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Commission strives to close regulatory gap concerning competitor collaborations

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Regulatory gap
Comment

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The Federal Economic Competition Commission recently released its Strategic Work Plan 2015. Among other things, the plan addresses one of the main issues facing antitrust regulation in Mexico: collaborations among competitors. The plan specifically commits to drafting, submitting to public consultation and ultimately issuing guidelines setting out the commission's criteria for assessing collaborations among competitors.

Regulatory gap

Collaborations among competitors are not specifically regulated by law and do not necessarily imply concentration agreements among the parties. Moreover, such collaborations are conceptually distinct from hardcore cartel offences, which by definition raise prices and harm consumers. Collaborations, on the other hand, may have pro-competitive effects for the market, including:

- facilitating expansion to foreign markets;
- financing expensive innovation efforts; and
- lowering production and other costs.

This is particularly relevant since, given the regulatory gap, economic agents have no certainty over the lawfulness of specific agreements and there is no formal procedure to deal with the issue. Previously, the commission authorised(1) a strategic alliance between airlines through the merger notification procedure.(2) In that case the former commissioner, Miguel Ángel Flores Bernés, stated his strong opposition to the decision, contending that the agreement was not a merger and should be assessed as an absolute monopolistic practice – that is, a hardcore cartel practice – instead.

In line with this, on November 27 2014 the commission issued an opinion in response to a request from the general director of civil aviation (from the Secretariat of Communications and Transport) for information regarding the possibility of authorising strategic alliances between national and foreign airlines and a possible procedure for doing so. The commission concluded that collaborations among competitors – specifically, strategic alliances among airlines – could be authorised through the merger notification procedure, provided that the nature and characteristics of such alliances aligned with the principles specified in Article 61 of the Federal Law on Economic Competition, which sets out the criteria for mergers.

Despite the commission's abovementioned 2014 opinion, a regulatory gap still exists regarding competitor collaborations, since there is no procedure to assess those collaborations which do not necessarily constitute mergers or acquisitions. In contrast, the US Federal Trade Commission has published its Antitrust Guidelines for Collaborations Among Competitors (2000), while the European Commission has issued its Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements (2011), both of which acknowledge the existence and benefits of such agreements.

Comment

Although the commission's 2014 opinion relating to airline alliances shed light on how to approach such collabrations from a regulatory perspective, it has also forced the authority and economic agents to treat almost any type of contractual arrangement among competitors as a merger. This has significant implications for other common contractual arrangements between competitors and non-competitors that could broadly be considered mergers and thus trigger other obligations for economic agents (eg, prior authorisation from the authorities). Other unlawful alliances could also be framed as mergers in order to circumvent penalties for absolute monopolistic practices.

For this reason, the commission's intention to issue guidelines in this regard has been welcomed by the legal community. This implicit recognition of the lawfulness of some collaborative agreements

and the will to distinguish them from absolute monopolistic practices can be seen as a positive trend, encouraging further alignment with international best practices. Nevertheless, the fact that the commission must devise a procedure to assess all collaborations among competitors – not only those that constitute mergers – cannot be ignored; otherwise, a lack of legal certainty will result and the main problem will remain unchanged.

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Endnotes

(1) File CNT-001-2011 authorising a joint venture agreement between British Airways, PLC, Iberia Líneas Aéreas de España, SA and American Airlines, Inc.

(2) Other examples of joint venture agreements authorised through the merger notification procedure include CNT-023-2013, CNT-004-2012, CNT-001-2011, CNT-039-2010, CNT-034-2010, CNT-064-2009, CNT-011-2009, CNT-062-2008 and CNT-082-2003.

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