I. INTRODUCTION

The Mexican Federal Competition Commission (“FECC”) is the entity in charge of enforcing the Mexican Antitrust Act (Law). The FECC has issued a draft document titled “Guidelines for Collaboration Agreements Among Competitors” (“Guidelines”). These Guidelines are subject to public consultation for a 30 business-day period concluding at the end of January 2018. Any interested party may submit opinions on them for FECC consideration.

The Guidelines are not legally binding but constitute an important instrument for clarification and for orienting practitioners and the general public. They provide information on the factors that the FECC uses to assess collaboration agreements between competitors in order to determine whether said agreements are in compliance with the Law.

The Guidelines are significant in that they point to and confirm the Law’s provisions regarding the consequences of certain horizontal agreements. These consequences include the potential existence of cartels (an absolute monopolistic practice, which is a serious breach of the Law resulting in administrative and, in some cases, civil and criminal consequences); an illegal concentration; or, in certain cases, a relative monopolistic practice.

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2 The FECC’s purview does not extend to the broadcasting and telecommunications sectors, where antitrust law is enforced by the Federal Telecommunications Institute.

3 According to Section 61 of the Law, “A concentration shall be considered a merger, acquisition of control, or any other act by means of which companies, associations, stock, ownership interest, trusts, or assets in general are consolidated among competitors, suppliers, customers, or any other Economic Agents. The Commission shall not authorize or it shall, as the case may be, investigate and punish those concentrations whose purpose or effect is to hinder, harm, or impede competition and free market access regarding equal, similar, or substantially related goods or services.”
In our opinion, the fact that the FECC has issued these Guidelines reflects the agency’s concern with the collaboration agreements described below. Therefore, any such agreement must be carefully reviewed pursuant to the Law and the Guidelines.

II. COLLABORATION AGREEMENTS IN GENERAL

Collaboration agreements among competitors are not forbidden per se, and the Guidelines recognize that they might potentially benefit the competition process (for instance, by allowing parties to take advantage of economies of scale or improve their technical capacity). Nevertheless, the Guidelines specify that collaboration agreements might also run afoul of the Law where so deemed by FECC review. Reviews of this type are carried out on a case-by-case basis.

A. Illegal Concentrations

The Law states that certain transactions must be cleared by the FECC before they can take place, provided they meet certain thresholds. However, regardless of the need to obtain clearance, all concentrations (including those that do not surpass said thresholds) can be considered illegal. A collaboration agreement among competitors might give rise to an illegal concentration if the purpose or effect of the concentration is to diminish, hinder, or impede competition or free access to the market. In such cases, parties under investigation are allowed to demonstrate efficiency gains in order to avoid penalties.

B. Cartels

The Law does not necessarily forbid collaboration agreements among competitors. However, if agreements are executed for the purpose of carrying out any of the absolute practices listed in the Law (List of Practices), or if agreements result in these absolute practices, a cartel might be deemed to exist. The List of Practices includes price fixing, restricting output, market allocation, bid rigging, and exchange of information. Cartels are penalized per se, with no possibility for the parties to propose arguments of efficiencies or of any other kind.

Furthermore, according to the Guidelines, agreements not clearly executed for the purpose of any activity on the List of Practices must be closely reviewed by the FECC if the effects of said agreements run contrary to the Law. In these cases, the FECC takes into account the contents of the agreement in question, market specifics, the parties’ participation in the market, and any other necessary elements (e.g., the number of participants in the market and level of information exchanged between the parties). Because absolute practices are sanctioned per se, the Guidelines specifically mention that this review does not contemplate the acceptance of justifications or arguments from the parties and only references the agreements’ review.

C. Relative Monopolistic Practices

Vertical practices, or relative monopolistic practices, are carried out by non-competitors; however, a specific practice specified in the Law might apply. The monopolistic practice known as boycotting can occur as a result of a collaboration agreement. Unlike the

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4 Section 56, Article VI, of the Law defines a boycott as “an arrangement between several Economic Agents or an invitation for them to exert pressure on a specific Economic Agent or to refuse to sell, market, or acquire goods or services from the latter Economic Agent in order to dissuade it from a certain behavior, to retaliate, or to compel it to behave in a certain manner.”
case for absolute monopolistic practices, the participants in relative practices may use arguments of efficiencies. Additionally, participants must have substantial power in the relevant market in order for a relative practice to be penalized.

III. COLLABORATION AGREEMENTS SPECIFICALLY REVIEWED UNDER THE GUIDELINES

The Guidelines make general reference to the collaboration agreements they consider the most common. These include research and development agreements, joint production agreements, purchase agreements (buyers’ clubs), merchandising agreements, and standardization agreements.

The Guidelines deem research and development agreements acceptable when they effectively allow the performance of research and development activities; when activities are more effective if performed jointly, minus cases of joint exploitation; when agreements are executed for a limited term; and when participants are limited in number and market share. Agreements whose purpose or effect includes one of the items on the List of Practices are not acceptable under the Guidelines.

Joint production agreements may be executed to combine complementary technologies, know-how, or assets that allow for production collaboration for the purpose of saving on production costs and producing a good that could not otherwise be produced independently. Nevertheless, if the purpose of such an agreement is to determine the offer level or sale price of a good, the joint production agreement might be considered a cartel.

The Guidelines state that purchase agreements, or buyers’ clubs, aim at increasing participant bargaining advantage and/or creating economies of scale so that participants might collectively purchase from certain suppliers, thereby improving the terms of purchase. This type of agreement falls under the category of a buyers’ club. The FECC recommends that parties to this type of agreement voluntarily subject the transaction in question to regulator review so that it might be cleared as a concentration, regardless the agreement’s purpose.

According to the Guidelines, international experience shows that merchandising agreements can have procompetitive effects if new products are developed or if access to new markets is provided and efficiencies ensue (in terms of distribution costs, scale economies, etc.). However, the transaction might be considered a cartel if it provides for price fixing, offers, or the use of assets that keeps the parties from competing independently, among other things.

The Guidelines state that standardization agreements are executed for the purpose of determining technical requirements that must be met by certain products or services as well as production procedures and methods. The benefits of said agreements include the development of new products and improved product quality. However, if an agreement restricts output or results in market allocation, a cartel might be deemed to exist.

IV. CONCLUSION

As mentioned above, the Guidelines represent a draft that is still subject to review. Moreover, due to the importance of collaboration agreements and the high risk of running afoul of the Law (particularly with respect to the creation of cartels), we recommend that all agreements between competitors falling within the scope of the Guidelines be meticulously reviewed in order to ensure compliance with the Law.