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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from El Salvador

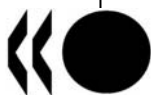
-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- El Salvador --

I. El Salvador's experience

1. According to the Central Reserve Bank of El Salvador, for 2008 the current consumption expenses in the non financial public sector¹ totalled US\$2,350.8 million dollars, equivalent to 11% of the economic activity level measured by the Gross Internal Product.

2. The governmental acquisitions and purchases in El Salvador are ruled by Administrative Law principles and by public honesty and competition criteria. Said principles are contained in the Law for Acquisitions and Contracts of the Public Administration (in Spanish, Ley de Adquisiciones y Contrataciones de la Administración Pública), and in its regulation. The aforementioned legal framework regulates purchase processes insuring the compliance of transparency requirements, as well as the efficient distribution of the State's resources.

3. Bid rigging is an infringement of the Competition Law (CL) and consequently, the Competition Superintendence (CS) has recently carried out efforts to improve the institution's capacity to prevent, detect and eradicate such practice.

4. As part of its Competition Advocacy activities, the CS has prepared a manual containing basic information in order to provide the officials directly involved in governmental purchases, the necessary tools to identify alert signals of possible bid rigging. Simultaneously, the CS is carrying out a permanent program of presentations where the institution's personnel explain with more detail the contents of the aforementioned manual. It contains mainly, topics such as: what is bid rigging, the different ways this practice may be disguised and the detail of various conducts that might suggest the existence of bid rigging amongst the participants in a public tender.

5. With respect to this matter, the CS has developed a continuous communication channel with the procurement offices of the public institutions.

6. In 2009, the CS sanctioned four travel agencies for bid rigging in two public tenders carried out by two governmental institutions. The travel agencies had previously agreed on the commission prices to be charged for the issuance of airplane tickets, having filed identical economic bids. During the investigation, the CS did not find any valid economic explanation that could justify the identical bids, ergo, the Board of Directors of the CS found the travel agencies culpable of infringing Article 25 of the CL.

¹ This amount includes both the ones carried out through competitive processes (public tenders or auctions) and those carried out through direct purchases.

II. Corruption

7. The CS is responsible for cartel detection in all sectors of the Salvadoran economy. In that way, the institution examines public bids in order to detect two issues principally: (a) if the participants have arranged an agreement to fix or limit prices or other conditions in their proposals (bid rigging); or (b) if the terms of the bid designed by a public contractor reduce or limit competition in the bid procedure.

8. Therefore, it is important to mention that the CS does not develop investigations to unveil corruption in the public sector, since there are other authorities in the country in charge for them (Country's Attorney General in charge of criminal prosecutions² and the Government Ethics Tribunal³). In this way, the competition agency has no power or incidence in this area.

9. However, during an investigation or analysis of bid procedures, the CS may discover certain conducts that, even though do not involve anticompetitive conducts or restrictions to competition, indicate a corruption activity from public authorities. In these cases, the CS must notify to the authorities that investigate corruption cases so they can initiate the legal actions necessary to penalise the responsible personnel.

10. Therefore, even though the CS does not formally investigate corruption cases during bid procedures, it has the duty of contribution with the proper authorities, especially since the elimination of corruption and an increase in transparency contributes to a more competitive environment that promotes efficiency and benefit consumers.

III. Fighting collusion and corruption

11. As it was mentioned before, the CS is only responsible for investigating and fighting collusion in public procurement. However, the aforementioned does not mean that if the institution becomes aware of reasonable grounds of corruption, it is not liable for making the proper disclosure to the competent authorities.

12. In that sense, it is not possible to mention at this moment, examples of cases that involve both corruption and collusion in public procurement. The one case the CS filed for this infraction was already commented above and identified as the travel agencies investigation.

13. Regarding the level in which the collusion cases have developed, whether it has been locally, provincially or nationally it is important to mention that in El Salvador, the one case that has been cited as precedent on this matter occurred at the national level. However, there are many procurement processes that only involve local governments. In these cases, the Superintendence has not yet initiated an investigation, but it is possible that it will happen in the short or medium term.

