

Unclassified

English - Or. English

25 September 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Latin American and Caribbean Competition Forum

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - SESSION II: INTERIM
MEASURES**

- Contribution from the Central American Committee on Competition -

9-10 October 2024

This attached document from the Central American Committee on Competition is circulated to the Latin American and Caribbean Competition Forum (LACCF) FOR DISCUSSION under Session II at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

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JT03550242

Session II: Interim Measures

Contribution of the Central American Committee on Competition (Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama)

1. Background

1. The Central American Regulations on Competition were approved by the Council of Ministers of Economic Integration (COMIECO in Spanish) by Resolution 441-2020, as part of the commitments undertaken in the Association Agreement between the European Union and Central America. In the Resolution, the signatory states undertake to have a competition law and authority in each of the countries, in accordance with Article 25 of the Protocol to the General Treaty on Central American Integration (Guatemala Protocol) and Article 21 of the Framework Agreement for the establishment of a Central American Customs Union.

2. This Regulation establishes the Central American Competition Committee (CCC in Spanish), made up of representatives from the authorities responsible for economic integration and the national competition authorities for the region: for Guatemala, the Vice Ministry of Investment and Competition through the Directorate for the Promotion of Competition of the Ministry of Economy (MINECO in Spanish); for El Salvador, the Superintendency of Competition (SC in Spanish) and the Ministry of Economy (MINEC in Spanish); for Honduras, the Commission for the Defence and Promotion of Competition (CDPC in Spanish) and the Secretariat of Economic Development (SDE in Spanish); for Nicaragua, the Directorate for the Promotion of Competition (PROCOMPETENCIA in Spanish) and the Ministry of Development, Industry and Commerce (MIFIC in Spanish); for Costa Rica, the Commission to Promote Competition (COPROCOM in Spanish), the Superintendency of Telecommunications (SUTEL in Spanish) and the Ministry of Foreign Trade (COMEX in Spanish); and for Panama, the Authority for Consumer Protection and Defence of Competition (ACODECO in Spanish) and the Ministry of Commerce and Industry (MICI in Spanish), with technical support from the Central American Economic Secretariat (SIECA in Spanish).

3. The Committee is in charge of implementing, applying and managing the work required to comply with the provisions of the Central American Competition Regulations. It is also a technical forum for discussion about promoting efforts to foster co-operation and encourage competition in the region, within the framework of the legal instruments of the Central American Economic Integration Subsystem.

2. Legal and institutional framework

4. The six countries that make up the Central American Committee are committed to adopting national competition laws, with the exception of Guatemala, which is pending approval of its legislation. All countries have included among their powers the imposition of interim measures, either ex officio or at the request of a party.

5. In the case of El Salvador, its legal framework is based on Competition Law (Decree No. 528) in which Article 13, paragraph S and Article 14, paragraph N recognise

the powers of the Superintendent and the Board of Directors to impose, confirm, modify or lift interim measures, and on Article 60-A of the Competition Law Regulations. The interim measures may be applied ex officio or at the request of a party, before initiating the administrative procedure, during the investigation stage of the procedure or once the administrative procedure file has been sent to the Board. The measures may include: 1. the temporary suspension of activities; 2. subjecting certain products or services to particular conditions; or 3. any other measures applicable to the case in question. These measures will be considered by the authority in the following circumstances: a) there is an imminent risk to the market that could result in limiting or restricting competition; b) an economic agent accesses a market; c) an economic agent is excluded; or d) the conduct under investigation could cause damage to third parties or to public or collective interests. One notable point is that such measures may remain in force until the final resolution of the case is issued. However, they may be revoked at any time, at the request of a party or ex officio, if the Superintendency deems it appropriate, provided that it is proven that the causes that motivated them have disappeared or substantially changed.

