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Session III: Ex officio Investigations

- Contribution from Costa Rica -

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The attached document from Costa Rica is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

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Session III: Ex officio Investigations

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1. Background¹

1. The Commission to Promote Competition (COPROCOM), the national authority, and the Telecommunications Superintendency (SUTEL), the sectoral telecommunications authority, are the administrative entities responsible for enforcing competition regulations in Costa Rica, including the investigation and sanctioning of cartels and vertical restraints.

2. For the purposes of investigating, instructing, and potentially sanctioning anticompetitive conduct, the Law for the Strengthening of Competition Authorities of Costa Rica, Law No. 9736, established a special procedure applied by both Competition Authorities. The main objective of this procedure is to maintain an efficient and competitive market, preventing practices that could harm consumers and other competitors. In this context, ex-officio investigations play a crucial role, as they allow authorities to proactively identify and sanction anticompetitive conduct without the need for a prior complaint.

3. This procedure is divided into three independent stages, each managed by different bodies, which cannot intervene in any stage other than the one assigned to them by law.

4. The preliminary investigation stage aims to determine whether the elements and conditions that warrant initiating the instruction stage of the special procedure are present. This stage can begin by complaint or ex-officio, at the initiative of the person in charge of this stage or the deciding body.

5. The instruction stage aims to carry out all necessary actions to prepare the special procedure for the decision stage, in which the Superior Body determines whether the infringement occurred or not.

6. The execution of these stages in the context of a preliminary investigation is detailed as follows:

- Preliminary Investigation Phase:
 - Initial Data Collection: Authorities gather basic data to assess the credibility of indications of anticompetitive practices.
 - Evaluation of Indications: The collected information is analyzed to determine if a deeper investigation is justified.
- Formal Investigation Phase:
 - Detailed Analysis: A thorough investigation is conducted, including inspections, information requests from companies, interviews with stakeholders, and analysis of internal documents.
 - Right to Defense: Investigated companies have the right to be informed of the charges and to present their arguments and evidence in defense.
- Precautionary Measures:

¹ Contribution by the Commission to Promote Competition (COPROCOM) and the Telecommunications Superintendency of Costa Rica (SUTEL).

- **Damage Prevention:** During the investigation, authorities can impose provisional measures to prevent further market damage, such as suspending certain activities of the investigated companies.
- **Resolution and Sanctions:**
 - **Investigation Results:** Upon concluding the investigation, authorities can impose sanctions, fines, or recommend changes in business conduct.
 - **Publication of Results:** The results are usually published to promote transparency and deter future anticompetitive practices.

2. On Ex-officio Investigations

7. Ex-officio investigations allow competition authorities to intervene without the need for a formal complaint, which is crucial in markets where affected parties may fear retaliation or lack the resources to file a complaint. This proactive approach ensures continuous market monitoring, promoting competition and protecting consumers from abusive practices.

8. To initiate ex-officio investigations, only indications of possible anticompetitive conduct are required, as the investigation itself allows for a deeper examination of the facts to determine if there are sufficient indications to recommend the instruction stage and subsequent decision.

9. The ex-officio powers allow for initiating procedures both reactively—in case of receiving news of an infringement through any available means or tool—or proactively—through market monitoring and the use of other information sources.

10. Three key characteristics define these investigations. Proactivity, as authorities do not wait for a complaint to be filed; they act preventively. They are broad in scope, covering any market sector and any type of anticompetitive practice. Lastly, they offer flexibility, allowing authorities the freedom to choose when and how to start investigations based on various indications.

11. To determine a possible infringement of competition rules, all legally authorized information and evidence collection mechanisms can be used. In this regard, Law 9736, as a result of the recommendations issued by the OECD during Costa Rica's accession process, strengthened the detection tools available to authorities to fulfill their objective of detecting anticompetitive conduct, including cartels.

