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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session III: Competition
and sports**

- Contribution from Paraguay -

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The attached document from Paraguay is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 28–29 September 2023 in Quito, Ecuador.

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Session III: Competition and sports

- Contribution from Paraguay -

1. Introduction

1. This contribution discusses how Paraguay's national competition authority, the National Competition Commission (CONACOM), has dealt with sports-related issues in cases of restrictive practices and advocacy within its remit.

2. Regulatory and institutional framework

2.1. Law and authority

2. Paraguay's 1992 Constitution establishes the guarantee of competition in the market.¹

3. Paraguay's Act No. 4956 on the Defence of Competition (Ley de Defensa de la Competencia – LDC) was enacted in 2013.² In addition to establishing the country's first comprehensive regulatory framework for mergers and anti-competitive practices (abuse of dominant position and agreements restricting competition), it created the inaugural national competition authority: CONACOM. Prior to its creation, no office or institution acted as competition authority in the country.

2.2. Institutional framework

4. CONACOM is the only competition authority in Paraguay³ and competition is its only remit; matters related to consumer protection, intellectual property and market regulation are therefore assigned to other institutions, unlike in other countries that have integrated agencies with several functions.

5. CONACOM is an autonomous and self-governed institution within the Paraguayan State.⁴ It is connected to the Executive Branch through the Ministry of Industry and Commerce, which serves as the articulator and administrator of trade policy.

6. CONACOM operates through two main bodies. The three-member Board of Directors is in charge of administrative matters, takes on advocacy functions and makes decisions on cases involving mergers and anti-competitive practices.⁵

¹ Constitution of the Republic of Paraguay, Article 107.

² The LDC is available in Spanish at www.bacn.gov.py/leyes-paraguayas/4775/ley-n-4956-defensa-de-la-competencia (accessed 28 June 2023).

³ LDC, Article 61.

⁴ LDC, Article 15.

⁵ LDC, Article 17.

7. These merger and anti-competitive practice cases are submitted to the Board of Directors through the Investigation Directorate, which has the functional autonomy to study and investigate the cases.⁶

2.3. History

8. Although the LDC was enacted in 2013, it took two more years to install the first Board of Directors, and another additional year to appoint the first Director of Investigations. Even today, CONACOM is adding the necessary staff as it receives more funding from the national government, while improving its institutional positioning and awareness of competition law.

9. The first merger control rulings were issued in 2017,⁷ and the first (and currently only) refusal of authorisation for a merger was issued in 2020⁸ out of a total of 40 as at October 2022.

10. The first cases on anti-competitive practices were resolved in 2021, although the first sanctions were not issued until 2022. Prior to that, penalties were imposed on cases of infractions of merger conditions.⁹

11. As for advocacy, CONACOM appointed its first Head of Advocacy in 2021, although efforts to raise awareness of competition benefits and issue legal opinions had already been initiated in previous years.¹⁰

3. Competition and sports in Paraguay

3.1. In the legislation

12. The LDC is applicable to all sectors in the country.¹¹ The sports sector may therefore be subject to both investigations and sanctions for restrictive practices; mergers that exceed the thresholds of the law must be notified for approval or refusal by the competition authority; and advocacy processes that promote competition may be undertaken.

⁶ LDC, Article 30.

⁷ CONACOM (2020), *Historial de Expedientes de Control de Concentraciones* [Merger Control Case History], www.conacom.gov.py/ambitos-de-actuacion/concentraciones/historial-de-expedientes (accessed 28 June 2023).

⁸ CONACOM (2020), “La CONACOM resolvió denegar la autorización a la operación de concentración económica entre las empresas Frigomerc S.A. y Frigorífico Norte S.A.” [CONACOM decides to refuse authorisation for merger between Frigomerc S.A. and Frigorífico Norte S.A.], www.conacom.gov.py/noticias/la-conacom-resolvio-denegar-la-autorizacion-la-operacion-de-concentracion-economica-entre-las-empresas-frigomerc-s-y-frigorifico (accessed 28 June 2023).

