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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Costa Rica

- Session IV -

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More documentation related to this discussion can be found at: oe.cd/sctr.

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Remedies and Commitments in Abuse Cases

- Contribution from Costa Rica –

1. Background

1. Costa Rican law allows for the “early termination” of an ongoing enforcement procedure investigating relative monopolistic practices, that include vertical restraints and abuse of dominant position. This proceeding enables the termination of the enforcement procedure without requiring the competition authorities to follow all procedural steps and rules of the special competition procedure, without determining the guilt of the investigated company. **The proceeding, however, requires sufficient commitment from the economic agent to suppress the conduct and counteract its anticompetitive effects, by complying with the conditions imposed by the Commission.**

2. The reform of the Promotion of Competition and Effective Defense of the Consumer Act, N°7472 dated 2012, introduced for the first time the “*early termination of the procedure*” in the investigations carried out by the Commission to Promote Competition (COPROCOM), as national authority.

3. At that time, the wording of the regulation allowed the early termination in the event of any type of anti-competitive behavior, both absolute monopolistic practices (hard-core agreements) and relative monopolistic practices. Although not usual, COPROCOM agreed to the early termination of some procedures under collusive agreements that were carried out in scarcely relevant markets and with insignificant consequences.¹

4. In 2019, with the issuance of the Strengthening of the Competition Authorities of Costa Rica Act, N°9736, the wording was amended so that “early termination with an offer of commitments”² would be applicable exclusively to procedures for relative monopolistic practices. In addition, this law granted powers to the Superintendency of Telecommunications (SUTEL), as the sectoral competition authority, to apply this procedure.

¹ It was used in the following cases: 1) presumed price-fixing agreements between hotels in a specific location in the country, 2) alleged collusive bidding among several small printers houses to provide a relatively low-cost service to the Administration, and 3) potential agreement of the Board of Directors of the pig farmers association to establish reference market prices. These cases would now probably fall under the “de minimis” rule.

² Act N°9736 introduces several forms of early termination of the procedure: 1) obvious inadmissibility, 2) law infringement, and 3) offering commitments. However, only in the latter case it is applicable to relative monopolistic practices, which include abuse of dominant position.

2. GOVERNING LAWS

2.1. Early termination procedure with an offer of commitments

4. The “*early termination procedure with offering of commitments*” may be brought only by the economic agent under investigation for carrying out an alleged relative monopolistic practice. The application may be submitted at any time, from the time the agent is informed of the beginning of the investigation phase of a special proceeding until **before the beginning of the oral and private appearance before the Superior Body** of the corresponding competition authority. In procedures brought against more than one party, the early termination proposal must be submitted by all economic agents and individuals under investigation.

5. The application must include an express commitment to: 1) eliminate the facts included in the order to start the investigation phase and notification of charges, and 2) take measures to counteract, where appropriate, the potential anti-competitive effects. It should also indicate the form and term for the implementation of the commitments offered. In addition, the proposal should include the guarantees offered for complying with the proposal, indicating the type of guarantee and all other conditions that will govern its performance.

6. As established by law, the application does not imply that the party accepts that it engaged in illegal conduct.

7. Where it is deemed necessary to clarify the scope of the commitments offered, the Superior Body of the corresponding competition authority may, ex officio or upon the party’s request, hold meetings with the parties. This will be recorded in a minute indicating the main topics covered, which must be signed by all participants.

8. If the early termination application is made in a case brought by a complaint, the Superior Body of the corresponding competition authority shall forward a non-confidential version of the proposal to the complainant, so that the complainant can make any statement deemed appropriate, within five business days. While these will be considered by said Superior Body when making the decision, the approval or consent of the complainant is not required to sustain the grant the early termination.

10. Once the application has been submitted, the term of the special procedure is suspended until final resolution Superior Body, in a time frame of 30 business days from its receipt.

9. Assessing the proposal requires consideration of possible anti-competitive effects attributed to the conduct under investigation and the possibility of re-establishing competition conditions in the market. Furthermore, it must also be assessed if:

- The proposal eliminates the conduct under investigation and its possible anti-competitive effects.
- The commitments offered may be implemented quickly and effectively.
- Monitoring compliance and the effectiveness of commitments is feasible and effective.

