COMPETITOR COLLABORATION IN MEXICO: THE CASE FOR UPGRADING REGULATION



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Collaboration agreements are insufficiently addressed in the Mexican antitrust legislation. The rigidity of the legal design to categorize *per se* illegal conduct versus that which admits a *rule of reason* approach, as well as the broad merger control regime, may play against the understanding, promotion, and regulation of agreements between competitors, despite their benefits to consumers.

In June 2018, an effort to adopt specific guidelines for collaboration agreements that would have provided minimum legal certainty to economic agents, did not pass the debate on COFECE's Plenum of Commissioners. The conclusion was that it was duplicative with the existing guidelines for information exchange among economic agents. Meanwhile, COFECE has suggested that -to achieve sufficient certainty- collaboration agreements may be reviewed using the merger control procedure.

In this article, we argue that the reasons to avoid an open discussion on collaboration agreements might be more closely related to the fear of opening a broader discussion on the implications of an overly strict definition of cartel activity and *per se* offenses under the Mexican Law. We also suggest alternative approaches from other jurisdictions to facilitate the implementation of collaboration agreements to economic agents and reap the benefits of such agreements on the overall economy.

I. WHAT BROUGHT US HERE?

Although since 1857 the Mexican Constitution proscribed monopolies, real enforcement started in 1993 with the entry into force of a competition law which was, in part, the result of the negotiations of NAFTA and the interest of Mexico in becoming a member of the Organization for Economic Cooperation and Development ("OECD"). A process of harmonization of the U.S. and Mexican commercial laws invigorated the application of a modern and enforceable antitrust framework, informed by mature legislations such as the United States ("U.S.").[2] A clear example was the explicit inclusion of the long-term debate in U.S. courts between the application of a *per se* approach to conduct that always -or almost always- has anticompetitive effects, and a different and comprehensive *rule of reason* approach to the rest of the potentially unlawful behaviors. Elegantly, and perhaps mindful of the formalistic tradition of Mexican law, the new competition law categorized in one section those "absolute" monopolistic practices that should be investigated as *per se* offenses and, in a different section, those "relative" monopolistic practices that should be prosecuted and judged according to economic understanding of both the potential damages and overall efficiencies to the consumers.

Even when the terminology may sound strange to outsiders, the strict division between absolute and relative monopolistic practices has proven useful to a greater extent for antitrust practitioners and economic

2 Crawford, James E. (1997) "The Harmonization of Law and Mexican Antitrust: Cooperation or Resistance?," Indiana Journal of Global Legal Studies: Vol. 4: Iss. 2, Article 6. Available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1099&context=ijgls.

agents in Mexico. Having clarity on those cases in which the authority would use one standard or another is a true relief in the context of Mexico's tight and legalistic tradition, where the rule of law is still also an enormous challenge. In addition, the antitrust cases in Mexico are always driven by the regulators themselves as private litigation is still very underdeveloped. Therefore, the usual American critiques to the *rule of reason* pleading requirements[3] or the tricky methods of analysis by the courts[4] are not necessarily relevant to our reality.

Nevertheless, that practical separation of conduct in the Mexican Law was challenged by economic reality. For example, cases of boycotts or joint market power have proven complicated to prove and sanction. The same happens with interactions among competitors in the context of a collaboration agreement, where real life cases have tested the flexibility of the Mexican law to efficiently manage the gray areas between a *per se* approach and a more comprehensive reasoning.

One may argue that many collaboration agreements among competitors may not have the "*purpose or effect*" of hindering competition, thus, they should not be considered as an "absolute monopolistic practice" under Article 53 of the Federal Economic Competition Law.[5][6] In fact, most of the collaborations bring benefits to competition in the market and opportunities for consumers. But the broad scope of the catalogue of conduct listed and described in Article 53 creates a significant area of risk for economic agents that want to efficiently collaborate with competitors for the benefit of consumers and may create an unintended "chilling effect" for economic activity. Many collaborations that happen in other jurisdictions are not structured as such in Mexico because of the competition law risk.

