

## Mexico could scrap JV competition guidelines, observers say

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The board of Mexico's competition watchdog last week voted against the implementation of guidelines that would have clarified the legality of competitor collaboration, local lawyers have said.

A spokesperson for Mexico's Federal Economic Competition Commission (COFECE), confirmed on 12 June that the board of commissioners voted on the guidelines in their 7 June meeting. However, the spokesperson said she could not confirm or deny the outcome until the authority published its decision, which it must do within 20 days of the vote.

Some of the world's biggest competition agencies exempt competitor collaborations – also commonly referred to as joint ventures or cooperation agreements – from enforcement if they are sufficiently justified by efficiencies. For example, airlines with code-sharing agreements can sell seats on each other's flights once they have received approval for the collaboration from the relevant enforcers.

The guidelines drafted by COFECE cover five types of collaborative agreements: research and development, co-production, purchasing, marketing and standardisation.

Mexico's enforcer opened a public consultation on the guidelines from 30 November 2017 to 26 January, and received five responses. Local lawyers said the EU's and US'

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existing guidelines on collaborative agreements served as contributors' main reference, though this is not mentioned in the draft guidelines.

In its draft guidelines, COFECE specified four factors that could lead the authority to deem collaborative agreements harmful to competition. These were a reduction in the incentive to compete independently; the generation of variable costs in common to facilitate coordination in prices and supply or demand; a possibility of sharing strategic information; and a length of the collaboration that tends to eliminate or significantly reduce competition in that market.

COFECE first made public its intention to develop guidelines for collaborative agreements in its 2017 Annual Working Plan. Though the antitrust agency published guidelines on information exchanges in 2015 that touched on collaborative agreements, COFECE said in the 2017 plan that the consultation would seek to clarify best practices and lay out the difference between collusive and cooperative agreements.

Mexican competition specialists, many of whom worked closely with the authority on the drafted guidelines, were dismayed to hear of a vote against their implementation.

A lawyer who worked on the guidelines said COFECE voted to cancel the submissions over concerns they lacked sufficient substance to provide legal certainty. Instead, the authority is allegedly inserting the drafted collaborative agreement guidelines into other existing guidelines, the source said.

Another lawyer who contributed heavily to drafting the guidelines reported being told by a COFECE official two weeks ago that the guidelines would be published by mid-June – “so a postponement or cancell[ation] of this is certainly surprising”.

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Carlos Mena-Labarthe, a partner at [Creel, García-Cuëllar, Aiza y Enriquez SC](#) in Mexico City, said he was told by other practitioners that the board voted not to adopt the guidelines, but did not know whether their implementation had been postponed or entirely thrown out.

Mena-Labarthe said such a vote is disappointing given contributors' hard work to provide clarity on collaborative agreements, especially with the law's current ambiguities on the matter. He speculated that the board failed to approve of the content of the guidelines.

"Mexico is like a straitjacket when it comes to cartel conduct," Mena-Labarthe said. The country's broadly worded laws result in companies' constant uncertainty as to whether or not they should apply to have an agreement cleared by COFECE, he said.

[Von Wobeser y Sierra SC](#) partner Fernando Carreño Nuñez de Alvarez in Mexico City – one of the practitioners consulted on the guidelines – said the authority received only five submissions in response to its call for public comment.

Respondents warned against including potential competitors so as not to confuse them with actual competitors, and suggested that companies be allowed to provide evidence of collaborative agreements' pro-competitive effects, such as a verifiable list of efficiencies, he said.

They also called for COFECE to consider allowing companies to notify collaborative agreements to the authority for analysis rather than only allowing the agreements to be notified as presumed concentrations. Finally, Carreño added that respondents described the guidelines' definitions of markets affected by the guidelines as vague, and warned that this could cause confusion.

The authority has until 27 June to issue a statement on the outcome of last week's board of commissioners' vote.

Practice area : Antitrust & competition  
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## Reference

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## Construction

### Chile

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### Brazil

Fernando Marcondes, Ricardo Medina Salla, Marlon Shigueru Ushiro Ieiri, Adriana Regina Sarra de Deus and Juliana Yumi Shiina Morato  
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