10. In all cases, there must be conformity between the facts subject to the special procedure, the possible anti-competitive effects attributable to the conduct being investigated, and the commitments offered by the economic agent under investigation.

11. Upon assessment of the proposal, the competition authority may:
 - Accept the proposal if it adequately fulfills the purposes pursued by the law. In this case, it can also order the publication of a summary of the agreement ending the special procedure in a nationwide newspaper or the direct communication it to those deemed appropriate, all at the applicant's expense.
 - Grant the applicant a period of up to 30 business days to submit a second proposal that corrects or extends the commitments offered, when it considers that the proposal submitted does not eliminate the conduct being investigated nor it counteracts its possible anti-competitive effects, but that these could be resolved through other commitments.³ If the proposal is not submitted within the indicated term, the application shall be deemed dismissed.
 - Reject the proposal if it considers that the early termination of the case does not serve the public interest, or it does not allow the competition conditions to be restored in the market.
12. If the application is rejected or the applicant does not submit a second proposal for commitments as indicated in subparagraph b) above, the case is returned to its last procedural stage, so that the special procedure can continue.
13. The decision adopted by the competition authority's Superior Body may be appealed to the same body.
14. There is no restriction whatsoever in the regulations as to the type of commitments to be accepted. What is important from a legal point of view is that they serve the purpose of the early termination instrument. However, in general, COPROCOM has chosen behavioral commitments.
15. However, since early termination is aimed at modifying the behavior of the economic agent and the effects thereof, the submission of structural commitments, which would presumably be aimed at diminishing the dominant position of an economic agent, seems unlikely.
16. On the other hand, the rules governing the enforcement of this instrument do not allow the competition authorities to impose conditions deemed appropriate if such conditions have not been offered by the applicant. However, if the economic agent does not offer any commitment that the authority considers appropriate, the authority may reject the application and carry on with the enforcement procedure.

2.2. Monitoring of compliance with commitments

17. To monitor the execution of and compliance with the commitments, competition authorities may require the economic agent involved as well as any other agent, all reports and the additional information necessary, whenever they deem appropriate. In the case of the applicant, these requirements are generally established in the decision in which the early termination of the procedure is approved.

³ If the applicant submits the second commitments proposal, the Superior Body of the corresponding competition authority may request clarification of the commitments offered, and this second proposal must be resolved within 30 business days.

18. In addition, the corresponding competition authority may request the delivery of a financial guarantee upon said authority's order. This guarantee should not exceed the maximum fine established for the behavior to which the commitments offered refer, and the term of validity should not be greater than that established for the fulfillment of the conditions guaranteed.

19. Failure to comply with an approved early termination commitment is considered a severe offense. Therefore, it may be penalized with a fine equivalent to 10% of the economic agent's total turnover.

20. Failure to comply with the commitments undertaken, as verified by a special procedure, could result in the execution of the financial guarantee, in whole or in part, to cover the fine.

21. The corresponding competition authority may also, ex officio or upon a party's request, and without further procedure, annul the decision to terminate a special procedure, if the decision was made based on incomplete, inaccurate, or misleading information provided by the parties, notwithstanding the applicable fine.

3. EXPERIENCE ENFORCING EARLY TERMINATION

22. From 2013 to this date, COPROCOM has received six early termination applications with an offer of commitments. As mentioned above, three of these cases relate to proceedings brought by alleged collusive agreements, and the remaining three applications related to relative monopolistic practices, of which two were approved, and one was rejected.⁴

23. The rejected application was filed in a proceeding against a drug wholesaler and its related companies, for engaging in various relative monopolistic practices, including the imposition of conditions, single supply contracts, and eventual margin squeeze; as the company under investigation was vertically integrated with a pharmacy chain. The application was rejected because the proposed commitments did not fulfill the purpose of the instrument, which is to remove market distortions in a more efficiently manner, since the conduct was not completely suppressed, and its anti-competitive effects were not counteracted.

