



# COVID-19: The Mexican Antitrust Authority's Perspective

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After the declaration made by the Mexican Federal Government<sup>2</sup> to recognize coronavirus disease (“COVID-19”) as a “serious disease of priority attention,” the Federal Economic Competition Commission (the “Commission” or “COFECE”) decided to intervene and issued an opinion (the “Opinion”) on the application of the Mexican Competition Law (the “Law”) and competition policy at this challenging time.<sup>3</sup>

Other competition authorities in Latin America have also taken measures to ensure the enforcement of the competition framework during the COVID-19 pandemic. Examples of these are the Peruvian authority,<sup>4</sup> which has stated that even though it has no powers to regulate prices, it can sanction cartels; the Brazilian agency,<sup>5</sup> which initiated an investigation to determine whether companies are abusively raising prices in the pharmaceutical sector as a result of the emergency; the Colombian<sup>6</sup> competition authority, which urged the business sector to avoid practices tending to limit free competition or distort prices; and the competition authorities of Chile,<sup>7</sup> which have adopted measures to carry out their activities electronically.

Prior to issuing the Opinion, the Commission also published a press release suspending terms and deadlines in its procedures from March 23 until April 17 with the exception of: (i) merger control procedures; and (ii) requests for COFECE’s opinion on bidding processes, concessions, permits and other similar procedures (e.g. cross-shareholdings in hydrocarbons).

In the Opinion, COFECE emphasizes its awareness of the problems the COVID-19 crisis raises for companies in the ordinary course of their business and in the regular functioning of markets. To try to mitigate the effects of COVID-19, the Mexican competition authority issued certain guidelines for its actions during the crisis, mainly focused on pro-competitive collaboration agreements, thorough investigation of indiscriminate price increases, and speedy review of mergers.

Similar to the guidance set out by the European Commission<sup>8</sup> as well as the U.S. Department of Justice Antitrust Division jointly with the Federal Trade Commission,<sup>9</sup> COFECE also set out its views on collaboration agreements among competing and non-competing firms in the context of COVID-19.

It is important to point out that Mexico has one of the strictest systems regarding exchanges of information and collaboration between competitors, as anticompetitive exchange of information is criminally sanctioned. Further, there are no official guidelines regarding collaboration among competitors, but only guidelines for exchanges of information.

Having said that, and in view of the current context, COFECE’s Opinion states that it will not prosecute collaboration agreements that are necessary to maintain or increase supply, satisfy demand, protect supply chains, or avoid shortages or hoarding of goods, provided that such measures do not aim to displace competitors.

This means that firms can lawfully collaborate with competitors to improve their efficiency and satisfy current demand, so long as such collaboration does not have the purpose or effect of limiting competition. COFECE also issued certain clarifications<sup>10</sup> relating to collaboration agreements, to specify that these can be carried out by competing or non-competing firms, but can also fall in the definition of a “concentration” and therefore be subject to merger control. To determine whether they fall within this definition, COFECE indicates that it will consider the following elements: (i) temporality; (ii) independence of decision-making; (iii) scope; (iv) whether the parties maintain competitive pressure exerted in other markets; and (v) the levels of competitive constraint exerted by the firms party to the agreement.

COFECE also notes that in the current health emergency, a given collaboration agreement may generate risks of future anticompetitive effects, but be necessary at the moment, provided that it does not have as its main or preponderant purpose to fix or manipulate prices, to reduce supply, or allocate markets. The Mexican authority urges economic agents to inform the Investigative Authority as soon as possible of its intention to carry out such agreements, which would be temporary and only to resolve situations arising from COVID-19, as soon as possible. COFECE explains that this is to allow authority to ensure that it has no antitrust concerns, while also emphasizing that such conduct, made during the emergency, will not be subject to investigation.

Further, COFECE notes the importance of pricing decisions being made independently by firms, and not for them to be induced, encouraged or recommended by Associations, Confederations or Chambers. On March 31, COFECE issued a publication urging the National Association of Real Estate Developers to refrain from promoting possible agreements among competitors. In this matter, COFECE noted that the association promoted the granting of discounts and benefits to tenants that could be considered an absolute monopolistic practice (cartel activity) if they are established through agreements that have the purpose or effect of determining a quota, or maximum amount of discounts to be granted to tenants as a reaction to the health crisis.<sup>11</sup>

In this regard, it is important to highlight the risks for competing firms that might seek to engage in price fixing, bid-rigging, or market allocation. Due to the COVID-19 crisis, such conduct will be viewed as particularly serious and will be severely sanctioned by the Commission.