II. UNTYING THE KNOT

As discussed above, the Mexican Antitrust Law of 1992 which entered into force in 1993 and subsequent laws[7] reflected the U.S. tradition of dividing anticompetitive behaviors into *per se* offenses and those to be evaluated under a "rule of reason." Article 9 of this Law included a catalogue of conduct considered as plain *cartel activities* and thus seen as anticompetitive *per se*. Moreover, conduct considered to be an *abuse of dominance* was listed in Article 10, which explicitly established conditions for those behaviors to be considered as unlawful and also stated the possibility for the defendants to argue efficiencies. Embodying in the law such historical distinction from U.S. courts when assessing monopolistic behavior has been widely regarded as a good choice for the foundation of the modern era of the Mexican antitrust system.[8]

Nonetheless, any foreign legal appropriation has its limits. As discussed by Hovenkamp (2018), the lack of clarity in the U.S. laws as regards the formation of specific antitrust rules of illegality makes the court's role "unusually important in the development of antitrust rules."[9] The determination of which conduct is a *per se* offense in the U.S. was not set in stone but has evolved throughout the years based on: (i) cost-efficiency criteria; (ii) the knowledge of the type of agreements to be reviewed; and (iii) the factual evidence, as analyzed on a case-by-case basis. While some conduct like price fixing or bid rigging are generally considered as *per se* offenses in the U.S., the analysis is generally more flexible than in the Mexican Antitrust Law. Furthermore, our legal system is far less reliant on precedents and almost addict to the letter of the law. The dynamism and constant court feedback of the U.S. and other advanced jurisdictions´ legal systems is in contrast with the Mexican one, in which the lack of trust in the rule of law creates a more arthritic tradition, full of formalism and timorous of creative interpretations of the law, especially from the government agencies which are always worried of internal investigations for minor departure from legal formalities.

3 Bork, Robert H. (1966) "the rule of reason and the per se concept: price fixing and market division), The Yale Law Journal, Vol. 75, No. 3. Available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4159&context=fss_papers.

4 Carrier, Michael A., (2019), "The Four-step rule of reason," Antitrust Magazine, Spring 2019, Vol. 33, No.2. Available at https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf.

5 Federal Economic Competition Law. Published on Mexico Federal Economic Gazette on May 23rd, 2014. Available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_270117.pdf An English version is available at https://www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf.

6 Such definition capturing both the "*aim and the result*" seems also to feed itself from the U.S. tradition, in particular *United States v. Trenton Potteries, Co.*

7 Since 1857 the Mexican Constitution Law proscribed monopolies, however, it remained largely unknown and unforced until the last decade of the 20th century. In 1992 the first Competition Law was enacted but it remained largely unknown for a long time. Important reforms to the Mexican Constitution were enacted in 2013 and a new competition law was enacted in 2014. Such process of reform also resulted in the current Federal Economic Competition Law of 2014. For a historical review of the reforms please refer to http://dei.itam.mx/archivos/REFORMAS_A_LA_LEY_DE_COMPETENCIA_ECONOMICA_DE_MEXICO.pdf. Cfr. Mena-Labarthe, Carlos (2017), "The new competition policy in Mexico," Competition law and policy in Latin America : recent developments / edited by Paulo Burnier Da Silveira, Kluwer Law International, 2017.

8 Slottje, Daniel J, et al, (2001). "*Antitrust Policy in Mexico*," 7 Law and Business Review of the Americas, Volume 7, Number 3, Article 6. Available at https://scholar.smu.edu/cgi/viewcontent.cgi?article=1833&context=lbra.

9 Hovenkamp, Herbert J., (2018), "The Rule of Reason," Faculty Scholarship at Penn Law. 1778. Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty_scholarship.

