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SANCTIONS IN ANTITRUST CASES

Contribution by Costa Rica

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SANCTIONS IN ANTITRUST CASES

-- Costa Rica (SUTEL)* --

1. The General Telecommunications Law N° 8642 in its Article 52 holds that the operation of networks and telecommunications services will be subject to the sectorial competition regime provided in this act. However, the competition criteria set forth in Law 7472 are subsidiary to those provided by the General Telecommunications Law.
2. With the purpose to ensure coherence in the application of competition law in Costa Rica, Articles 55 and 56 of the General Telecommunications Law set forth communication and co-operation requirements between SUTEL and COPROCOM.
3. Under Article 55, when dealing with anticompetitive practices SUTEL shall request COPROCOM's non-binding technical opinion prior to starting the enforcement procedures and before taking a final decision.
4. So far, SUTEL has only imposed one sanction in a case of anticompetitive conduct. In May 2015, following a complaint filed by *Telefónica de Costa Rica TC, S.A.* in 2011, SUTEL imposed a fine of over USD 4 000 000 (US dollars) to *Instituto Costarricense de Electricidad (ICE)* for margin squeeze.
5. According to SUTEL, ICE – a state-owned telecommunications company that used to operate under monopoly conditions and which, at the time of the complaint, was still dominant in the market – offered discounts to final consumers at prices below the interconnection fee that other competitors had to pay to connect to ICE's network.
6. Following a thoroughly reasoned decision, which considered international experiences and referred to the work of a number of international bodies and other competition agencies, SUTEL determined that, even though the practice was pursued for ICE for over two years, it only had anticompetitive effects for four months.
7. The sanction imposed amounted to 0.58% of ICE's gross income for mobile telephony in the fiscal year in which the anticompetitive practice took place. The decision followed COPROCOM's non-binding opinion, which had concluded that "*there was evidence indicating that a pricing scheme or predatory conditions conduct was being executed, or a margin squeeze, in order to generate a barrier to entry for competitors*".

* Contribution by the Superintendencia de Telecomunicaciones de Costa Rica (Telecommunications Superintendency of Costa Rica, SUTEL).

1. Determination of the basic fine

1.1 *If you have imposed fines in antitrust cases, please describe type and nature of financial sanctions in antitrust cases (civil, administrative, criminal, combined): On whom (e.g. companies, individuals) can sanctions be imposed.*

8. Under the General Telecommunications Law N° 8642, the financial sanctions that can be imposed by SUTEL in antitrust cases are administrative in nature and can be imposed only on an operator or service provider.

9. The Law N° 8642 qualifies absolute and relative monopolistic practices as “serious” offenses that can be sanctioned with fines of between 0.5% and 1% of the market player’s gross income obtained during the previous fiscal period, or of the value of its assets or of its presumed revenue for the period. If a “particularly severe” infringement to the law is identified, SUTEL may impose a fine that goes from 1% to 10% of the annual sales obtained by the offender, or of the value of its assets, or of its presumed revenue for the period.

10. Furthermore, SUTEL is empowered under Article 58 to order the suspension, correction or elimination of the unlawful conduct.

11. Under Article 69 SUTEL can impose as a sanction the closure of an establishment or its facilities and the removal of equipment.

1.2 *What kinds of laws or regulations provide criteria for determining fines? If you have guidelines(s) on calculations of fines or detailed rules for calculating fines, when have you introduced the guidelines (or rules) and what aspects do the guidelines (or rules) include? (e.g. how to set the base fine, mitigating and aggravating circumstances).*

12. The Article 70 of the Law 8642 provides that SUTEL should set its sanctions in a gradual and proportional manner, taking into account: i) the seriousness of the offence; ii) time; iii) recidivism; iv) the potential benefit that arises from the offence; v) the harm caused and; vi) the offender’s payment capacity.

13. SUTEL has not issued any guidelines or criteria regarding the determination of the amount of fines.

14. The Law establishes the base fine to be imposed 0.5%, but considering the criteria established in Article 70 SUTEL could increase the fine up to 10%.

