

Answers related to COFECE's Press Release 012-2020

Mexico City, April 1st, 2020

The press release states: *“Agreements between competitors breach the Federal Economic Competition Law and are investigated and sanctioned when their purpose or effect is manipulating prices, allocating the market, and/or restricting the supply of goods and services in detriment of the consumer. Therefore, any agreement of collaboration between economic agents that, in the present context of a health emergency, is necessary for maintaining or raising the supply, satisfying the demand, protecting supply chains, avoiding the shortage or hoarding of goods, will not be prosecuted as long as they comply with the law and do not displace competitors in the market”*.

1. ¿Does the press release refers to collaboration agreements between competitors? and ¿does it refers to vertical agreements, that is, between non-competitors?

It refers to “any collaboration agreement”, this means it includes both agreements between competitors and vertical agreements.

2. Will it be mandatory to notify these collaboration agreements as concentrations?

As previously stated, collaboration agreements between economic agents may occur between competitors as well as between non-competitors.

To determine if a collaboration agreement between economic agents is a concentration, several elements are usually considered, such as:

- a) **Duration:** concentrations are generally designed to have permanent or long-term effects.
- b) **Independence:** an important element to identify if an agreement between competitors is a concentration lies in determining if the transaction implies the creation of a new economic agent and if this new economic agent will be independent from shareholders in decision-making (for example, for price determination).



- c) **Scope of the agreement:** when a collaboration agreement between economic agents is established, the parties must maintain the competitive pressure in all other activities not included in such agreement. Accordingly, a collaboration agreement between economic agents should not limit independent decision-making in markets that are located outside the agreement, either on assets, production or price levels, or any other sensitive variable that could reduce the capacity or the incentive of the participants to compete independently. Moreover, the exchange of information between economic agents should be limited to the scope of the collaboration agreement, specially when it comes to competitors.
- d) **The levels of competitive pressure exercised by both parties to an agreement.** For example, if a company's competitive pressure on another company disappears permanently in a market (for example, in the market for the purchase of an input), this may imply that it is a concentration.

It is the responsibility of the economic agents involved in the transaction to analyze whether the agreement they want to reach is a concentration. If so, and the transaction exceeds thresholds established by the Law¹ it is mandatory to notify it and that the Commission issues the corresponding resolution.

Thus, the press release states that COFECE is committed to an expedite review of concentrations that arise from the need to build synergies and increase production capacities to satisfy, in a timely and efficient manner, the need of popular consumption products and any other goods necessary to face the current crisis.

Moreover, it may be that, in the current context of health contingency, there is a collaboration agreement, that the involved economic agents or their lawyers consider it might create risks to competition in the corresponding market, but at the moment it is necessary to maintain or increase supply, satisfy the demand, protect supply chains, prevent a shortage of goods or hoarding commodities; it is also temporary and that it does not have as its main or preponderant object to fix or manipulate prices, reduce supply or allocate the market in detriment of consumers.

¹ Article 86 of the Federal Economic Competition Law (LFCE).

Examples of this kind of temporary agreements are:

- Sharing certain assets to achieve economies of scale and scope, as well as network effects resulting in cost reduction for a given input necessary for production, distribution and/or commercialization;
- Consolidating production activities and/or patent licensing and property rights for producing goods, whether directly or through a third party, which can be used by the parties to the agreement as an input afterwards;
- Sharing distribution and/or commercialization channels.

In these cases, economic agents must report COFECE's Investigative Authority of the intention of the agreement, assuring that it is temporary and aimed at addressing the situation derived from the COVID-19 pandemic, so that the Investigative Authority, in the shortest time possible, conducts the corresponding analysis and, if it is the case that, in effect, the agreement does not have as its main or preponderant object to fix or manipulate prices, reduce supply or allocate the market in detriment of consumers, inform the applicant that such conduct will not be investigated during the contingency.

It is worth reiterating that any agreement between competitors with the object or effect of manipulating or fixing prices, reducing supply or segmenting a market will be analyzed as an absolute monopolistic practice and will not be subject to the treatment described in the previous paragraph.

3. Are the effects of collaboration agreements exempted? and, for how long will this position will be in effect?

It is not an exemption for collaboration agreements, because these by themselves do not infringe the LFCE. What COFECE acknowledges, is that, given the COVID-19 contingency, it may be necessary to make such agreements in a temporarily and promptly manner, so to prevent uncertainty for economic agents, COFECE urges them to request an opinion on collaboration agreements.



Concerning these requests, once the corresponding authorities determine the finalization of the contingency, economic agents must notify the end of the agreement or, when appropriate, the Commission could conduct the corresponding investigation for a potential unlawful merger.

Communication with COFECE's Investigative Authority must be made through the email provided in the statement consultacofece@cofece.mx.

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*The Federal Economic Competition Commission is entrusted with safeguarding competition and free market access.
Through this, it contributes to consumer welfare and the efficient functioning of the markets.
Through its work, it seeks better conditions for consumers, greater output and better services
and a "level playing field" for companies.*