6. In Honduras, the Law for the Defence and Promotion of Competition was approved by Decree No. 357-2005 (the Competition Law). According to its provision on interim measures, their function is to prepare for and/or adopt precautions to avoid serious, irreparable harm to the free competition process or serious damage to consumers through the actions and/or acts of economic agents. Article 17 of the Honduran Competition Law provides for two types of interim measures: a) precautionary measures are applied in cases of economic concentrations, mergers or acquisitions. Their purpose is to prevent these concentrations from negatively affecting competition in the market; and b) provisional measures are applied in situations resulting from investigations into anti-competitive practices. These measures are intended to prevent irreparable damage while the investigation is being carried out.

7. In Nicaragua, Article 42 of Law No. 601 concerning the promotion of competition, as amended by Article 5 of Law No. 1202 creating the National Attorney General's Office for the Defence of Free Competition and Alternative Dispute Resolution, establishes interim measures in competition matters. When imposing interim measures, the criteria indicated in Article 43 of Law No. 601 must be observed: a) that they are applied in accordance with the law; and b) that there is no possibility of causing irreparable damage to the interested parties. Accordingly, the Director of the Directorate for the Promotion of Competition does not have discretion to impose interim measures, and must comply with the provisions of the aforementioned law and ensure the parties are granted the right to defence and due process. The judiciary must also refer to Law 902, the Civil Procedure Code of the Republic of Nicaragua, to determine whether any other interim measures should be imposed.

8. In Costa Rica, two administrative bodies are responsible for applying competition regulations in the country: the Commission to Promote Competition (COPROCOM in Spanish), and the Superintendency of Telecommunications (SUTEL in Spanish), which is the specialist regulator for the telecommunications industry. Its regulatory framework is set out in Article 37 of Law No. 9736 for Strengthening Costa Rica's Competition Authorities, and Article 21 onwards of Law 8508, the Contentious-Administrative Procedural Code. With regard to interim measures, it states that such measures may be imposed that are: "...appropriate and necessary to provisionally protect and guarantee the subject matter of special proceedings and the effectiveness of the possible resolution."

9. Panama's legal framework regarding the use of interim measures in competition matters is made up of the following legal instruments: (a) Law 45 of 31 October 2007 (Law 45) establishing rules on consumer protection and defence of competition and another

provision; (b) Executive Decree 8-A of 22 January 2009 regulating Title I (On Monopoly) and other provisions of Law 45 of 31 October 2007; and (c) Title II (on Interim Measures) of the Judicial Code of the Republic of Panama, as a supplementary regulation.

10. The interim measures set out in the Panamanian Competition Law include provisional orders to suspend, correct, prohibit or refrain from acts or conducts contrary to free competition. Interim measures of an administrative nature may be ordered ex officio (independently) or at the request of a party.

3. Enforcement experience

11. Guatemala, El Salvador and Nicaragua have limited experience of interim measures, as they have never imposed them.

12. It is worth noting in Nicaragua's case that only 11 requests for interim measures have been filed, but they were not admitted due to failing to comply with formal requirements and because in some cases they dealt with the substance of the case.

13. In an economic concentration case related to the agri-food sector, the Honduran Competition Commission issued precautionary measures in order to carry out an investigation, given the importance of the sector and the complexity of the companies involved. With regard to provisional measures, the Commission imposed measures in a case relating to an investigation into practices prohibited by their very nature in the pharmaceutical distribution sector (pharmacies). The measures declared that the requirements imposed by the association of independent pharmacies and the municipal mayor's office, which prevented new competitors from joining, should be withdrawn to avoid serious, irreparable damage to the free competition process and serious damage and harm to consumers.

