

COVID-19 pandemic: economic competition considerations

16 April 2020 | Contributed by [SAI Law & Economics](#)

Introduction

Suspension of deadlines

Fixing or imposing prices

Price gouging

Supply agreements

Collaboration between companies

Failing firm operations

Introduction

As the COVID-19 pandemic develops and society and governments respond to it, the restrictions imposed to contain the spread of the virus are having adverse economic effects. On one hand, these restrictions may discourage the investment of capital and the development of new projects; on the other hand, they will also lead to significant losses for many businesses.

Extraordinary measures are being taken by companies and government authorities to avoid aggravating the situation and adapt quickly to the new operational and regulatory challenges arising from the pandemic. Nonetheless, economic competition law is still in force. This article discusses a series of considerations that companies should keep in mind to prevent potential competition risks relating to their behaviour or practices during the pandemic. These considerations take into account the statement which the Federal Economic Competition Commission (COFECE) issued⁽¹⁾ on the application of the Federal Economic Competition Law during the sanitary emergency.

Suspension of deadlines

In Mexico, competition authorities⁽²⁾ and the courts and tribunals of the Federal Judiciary Branch (including those specialised in competition matters) have declared that the legal deadlines for some of the proceedings that are being conducted will not elapse, without these actions necessarily implying a suspension of work. This suspension was adopted as a measure to reduce the risks of spreading COVID-19 and will remain in force at least until the end of April 2020, depending on the progress of the health situation.

The only exception from this measure relates to the analysis of concentrations and opinions of tender processes, concessions, permits and other similar procedures that are analysed by COFECE. This is possible thanks to the fact that the Federal Economic Competition Commission has implemented an electronic system that allows it to carry out various actions remotely.

Fixing or imposing prices

Despite the pandemic, any agreement between competitors having the object or effect of fixing or imposing prices will still have the risk of being analysed as a cartel. This applies regardless of whether the agreement is being encouraged by government institutions or whether it relates to goods or services that are essential during this crisis.

In that regard, COFECE's statement acknowledges that in the current circumstances this type of agreement is particularly harmful to society and reiterates the commission's commitment to investigate and impose penalties where necessary. In addition, the statement also emphasises that the determination of prices must be an individual and independent decision each company takes and cannot be induced or recommended by associations or industry chambers.

Price gouging

Companies offering goods or services that are especially needed during the pandemic will face an increase in demand that may compromise their inventories or require acceleration of their

AUTHORS

[Lucía Ojeda Cárdenas](#)



[Mariana Carrion](#)



production processes in order to minimise the risk of shortages. Under this scenario, it is common for such companies to be tempted to increase their prices. For that reason, some competition authorities around the world have called on companies not to engage in price gouging, in order to ensure that products continue to be available and affordable to consumers.

In Mexico, price gouging is not a practice related to economic competition – rather, it is regulated by consumer protection law. However, the Federal Economic Competition Law indicates that the Federal Executive Branch has the power to determine goods and services which may be subjected to maximum prices, provided that the competition authority has previously ruled on the existence of effective competition conditions in the relevant market. In this scenario, the Ministry of Economy may also set the corresponding prices for those goods or services in accordance with criteria that would prevent supply restrictions.

The procedure to rule on the existence of effective competition conditions may last approximately six months. Therefore, it is not a practical option in emergency situations. Nonetheless, it is still advisable for companies to be cautious before suddenly increasing their prices in order to avoid being perceived as taking undue advantage of the pandemic. Indeed, governmental authorities may adopt other measures to prevent price gouging (including the decision to set maximum prices) based on the dispositions of other laws or by a federal decree ordered by the General Health Council.

Supply agreements

Agreements between competitors that have the purpose or effect of restricting supply will still constitute a cartel. Further, supply-related practices that have the purpose or effect of displacing other economic agents from the market still risk being deemed as an abuse of dominant position.

Nonetheless, COFECE's statement declares that it will not prosecute coordination agreements that are necessary to increase the availability of products, prevent shortages to satisfy the demand and protect supply chains to prevent hoarding. In practice, there may not be a crystal-clear distinction between supply-related agreements that may be anti-competitive and those that may be desirable under the current circumstances. Therefore, it is still advisable to be cautious when these agreements are being executed between competitors or by a potentially dominant firm.

Collaboration between companies

As a result of the pandemic, collaboration between companies may be a mechanism to mitigate economic impacts or even to address COVID-19 more efficiently. For this reason, competition authorities in other jurisdictions have been relaxing the applications of some regulatory aspects of economic competition on the grounds that certain types of cooperation between economic operators may be desirable and help to cope with the COVID-19 outbreak. In addition, they have announced expedited procedures and provided guidance for collaborations of businesses working to protect the health and safety of people during the COVID-19 pandemic.

In Mexico, the regulatory framework does not allow competition authorities to partially waive on certain restrictions nor to adjust its procedures in case of an emergency. Consequently, the negotiation and implementation of cooperation agreements (specially between competing firms) may still face the risk of being considered anticompetitive, no matter how well intentioned they may be. Nonetheless, as mentioned, COFECE's statement acknowledges that some collaborations may be desirable and even promoted to face the emergency as long as they do not have an anti-competitive purpose or effect.

Regardless, there is no clarity on how competition authorities in Mexico evaluate collaboration agreements nor how they weigh their advantages with their potential competition risks. To seek more certainty on the legality of this type of agreement, it has been common practice to notify them as concentrations. However, to do so may not be practical in an emergency situation that requires the collaboration to be implemented expeditiously. In that regard, COFECE compromised itself through its statement to review expeditiously the pre-merger filings relating to the creation of synergies and increase of productive capacities to satisfy opportunely the needs caused by the COVID-19 pandemic.

For that reason, in case a collaboration agreement may have effects in Mexico, it is advisable to:

- obtain prior advice from a competition law expert;
- adopt all of the necessary safeguards relating to the exchange of strategic or sensitive information that may occur in the context of these collaborations; and
- keep close communication with COFECE's officials to speed up any proceedings relating to these collaborations.

Failing firm operations

As a result of the COVID-19 pandemic, various companies will face a serious financial situation that will risk their survival in the market, potentially causing companies to seek financing, incorporate new partners or shareholders, or simply sell their business to a third party. These operations may be subject to the applicable regulatory framework for concentrations and, in some cases, require prior authorisation by the competition authorities.

In this context, merging parties may analyse whether the 'failing firm' defence could be applicable to their operation in case a structural analysis of the market indicates the transaction does not meet *prima facie* the criteria set by competition authorities to deem it is unlikely it may cause competition concerns.⁽³⁾

In Mexico, there is no clear criteria on how a 'failing firm' must be assessed or when it would be applicable. Nonetheless, it is advisable to evaluate and document:

- the adverse effects that the COVID-19 pandemic may have caused within the business that have led the company to a precarious financial situation that made necessary the transaction in order to be able to survive in the market;
- the negative consequences for the market in case the transaction is not conducted; and
- the socially desirable gains that the transaction would generate.

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

Endnotes

(1) COFECE's statement was issued on 27 March 2020 and is available [here](#).

(2) The Federal Economic Competition Commission and the Federal Telecommunications Institute, only in relation to telecoms and broadcasting markets.

(3) In particular, if the *ex post* calculation of the Herfindahl-Hirschman index is greater than 2,000 points or has a difference from the *ex ante* index greater than 100 points.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).