15. The law does not provide any other argument to consider mitigating or aggravating circumstances.

1.3 *Is the proportionality principle explicitly provided under laws, regulations or guidelines for determining fines? How do you respect the proportionality principle when calculating the amount of the fine?*

16. The proportionality principle is explicitly provided under Article 70 of the Law 8642 and the Constitutional Chamber of the Supreme Court of Justice has analysed this principle in many of its decisions.

17. When calculating the amount of the fine the SUTEL has considered that the proportionality principle is respected with the applications of the criteria established in Article 70 of Law 8642.

2. Adjustment of the basic fine

2.1 *If you have mitigating and aggravating circumstances in laws, regulations or the guidelines, which circumstances are frequently applied in antitrust cases?*

18. The law does not provide for mitigating or aggravating circumstances. No circumstances have been applied in antitrust cases.

2.2 *If you consider recidivism for imposing fines (e.g. an aggravating circumstances for calculating fines), have you noticed whether repeated offenders have become more or less frequent over time? What are reasons in your view for any increase or decrease.*

19. Under Article 70 of Law 8642, recidivism is a criteria for imposing a fine. The Council has express that this would be considered and aggravating circumstance for calculating fine.

20. At this moment, SUTEL has not fined a repeat offender.

2.3 *Should competition authorities treat the fact that competition law offenders have antitrust compliance programmes (CPs) as an aggravating or mitigating circumstance? If you consider CPs for imposing fines (e.g. a mitigating circumstance for calculating fines), what are the grounds for adopting CPs as a circumstance? How do you distinguish genuine programmes from sham ones which are only seeking reduction of fines?*

21. The Law 8642 does not provide for CPs to be considered as a mitigating circumstance.

2.4 *In your jurisdiction, may a parent company be held jointly and severally liable for antitrust violations committed by its subsidiary (i.e. parental liability) in certain circumstances? If so, how does parental liability have a significant impact on the way fines are calculated?*

22. In our jurisdiction, a parent company can be held jointly liable for antitrust violations committed by its subsidiary.

23. Under Article 68 of the Law 8642, for purposes of imposing a penalty SUTEL must assess whether the offender is part of an economic group, if it is, the fine will be imposed considering the income or sales of all the companies that are part of the economic group as define in Article 6 of the Law 8642.

24. The Article 6 of the Law 8642 defines an economic group as a group of companies that have unity of direction or economic dependence, regardless of the legal status of the companies involved.

2.5 *Do you consider “inability to pay” in imposing or collecting the fine? If so, please specify the exact circumstances under which this criterion could be applied and the method of application.*

25. The inability to pay is a criteria for imposing a fine as establish in Article 70 of Law 8642.

26. This criteria has been taken into consideration to determine the fine in order not to impose a fine that might lead the company into bankruptcy, or eliminate or weaken competition in the markets.

3. Practical issues in determining the amount of fines.

3.1 *Does your law provide for an appeal against a decision the levies fines on competition law infringers? Does an appeal to a decision imposing a sanction/fine bring an automatic suspensory effect on the sanction/fine? If it is necessary to apply for suspension, what are the criteria?*

27. The Law 8642 states that when SUTEL imposes a sanction must follow the general administrative procedure establish in the Law 6227.

28. Under the Law 7593 and Law 6227, all the decisions of the Council of Sutel can be reconsider by the Council.¹

29. An appeal of a decision imposing a sanction/fine does no bring an automatic suspensory effect on the sanction/fine, according to Article 148 of the Law 6227.

30. In accordance with Article 148 of the Law 6227, the Council can decide a suspensory effect of the imposed sanction/fine while reviewing the appeal if the sanction/fine can cause a serious damage or if the damages are impossible or difficult to repair.

3.2 *How often does judicial scrutiny modify the amount of fines? What kind of reasons does judicial scrutiny provide to alter the amount of fines imposed by competition authorities?*

31. As of this moment no fine has been alter by the court.

32. In May 2015, following a complaint filed by Telefonica de Costa Rica TC S.A. in 2011, SUTEL imposed a fine of over USD 4 000 000 to ICE for margin squeeze. This case is under review by the Administrative Court and we are waiting for the Court to set a date for trial.²

3.3 *In your cases, have you faced situation where you imposed fines on companies but failed to collect the fines? If so, what are the reasons? How do you encourage or force the companies to comply with payment orders?*

33. The reason we have not been able to collect the impose fine is that ICE file a lawsuit against SUTEL and asked for an injunction of the imposed fine until the judicial review is concluded. However, the Court has not suspended other sanctions imposed in this procedure and SUTEL was able to prevent the launching of promotions by ICE with prices under the interconnection cost.

