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By Alejandra Palacios & Veronica Irastorza[1]

The economic system has historically undervalued or ignored environmental costs. As we face a climate emergency, it has become an area of much attention, including for the antitrust community. That is not to say competition law is the primary solution to climate change, but recent discussions have emphasized its role in not obstructing potentially useful collaborative efforts by the private sector on their path to becoming more environmentally sustainable.[2] Competition law and even more so, the fear of competition law, can be perceived as a barrier to collaboration efforts to promote sustainability.[3] As such, we are starting to see how some competition authorities, mostly European, are considering how best to support sustainability efforts that do not substantially harm competition.

The Mexican antitrust agency (COFECE or Commission) has not yet announced its position (if any) on how it will proceed to apply the antitrust laws when environmental concerns are at the center of their analysis, be it for mergers reviews, joint ventures, or any type of collaboration agreement between or among competitors. Our objective with this article is to drive conversation in Mexico on how to reduce the antitrust regulatory risks of formalizing a collaborative agreement for sustainability purposes between businesses. To be clear, we are not aiming to argue for a free pass for sustainability collaborations, but rather for the authority to give certainty on how collaborations that do not substantially harm competition and provide environmental benefits could be pursued without the fear of being investigated for anticompetitive practices.

As such, we outline a high-level proposal for a mechanism --a new review process established in the secondary bylaws--, that is different from the current traditional merger review by which the Mexican authority would review contractual joint venture agreements. We suggest a more modern way, outside a merger review, and by which it can assure the parties involved in a sustainability collaboration agreement that, under certain circumstances, it does not intend to bring enforcement action. We understand a collaboration agreement as a temporary strategic association that maintains the legal independence of each of businesses involved in a certain project or a commercial operation[4].

I. Climate Collaborative Efforts from Private Sector Competitors

According to the Intergovernmental Panel on Climate Change ("IPCC"), the world is off-track and at risk of surpassing the 1.5°C target.[5] The repercussions are a climate change phenomenon that adversely affects people and nature through increasing extreme weather events, rising sea levels and global warming. Subsequently, nearly half the global population is living in a danger zone of climate impact.[6] During the period of 2020-2022, the United Nations Office for Disaster Risk Reduction documented more than 150 disasters in Latin America as a result of meteorological,

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[2] See for example Simon Holmes, Climate Change and Competition Law – OECD Hearing on Sustainability and Competition, 2020.

[3] The word sustainability holds different meanings. A broader definition, like the UN's Sustainable Development Goals definition, used by the European Commission include ending poverty, zero hunger, gender equality and other social goals, in addition to environmental goals like climate action and conservation. A more limited definition relates only to environmental aspects. In this paper, we consider the narrower view, focusing only on climate action and conservation.

[4] See Carlos Mena and Edgar Martin Padilla, *Joint Ventures y alianzas entre competidores a la luz de la Ley Federal de Competencia Economica*, Derecho de la Competencia en Mexico. Nuevos paradigmas, Tirant le Blanch (2023).

[5] Intergovernmental Panel on Climate Change ("IPCC"), Climate Change 2023: Synthesis Report, March 2023.

[6] United Nations Office for Disaster Risk Reduction, Overview of disasters in Latin America and the Caribbean 2020-2022, September 2023.

climatological, and hydrological factors. These hazards were responsible for 40 percent of the reported fatalities resulting from disasters and caused 71 percent of the economic losses.[7] In addition, the depletion of the earth's natural capital poses significant risks for everyone, including investors. As seen recently with hurricane Otis, Mexico's geography makes it especially vulnerable to extreme weather events.[8]

We take as given that governments can encourage sustainability by using measures like regulations, taxes, subsidies, or market schemes. Yet, despite the efficiency of carbon taxes and cap-and-trade systems, there has been reluctance to fully adopt these methods. Therefore, sustainability initiatives stemming from the private sector are gaining track. For example, in Latin America, companies that represent 84 percent of the market capitalization of the region already disclose sustainability information, in spite of there not being a regulatory obligation to do so.[9] In Mexico, about 60 percent of the companies listed in the stock exchange provide quality environmental, social and governance ("ESG") information.[10]

