

# Practical guide for the celebration of cooperation agreements between competitors

*The Superintendence of Industry and Commerce issued Resolution No. 20490 which establishes criteria for entering into cooperation agreements between competitors to deal with the emergency arising from the outbreak of COVID-19 or to overcome the effects that will arise in the economy as a result of said emergency. Take into account the following guidelines to enter into cooperation agreements and to avoid transgressing the competition regime. These guidelines may not be applicable in particular cases.*

## International guidelines

The Superintendence of Industry and Commerce (“SIC”) issued Resolution No. 20490 on May 11, 2020. The entity took into consideration the measures that have been implemented by foreign competition authorities in order to adapt the competition regimes to the conditions caused by the sanitary emergency, such as the implementation of mechanisms to promote the celebration of cooperation agreements between competitors to face the aforementioned emergency.

## Promotion of cooperation agreements vs. repression of anti-competitive agreements

The competition authority considered that it is necessary to ensure that the general system for the protection of competition is not an obstacle to implement cooperation agreements between competitors which are aimed at facing the sanitary emergency and that may increase the consumer welfare and promote economic efficiency;

in all cases, these cooperation agreements may not restrict the free participation of companies in the market. Thus, SIC established an interpretation standard and issued guidelines to establish what is meant by cooperation agreements and which requirements must be met to be considered as valid and legal regarding the competition regime.

However, the authority warned that it will continue to exercise its powers of inspection, surveillance, and control over agreements that do not meet the characteristics described by the authority and that, therefore, are anti-competitive. In this sense, the administrative sanctions of the general regime of free competition, as well as the criminal sanctions for bid-rigging, will continue to be applied by the respective authorities, even more to such anticompetitive conducts that are carried out to obtain an illegitimate benefit from the situation that the country is facing.

## Cooperation agreements between competitors

SIC has established that cooperation agreements occur between two or more competitors that are in the same value chain, who combine their resources or unite part of their operations to achieve certain commercial goals.

In accordance with the above, the authority outlined the conditions that cooperation agreements between competitors must meet to be considered legitimate:

- a. The agreement must produce efficiencies in any of the stages of the value chain of the involved products or services. Efficiencies may, for example, take the form of risk sharing, cost reduction, increased investment, sharing of know-how, improved the product quality, increase the variety of products, or launch innovations more rapidly.
- b. In case the agreement generates restrictions of competition, they must be indispensable to obtain the efficiencies expected by the cooperation scheme.
- c. The efficiencies generated must be sufficiently pass-on to consumers for outweighing the restrictive effects that may result from the cooperation agreement. It is not sufficient that the efficiencies are solely generated in favor of the undertakings of the agreement.
- d. The cooperation agreement between competitors must not lead to the elimination of actual or potential competition in respect of a substantial part of the relevant market.

## Control of cooperation agreements

Finally, SIC established a procedure for market agents to inform the authority about the cooperation agreements that are going to be celebrated to face the sanitary and economic emergency. Competitors who intend to celebrate a cooperation agreement shall inform the Delegation for the Protection of Competition the following:

- a. The execution of the cooperation agreement;
- b. The intervening companies;
- c. The products and/or services that would be affected by the agreement;
- d. The specific content of the cooperation agreement, and;
- e. The duration of the agreement, specifying the start and projected end date.

The entity may request a concept from the supervisor/regulator of the sector in which the cooperation agreement will have effects, so that the latter may analyse the content of the agreement, as well as the benefits that may arise for consumers.

It is important to note that it is not clear which would be the consequences for not informing the cooperation agreement to the authority and whether such duty to inform is prior or after the parties enter into the agreement. Notwithstanding the above, in any case, competitors who enter into cooperation agreements must be able to demonstrate each of the necessary elements for such an agreement to be considered valid according to the current regulations.

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