14. In Costa Rica, prior to the reform of Law 9736, COPROCOM accepted two requests for interim measures in two proceedings: 1) a complaint of alleged relative monopolistic practices and notification of economic concentration. Following the entry into force of Law 9736, COPROCOM processed four requests for interim measures, which were rejected for not meeting the required conditions; and 2) SUTEL has limited experience of processing interim measures, which makes it difficult to determine their scope and effectiveness or any follow-up actions that might be required. Prior to the reform introduced by Law 9736, SUTEL received two requests to impose interim measures, both in proceedings related to relative monopolistic practices. These were rejected by the SUTEL Council on the grounds that not all the required conditions were met. Following the entry into force of Law 9736, SUTEL processed four interim measures in special competition proceedings, but all four were rejected for not complying with the requirement for sufficient legal basis and the likelihood of success based on the merits of the case.

15. Panama's experience includes the Visa – Mastercard Case (2022), an administrative investigation that began in 2022 into alleged abusive exercise of dominant (joint) position by Visa and Mastercard, relating to electronic card payment services through digital transactions in the Republic of Panama. In this case, an interim measure was ordered to suspend any type of communication, claim or threat against entities that carry out acquiring activities in Panama, to prevent them from continuing to contract with agents that offer the local control agent (LCA) model in the country and to avoid imposing or implementing any rule, programme or measure that prohibits or restricts the economic activity carried out by agents under the LCA model in Panama.

16. The countries in the Central American region have no experience of co-operating with other competition authorities in relation to interim measures, since there is no regulatory body to empower the authorities to implement any measures.

4. Key policy considerations

17. Guatemala does not have a policy on interim measures and therefore does not have any experience in this regard.

18. In El Salvador, both the Superintendent and the Board of Directors are empowered to impose interim measures that are specifically set forth in its legislation, during any stage of proceedings.

19. With regard to Honduras' policy of applying interim measures, the Competition Commission has the discretionary power to impose measures as control and prevention tools that can be adopted in a timely manner to reduce and/or avoid harmful effects for the markets and the exercise of free competition, as well as serious damage to consumers. However, any measures imposed may be appealed through the competent body before the Supreme Court of Justice, if the economic agent(s) consider(s) that such measures infringe their rights.

20. In Costa Rica, the principle of proportionality must be considered in order to grant or deny any interim measure, assessing in particular any possible harm to the public interest, any damage the measure may cause to third parties, and the instrumentality and temporary nature of interim measures, so as not to seriously affect the legal position of third parties. The new law also establishes that each competition authority will have a Technical Body (OTC in Spanish) to carry out its functions. The OTC is responsible for processing and resolving the investigation and preliminary investigation stages of special competition proceedings. Each of these stages is carried out by different officials, who have different, specific powers. The decision-making stage is the responsibility of the Decision-Making Body.

21. The reform that was introduced significantly modernised the system for interim measures in competition matters by increasing, among other aspects, the number of authorities that are authorised to issue them, extending it from just the Superior Body to those in charge of the investigation and preliminary investigation stages, and those entitled to request them.

22. When an interim measure is imposed in Panama, in addition to identifying the actual or imminent harm to the competition conditions and carrying out the relevant assessment of the criteria for applying the measure, it is also necessary to evaluate how the costs associated with the risks of implementing an exaggerated or disproportionate interim measure might affect the liable parties, as well as the costs associated with cases that could involve false positives. The processing of an interim measure does not influence the process of investigating restrictive competition practices. Once the ACODECO orders the interim measure and notifies the entity under investigation, the power to continue with the investigation is lost: the investigation must have ended. This is because when the ACODECO imposes an interim measure, it must file the formal claim within five (5) business days after serving notice of the interim measure.

23. The criteria for imposing interim measures in Nicaragua are set out in Article 43 of Law 601 and are as follows: a) they are in accordance with the law and; b) there is no possibility of causing irreparable damage to the parties involved.

24. With regard to digital markets, imposing interim measures can be challenging in some cases. However, given the tremendous speed with which actions or conduct that restrict competition, network effects and economies of scale, typical of these markets, can be implemented and take effect, it is vitally important to impose interim measures without delay, if appropriate according to applicable legislation for each jurisdiction, in order to avoid serious, irreparable damage that can increase rapidly in these markets due to network effects.