Investors and corporations' desire to work together on sustainability goals is likewise growing, including on collaborative projects between competitors that have a positive environmental impact.[11] The problem, however, is that competition law and, even more so the fear of competition law, can be perceived as a barrier to collaboration efforts to tackle sustainability challenges.[12] As a recent example, in May of this year, 22 republican state attorney generals in the U.S. sent a letter to insurance companies warning that companies' commitments to collaborate with other insurers and asset owners on sustainability issues may violate the antitrust laws (and as a result, many insurers left the alliance).[13,14]

In some countries, companies are concerned about collaborating, even when the intent is to improve sustainability without affecting competition. Indeed, a recent survey suggests that around 60 percent of businesses had shied away from such cooperation due to the fear of competition law.[15] Further to this point, the ICC has documented cases where even for sustainability collaborations that may not harm competition, companies are concerned about possible accusations and not willing to collaborate.[16]

Although self-interest and rivalry (i.e. competition) is needed to achieve innovation, cost and price reductions, and heightened quality in many markets, cooperation is not necessarily mutually exclusive to competition. Sometimes, companies that compete with the other can establish collaborations for specific purposes that allow them to achieve more efficient balances for their production, distribution, research, or supply procurement processes, without necessarily eliminating the pressure exerted between them. Even so, collaborations among competitors are somewhat limited by antitrust laws in most jurisdictions, making firms very cautious about engaging in collaborative agreements with competitors.

II. How Does Competition Policy Currently Fit in the Sustainability Fight?

The relationship between climate change and competition policy was first publicly raised in

[7] *Ibid.*

[8] World Bank, Climate Change Knowledge Portal, Mexico Country-specific information.

[9] OCDE, Sustainability Policies and Practices for Corporate Governance in Latin America, 2022.

[10] Sylvia Meljem, Enriquez De Rivera, Carlos Hernández Galvez, Zooming in on Mexico's Recent ESG Corporate Reporting, International Federation of Accountants, March 2023.

[11] ICC (2023), Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals. www.iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-to- climate-action.

[12] *Ibid.*

[13] https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf.

[14] S&P Global, Net-zero alliances jittery as GOP attorneys general play antitrust card, June 2023.

[15] Finding from a survey to over 500 sustainability professionals in the U.S. and Europe by Linklaters. Source: Linklaters, Competition Law Remains a Barrier to Sustainability Collaborations, 30 October 2023.

[16] ICC, When Chilling Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action, November 2022.

2015. The European Commission ("EC") authorized the acquisition by General Electric Company ("GE") of Alstom Energy's global businesses in the markets of thermal energy, renewable energy (offshore wind and hydroelectric) and electrical grids under certain conditions. As part of its merger control power, the European competition authority reviewed gas, steam and wind turbine markets, and expressed concern that the deal would give GE a dominant position in the gas turbine market, which could in turn see a price increase, impacting the construction of power plants. In speeches at the EC explaining this transaction, it was pointed out that conditioning the transaction on the sale of some segments of Alstom's gas turbine business to a third party would lead to a positive impact through a reduction in market power and the generation of cleaner energy. It was at this point, mainly in European countries, that discussions about how competition policy fits in the fight against climate change started. In the American continent, and particularly in Latin America, this debate has not yet gained momentum, but we believe that it is inevitable and appropriate.

Traditional economic competition models have tended to prioritize short-term growth and profit maximization without considering long-term environmental consequences. For example, a company may overuse fertilizers and pesticides to increase crop yields, even though this results in depleted soil and water pollution. Because competition historically encourages companies to focus on cutting costs (without including all environmental costs) and selling more, this can result in decisions that adversely affect environmental sustainability. On the other hand, it is also true that competition between companies can be a driving force for innovation towards the production of more sustainable goods and services. In Mexico, for example, the introduction of competition in the electricity sector brought the lowest price of solar energy in Latin America, observed until then.