12. Currently, there are several mechanisms or tools that provide greater capacity to detect infringements, as they allow for obtaining information and indications about the commission of such anticompetitive conduct by more means, thereby enabling the initiation of ex-officio investigations reactively or proactively.

3. Tools for Initiating Ex-officio Investigations

13. The tools available to COPROCOM and SUTEL for detecting cartels include:

- **Leniency Program:** Provides incentives for cartel participants to inform the authorities about the cartel in exchange for immunity from fines (total or partial, depending on the case) and disqualification from participating in public

procurement processes in cases of collusive bidding. There is also "plus amnesty," which allows agents to provide information about collusive behavior in other markets. This program has been operational and known to economic agents since 2022.

- **Dawn Raids:** Necessary to gather or prevent the loss or destruction of evidence for investigating cartels, abuses of dominance, or vertical agreements, with prior authorization from the competent judicial authority.
- **Incomplete Complaints:** A complaint must meet certain legal requirements to be processed; however, many complaints are not formalized but still serve as information sources for initiating ex-officio investigations when they indicate anticompetitive behavior.
- **Proactive Mechanisms:** Activities aimed at identifying possible infringements, such as monitoring priority markets, constantly reviewing specialized press, coordinating with other regional competition authorities, and tracking conditions of public procurement in the established system.

14. For COPROCOM, ex-officio investigations can be initiated based on various information sources that may indicate potential anticompetitive behavior:

- Market Studies
 - **Economic and Statistical Analysis:** COPROCOM conducts sectoral studies or economic analyses that reveal abnormal patterns in prices, market shares, or profit margins suggesting anticompetitive behavior.
 - **External Reports:** International organizations, consultancies, or academic institutions may publish studies identifying anticompetitive practices.
- Internal Observations:
 - **Continuous Monitoring:** COPROCOM continuously monitors markets to detect suspicious changes.
 - **Trend Analysis:** Tracks trends in mergers and acquisitions, sudden price changes, or the emergence of entry barriers for new competitors.
- News and Media:
 - **Investigative Reports:** Journalistic articles or investigative reports can reveal suspicious practices that attract COPROCOM's attention.
 - **Public Statements:** Comments or statements from company executives in the media may provide clues about potential infringements.
- Informal Complaints:
 - **Anonymous Informants:** Employees, competitors, or consumers may anonymously provide information about anticompetitive practices.
 - **Queries and Suggestions:** Companies or individuals may make queries or suggestions to the authorities that, although not formal complaints, can indicate competition issues.

15. For SUTEL, being the market regulator allows it to monitor various actions of the regulated entities to identify possible collusion signs, such as price changes, user offers, access and interconnection processes, and even public procurement procedures affecting the market.

16. Moreover, in its fight against cartels, a dedicated email address, competencia@sutel.go.cr, allows telecommunications service users, operators, providers, and other stakeholders to submit queries and report potentially anticompetitive situations. This has significantly increased the number of ex-officio investigations, as those alerting about potential infringements often choose not to formalize their complaints or remain anonymous. For instance, in 2023, 60% of all opened investigations were ex-officio.

17. Additionally, a project titled "Market Behavior Monitoring and Regulatory Impact Alert System on Free Competition, SMAC" is set to be concluded and launched in 2025. The SMAC is a more comprehensive data screening system developed by DGCO officials for extracting and analyzing relevant information for market behavior monitoring and compiling and studying data related to public procurement in telecommunications services. This is achieved through public data access and extraction using "crawling" and "web scraping" techniques, with programming developed in Python and incorporating business intelligence dashboards in Power BI.

4. Advocacy Efforts for Cartel Prevention

18. Competition authorities also engage in activities to promote and advocate for competition, such as issuing guides, manuals, and instructions, conducting market studies, and providing opinions and recommendations on terms of reference in public procurement processes. Additionally, they coordinate with other public sector entities and engage in training and outreach activities that raise awareness and open channels for recipients to become information sources for ex-officio actions to pursue infringements.