Due to the emergency, the Commission has also observed variations in prices of some inputs in Mexico, and drastic changes in the demand for certain goods and services. In this regard, COFECE, has committed to investigate indiscriminate price increases thoroughly, and to initiate procedures where this is the result of unlawful conduct. A clear example of this is COFECE's publication of March 30, exhorting the National Chamber of the Sugar and Alcohol Industry, as well as its members, to refrain from entering into agreements to manipulate the price of pure alcohol, its derivatives and some of its inputs, including molasses. This is because the Commission apparently has knowledge that there could be price increases for the said products due to manipulation by competitors.<sup>12</sup>

Finally, as noted, merger control procedures will continue in their ordinary course. This is to ensure that companies can continue to carry out their transactions. As most of these procedures are carried out electronically since the beginning of 2020, the risk of exposure to COVID-19 is low. Another element that aids companies in this regard is COFECE's commitment to carry out its analysis in a more urgent manner to ensure recovery from COVID-19, if justified.

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- <sup>2</sup> *Official Communication through which the General Health Council recognizes the SARS-CoV2 virus disease epidemic (COVID-19) in Mexico, as a serious disease of priority attention, and establishes the preparedness and response activities to such epidemic.* Published on the Mexican Federal Official Gazette on March 23, 2020 available at [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590161&fecha=23/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590161&fecha=23/03/2020).
- <sup>3</sup> *Postura de la COFECE en términos de la aplicación de la Ley Federal de Competencia Económica ante la emergencia sanitaria.* Federal Economic Competition Commission. Available at <https://www.cofece.mx/postura-cofece-ante-emergencia-sanitaria/>.
- <sup>4</sup> *El Indecopi no tiene facultades para controlar o regular los precios de los productos o servicios, pero sí para que se respeten precios informados y sancionar concertaciones.* National Institute for the Defense of Competition and Intellectual Property. Available at <https://www.indecopi.gob.pe/en/-/el-indecopi-no-tiene-facultades-para-controlar-o-regular-los-precios-de-los-productos-o-servicios-pero-si-para-que-se-respeten-precios-informados-y-sa>.
- <sup>5</sup> *Cade inicia coleta de dados para subsidiar investigação no setor de produtos médicos-farmacêuticos.* Council of Economic Defense. Available at <http://www.cade.gov.br/noticias/cade-inicia-coleta-de-dados-para-subsidiar-investigacao-no-setor-de-produtos-medicos-farmaceuticos>.
- <sup>6</sup> *Superindustria hace llamado a gremios para que protejan los derechos del consumidor y la libre competencia.* Industry and Commerce Superintendence. Available at <https://www.sic.gov.co/slider/superindustria-hace-llamado-gremios-para-que-protejan-los-derechos-del-consumidor-y-la-libre-competencia>.
- <sup>7</sup> *Auto Acordado N° 20/2020 Sobre La Modalidad De Teletrabajo Del Tribunal.* Free Market Defense Court. Available at [https://www.tdlc.cl/nuevo\\_tdlc/wp-content/uploads/2020/03/AA-N20-2020.pdf](https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/2020/03/AA-N20-2020.pdf). *FNE publica resolución sobre funcionamiento en emergencia.* National Economic Prosecutor's Office. Available at <https://www.fne.gob.cl/fne-publica-resolucion-sobre-funcionamiento-en-emergencia/>.
- <sup>8</sup> *Antitrust Rules and Coronavirus,* European Commission. Available at <https://ec.europa.eu/competition/antitrust/coronavirus.html>.
- <sup>9</sup> *Joint Antitrust Statement Regarding COVID-19.* U.S. Department of Justice Antitrust Division jointly with the Federal Trade Commission. Available at <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.
- <sup>10</sup> *Respuesta a preguntas relacionadas con el comunicado COFECE-012-2020.* Federal Economic Competition Commission. Available at <https://www.cofece.mx/respuesta-a-preguntas-relacionadas-con-el-comunicado-cofece-012-2020/>.
- <sup>11</sup> *Previene COFECE a la Asociación Nacional de Desarrolladores Inmobiliarios para que evite posibles acuerdos entre competidores de este mercado.* Federal Economic Competition Commission. Available at <https://www.cofece.mx/previene-cofece-a-la-asociacion-nacional-de-desarrolladores-inmobiliarios/>.
- <sup>12</sup> *Envía COFECE prevenciones a la Cámara Nacional de la Industria Azucarera y Alcoholera por un aumento en el precio del alcohol, sus derivados y algunos insumos para su elaboración, que podría ser producto de un acuerdo entre agentes económicos.* Federal Economic Competition Commission. Available at <https://www.cofece.mx/envia-cofece-prevenciones-a-la-camara-nacional-de-la-industria-azucarera-y-alcoholera/>.