⁹ CONACOM (2023), *Historial de Expedientes de Actuaciones ante Prácticas Restrictivas* [Restrictive Practices Case History], www.conacom.gov.py/ambitos-de-actuacion/practicas-restrictivas/historial-de-expedientes (accessed 28 June 2023).

¹⁰ CONACOM (2023), *Historial de Opiniones* [Opinion History], www.conacom.gov.py/ambitos-de-actuacion/abogacia/historial-de-opiniones (accessed 28 June 2023).

¹¹ LDC, Article 63.

3.2. Television rights

13. In exercising its functions, CONACOM has handled cases related to televising sports, taking action against restrictive practices and engaging in competition advocacy.

3.2.1. Teledeportes Paraguay S.A. case, concerning an alleged violation of Act No. 4956/2013

14. On 15 April 2021, through its Technical Report CONACOM/DI No. 2/2021, the Investigation Directorate of the National Competition Commission filed an accusation against Teledeportes Paraguay S.A. for alleged violation of Article 9 of Act No. 4956/2013 on the Defence of Competition. The accusation involved abuse of a dominant position in the distribution market for Paraguayan football signals at the national level, through denial of supply to the complainants, AMX Paraguay S.A. (CLARO TV) and TUVES Paraguay S.A. (PERSONAL TV).

15. The complaint stated that Teledeportes Paraguay S.A. – assigned the television rights to Paraguayan football by the Paraguayan Football Association (APF) – denied the complainant cable companies access to its television channels that broadcast the football matches, thereby favouring the cable company belonging to its economic group, Tigo.

16. The Investigation Directorate noted that refusal to supply affected these complainants, Tigo's main competitors, but not regional cable companies or the State-owned cable company, which offered the channels via its grid.

17. In the aforementioned Technical Report, the Investigation Directorate requested that the Board of Directors impose a fine of USD 6 085 000, in addition to applying corrective measures that, in the opinion of the Board, are sufficient to stop the alleged infraction, restore competition to the level it was prior to the unlawful activities and prevent this violation occurring again in the future.¹²

18. Following the administrative investigation, the Board of Directors issued Resolution D/AL No. 87/2021.

19. The Board of Directors analysed the case based on the available documentation. In its Resolution, it reiterated that, like many other constitutions, the Paraguayan Constitution recognises the right of companies to freely dispose of their property, including intellectual property and, therefore, the right to choose their contractual partners.

20. Constitutional, conventional and legal rights grant the holder of this intellectual property exclusive rights, including the possibility of refusing third parties licences to this intellectual property.

21. In certain exceptional circumstances, the exercise of the exclusionary right granted by intellectual property rights may involve abusive behaviour, under the terms of the prohibition contained in Article 9 of Act No. 4956/2013.

¹² CONACOM (2021), *Informe Técnico CONACOM/DI N° 2/2021 de la Dirección de Investigación de la Comisión Nacional de la Competencia* [CONACOM/DI Technical Report No. 2/2021 of the Investigation Directorate of the National Competition Commission], www.conacom.gov.py/noticias/la-direccion-de-investigacion-acusa-teledeportes-paraguay-s-de-abusar-de-su-posicion-de-dominio-en-el-mercado-de-distribucion-de (accessed 28 June 2023).

22. In this sense, for the refusal under analysis to constitute an abuse of a dominant position, all of the following elements should be established, based on solid and convincing evidence:

1. The refusal relates to a product or service that is objectively necessary to compete effectively in a downstream market.
2. The refusal is likely to eliminate effective competition in the downstream market.
3. Finally, such refusal is likely to be detrimental to consumers.

23. Within this framework, any imposition by CONACOM of a licensing obligation in the area of intellectual property rights, in application of the LDC, will always involve a significant intervention on rights with strong constitutional roots, such as those mentioned above. Such imposition therefore requires very thorough reasoning.

24. In the present case, it was not possible to prove that the service was essential or that effective competition was eliminated, due to the lack of concrete, solid and convincing evidence to support such analysis.

25. Therefore, at the discretion of the Board of Directors and in accordance with the provisions of Article 59 of the LDC, it was decided to acquit the defendant as the existence of a prohibited practice was not proven.