14. On the topic of the methods and techniques for fighting corruption that would aid the fight against collusion, one of the most important issues on this matter is the communication and collaboration between the different procurement offices on the government, the country's Attorney General and the CS. It is vital that if one of the agencies senses that something is going wrong it requests the aid of the others so

² The Criminal Code establishes in Articles 325 to 334 that certain conducts constitute acts of corruption, such as: embezzlement, illegal negotiations and subornation. Such crimes are sanctioned by a Criminal Court with prison for the guilty.

³ The Government Ethics Tribunal is an administrative authority that can impose fines or destitution to public authorities that commit any corruption conduct during a bid procedure.

that the unification of efforts can provide for a successful investigation. Amongst other things, it is also imperative that the records and documentations presented by the participants of the bid are examined and shared between institutions so there is a guarantee of full access to information.

15. Since there is a clear differentiation between the processes for corruption and collusion, there is no limitation on whether individuals engaged in bribery can receive leniency. The conditions that must be satisfied for leniency qualification are listed in article 39 of the CL and they have no relationship with corruption.

IV. Advocacy

16. On the issue of how regulatory or institutional conditions help facilitate bid rigging and corruption, it is imperative to mention that any flaw on transparency in the bidding procedure must be corrected by strengthening the regulatory and institutional framework. Therefore, it is most important to recognise the laws and institutions as the way to prevent and discourage collusion and corruption, either by providing elements that promote them or by establishing sanctions for transgressions.

17. In that way, competition authorities can execute relevant measures to improve efficiency in public procurement, which is done indirectly by reviewing the bidding processes for illegal conducts and providing for their elimination.

18. The CS is committed to prevent collusion in public procurement. Two approaches have been taken to achieve this goal. First, the agency is investigating cartels in this area having sanctioned one in 2009 that was mentioned before (travel agencies case); this action must deter others from committing such practice via the burden of high fines. Second, the institution has developed an intensive advocacy program to educate society on this matter, specifically publishing in 2009 a Guide to Detect and Prevent Bid Rigging aimed to the members of the procurement offices and to the public.

19. The CS believes that fighting against collusion and bid rigging in public procurement will contribute to diminish the risk of corruption, although the institution is aware that the latter is a complex problem that needs to be addressed from a numerous flanks.

APPENDIX



**Sanctioning procedure against the Salvadoran
travel agencies: “Amate Travel”, “U-Travel”,
“Inter-Tours”, “Agencia de Viajes Escamilla”,
and “Hispana de Viajes”
Bid Rigging in Public Procurement Processes**

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Contents

1. Anticompetitive Agreements amongst Competitors
2. Investigated Facts
3. Sanctioning Procedure
4. Analysis of the Agreements amongst Competitors pursuant to Competition Law
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6. Final Decision
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Superintendencia de Competencia



Anticompetitive Agreements amongst Competitors

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Anticompetitive Agreements amongst Competitors

Art. 25.- Anticompetitive practices among competitors are prohibited, these practices include the following, amongst others:

- a) Establish agreements to fix prices or other purchase or sales conditions under any form whatsoever;
- b) Fixing or limiting quantity output;
- c) Fix or limit prices at auctions or in any other form bidding private or public, national or international, with the exception of the joint bids submitted by economic agents that are clearly identified as such in the documents submitted by the bidders; and,
- d) Market allocation, either by territory, volume of sales or purchases, by type of good sold, customer or seller, or by any other means.

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Superintendencia de Competencia



Investigated Facts

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Investigated Facts

The possible existence of an agreement adopted amongst the investigated economic agents in order to alter the competition conditions in the service rendered to issue airline tickets in certain governmental procurement procedures since 2006:

1. Ministry of Economy DR-CAFTA No. 03/2008;
2. Salvadoran Tourism Corporation (in Spanish, Corporación Salvadoreña de Turismo, "CORSATUR") No. 02/2008;
3. Ministry of Foreign Relations DR-CAFTA No. 03/2007;
4. Ministry of Foreign Relations No. 04/2007; and,
5. Ministry of Internal Affairs No. 03/2007.