34. According to Article 150 of Law 6227 the SUTEL has to issue payment orders and require the companies to comply. After that, the SUTEL can go to court and proceed to ask a judge to order the payment of the fine.

3.4 *Do you have any evidence on whether fine levels are sufficient to deter illegal activities?*

35. At this moment, we do not have any evidence that the fine levels are sufficient or insufficient to deter illegal activities.

¹ Article 73 of Law 7593 and Articles 58, 343, 345 of Law 6227

² Case file number 15-005029-1027-CA

36. However, in a proposal of new legislation that is in discussion in the Legislative Assembly, the sanctions/fines are increase significantly.³

3.5 *In order to achieve an “optimal” level of corporate fines, in your jurisdiction, what aspects of criteria for determining fines need to be changed.*

37. At this moment, we have not study what aspects of criteria for determining fines need to be changed in order to achieve an optimal level of corporate fine. The propose new legislation changes introduces new criteria for determining the fines (*the seriousness of the offense, threat or damage, evidence of intent, the participation of the offender in the market, the size of the affected market, length of practice, the economic capacity of the offender, and recidivism*).

3.6 *In your jurisdiction, is there a leniency programme? If so, how does leniency programme interact with fines? Have you observed heavier sanction such as higher fines compared to illegal gains encourage more applications for leniency?*

38. In our jurisdiction, there is no leniency programme. The proposal of new legislation, which was referred above, introduce a leniency programme. The proposal states that the leniency programme will go from exemption from fines to a reduction of 50%, 30% and up to 20% of the fine for the second, third, fourth and following agents that agreed to the programme.

4. Alternative to fines

4.1 *What sanctions in addition to those fines mentioned above can be imposed on individuals who are involved in anticompetitive conduct?*

39. Law 7472 and Law 8642 do not foresee sanctions for individuals involved in an anticompetitive conduct.

4.2 *If your jurisdictions provide criminal sanctions against individuals including imprisonment, how many cases did you handle for last few years?*

40. Our jurisdictions does not provide for criminal sanctions against individuals.

4.3 *Has a private enforcement, especially private damages, increased in your jurisdiction? If so, how do private damages interact with sanctions?*

41. In the event that SUTEL determines that an operator or service provider is responsible for an anticompetitive conduct, under ordinary law any affected person may resort to the legal system to claim damages. To date, there is no record of any such action.

4.4 *Do you use or plan to use disqualification orders on individuals for sanctions? If so, what are the strengths and weaknesses for the disqualification orders?*

42. The Law 8642 does not foresee the use disqualification orders on individuals for sanctions.

³http://www.asamblea.go.cr/Centro_de_Informacion/Consultas_SIL/Pginas/Detalle%20Proyectos%20de%20Ley.aspx?Numero_Proyecto=19996

4.5 *How effective are fines imposed on individuals if there is no prohibition against reimbursing individuals? On the other hand, can prohibitions against reimbursement be effective?*

43. The Law 8642 does not foresee sanctions for individuals involved in an anticompetitive conduct.

4.6 *If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions (e.g. bans on bidding for public contracts), what are the result for those differences? Have you found the differences effective?*

44. The Law 8642 does not consider bid-rigging cases differently from other forms of hard-core cartels in term of sanctions.

45. However, the Law 7494 for Public Procurement in Article 100 considers as a sanction the ban on bidding for public contracts.

4.7 *What other sanctions have been used and found successful in your jurisdiction?*

46. We have not study what other sanctions have been used and found successful apart from those contemplated in the Law 8642.

4.8 *What are the experiences concerning the effectiveness of various sanctions in order to achieve deterrence and punishment? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? Do you have any suggestions on ways to improve the effectiveness of combinations of sanctions?*

47. We have limited experience imposing sanctions, so we have not carried a study about the ways to assess effectiveness of sanctions, including combinations of sanctions.