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The above has been made quite clear by the antitrust courts in Mexico. In the *Amparo 46/2014* the specialized tribunal stated that absolute monopolistic practices are "unreasonable" in all cases as they "*illegally restrict the competition process*," and always lack "*any economic justification; they are illegal per se*."[10] In the context of such interpretation, it is worth reflecting on the possibility of collaboration agreements among competitors not being considered as *per se* illegal in Mexico. As discussed above, an initial argument would be that in the vast majority of cases such agreements do not have the purpose or effect of restricting competition in any way. Nevertheless, the list of conduct is so broad that it would be very risky for the parties to completely rule out any possibility of fitting in one of their paragraphs.

Considering this situation, the Investigative Authority of COFECE proposed in June of 2018 Draft *Guidelines for Collaboration Agreements among Competitors* (the "Draft"). The Investigative Authority correctly expressed that given the frequency with which these agreements are carried out and the uncertainty of the situations in which they may constitute an illegal conduct, it was important to provide specific guidelines for economic agents on this important topic. The Commission opened this draft for comments from the public, which in general were supportive of the effort and created a good debate around the specific issues discussed in the draft. Unfortunately, the proposal was not adopted as a guide by the Plenum of Commissioners of COFECE, who argued that the guidelines were to some extent duplicative of the current *Guidelines of Information Exchange among Competitors* (the "Guidelines for Information Exchange").[11] The debate at the Plenum level also evidenced a fear of overcommitting to some legal interpretations that could signify a departure from formalistic legal interpretations.

In our view, the Investigative Authority of COFECE was right on the need for having guidelines on collaboration agreements among competitors. While the *Guidelines of Information Exchange among Competitors* indeed mention the existence of some situations in which competitors may collaborate and explains the importance of having the necessary protocols to avoid unlawful exchanges of competitively sensitive information, it helps very little to understand the limits of such collaboration to avoid an interpretation of wrongdoing. It is also true that the Draft had areas of opportunity -notably the lack of concreteness and specificity- but two years have passed and there is no indication of upgrades, or of the possibility of discussing a new document.

Considering the strict *per se* approach of the Mexican Antitrust Law, having at least some guidelines on competitors' lawful collaborations becomes critical. In Mexico, a "straightforward" collaboration among competitors could be considered very risky and it is worth to better explain to economic agents what conduct is considered to have the "purpose or effect" of affecting competition. Also, it is important to understand the cases in which the authority may consider a collaboration to be a *concentration* under the definition of the law.[12] Although there is always the possibility for firms or individuals to self-assess their collaboration and structure it in a way that the risk of illegal conduct diminishes greatly, some uncertainty remains. The Draft prepared by the Investigative Authority of COFECE was inspired by other jurisdictions' documents, in particular the "*Antitrust Guidelines for Collaborations Among Competitors*" ("U.S. Guidelines") issued by the Federal Trade Commission and the U.S. Department of Justice.[13] COFECE's Draft explicitly replicates the idea that collaboration agreements among competitors can provide benefits to competition as long as they do not fall under the scope of an unlawful concentration or agreements challenged as *per se* illegal. In this regard, it emphasized the fact that collaboration agreements among competitors could be seen as *per se* illegal agreements, therefore, as in the U.S. Guidelines, it provided economic agents with information regarding the key elements to take into account prior to executing a collaboration agreement.

10 PRÁCTICAS MONOPÓLICAS ABSOLUTAS. SON ILEGALES, *PER SE*. Amparo en revisión 46/2014. Avícola Pilgrim's Pride de México, S.A. de C.V. 6 de mayo de 2016. Unanimidad de votos. Ponente: Óscar Germán Cendejas Gleason. Secretario: Agustín Ballesteros Sánchez. Época: Décima Época: Registro: 2012166; Instancia: Tribunales Colegiados de Circuito; Tipo de tesis: Aislada; Fuente: Gaceta del Semanario Judicial de la Federación, Libro 32, Julio de 2016, Tomo III, Materia: Constitucional; Tesis I.1o.A.E.162 A (10a), Página 2182.

