FECC launches project to develop guidelines for analysis of collaboration agreements between competitors

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Introduction

In January 2017 the Federal Economic Competition Commission (FECC) issued its Annual Working Plan. In it, the FECC recognised that one of its strategic goals is to communicate to economic agents how anti-competitive practices will be investigated and which actions agents may adopt to prevent potential risks. In particular, the FECC declared that one of its goals for 2017 would be to launch a project to develop guidelines for the analysis of collaboration agreements between competitors. According to the FECC, this project will:

- clarify key concepts on the subject;
- collect best practices on the analysis of collaboration agreements among competitors;
- indicate specific criteria to identify the activities that should be investigated; and
- highlight collaboration agreements that may be considered collusive.

Overview

The FECC launched the project on November 30 2017. The project was subject to public consultation, giving economic agents, law firms, legal scholars or anyone with an interest the opportunity to comment and propose modifications to the guidelines proposed under the project. The purpose of this public consultation was to generate complete and clear guidelines which promote competition while allowing and incentivising collaboration agreements. The public consultation concluded on January 26 2018.

In general terms, the guidelines contains the factors that the FECC will consider when analysing collaborative agreements among competitors. These factors should be analysed together with those set by the Guidelines on Information Exchanges, issued by the FECC in 2015. The guidelines focus on explaining which factors may result in collaboration agreements becoming illicit concentrations or absolute monopolistic practices (cartels). In addition, the guidelines examine and set out examples of the most common types of collaboration agreement:

- research and development agreements;
- co-production agreements;
- purchase agreements;
- commercialisation agreements; and
- standardisation agreements.

The project is particularly relevant for Mexico considering that, according to the Federal Law on Economic Competition, the rule of reason does not apply for the analysis of agreements among

competitors. That is, all types of agreement among competitors that have as their purpose or result any of the outcomes referred to in Article 53 of the law(1) will be deemed illegal *per se*. Thus, it is unclear how to balance that legal disposition with the fact that, in certain cases, collaboration agreements may be desirable.

Opportunities

The scope of the guidelines created under the project are limited only to collaboration agreements among competitors which have already taken place, leaving out those which are being planned or are about to be carried out. Thus, although the project establishes the possibility for economic agents to request a non-binding opinion on agreements that they intend to enact, it is unclear whether these would be analysed in similar terms as those that have already been finalised or executed. This is particularly relevant considering that the division of the FECC responsible for analysing and issuing non-binding opinions is not the same as the division which investigates probable anti-competitive practices that may derive from fully executed collaboration agreements.

In addition, the guidelines fail to acknowledge that collaboration agreements among competitors may also be desirable and pro-competitive. Indeed, certain agreements, if duly drafted and executed, may serve to improve efficiency and lead to benefits for final consumers. Consequently, the guidelines set by the project seem to identify possible competition risks rather than tracing the safeguards that these agreements should contain to prevent or minimise said risks and allow their execution.

Finally, the guidelines fall short in clearly distinguishing when a collaboration agreement may constitute a concentration. They refer only to vague elements of analysis (eg, long-term agreements, reduced rivalry and control) without providing enough legal certainty. On the contrary, the guidelines exhort economic agents to notify their collaboration agreements as concentrations in case of doubt. This may generate unnecessary costs and discourage the execution of otherwise pro-competitive agreements.

Comment and recommendations

Notwithstanding the foregoing, some in the industry celebrate the fact that the FECC has addressed this topic and is attempting to provide economic agents that compete among themselves with more legal certainty regarding any collaborations that they may undertake. This project is a great starting point; yet, the FECC still has some way to go before being able to issue clear guidelines.

Industry experts recommend that the FECC organise a discussion forum on this topic before issuing the final version of the guidelines. Ideally, international authorities could share their experiences in countries where collaboration agreements among competitors have been further analysed. It would also be convenient for entities in the private sector to participate in those discussion forums, so that they can provide the FECC with their requirements and perspectives regarding this type of agreement. The foregoing would enrich the debate and lead to guidelines which may better achieve the purpose of the project.

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Endnotes

(1) Specifically, to:

- fix, raise, coordinate or manipulate prices;
- restrict or limit the supply of goods or services;
- allocate markets;
- coordinate bids; or
- exchange information with any of the purposes or effects referred to in the previous subsections.