Another aspect of the competitive process is that companies can compete on the basis of the sustainability of the products or services. A company may, in some cases, want to implement sustainability measures or adopt certain standards to reach its sustainability goals and or reduce its environmental impact. This is especially the case when customers are also favoring green solutions and willing to pay more for eco-friendly products, even if adopting more sustainable products or practices may imply significant investments and costly measures that could result in higher prices. It can also be the case, of course, that a first mover who implements a sustainable practice ends up with a competitive disadvantage. Such a move could reduce profitability as costs increase and customers are not willing to pay more, and the sustainable action, therefore, is set aside. Collective action amongst competitors can help overcome these externalities, but at the same time, can be a risky business in many jurisdictions if the action is perceived as anticompetitive by the antitrust agency.

Companies therefore need clarity in what types of cooperation agreements pursing sustainability can be pursued without raising concerns from the competition authorities.[17]

III. The European Recent Approach on Treating Collaboration Agreements Linked to Sustainability Efforts

With these complexities in mind, there is growing acceptance by some competition agencies, primarily European, that certain industry collaborations should be allowed to achieve sustainability goals. The EC is signaling to companies considering collaborations motivated by sustainability objectives that there are paths for discussing on the pro- and anticompetitive effects of these collaborations and for showing antitrust compliance. For example, in June 2023, the EC published its revised Horizontal Agreements Guidelines, which added a separate chapter on sustainability agreements, confirming an approach to consider broader efficiencies[18].

[17] In September 2020, the EC launched a debate asking questions about how competition rules and sustainability policies can work together. Around 200 contributions were received and among the conclusions was the need for clarity. For more details see European Commission, Competition Policy Brief, September 2021, ISBN: 978-92-76-41099-7.

[18] See https://competition-policy.ec.europa.eu/document/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en.

Benefits have to outweigh the costs to the consumers in the relevant market, but include: 1) individual benefits that improve the consumer of the good's experience (i.e. knowing that a product doesn't contain potentially harmful ingredients), 2) individual non-use benefits – when the consumer is better-off from knowing that another group is benefiting, even when their own experience is unchanged and 3) collective benefits where, regardless of the consumer's view, benefits outside the relevant market that are significant for the consumers of the product, are considered[19]. Hence, even though if sustainability agreements cannot evade antitrust scrutiny merely by referring to a sustainability objective, they nevertheless may fall outside the scope of the cartel provision if they are necessary to achieve sustainability benefits that outweigh the costs for consumers and competition is not completely excluded. It is worth to mention that it is still unclear what would be considered a "significant" price or quality impact. Moreover, if the guidelines do not address all inquiries or provide the desired reassurance, companies are encouraged to reach out to the EC for further assistance.

Additionally, the EC provides "safe harbor" exemption for agreements that set sustainability standards if they comply six cumulative conditions: 1) clear and transparent procedures to develop the standards, 2) voluntary participation in the process, 3) participants should be free to adhere to higher standards, 4) avoid the exchange of commercially sensitive information unless objectively necessary and proportionate, 5) effective and non-discriminatory access to the standard, and 6) must meet one of these: 6a) no significant price or quality impact, 6b) combined market shares below 20 percent in any relevant market.[20]

The UK Competition and Markets Authority ("CMA") also issued new guidelines to show how businesses can pursue green cooperation without fear of infringing on UK competition law[21]. CMA is also taking a more open-ended approach, considering the total benefits of the sustainable agreement for all UK consumers rather than the benefits to consumers in the market affected when assessing "climate change agreements." It also clarifies when collaborative agreements unlikely will infringe competition rules, such as when they do not appreciably affect competition because, for example, the parties' combined market share is too small, or do not affect competitive parameters. Additionally, information sharing between parties to a permissible environmental sustainability agreement will not raise competition concerns provided they do not go beyond what is necessary and is proportionate to the agreement's objectives. Finally, the CMA expressly mentions that it is determined to help businesses and support their sustainability initiatives, thus is operating an open-door policy whereby companies may ask the authority to provide informal guidance on their proposed sustainability agreements.