26. However, it was stated that, during the analysis of this case, concerns had arisen that involve not only the subscription-television market and the wholesale distribution market, but also the market for acquiring the APF football television rights in particular. It would therefore be appropriate for CONACOM to start advocacy to promote effective competition for access to such rights, before the contract currently in force between Teledeportes Paraguay S.A. and APF comes to an end.¹³

3.2.2. Opinion on the call for tenders to assign television rights to Paraguayan football

27. As a follow-up to the Resolution, in December 2022, the Board of Directors of the National Competition Commission initiated an advocacy process, holding meetings with APF and Teledeportes Paraguay S.A. In these meetings, they expressed their concerns over the current contract assigning television rights, which could affect future APF calls for tenders, warning of the risks created by the possible existence of agreements restricting competition, under the terms of Article 8 of the LDC.

28. The Board's concerns centred on a clause in the contract between the two parties, which established three issues that were repeated in successive contracts between APF and Teledeportes Paraguay S.A. since 2007:

- Preferential negotiation right, which allowed Teledeportes Paraguay S.A. to have priority negotiation of the rights covered by the contract for a new four-year period.
- Contractor's right of first refusal, which allowed Teledeportes Paraguay S.A. to match and/or surpass any bid submitted to APF by a third party.

¹³ National Competition Commission (2001), Resolución D/AL N° 87/2021 de la Comisión Nacional de la Competencia [Resolution D/AL No. 87/2021 of the National Competition Commission], www.conacom.gov.py/noticias/el-directorio-emite-resolucion-en-el-sumario-de-investigacion-n-032020 (accessed 28 June 2023).

- Allowing third-party bidders to provide a bank guarantee for 60% of the bid, issued by a leading bank headquartered in a European country or in the United States (in the contract entered into in 2007, this guarantee was for 100%).
29. In addition, there was a latent possibility of extending the current contract in the event that no bids were received by 1 June 2023.
30. Given these circumstances, in the opinion of the Board of Directors, it is unsurprising that there are no competitors able to offer alternatives to APF.¹⁴
31. Following the meetings held with APF and Teledeportes Paraguay S.A., the deadline for setting the extension was extended to 31 July 2023. This allowed APF to set out its bidding terms and conditions, and CONACOM to issue an opinion on the draft.
32. Likewise, Teledeportes Paraguay S.A. accepted that the guarantee of the third-party bid be reduced to 30%. For its part, APF submitted an alternative wording of the preference clause to CONACOM; in addition to eliminating the requirement of the bid bond for third parties, this clause established that it would only be granted once and never again. Likewise, the right to preferential negotiation, which allowed for an automatic extension, was not exercised.
33. After studying the draft bidding terms and conditions that APF submitted to CONACOM, the Board of Directors recommended that APF clarify whether the bid guarantee will be mandatory. If so, the Board recommended that APF require it under conditions that promote competition, by avoiding significantly raising the cost of the bid through a very high percentage of coverage or requiring that the banks issuing the bond be headquartered in Europe or the United States, unless such conditions are duly justified.
34. Likewise, it was recommended that successive and unlimited preference clauses be avoided in bids and contracts for assigning Paraguayan football television rights. Taking reference cases from Brazil (Globo and Clube dos 13)¹⁵ and Uruguay (Tenfield),¹⁶ the Board noted that these clauses may restrict competition by reducing the incentive to submit a competitive bid since bidders would know that, if awarded in the first instance, the only way to win would be for the current contractor not to exercise the right of first refusal. This would only occur if the amount awarded were not profitable, thus prejudicing the awarded bidder.

¹⁴ National Competition Commission (2023), Opinión del Directorio D/03/2023 de la Comisión Nacional de la Competencia [Opinion D/03/2023 of the National Competition Commission Board of Directors], www.conacom.gov.py/noticias/la-conacom-emitio-una-opinion-sobre-el-borrador-del-pliego-del-llamado-para-la-cesion-de-derechos-de-televisacion-del-futbol-par (accessed 29 June 2023).

