COMPETITION & ANTITRUST - MEXICO

FECC issues guidelines on exchange of information between competitors

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Introduction

The Federal Law on Economic Competition entered into force on July 7 2014. According to Article 53 of the law, information exchanges between competitors may constitute an absolute monopolistic practice where they have any of the following anti-competitive purposes or effects:

- fixing prices;
- reducing output;
- allocating markets; or
- coordinating biddings.(1)

Absolute monopolistic practices are illegal *per se* and can trigger criminal liability. In this regard, the law is unclear as to what or how information may be exchanged between competitors without incurring risks.

New guidelines

Following a public consultation, in December 2015 the Federal Economic Competition Commission (FECC) issued guidelines on the exchange of information between economic agents. The guidelines aim to clarify the elements that the FECC will consider when evaluating information exchanges and allow economic agents to determine with greater certainty whether their exchanges of information are permissible. The recommendations contained in the guidelines are particularly relevant when exchanging strategic information, such as information relating to:

- prices and discounts;
- costs;
- inputs;
- production and commercialisation strategies;
- sales;
- stocks;
- lists of clients or suppliers;
- market share; and
- investments for expansion.

The FECC recognises that access to this type of information may facilitate coordination between competitors, as it eliminates uncertainty, exposes the actions of the economic agents involved and allows them to monitor their behaviour and detect deviations from collusive agreements.

The guidelines identify the following scenarios in which information exchanges are common and often necessary,(2) but nevertheless potentially risky:

- activities of trade associations and chambers of commerce;
- evaluation of mergers;
- conclusion of joint ventures and cooperation agreements; and
- sharing of directories.

Recommendations

The guidelines recommend that the exchanged information be aggregated so that it is impossible to identify the specific information of each competitor. Moreover, the guidelines note that an exchange will pose less risk where it involves more historical information and is undertaken sporadically, so that it does not increase market transparency or facilitate the prediction of competing economic agents' future commercial conduct. Finally, the guidelines suggest that economic agents establish mechanisms to restrict access to the information being exchanged and preferably encourage the involvement of independent third parties.

The following chart summarises the recommendations contained in the guidelines.

	Low risk	**High risk**
Strategic importance of information	The information is not considered strategic, so its exchange has less risk of reducing incentives to compete.	The exchange of information with a high strategic value poses a greater risk of being considered anti-competitive.
Aggregation of information	Exchanged information is sufficiently aggregated in such a way that it is impossible to distinguish the strategic information of each competitor.	The information is sufficiently disaggregated to distinguish the strategic information of each competitor.
Age of information	Exchanged information is historical and does not facilitate prediction of the future commercial conduct of competing economic agents; nor does it facilitate the monitoring or deviation of possible agreements.	Recent, current or future information facilitates surveillance of compliance with potential coordinated conduct, as well as prediction of the future commercial conduct of competing economic agents.
Frequency of exchange	Infrequent exchange does not considerably increase market transparency.	Frequent exchange provides greater certainty on competitor behaviour, which reduces incentives to compete.
Public availability of information	Shared data is made public and accessible to consumers and competitors at a reasonable cost, and the mechanism for its exchange is transparent and known to the general public.	Shared data is not made public or available to third parties at a reasonable cost, thus limiting the social benefits of the information. Confidential exchange which is not subject to public scrutiny may facilitate inappropriate contact between competitors.
Use of protocols to access information	The use of strict rules on access to information and effective procedures for its control mitigates the risk of anti-competitive conduct or effects.	The exchange lacks rules and procedures to impede access to personnel whose knowledge of the information may harm competition.
Purpose of exchange of information	The information is accessory to the achievement of a goal compatible with the Federal Law on Economic Competition and is strictly necessary to achieve said goal, and measures to prevent risks arising from inappropriate access to the information are adopted.	The exchange lacks a commercial purpose compatible with the Federal Law on Economic Competition or exceeds what is strictly necessary to achieve that purpose, and measures are not adopted to prevent risks arising from inappropriate access to the information.

Despite the above recommendations, the guidelines highlight that the risks arising from an exchange of information between competitors vary depending on the relevant market structure. Such an exchange is particularly risky where it involves concentrated or static markets, homogeneous goods or services, or asymmetric competitors. Thus, it is impossible for the FECC to be more precise in its recommendations; a proper analysis of the purpose and effects of information exchanges must be undertaken on a case-by-case basis. For this reason, the guidelines urge economic agents to seek advice before entering into potentially risky exchanges of information.

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Endnotes

(1) Absolute monopolistic practices are penalised by the FECC with a fine of up to 10% of the involved undertakings' annual income.

(2) The exchange of strategic information between competitors is justifiable to the extent that it is strictly necessary to pursue a legitimate goal and to facilitate efficiency gains and consumer benefits.