IV. The Current Mexican Review Process of Collaborative Agreements Is Not Fit for the Purpose

In our view, the current Mexican review process of collaborative agreements can greatly disincentivizes potentially useful collaborations contained around sustainability objectives. As elsewhere, there is a general lack of clarity around how the Mexican antitrust agency will view cooperation agreements between businesses looking to adopt sustainability collaborative efforts without the risk of potential antitrust scrutiny. Moreover, what sets Mexico apart from other jurisdictions are two structurally limiting factors within the antitrust system:

1. Joint ventures or collaboration agreements are not contemplated in law. As such, there isn't a dedicated process by which the agency can review agreements before they take place, nor is there any possibility of exemption in the application of the

[19] The established methods and substantiated evidence are required to quantify the benefits and even when the Guidelines do not specify the economic analysis needed for different situations, the Guidelines do provide some illustrative approaches and even refer to the Environmental Footprint toolkit developed by the EC.

[20] *Ibid.*

[21] See Competition and Markets Authority, Green agreements guidance: Guidance on the application of the chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, October 2023.

competition law for collaboration agreements.[22]

2. Even if the status of joint venture does not exist under the law, the 2021 Merger Guideline for the first time mentions that they can be understood as a *concentration*, just as those involving societies, associations, shares, parties, trusts or assets that are established between competitors, suppliers, clients or any other economic agent[23]. Thus, in practice COFECE could treat a collaboration agreement as a candidate for a mandatory merger review process[24]. Although it also points out that if the collaboration agreement between competitors limits competition it can be considered a cartel.

Given this context and challenge, Mena and Martín Padilla suggest that when understanding if COFECE might consider an agreement between businesses to be anticompetitive, two categories of collaboration agreements should be distinguished. On the one hand, those that would likely be considered as a "concentration" under the Mexican law, as they involve the creation of a new company for a specific activity, with its own legal personality, independent of the associated companies, although commonly owned and controlled by them. In this case, the authors categorize them as a "corporate joint venture." On the other, agreements that materialize through a contract that outlines the purpose of the new venture, its specific activity and the rights, obligations and the relationship of the parties involved ("contractual joint venture").[25]

A. The Challenge of Assessing if the Collaboration Agreements Should be Catalogued as a "Concentration" and thus, Require a Pre-merger Approval.

To start, businesses are required to self-assess their compliance under the Mexican antitrust framework, meaning that those interested in formalizing a collaboration agreement must self-assess if such an endeavor requires a pre-merger review approval by the antitrust authority before closing the deal. To do so, the Merger Guideline suggests considering, among others, that the creation of a new economic entity with functional, operational, and financial autonomy is treated as a merger.[26] Thus, in practice, "corporate joint ventures" most likely will be considered as mergers and can be blocked if the authority considers that it limits competition.

It is less clear to determine if "contractual joint ventures" need a pre-merger approval. The Merger Guideline only suggests that cooperation agreements between businesses that are competitors or potential competitors could be eligible for a merger review.

B. Substantive Challenges of Reviewing Collaboration Agreements as "Concentrations"

Following their self-assessment, once the joint parties decide to file the cooperation agreement for a pre-merger review, the Mexican authority will follow a "traditional" merger review process. As mentioned, even if the merger guideline acknowledges that collaboration agreements between competitors provide efficiency gains (like using the assets of each party for improving production, distribution, marketing, investment, research and development spending), the law does not establish exceptions.[27] For example, there is no consideration for research and development related activities, let alone sustainability.

Related to the review process, as in any other merger review, the Mexican authority will consider the anticompetitive effects of the cooperation agreement in comparison to efficiency gains that can be passed on to consumers, generally through prices. As in all jurisdictions, the challenge is if the antitrust agency will balance environmental benefits with

[22] COFECE's Merger Guideline (2021) at 9-12. Document available at https://www.cofece.mx/wp-content/uploads/2021/06/GUIACON_2021.pdf.

[23] *Ibid.*

[24] *Ibid.*

[25] Carlos Mena & Edgar Martin Padilla (2023).

[26] *Ibid.*

[27] *Ibid.*

the potential negative effects on prices or choices.