¹⁵ João Marcelo da Costa and Silva Lima (2014), “A cláusula de preferência em relações verticais entre empresas”, *Revista de Defesa da Concorrência*, Conselho Administrativo de Defesa Econômica, Vol. 1/1, <https://revista.cade.gov.br/index.php/revistadedefesadaconcorrenca/article/download/99/54/369> (accessed 29 June 2023).

¹⁶ Commission for the Promotion and Defence of Competition (2011), Informe N° 69/011 del 14 de septiembre de 2011, sobre Contratos entre la Asociación Uruguaya de Fútbol y Tenfield S.A. [Report No. 69/011 of 14 September 2011, on contracts between the Uruguayan Football Association and Tenfield S.A.], www.gub.uy/ministerio-economia-finanzas/sites/ministerio-economia-finanzas/files/documentos/publicaciones/20110915_informe_contratos_auf_tenfield.pdf (accessed 13 June 2023).

35. Likewise, the risks of incentivising collusion were also recognised, as such clauses encourage competitors to agree to subcontracting, or to another commercial relationship with the incumbent contractor, rather than submit rival bids.

36. However, possible efficiencies were recognised, such as the possibility of planning investment recovery over a longer period of time and confirming the existence of at least one interested party in future calls for tenders. Nevertheless, these benefits seem to be more compatible when there is a new operator, and significant investments must be made to initiate the provision of services or goods.

37. Although its successive incorporation into contracts since 2007 is still a concern, the temporary nature of the clause to be inserted in the future contract once and never again will provide certainty to the contractor and other potential bidders regarding the terms of contractual rights and open up competition in future bids with greater solvency. Therefore, it is considered that, with the proposed wording, the conditions of competition will progressively improve.

38. Considering that the Board of Directors had access to only a draft of the tender documentation and the future preference clause, it also recommended that APF send CONACOM a copy of the final documentation once the tendering process was open, and the draft contract to be signed with the winning bidder.

3.3. Sports betting

39. CONACOM has issued two opinions with recommendations to improve competition in sports betting.

3.3.1. *Opinion on exclusivity*

40. In Paraguay, Act No. 1016/97 regulates gambling. This legislation establishes that certain games of chance require a licence from the Paraguayan State, and in the case of the pools, instant lottery, deferred lottery, four raffles (one per quarter), televised bingo (one per open channel), sports betting and *Quini seis* (a lottery), the bidding implies nationwide exclusivity.

41. In other words, in Paraguay, only one company is legally authorised to operate the sports betting business.

42. In its Opinion, the Board of Directors emphasised that, historically, gambling regulation has restricted competition to prevent gambling addiction and promote responsible gaming. However, citing the Spanish competition authority, it recognised that, as an economic activity, gambling's cost structure, the characteristics of the games and the amount of investment would not justify the restriction.¹⁷ It also noted that there are regulatory alternatives that could be implemented, such as the progressive and monitored opening of the market that would allow for periodic evaluation of the impact on the population.

43. During the advocacy process, CONACOM consulted the regulatory body, the National Gambling Commission (CONAJZAR). Its position on the matter was that it was open to a legal modification that would eliminate exclusivity and allow multiple operators of various games of chance.

¹⁷ Spanish National Competition Commission (2010), *IPN 48/10 Anteproyecto de Ley de Regulación del Juego* [Draft Bill of the Gambling Regulation Act], www.cnmc.es/sites/default/files/442501_7.pdf (accessed 25 November 2022), p. 17.

44. In accordance with this position, the Board of Directors issued an opinion recommending that the Executive and Legislative Branches review the issue of exclusive rights to certain games and eliminate the barrier, unless a study clearly proves the necessity, proportionality and neutrality of such a measure.¹⁸

45. There are currently bills going through the National Congress that propose modifying the regulations.

3.3.2. Opinion on 2021 call for tenders

46. Following up on the opinion issued on the granting of exclusive rights to sports betting and other forms of gambling, an advocacy process was initiated on the last public bidding process for granting these rights, which had begun in 2021.

