infant formula trademarks; and (2) Nestlé would be subject to a 20-year blackout period in which Nestlé would not be able to use those trademarks in Mexico, to allow the licensee to consolidate its market position by developing its own infant formula trademarks in Mexico. The terms and conditions of the exclusive licence were not determined by COFECE's decision, and therefore, the licence's commercial terms (including royalty fees) were left to the commercial negotiations of the parties.

Under the new FECL, two recent precedents concerned remedies that, to our knowledge, involve IP rights.

The first one was in connection with the proposed sale by Sanofi of its consumer healthcare business to Boehringer. In December 2016, COFECE resolved not to authorise the sale, unless certain conditions were accepted by the parties. While the details of the resolution have not been made public, the conditions – among others – consisted in Sanofi refraining from acquiring certain trademarks then owned by Boehringer in Mexico (e.g., Bisolvon, Mucosolvan and Sekretovit), to maintain the existing pricing pressure in the chesty-cough over-the-counter market.

The second precedent concerned the proposed acquisition by ChemChina of assets by Sygenta, in the herbicide and fungicide markets in Mexico. COFECE considered that the full sale to ChemChina could result in that economic agent acquiring a substantial market position, and therefore conditioned the transaction upon the sale by Sygenta of five of its products to a third party pre-approved by COFECE. Again, the details of the resolution are not public, but arguably, the sale of these products would most likely also involve the divestiture of the IP rights associated with the products.

The above precedents, in addition to various other actions taken recently by COFECE on various fronts, show COFECE's intention to fully enforce its powers and authority under the Constitutional Reform and the new FECL to fulfil its mandate to foster competition in Mexico.

VI OTHER ABUSES

i Sham or vexatious IP litigation

'Sham litigation' has been defined by the US Supreme Court through a two-tier definition:

a First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favourable outcome, the suit is immunised, and an antitrust claim premised on the sham exception must fail.

b The second tier, to be reached 'only if challenged litigation is objectively meritless', is 'whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon'.[8]

Mexican courts have not provided for a similar definition of sham litigation in the context of antitrust proceedings.

However, it is a common practice worldwide to use strategic litigation to obtain competitive advantages; therefore, even though, to our knowledge, there is no current litigation on the subject of SEPs or other non-SEPs that could have had anticompetitive effects (as was the case in Germany with the *Motorola Mobility* case and in other jurisdictions in the *Samsung Electronics* case), Mexican commercial and IP laws provide for the tools that could eventually provide a potential plaintiff to unduly seek injunctions, abusing its dominant position.

In this respect, a challenge for the new antitrust specialised courts will be to be cautious of potential anticompetitive effects resulting from sham litigation or patent protection, artificially filed with the sole purpose of obtaining an unlawful competitive advantage in the market.

8 www.lectlaw.com/def2/s112.htm.

In the past, the Mexican courts have stated that no person may claim an IP right to maintain unlawful competition conditions. Although this court precedent was issued under a previous industrial property law not currently in force, it is reasonable to maintain that this principle is still valid under the current IP law, and potential sham litigation on the basis of an IP right (such as patent rights) with the purpose of availing oneself of or maintaining unlawful competition conditions should be analysed by the new antitrust specialised courts with regard to the above principle.[9]

ii Misuse of the patent process

We have no knowledge of any particular recent patent process in Mexico that has been manipulated with the purpose of artificially extending the term or geographical scope of the patent protection, or for the enforcement of a patent obtained through fraud.

However, as discussed above, there could be incentives for patent holders in Mexico to use strategic litigation to unlawfully displace a competitor through the use of injunctions or other legal instruments available under Mexican law, with the purpose of hindering the competitor from entering the market, or by obliging the competitor to enter into a disadvantageous settlement agreement to be able to enter a particular market (as has been the case in other jurisdictions).

iii Anticompetitive settlements of IP disputes

International experience has shown that the majority of settlement agreements that establish excessive royalty payments and other 'hold-up' sale clauses have anticompetitive effects. To our knowledge, there is no recent experience in Mexico of this type of settlement agreement.