In Mexico, the secondary bylaws (known as *Disposiciones Regulatorias* in Spanish) of the Competition Act list a set of efficiency gains that can be considered as procompetitive effects of a merger, such as savings in resources that allow the same quantity of the good to be produced at a lower cost without reducing the quality; the reduction of costs if two or more goods or services are produced jointly rather than separately; the transfer or development of production technology; or any other action that demonstrates that the net contributions to consumer well-being derived from the merger exceeds its anticompetitive effects.[28]

One could argue that sustainability efficiencies could fit into these categories; however, in some cases, for example, when jointly agreeing to eliminate a contaminating input, there may be a cost (and a price) increase in the short run that will not fit the efficiency standard. Sustainability projects may take time to materialize so although production costs may be lower in the long run, this could not be the case initially, again not fitting the efficiency standard. Other projects will probably elevate costs as cleaner technologies for production purposes are under development.

Additionally, in practice, the legal standard for efficiencies to be considered as "favorably impacting the process of competition" in that it results in an "improvement in consumer welfare" is complicated to achieve. Consistent with the traditional merger review process, efficiencies must be merger-specific, offset any anticompetitive impact, and be verifiable. Again, the evidence required to prove long-term sustainability-related benefits for consumers explicitly derived from the collaboration agreement seems out of place and rather challenging to demonstrate.

Finally, the Merger Guideline also mentions that even if the collaboration agreement goes through the merger review process, it does not exempt it from being investigated later, if COFECE considers that said agreement might constitute an anticompetitive conduct.[29] This means that even when a collaboration agreement between competitors has been analyzed and authorized by the Commission through its merger review process, an investigation could be initiated if the agency presumes that the agreement had the object or effect of a collusive agreement (by mainly involving information sharing aspects regarding prices and/or quantity offered).[30] It is important to note that if a cooperation agreement is investigated, it will be analyzed and sanctioned under the *per se* rule as a cartel activity. Thus, contrary to other antitrust systems, Mexican law has no room for a more flexible analysis (anticompetitive versus procompetitive effects) of an anticompetitive conduct investigation of a cooperation agreement between competitors.[31]

As can be seen, since the Merger Guideline differentiates between formal joint ventures (i.e. creating a new entity) and contractual joint ventures (an agreement to collaborate), it is not easy to determine through self-assessment whether a contractual agreement should be filed for approval before the antitrust agency. Additionally, even if, through the stated guideline, COFECE suggests that to achieve certainty, collaboration agreements may be reviewed using the merger control procedure, there is no assurance that they will not be investigated as collusive agreements. This is especially the case if these agreements are among current or potential competitors. Moreover, if the collaboration agreement somewhat reduces the degree of competitive rivalry between competitors but has significant sustainability effects that justify the risk of competitive decline, there is little space for a sustainability efficiency defense if such doesn't materialize immediately. In a nutshell, as Mena and Martín (2020, 2023) have previously mentioned, the actual merger process for

[28] Article 14, *Disposiciones regulatorias de la Ley Federal de Competencia Económica* (last reform 2019), available at https://www.cofece.mx/wp-content/uploads/2019/08/19.08.01-Disposiciones-Regulatorias-de-la-LFCE-ultima-reforma.pdf.

[29] *Ibid.*

[30] Carlos Mena & Edgar Martin Padilla (2023).

[31] Carlos Mena & Edgar Martin Padilla, Competitor Collaboration in Mexico: The Case for Upgrading Regulation, Competition Policy International (November 2020).

reviewing cooperation agreements is far from functional. These procedural gaps for analyzing cooperation agreements become more evident and more urgent to attend given our current climate crisis.

As a final point, the Mexican law includes a procedure for requesting a "general orientation" on competition matters to the antitrust authority. It states that the Commission must offer general guidance regarding the application of the law to those who request it[32]. Even though this mechanism seems like a window for individuals or businesses to know if their cooperation agreement or joint venture would possibly trigger a competition violation investigation, much like a business review letter by the Department of Justice in the U.S.,[33] in our view, it is flawed for this very purpose. The Technical Secretariat within COFECE, which answers such queries, does not have the legal attribute to initiate an enforcement investigation; only the Investigative Authority within COFECE does. Accordingly, even if were to respond to the query its non-intention to prosecute a collaboration agreement as a cartel, the answer would not have legal standing. In fact, the only time that COFECE answered a guidance request of this type between the years 2013 and 2021, related to a collaboration agreement amongst competitors asking if they could produce compact detergent that reduced the negative impact on the environment, the answer given by COFECE was not only that they could not commit to investigate, but the Investigative Authority was notified of the intended agreement.