47. Potential bidders had to acquire the tender documentation in advance, in accordance with Act No. 1016/97. This meant that they were not aware of its contents at the time of purchase. Only those who had purchased the tender documentation were allowed to bid. Six potential bidders bought the documentation, but only three submitted bids. Two of the bids were disqualified for non-compliance with the experience requirement, among others. The winning bid was submitted by the current licensee.

48. Given the requirement for previous gambling industry experience and registration in the National Registry of Gambling Operators, CONAJZAR could anticipate in advance the potential bidders. This knowledge was used to send information requests to the companies that could bid, as well as those unable to bid because they did not meet the requirements of the call for tenders, despite having purchased the tender documentation (again, without knowing its contents).

49. A list of barriers to competition was gathered from the internal analysis of the tender documentation and the responses of the companies consulted.

50. The first barrier was regulatory – CONACOM considered that Act No. 1016/97 on Gambling may establish an unjustified barrier to competition as it requires tender terms and conditions for gambling operations to have a cost. Furthermore, potential bidders cannot know the conditions of the call before acquiring a copy of the documentation. On this point, it was recommended that the Executive and Legislative Branches take the appropriate measures to revise the regulations that stipulate that tender documentation must have an acquisition cost.

51. Regarding the documentation itself, CONACOM noted that, although the convening authority may establish conditions for participation in the bidding process, it is important that any barrier to competition is duly justified, based on the principles of necessity, proportionality and non-discrimination. This is in order to develop terms that encourage robust competition and allow the State to obtain the best conditions for the benefit of society as a whole. In this regard, it identified several barriers to competition that merit further review in order to improve the competition conditions in future proceedings.

¹⁸ National Competition Commission (2022), Opinión del Directorio D/11/2022 de la Comisión Nacional de la Competencia [Opinion D/11/2022 of the National Competition Commission Board of Directors], www.conacom.gov.py/noticias/la-conacom-emitio-una-opinion-sobre-barreras-regulatorias-en-regimen-normativo-de-juegos-de-azar (accessed 29 June 2023).

52. One of these barriers is the high cost set out in the bidding terms and conditions. CONACOM was able to verify that it was the most expensive CONAJZAR tender, representing an increase of 140% compared with the last call for tenders in 2017. This was despite such an increase not being justified by inflation and sports betting not being the game of chance that generates the most revenue for the Paraguayan State. By way of comparison, the pools generated 70.8% of the total gambling fees collected in the first half of 2022, while sports betting contributed just 8%.

53. Another barrier was excluding international bidders from participating and disregarding their experience in consortia. This issue is particularly important because there are few national companies with sufficient experience and solvency to operate in the field. It was noted in particular that such provision was not included in the 2017 call for tenders.

54. Likewise, the parameters determined to evaluate financial solvency were identified as barriers, especially regarding certification of the available balance, which discouraged one potential bidder from participating. These requirements were the same as those imposed in 2017, which had likewise led to only one bidder being verified as complying with this condition.

55. Another barrier identified was the exclusion of those who had been merely reported for operating clandestine games, even if this had not been proven administratively. Two potential bidders were thus excluded. CONACOM noted that this requirement could be replaced by a system based on administrative sanctioning processes that guarantee the right to defence, reiterating the presumption of innocence until a sentence is handed down proving responsibility for the crime.

56. The double requirement in the documentation for bidders to be registered in the National Registry of Gambling Operators and to submit the bid was another issue that, although minor, creates an additional procedure for potential bidders.

57. Finally, another barrier identified was the fact that the evaluation considered the number of premises available to the bidder to take up the bids. This issue was observed by two potential bidders who declined to participate. It should be noted that, in the bid evaluation process, more points are awarded to companies with the largest number of premises, and in the case of consortia, only the largest number of one of the members could be included. Given these circumstances, it was concluded that the licensee seeking to renew its concession contract would have a clear advantage as it already had the number of operating premises in advance, requiring its competitors to manage a similar number at the time of the bid in order to be able to compete on that point.

58. Against this backdrop, CONACOM recommended that CONAJZAR carry out a technical study on the competition conditions in the call for tenders and take the appropriate measures to improve the terms and conditions in the next tendering processes for gambling, in order to increase the number of eligible bidders participating.