19. Specifically, regarding actions taken against cartels, in 2022 COPROCOM and SUTEL jointly issued the Guide on the Benefits Program for Exemption and Reduction of Administrative Sanctions. They also plan to release the Guide for Detecting Collusive Bidding in 2024.

5. Application Cases

20. In the case of COPROCOM, through the ex-officio initiation of a special procedure for the alleged commission of absolute monopolistic practices, an agreement between nine competitors in the agro-industrial sector to not purchase rice from domestic producers until the publication of a consumer price decree was sanctioned. This conduct constitutes an absolute monopolistic practice under Article 11, subsection (e) of the Law for the Promotion of Competition and Effective Consumer Protection, Law No. 7472.

21. In the ex-officio procedure conducted by COPROCOM, it was confirmed that two agreements made at the Rice Agro-industrial Assemblies on August 5 and 12, 2019, were preparatory acts for the agreement adopted on December 2, 2019, in the Regular Session 885-12-2019 of the Board of Directors of CONARROZ (agreement 3.2.1). This agreement established the non-purchase of domestic rice production until the publication of the consumer price decree. By that date, the Law to Strengthen Competition Authorities, Law No. 9736, was already in force and, therefore, applicable.

22. The behaviors of the involved economic agents were classified as very serious under Article 118, subsection (a) of Law No. 9736. For the imposition of individual sanctions, Article 119, subsection (e) of the same law was used, which establishes that very serious infractions will be sanctioned with a fine of between 0.1% and 10% of the total business volume of the economic agent in the fiscal year immediately preceding the

imposition of the sanction. The sanctions imposed on each of the nine involved agents, according to COPROCOM Vote-022-2022 of July 26, 2022, range from more than eight million colones to over two billion colones. In total, all sanctions sum to more than five billion colones (equivalent to eight million dollars).

23. Furthermore, through the ex-officio initiation of a procedure, alleged absolute monopolistic practices, specifically supposed price agreements in the commercialization of flowers, were investigated. In this case, the investigated party was the association named APROFLOR.²

24. Through COPROCOM Vote-64-2023, the price-fixing agreements, in violation of Article 11 of Law No. 7472, made in APROFLOR's board of directors and assembly meetings in the market of production and on-farm sale of various cut flower varieties for national consumption, were sanctioned.

25. In summary, COPROCOM, exercising its authority to initiate ex-officio investigations in response to alleged anticompetitive behavior, started three investigations in 2021 in the markets of vehicle commercialization, flowers, banking commissions, and public work construction. In 2022, the National Authority initiated an investigation in the prepared food delivery platform market. In 2023, an investigation was launched into an alleged economic concentration involving a media outlet.

26. For its part, SUTEL, as a result of market monitoring actions carried out in the telecommunications market and specifically in public procurement, initiated an ex-officio investigation in 2021 for an alleged cartel-related infringement.

27. The case initiated ex-officio in 2021 concerns collusive bidding, currently in the instruction stage, so its specific details are confidential under the law. Generally speaking, the case arose in the context of a national radio spectrum auction, where some indications were identified, suggesting the possibility of two distinct forms of cartelization.

28. During this investigation, tools and powers obtained through Law 9736 were used for the first time. Specifically, judicial assistance³ was requested for a judge to order the delivery of certain required information.

29. Significantly, the Administrative and Civil Court of Finance ordered the delivery of all the information requested by SUTEL.

30. Before Law 9736, the case could not have progressed due to a lack of information.

31. Undoubtedly, the strengthening of Costa Rica's competition legal framework with the promulgation of Law 9736 and its regulations, through the use of proactive and reactive tools provided by the legal system, also strengthens the ex-officio actions of both authorities in pursuing cartels.

² APROFLOR, an association dedicated to addressing the challenges faced by flower producers in Costa Rica, was involved in a price-fixing agreement identified as an anticompetitive practice. This organization, comprised of farmers and residents of Llano Grande de Cartago, Costa Rica, includes members who are direct competitors in the production and sale of cut flowers.