However, with the right incentives, an agreement to settle patent litigation may be pro-competitive, and can also create synergies to implement technology improvements for the ultimate benefit of consumers. A recent international example is the agreement between Apple Inc and Ericsson to settle approximately 40 disputes in various jurisdictions, which will cause both companies to share technology and jointly develop a new 5G platform for mobile phones.[10]

VII OUTLOOK AND CONCLUSIONS

As may be inferred from the discussion contained in this chapter, the interrelation between the exercise of IP rights and the enforcement of antitrust laws is a subject that is still to be fully developed and tested in Mexico. Mexican laws do not contain very specific or particular regulations with respect to the scope and terms under which IP rights may be licensed according to pro-competitive principles, and as the concept of SEPs and potentially monopolistic conduct of their holders is a subject that has not yet reached Mexican courts, they have yet to provide more insight as to its legal implications in Mexico.

However, as Mexico is an active member of the international community and, particularly, a party to most of the primary international treaties on IP matters, whenever these issues reach the Mexican courts, it is expected that the courts will follow the principles and guidelines established by those international treaties and best international practices.

9 Court precedent: 'Marcas. Ley de Invenciones y Marcas. Competencia desleal. Que debe entenderse por.'

10 See www.ericsson.com/news/1974964.

The exercise of exclusive IP rights (such as exploiting an SEP or non-SEP) is not by its nature anticompetitive. The exploitation of a patent on an exclusive basis is the very nature of this right and is protected by law, as well as the right of its holder to license it to third parties. However, particular circumstances may render the exercise of the exclusive right anticompetitive, taking into consideration various circumstances such as the market power of the licensor, the relevant market, the type and scope of the patent, among other things.

The establishment of FRAND terms to ensure the pro-competitive effects of patent licences is a proven efficient tool to protect the interests of both the patent holder and licensees. While Mexican law and practice have not yet tested the imposition of FRAND terms in this context, the principles and public policy contained in the Constitutional Reform should be followed, which most probably will respect such a practice already tested in other markets.

As a final note, the telecommunications and antitrust regulations derived from the Constitutional Reform are expected to foster competition and growth in the Mexican economy. The creation of IFETEL and COFECE as separate constitutional agencies independent from the executive branch is certainly a step towards ensuring that the goals of the Constitutional Reform are reached. However, in practice, the delimitation of jurisdiction between both agencies in certain ICT-related matters is still a matter of debate, and its definitive limits will have to be determined by the specialised Mexican courts created through the Constitutional Reform.

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Antonio Cárdenas is a local partner at White & Case, SC (Mexico City). Mr Cárdenas joined the firm in 2008. His practice is primarily focused on TMT, antitrust and administrative and commercial litigation. He has served as an attorney in some of the main litigation in the telecommunications, antitrust and media broadcasting sectors in Mexico, the foremost being: (1) an *amparo* proceeding before the Mexican Supreme Court of Justice as to the jurisdiction of the defunct Federal Telecommunications Commission to determine mobile interconnection rates (MIR) (2008 to 2012); (2) third-party involvement in actions brought against several strategic antitrust and telecommunications trials filed by América Móvil, Telmex and Telnor and several companies of the group (2010 to date); (3) various trials against extension for certain licensees of radio spectrum frequencies including the 2.5GHz band (2013 to 2015); and (4) complaints due to América Móvil's breach of its licensing instruments and economic competition obligations, among others (2010 to date). In areas of antitrust other than the telecommunications and broadcasting sector, Antonio has led the representation of various economic agents in defending their interests in the poultry industry, decorative painting and the aeronautical and financial services sectors. Mr Cárdenas was promoted to local partner at White & Case, SC, effective as of January 2017.

CARLOS MAINERO RUIZ

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Carlos Mainero is a local partner at White & Case, SC (Mexico City). Mr Mainero joined the Mexico City office of the firm in 2003, and was promoted to junior associate in 2006. In 2009, Mr Mainero joined the New York office of the firm (2009–2010), participating primarily in capital markets deals involving Latin American issuers. Mr Mainero's practice is primarily focused on capital markets, bank finance and M&A transactions, including advising Mexican and foreign issuers in the public offering of securities on the Mexican Stock Exchange, as well as 144A and Reg S private offerings by Mexican issuers. His practice also includes advising lenders and borrowers in syndicated loan agreements and the creation and perfection of collateral over assets located in Mexico. Mr Mainero has also participated in a number of M&A transactions, with a particular focus on the competition and antitrust aspects of those deals. Mr Mainero obtained his master's degree in banking and financial law from Boston University in 2009, and his bachelor's degree from the Panamerican University in 2006. Mr Mainero also obtained certification for his participation in the Antitrust Legal Workshop organised by the International Chamber of Commerce and the Ibero-American University (2013). Mr Mainero was promoted to local partner at White & Case, SC, effective as of January 2017.