Examine the alleged commission of anticompetitive practices described in Article 25 letters a), c), and d) of the Salvadoran Competition Law.

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Superintendencia de
Competencia



Sanctioning Procedure

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Sanctioning Procedure

Feb/02/2009

- The CS initiated ex-officio the formal investigation procedure and requested information to governmental institutions.

Mar/04/2009

- The investigated economic agents filed defense arguments.

Mar/19/2009

- The CS opened the probatory phase of the procedure for 20 business days, period during which the CS requested information to the investigated parties and to governmental institutions.

Mar/30/2009

- The CS issued, ex-officio, a resolution calling witnesses to testify and requesting information to public authorities.

Apr/01/2009

- Witnesses were interviewed.

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Sanctioning Procedure

April/24/2009

- Probatory phase ended.

April/29/2009

- Resolution for the confidentiality hearing was issued.

May/05/2009

- Confidentiality term, prior to the hearing, concluded.

May/20/2009

- Confidentiality resolution issued; file integrated and sent to BD.

July/07/2009

- The BD issued the final resolution.

Aug/11/2009

- The BD overruled review recourses and confirmed final resolution.

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Analysis of Agreements amongst Competitors pursuant to Competition Law

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Analysis of Agreements amongst Competitors pursuant to CL

Said agreements are analyzed pursuant to the “*per se*” rule. Evidence of the agreement’s existence is enough to determine the infringement.

- OCDE: “Damages Caused by Cartels and Imposing Effective Penalties”;
- AMERICAN BAR ASSOCIATION: “Antitrust Law Developments (Sixth)”;
- ICN: “Defining Hard Core Cartel Conduct. Effective Institutions, Effective Penalties”;
- SUPREME COURT (USA): United States v. McKesson & Robbins, Inc.; United States v. Elmore Roy Anderson;
- CNDC (Argentina): pharmaceutical oxygen; and,
- CS: wheat flour; PDBESA.

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Analysis of the Investigated Practices

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Analysis of the Investigated Practices

- A. Article 25 letter C) CL.
 1. DR-CAFTA LA No. 03/2008 (Ministry of Economy) Public Procurement Process

Tender documents (economic bid format)

ANEXO 5

CUADRO DE OFERTA BÁSICO

Nº	SERVICIO	COSTO
11.	Costo por emisión de Boletos de ida y vuelta (costo por boleto NO por segmento) Tarifa de \$1 - \$500 Tarifa de \$ 501 - \$1,000 Tarifa mayor de \$1,000	
12.	Reconfirmación de vuelo/boleto y constancia de reservación.	
13.	Trámite de Boletos premio	
14.	Anulación de boletos	
15.	Re-emisión de boleto	
16.	Emisión de boleto contra orden de canje (MCO)	
17.	Trámite de Reembolso de boleto no utilizado	
18.	Trámite de Reembolso de boleto extraviado	
19.	Reservación de tren	
20.	Servicio a domicilio dentro del área metropolitana	

EL COSTO DEBE INCLUIR IVA.

NOTA: Cualquier otro costo adicional que aplica la empresa, deberá incluirlo en este cuadro.

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Analysis of the Investigated Practices

SERVICES TO BE RENDERED	AMATE TRAVEL	AGENCIA DE VIAJES ESCAMILLA	U TRAVEL	INTER TOURS
Cost for issuing round trip tickets	US\$39.55	US\$39.55	US\$39.55	US\$39.55
Flight confirmations/ ticket and reservation voucher	Cost free	Cost free	Cost free	NA
Premium ticket procedure	Cost free	Cost free	Cost free	NA
Ticket annulment	Cost free	US\$39.55	Cost free (the same day)	NA
Ticket re-issuance	US\$39.55	US\$39.55	US\$39.55	US\$39.55
Issuance of ticket against exchange order (MCO)	US\$39.55	Cost free	US\$39.55	US\$39.55
Procedure for the reimbursement of non utilized tickets	Cost free	Cost free	Cost free	NA
Procedure for the reimbursement of lost tickets	Cost free	Cost free	Cost free	NA
Train reservation	Cost free	Cost free	Cost free	NA
Delivery service in the Metropolitan Area	Cost free	Cost free	Cost free	NA
Total	US\$118.65	US\$118.65	US\$118.65	US\$118.65