11 See pages 26 and 27 of COFECE's Board of Commissioners' Plenum discussion from June 7, 2018. Available at https://www.cofece.mx/wp-content/uploads/2018/07/VEP_20180607_21.pdf.

12 Article 61 of the Federal Economic Competition Law states that: "*For the purposes of this Law, a concentration shall be understood as a merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, and which is carried out among competitors, suppliers, customers or any other Economic Agent.*"

13 "*Antitrust Guidelines for Collaborations Among Competitors*," Section 3.32: Relevant Markets Affected by the Collaboration, pg. 16. Available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

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As in the U.S. case, COFECE's Draft also provided a section explaining different types of collaboration agreements that are typically created by economic agents (i.e. production collaborations, marketing collaborations, buying collaborations, etc.). Interestingly, it included a section on *joint purchasing agreements*, expressly stating that COFECE suggests economic agents to notify these type of agreements as "concentrations," even if the agreement does not trigger a mandatory pre-merger filing. In fact, there are precedents in Mexico of buyer's clubs which were indeed notified to COFECE.[14]

But the Mexican Draft also had to cope with legal limits. Even when it would have benefited from a more concrete approach in its guidance, for example, about "safe harbors" as in the U.S. Guidelines, COFECE considered it impossible to adopt them without a legislative change. It is also important to bear in mind that the Mexican Antitrust legislation lacks a procedure of consultation like the one described in the Canadian Guidelines for Collaboration Agreements which could also greatly benefit the system.

Regulating collaboration agreements may open the door for a more flexible understanding of *per se* offenses in Mexico. In the absence of a "living law" that is constantly informed by precedents or, from time to time, upgraded by expert legislators, there is a risk of mismatches with the complex and dynamic business reality. The rejection of the Draft presented to the Commissioners was attributed to the duplicity with other available documents and the risk of overstepping the law, but it might also be the case that the regulator still feels like releasing such a document (or further regulating agreements among competitors) may be going too far as creating the perception of a blank cheque to circumvent the law.[15] After all, the same limitations in our formalistic legal system may play for and against the regulator.

But the need for orientation was evidenced during the beginning of the pandemic and the problems that it created for the subsistence of many companies in Mexico. COFECE released several communications insisting that collaboration among competitors in the context of the extraordinary circumstances were not going to be prosecuted. It also invited economic agents to voluntarily submit those agreements to the Investigative Authority to rubber stamp them before its implementation. Nevertheless, there was very little appetite from economic agents to approach the authority through this proceeding and this could be partly fueled by the uncertainty in this area.

And then, what to do to have legal certainty of collaboration agreements among competitors in Mexico? COFECE's response has been clear: you can make a self-assessment and run the risk of an investigation, or you can submit them as *concentrations* under the pre-merger control procedure. Both in the Draft and in the previous Guidelines for Information Exchange, COFECE has suggested that for economic agents to have full certainty, collaboration agreements must be treated as concentrations and be subject to the same procedure, which is a long, document-intensive one. Although almost no collaboration agreement has the nature of a concentration, we must also understand that subjecting them to a lengthy revision may destroy the value of the business strategy. For example, in the aviation industry, COFECE's recommendation not only for joint ventures but even for light forms of collaboration among economic agents is to submit them as a *concentration*, which does not seem to be appropriate in all cases.[16] Many firms are deciding to run the risk, establishing clear safeguards for information exchange and documenting the pro-competitive nature of the business arrangements. In any case, the system is difficult to explain, especially to international companies when most other relevant jurisdictions have established clear and predictable systems to deal with these challenges.

14 In 2017 COFECE approved the purchasing club of G500 in the retail of gasoline in Mexico. Further information available in the link https://www.cofece.mx/nuevo-comunicado-g-500/.

15 See https://www.cofece.mx/postura-cofece-ante-emergencia-sanitaria/.

16 COFECE (2016). "*Análisis de caso, acuerdo conjunto de cooperación entre Delta y Aeroméxico para sus vuelos entre México y Estados Unidos.*" Available at https://www.cofece.mx/wp-content/uploads/2017/11/AMX-DELTA-v2.pdf.

