

Mexican antitrust commissioners felt guidelines were redundant

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Two commissioners at Mexico’s competition authority said that guidelines clarifying the legality of competitor collaboration reiterated issues already covered in other guidance, as revealed by the minutes for the meeting at which the draft guidelines were scrapped.

The meeting minutes also confirmed that the commissioners present unanimously voted against adopting guidelines last month.

The investigative arm of Mexico’s Federal Economic Competition Commission (COFECE) had proposed the guidelines, which would have covered five types of collaborative agreements: research and development, co-production, purchasing, marketing and standardisation.

Having already published guidelines on information exchanges in 2015 that touched on collaborative agreements, COFECE said in its 2017 Annual Working Plan that further guidance would clarify best practices and lay out the difference between collusive and cooperative agreements.

Specifically, the draft guidelines laid out four factors that could lead COFECE to deem a collaborative agreement harmful to competition. These were: reduction of incentives to compete independently; generation of variable costs in common to facilitate coordination in prices and supply or demand; possibly allowing the sharing of strategic information; or a length that tends to eliminate or reduce competition in a market.

After a public consultation on the guidelines from 30 November 2017 to 26 January 2018, the commissioners discussed them at their 7 June meeting. The meeting minutes were made public last Thursday; the only absent commissioner was president Alejandra Palacios.

Commissioners Brenda Gisela Hernández Ramírez and Jesús Ignacio Navarrese Zermeño were the only two who spoke about the guidelines at the meeting. Ramírez said the draft presented issues that COFECE has already addressed in other documents, including the information exchange guidance.

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Zermeño agreed with his colleague and said there is a “certain duplication” between the collaboration guidelines and current guidance. Both commissioners suggested that some of the “valuable” aspects of the guidelines could be “rescued” in other documents.

That the commissioners present voted against adopting the guidelines after only two commissioners gave brief remarks has triggered some concern in the antitrust community.

Carlos Mena-Labarthe, a partner at Creel García-Cuëllar Aiza y Enríquez in Mexico City, started the project while he was still the chief prosecutor at COFECE. He said that it is “sad to see” that the commissioners spent only a few minutes discussing a document that the staff and the broader competition community spent “a year to prepare and discuss”.

“The [commissioners] arguments are not directed to the substance of the guide and there is no real understanding of the issues,” Labarthe said. They did not discuss joint ventures, research and development agreements or purchasing groups, about which he said there has been a lot of confusion in the antitrust bar.

The guide provided necessary clarification, Labarthe said, and he praised the staff for putting forth “a very good draft document”. He said he hoped there is further effort to provide guidance, because businesses want to comply with the law but need additional clarity on those important issues.

Von Wobeser y Sierra SC partner Fernando Carreño Nuñez de Alvarez also noted that the publicly available information shows that the commissioners “did not discuss all the content of this document” – and that only a couple of the commissioners even expressed their opinion before dismissing the draft.

“It is noteworthy to mention that the collaboration guidelines tried to assess whether some collaborative agreements might not be considered as cartels under the presence of some specific qualifications,” Carreño said. “In the opinion of many practitioners, there are still areas where a specific guideline from COFECE would be advisable, avoiding grey areas and providing certainty to clients.”

Others – including Greenberg Traurig SC shareholder Miguel Flores, SAI partner Lucía Ojeda and Cuesta Campos y Asociados partner Azucena Marín – took to Twitter to voice their displeasure with the commission’s decision not to issue the guidelines.

COFECE did not respond to a request for comment about the chairwoman’s views on the guidelines.



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