Currently, COFECE has yet to publicly mentioned if it intends to (1) balance sustainability against efficiency in its merger review process and/or (2) consider asking for a law amendment to be able to consider antitrust exceptions to collaborative projects for sustainability purposes. In the meantime, we suggest a path foreword below, an approach that has only recently been made in Europe.

V. A High-Level Proposal for the Mexican Context

Our objective with this article is to drive the conversation in Mexico on how to reduce the regulatory risks of formalizing a collaborative agreement that do not harm competition, in the context of sustainability projects, especially those joint ventures that would materialize through a contractual joint venture. As mentioned, "contractual joint ventures" are at greater risk than "corporate joint ventures" of remaining in limbo. From intuition, we believe that competing businesses will mostly pursue contractual joint ventures for sustainability purposes.

This proposal aims to tackle the issue of certainty that, under certain circumstances, a collaboration agreement can receive assurance from COFECE's investigative arm that it has no intention to bring an enforcement action against the proposed joint venture. Although this does not solve all the abovementioned issues, it would signal that COFECE is willing to accommodate its traditional approach to cooperation agreements between competitors in the context of the climate crisis (and in general, fix a gap in the system either it be the intention of businesses to create a joint venture for sustainable or other purposes).

In this case, the Board of Commissioners would need to create a formal procedure, regulated in the secondary bylaws (*Disposiciones Regulatorias*), by which the Investigate Authority would be given the power to answer queries on a case-by-case basis, about how it could respond to an agreement among competitors that pursue sustainability objectives. I.e., would it intend to prosecute it as cartel activity or not, much like the Department of Justice Antitrust Division Business Review where a business requesting a business review generally receives as a response on the intention (or not) to bring an enforcement action against the proposed agreement if it goes forward.

[32] Article 110, *Disposiciones regulatorias de la Ley Federal de Competencia Económica* (last reform 2021), available at https://www.cofece.mx/wp-content/uploads/2019/08/19.08.01-Disposiciones-Regulatorias-de-la-LFCE-ultima-reforma.pdf.

[33] See "Introduction to Antitrust Division Business Reviews," available at https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf.

Each case analysis would consider the nature of the businesses involved, the type and scope of the collaboration, and the markets where the parties are involved (that is, the market affected by the collaboration agreement, as well as those markets where parties involved currently or potentially compete), to assess the likelihood of said specific collaboration hindering competition. The specific parameters of such analysis could be in line with those that appeared in COFECE's proposal of a Competitors' Collaboration Agreements Guideline that was put out for public consultation in 2017,[34] although never approved by the Board of Commissioners. That is to say:

The first step would be to consider if the cooperation agreement is a mere guise of an intention for coordinating (a) price adjustments; (b) supply limitations; (c) market segmentation; or (d) the exchange of information with any of the objects or effects referred here in any of the related markets where the businesses involved in the agreement participate. If so, given that the most fundamental element of a competitive market is that competitors make decisions independently in price, supply, and commercial strategies, without further detail, the agreement would not be approved and, if materialized, would be considered a cartel.

If the collaboration agreement is not intended to be used as a cartelization vehicle, then the authority would need to make a case-specific decision, considering (1) the total number of participants and their shares in the market where the collaboration is taking place, (2) the level of information exchange needed between parties to carry out the collaboration agreement, (3) the necessity or indispensable nature of the agreement, (4) the estimated duration of the collaboration, (5) if as a result of the collaboration agreement a relevant competition characteristic of the market could be modified, (6) if an estimated price increase resulting from the sustainability project could be considered "insignificant," (7) if the agreement does not concern companies' economic activity but merely relate to their internal corporate conduct, among other elements.