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III. FIGURING A WAY OUT

First and foremost, we believe that COFECE should revisit the idea of releasing clear and concrete guidelines for collaboration agreements among competitors. Several jurisdictions like Canada, New Zealand, or the U.S. have released such type of orientation with the purpose of helping economic agents to self-assess their interactions with competitors and also to boost such type of efficient arrangements for the benefit of the economy.

We have a very tight legal framework, an underdeveloped case law, and a weak rule of law in Mexico. Under such circumstances, we cannot afford to have this level of uncertainty in such an important area. Furthermore, the existence of guidelines promotes self-assessment on economic agents, which creates a positive cycle of self-regulation and removes pressure from the system.

In this regard, it is interesting to see the recommendation to Brazil in the OECD *Peer Reviews of Competition Law and Policy: Brazil 2019* which stated that "*the CADE should publish more substantive guidelines to improve transparency, predictability and legal certainty of companies and to improve the coherence of the approach at the domestic level. Possible issues that would benefit from further guidance are: (…) horizontal cooperation between competitors.*"[17] Following this advice, Brazil now has an expedited review of collaborations among competitors that does not follow the burdensome rules of merger control proceedings, but rather a very specific and concise procedure to analyze collaborations that gives certainty to the parties.

Implementing a quick review process of collaboration agreements should also be considered by COFECE. Treating them as concentrations seems to be a very limited strategy to capture the nature and benefits of collaboration among competitors. In practice, parties have spent months convincing the authority just on the specific issue of how the proposed transaction is to be considered a merger and should be analyzed through the merger control proceeding. Conversely, the Canadian strategy to assess these types of collaborations may be beneficial for countries like Mexico. The Canadian Competition Bureau explicitly includes a quick procedure in the *Competitor Collaboration Guidel*ines stating that "*firms contemplating collaborations with competitors are encouraged to seek advice regarding specific issues that may arise. Guidance regarding future business conduct can be obtained by requesting a binding written opinion from the Commissioner under section 124.1 of the Act.*"[18]

Finally, a bolder option is to also seek more flexibility with the approach to *per se* offenses in Mexico. In this regard, it is interesting to review the approach of the Chilean regulator, which faced the same tension when enacting their current law. Practitioners were worried that establishing an explicit *per se* approach to certain conduct may unintendedly discourage or forbid collaboration among competitors that were considered to be efficient and pro-competitive. But the Chilean tribunals were up to the challenge when analyzing a joint venture in the aviation industry. Similar to the U.S. Court in *Broadcast Music, Inc. v. Columbia Broadcasting*,[19] the Chilean Tribunal determined that they could not apply a straightforward *per se* approach for the analysis, since they simply lacked the experience and knowledge of the particular type of agreement to be analyzed.[20] Therefore, it deserved a more comprehensive analysis of pro-competitive effects and competition risks, operating as a kind of reverse "*quick look*" approach.

The Mexican specialized tribunals and the regulators themselves may start using more creative approaches to better capture reality. Creative solutions will help companies, regulators and judges to navigate complexity and adjust to new challenges. Let us not forget that competition policy should be mindful not only of the net social costs of anticompetitive practices but also on the administrative costs of operating the enforcement system.[21] After all, having better rules and bolder interpretations will move the frontier of the antitrust law understanding in Mexico.

17 OECD. "*OECD Peer Reviews of Competition Law and Policy: Brazil 2019*," available at http://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf.

18 Government of Canada. "*Competitor Collaboration Guidelines*," available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html#ccg-1.1.

19 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979)

20 Jorge Grunberg Pilowsky, "Regla per se para carteles duros y acuerdos de colaboración entre competidores: un problema regulatorio aparente," Investigaciones CeCo (febrero, 2020), http://www.centrocompetencia.com/investigaciones.

21 *Ídem*. Hovenkamp 2018.

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