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Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

U-TRAVEL: *"Asked if the identical service fee does not indicate anything to the company. Answers it is just a coincidence in calculation procedures, in the cost structure that one may have."*

AMATE TRAVEL: *"[The commission was calculated] on the basis of the 2003 experience, based on their clients' consumption in that account, that is how they arrived to the US\$35.00 + sales tax. In addition, there are many variables that affect their supply if calculated under the same principles, so their bids consider the fair cost and that is the way the calculations are made, on the basis prior experience with different institutions"*.

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Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

AGENCIA DE VIAJES ESCAMILLA: *"He can talk about the calculations made by Escamilla. He speculates they have the same program with the airline. He can talk about Escamilla's costs. For him, it's very difficult to speculate if those people have the same costs as Escamilla's, if the airline has the same program".*

INTER-TOURS: *"The witness is asked again why, existing so many variables that influence in the preparation of the bids and being the companies so different, they all offer an identical charge to the cent. The witness answers he does not know how the others made their calculations but he analyzes the tender documents, sees where they are flying to, the services required, the number of them to be rendered, and then calculates his costs. He does not know the others' costs, but this is the way he calculates them".*

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Analysis of the Investigated Practices

Even though each travel agency argued that the US\$39.55 commission was independently calculated based on their costs, the depositions of the four travel agencies' representatives did not explain how the calculations were made.

Average charged commissions

Travel agencies under investigation	To Private Sector	To Public Sector	Difference
Inter Tours	US\$34.52	US\$47.17	US\$12.65
Amate Travel	US\$13.42	US\$45.39	US\$31.97
U-Travel	US\$13.22	US\$24.75	US\$11.53
Agencia de Viajes Escamilla	US\$30.81	US\$68.75	US\$37.94

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Analysis of the Investigated Practices

History of public procurement processes carried out by the Ministry of Economy

Number	Date	Winning agent	Adjudicated Commission
01/2005	Feb/02/2005	Maya	US\$15.00
01/2006	Aug/17/2006	Maya	US\$14.00
02/2007	Feb/01/2007	U-travel	US\$14.00
DR CAFTA LA 03/2008	Aug/12/2008	U-travel	US\$38.55

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Analysis of the Investigated Practices

Structure information of the investigated agencies

Economic agent	Assets	Number of employees	Establishments
Amate Travel	US\$679,605.43	22	1
U-Travel	US\$2,094,406.26	35	1 and 2 mini establishments
Agencia de Viajes Escamilla	US\$1,699,372.00	5	1
Inter-Tours	US\$278,873.35	6	1

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Analysis of the Investigated Practices

Conclusion

The CS gathered evidence that indicated that the investigated agents committed the analyzed anticompetitive practice and said proof was corroborated by the CS' economic analysis carried out in similar cases, thus, the decision was issued in the aforementioned sense.

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Analysis of the Investigated Practices

- A. Article 25 letter C) CL.
 2. Public Procurement Procedure 02/2008 Salvadoran Tourism Corporation (in Spanish, Corporación Salvadoreña de Turismo, "CORSATUR")

Tender documents (economic bid format)

CUADRO DE OFERTA BÁSICO
 TARIFARIO DE SERVICIOS OFERTADOS

No.	SERVICIOS DE SUMINISTRO DE BOLETOS AÉREOS	Costo US\$ Tarifa fija (IVA incluido)
1	Emisión de boletos aéreos en general	
2	Reconfirmación de vuelo	
3	Servicio a domicilio: Dentro del área metropolitana	
4	Trámite de boleto extravíaado	
5	Anulación de boleto aéreo	
6	Reembolso de boleto no utilizado, en efectivo o en MCO emitido por la aerolínea, a favor de CORSATUR	
7	Envío de confirmación vía Internet, fax o teléfono	
8	Emisión de boletos fuera de horas laborales de la Agencia	
9	Emisión de boletos de Emergencia	
10	Emisión de boletos contra orden de cargo (MCO)	
11	Asesorías a Pre-cheques	
12	Cobro de boletos propagados + IVA	
13	Reservación de auto/hotel	
14	Otros	