³ Through this mechanism, an Administrative Judge orders a specific economic agent, individual, or other entity to provide certain information to the competition authority.

Bibliography

- Law for the Promotion of Competition and Effective Consumer Protection, Law No. 7472, December 20, 1994. Available at: https://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=26481
- General Telecommunications Law, Law No. 8642, June 4, 2008. Available at: https://www.pgrweb.go.cr/scij/Busqueda/Normativa/normas/nrm_texto_completo.aspx?nValor1=1&nValor2=63431#:~:text=N%C2%BA%208642&text=El%20objeto%20de%20esta%20Ley,de%20los%20servicios%20de%20telecomunicaciones
- Law to Strengthen Competition Authorities, Law No. 9736, September 5, 2019. Available at: https://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=90054
- Public Services Regulatory Authority Law (ARESEP), Law No. 7593, September 5, 1996. Available at: https://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=26314&nValor3=0&strTipM=TC
- Regulation for the Law 9736 Strengthening Competition Authorities, Executive Decree No. 43305-MEIC, October 29, 2021. Available at: https://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=95838&nValor3=128083&strTipM=TC
- Public Services Regulatory Authority. (June 12, 2024). Superintendence of Telecommunications. Available at: https://www.sutel.go.cr/sites/default/files/2024-01/reglamento_interno_de_organizacion_y_funciones_de_la_autoridad_reguladora_de_los_servicios_publicos_y_sus_organos_desconcentrados_riof.pdf
- Market Study on Public Procurement of Telecommunications Services. Available at: https://sutel.go.cr/sites/default/files/informe_estudio_mercado_compras_publicas.pdf
- Guide to Analyzing Anticompetitive Practices. Available at: https://sutel.go.cr/sites/default/files/guia_de_analisis_practicas_anticompetitivas_0.pdf
- Guide for Imposing Fines for Violations of Competition Regulations. Available at: https://sutel.go.cr/sites/default/files/guia_de_imposicion_de_multas.pdf
- Guide on the Benefits Program for Exemption and Reduction of Administrative Sanctions. Available at: https://www.sutel.go.cr/sites/default/files/guia_del_programa_de_beneficios_de_exoneracion_y_reduccion_de_sanciones_0.pdf ([https://www.sutel.go.cr/sites/default/files/guia_d el_programa_de_beneficios_de_exoneracion_y_reduccion_de_sanciones_0.pdf](https://www.sutel.go.cr/sites/default/files/guia_del_programa_de_beneficios_de_exoneracion_y_reduccion_de_sanciones_0.pdf))
- Guidelines for Conducting Unannounced Inspections by SUTEL. Available at: https://sutel.go.cr/sites/default/files/lineamientos_de_actuacion_ante_las_inspecciones_no_anunciadas_de_la_sutel_0.pdf (https://sutel.go.cr/sites/default/files/lineamientos_de_actuacion_ante_las_inspecciones_no_anunciadas_de_la_sutel_0.pdf)
- Best Practices Manual for Public Procurement of Telecommunications Services Available at: https://sutel.go.cr/sites/default/files/manual_de_buenas_practicas_compras_publicas_servicios_telecom_0.pdf ([https://sutel.go.cr/sites/default/files/manual_de_buenas_practicas_c ompras_publicas_servicios_telecom_0.pdf](https://sutel.go.cr/sites/default/files/manual_de_buenas_practicas_compras_publicas_servicios_telecom_0.pdf))

Guide for the Prevention and Detection of Collusion in Public Bidding. Available at:
<https://sutel.go.cr/sites/default/files/audiencias/Guia%20licitaciones%20COPROCOM%20SUTEL%20BID%20%28VCP%29.pdf>](<https://sutel.go.cr/sites/default/files/audiencias/Guia%20licitaciones%20COPROCOM%20SUTEL%20BID%20%28VCP%29.pdf>)