⁴ Documents may be consulted at:

<https://www.coprocom.go.cr/resoluciones/2015/VOTO%2059-2015%20TERMINACION%20ANTICIPADA%20GRUPO%20PORCINO.pdf>

<https://www.coprocom.go.cr/resoluciones/2020/VOTO-20-2020%20TERMINACION%20ANTICIPADA%20LAICA.pdf>

<https://www.coprocom.go.cr/resoluciones/2016/VOTO%2026-2016%20TERMINACION%20ANTICIPADA%20INS.pdf>

<https://www.coprocom.go.cr/resoluciones/2015/VOTO%2029-2015%20TERMINACION%20ANTICIPADA%20HOTELES.pdf>

<https://www.coprocom.go.cr/resoluciones/2015/VOTO%2046-2015%20SOLIC-TERMINACION%20ANTICIPADA%20SOLUCIONES%20LITOGRAFICAS.pdf>

<https://www.coprocom.go.cr/resoluciones/2016/VOTO%2039-2016%20RECHAZO%20TERMINACION%20ANTICIPADA%20CEFA%20Y%20OTROS.pdf>

24. On the other hand, COPROCOM approved an early termination application with commitments in a proceeding against the country's largest insurance company for alleged conditions imposed on agents marketing its products, which prevented them from competing with each other, and penalizing them if they did not comply with such provisions. This restricted intra-brand competition in a market with limited inter-brand competition. Thus, the procedure was concluded in approximately six months, with the removal of all restrictions.

25. Finally, COPROCOM approved an early termination procedure with commitments in a sanction procedure investigating a relative monopolistic practice, consisting of the implementation of exclusive supply contracts in the retail sugar market. Although the first proposal submitted was not accepted by the competition authority, the commitments offered in the second proposal were deemed appropriate. Among other things, the economic agent offered to publish in a nationwide newspaper, send a note to all its retail customers, and disseminate on the company's website, the commitments agreed with the competition authority.

26. To this date, COPROCOM has brought only one investigation for alleged non-compliance with agreed commitments, precisely in the case of the sugar market, which has enabled the competition authority to learn from experience. The alleged non-compliance being investigated appears to have arisen in the way the agreed commitments have been implemented, in particular, on how the communications were written, as well as the publications in a nationwide newspaper and on the company's website.

27. Experience has shown that the commitments must be drafted in such a way that the agreed obligations are completely clear, without allowing economic agents any discretion in terms of the content and on how they must be met. On the other hand, this case also showed that, while imposing a financial guarantee is optional for the competition authority, it is the appropriate instrument to ensure compliance with what is offered so it should be requested in all cases.

28. The Competition Reform Act and its regulations, have set rules that provide greater clarity on the implementation of various instruments, including the early termination with commitments, which will enable the authorities to enforce them in a more transparent and efficient manner.

29. In the case of SUTEL, two applications for early termination of the procedure with an offer of commitments have received and approved since 2019.⁵ Both applications related to an alleged exclusivity or single-brand agreement in two residential condominiums. These infractions were allegedly committed by the same economic agent in two different condominiums and were approved by SUTEL's Council by considering that the commitments offered by the economic agent investigated were adequate, as the behavior was completely suppressed, and its possible anti-competitive effects were counteracted. Note that SUTEL monitored the execution and compliance of the approved commitments and confirmed their proper performance by the applicant company, ordering the early termination of both procedures.

⁵ Related documents may be consulted at: https://www.sutel.go.cr/sites/default/files/rcs-102-2022_se_ordena_archivo_procedimiento_administrativo_contra_conecta.pdf y https://www.sutel.go.cr/sites/default/files/rcs-161-2021_se_ordena_terminacion_anticipada_procedimiento_adm_conecta.pdf

4. CONCLUSION

30. Finally, for smaller authorities, early termination of an enforcement procedure is an opportunity to eliminate market distortions more efficiently, as they do not need to wait for a process that could take a long time and mean greater resources for the authority. However, the difficulty in using this instrument lies in the proper selection of conditions, which depend on the alleged conduct, its effects on the market, the industry concerned, and the measures taken to ensure compliance with the agreement. If not carried out properly, this work will promote the impunity of anti-competitive behaviors.