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Analysis of the Investigated Practices

Services to supply airplane tickets	U-Travel	Amate Travel	Inter-Tours
Issuance of airplane tickets in general (US\$ fixed tariff, sales tax included)	US\$56.50	US\$56.50	US\$56.50
Flight confirmation	Cost free	Cost free	Cost free
Delivery service in the Metropolitan Area	Cost free	Cost free	Cost free
Procedure for lost ticket	Cost free	Cost free	Cost free
Ticket annulment (in the same day)	Cost free	Cost free	Cost free
Reimbursement of ticket not used, in cash or in MCO issued by the airline to CORSATUR	Cost free	Cost free	Cost free
Sending information via fax, Internet, or telephone	Cost free	Cost free	Cost free
Issuance of tickets in non-business hours	Cost free	Cost free	Cost free
Issuance of emergency tickets	Cost free	Cost free	Cost free
Ticket issuance against exchange order (MCO)	Cost free	Cost free	Cost free
Pre-checking guidance	Cost free	Cost free	Cost free
Pre paid tickets charges + sales tax	Cost free	Cost free	Cost free
Hotel/car reservations	Cost free	Cost free	Cost free
Other services	Cost free	Cost free	Cost free

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Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

U-TRAVEL: "Answers that the same variables that existed in that moment in the market, the commercial elements, the interest to have that account or not were the elements considered when bidding".

AMATE TRAVEL: "AMATE TRAVEL based its bid in the experience with the account and they had worked with the institution years before (referring to the year 2003), hence, based on that element they made their cost calculations (...) The account's behavior was analyzed for that year, consequently, they already knew or calculated the services to be rendered pursuant to the contract and based on this they calculated the percentage".

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Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

INTER-TOURS: *"He can talk about his costs. Ask the others or analyze their cost system (...) He makes his calculations based on his costs. In his calculations, the cost was forty eight twenty five"*.

Notwithstanding the fact that they argued that the US\$56.50 commission offered was independently calculated based on their costs, the depositions of the three travel agencies' representatives did not explain how they made their calculations".

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Analysis of the Investigated Practices

Conclusion

The CS gathered evidence that indicated that the investigated agents committed the analyzed anticompetitive practice and said proof was corroborated by the CS' economic analysis carried out in similar cases, ergo, the decision was issued in the aforementioned sense.

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Final Decision

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Final Decision

<p>Fines imposed for the agreement amongst competitors in the public procurement process DR-CAFTA LA No. 03/2008 carried out by the Ministry of Economy</p>	<p>Fines imposed for the agreement amongst competitors in the public procurement process No. 02/2008 carried out by CORSATUR</p>	<p>Communication to initiate the disqualification procedure</p>
<ul style="list-style-type: none"> • AMATE TRAVEL: 15 minimum monthly wages (US\$203.10), (US\$3,046.50) • U-TRAVEL: 15 minimum monthly wages (US\$3,046.50) • INTER-TOURS: 15 minimum monthly wages (US\$3,046.50) • AGENCIA DE VIAJES ESCAMILLA: 15 minimum monthly wages (US\$3,046.50) 	<ul style="list-style-type: none"> • AMATE TRAVEL: 15 minimum monthly wages (US\$203.10), (US\$3,046.50) • U-TRAVEL: 15 minimum monthly wages (US\$3,046.50) • INTER-TOURS: 15 minimum monthly wages (US\$3,046.50) 	<ul style="list-style-type: none"> • Article 158 letter j) of the Public Administration Acquisition and Contracting Law (in Spanish, Ley de Adquisiciones y Contrataciones de la Administración Pública, "LACAP"): "The Institution will disqualify the contractor who commits any of the following conducts, from participating in administrative contracting procedures for a 5-year term: j) Having been sanctioned pursuant to Article 25 letter c) of the Competition Law". • Communicate this resolution to the Ministry of Economy and to the Minister of Tourism who chairs CORSATUR, for the respective effects.

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Thank you

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