From such an analysis, the agreement would fall into one of two categories: those unlikely to raise concerns, either because they have no impact on competition or it is not substantial; and those that hurt competition, either because they are greenwashing or imply considerable anticompetitive effects. In the first case, the Investigative Authority would announce that it does not intend to take enforcement action against the sustainability agreement. In the second, it would state its intention to investigate if the proposed collaboration agreement takes place.[35]

Importantly, to complement this new procedure, the Investigative Authority would need to be more "flexible" in its efficiency analysis. If the negative impact on competition is not substantial, the Investigative Authority would need to be open to balancing the effects of core competition parameters with sustainability-related efficiencies, as in Europe and the UK. In the revised Horizontal Guidelines, the EC broadens its approach to efficiency gains to include variables such as better-quality products, less pollution, cleaner production and/or distribution technologies, including not only efficiencies accruing to users of the relevant products but also "collective benefits." In Mexico, COFECE's Board of Commissioners has the power to modify the secondary bylaws to include long-term sustainable efficiencies as part of potential efficiency gains in its antitrust analysis.

Additionally, COFECE's Investigative Authority would need to be open to actively encourage conversations with the parties involved to delimit the object and scope, if the proposed collaboration agreement negatively impacts competition. Both in the EU and UK, there is a commitment from the antitrust agencies to provide informal guidance to those interested in pursuing a collaboration agreement, with the

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[34] Document available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiDhbSeq-yCAxUfPUQIHX3vB78QFnoECBcQAQ&url=https%3A%2F%2Fwww.cofece.mx%2Fwp-content%2Fuploads%2F2017%2F12%2F171128_Guia_Colaboracion_limpia.docx&usg=AOvVaw3yFWdvx5Iw0eDzM-dPgEoX&opi=89978449.

[35] See section *The Division's Response: Business Review Letters*, "Introduction to Antitrust Division Business Reviews", available at https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf.

intent of allowing them to seek clarity and comfort on whether their joint project would comply with competition rules.

Of course, for the duration of the collaboration, the parties must act independently and avoid participating jointly in decisions on prices, supply, market shares, or commercial strategies. Otherwise, they could be subject to antitrust enforcement. The Investigative Authority would also need the power to request commitments from the parties (e.g. information firewalls or avoiding cross-directories with the joint venture) and the corresponding supervising mechanism.

It is important to note that this proposal is within what COFECE has thought in the past. What we propose is inspired by the Commission's Covid-19 pandemic experience of authorizing its Investigative Authority to temporarily authorize cooperation agreements between competitors with a commitment on non-cartel enforcement prosecution. At that moment, the Mexican antitrust agency opened up the possibility of having its Investigative Authority, the area within the Commissions responsible for carrying out its anticompetitive conduct investigations, to pre-approve cooperation agreements that complied with certain conditions. As the health crises unfolded and it was becoming to come clear that maybe temporary joint ventures between competitors would be needed to preserve supply chains, logistic routes, even the production of essential necessities, the antitrust agency issued a statement that indicated that collaboration agreements between competitors within the context of such extraordinary circumstances would not be investigated as collusive agreements if they complied with the following: (a) they were not intended to displace other competitors within the same market; (b) they would only be in force during the health contingency period, with the understanding that when the health authorities determine the end of the contingency, the economic agents must terminate said collaboration agreement and notify the Commission of that circumstance; and (c) that they were considered to be strictly necessary to (i) maintain or increase supply; (ii) meet demand; (iii) protect supply chains; or (iv) avoid shortages of goods[36]. In its press release, COFECE invited businesses to voluntarily present these agreements to the Investigative Authority for validation before their application.[37]

Some might argue that an amendment to the Mexican Competition Act would be needed in order to include a specific procedure for handling joint ventures, such as the one proposed here. In our view, the Board of Commissioners has the legal power to grant its Investigative Authority a business review procedure. If it does not, then it should proactively ask for an amendment in the law to be able to support sustainability efforts that do not considerably harm competition, as the climate crisis is here to stay.

[36] Press release COFECE-012-2020, *Postura de la COFECE en términos de la aplicación de la Ley Federal de Competencia Económica ante la emergencia sanitaria*, available at https://www.cofece.mx/postura-cofece-ante-emergencia-sanitaria/.

[37] *Ibid.*