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**LATIN AMERICAN COMPETITION FORUM**

**-- Session I: Competition Principles in Essential Facilities --**

**Contribution from Panama**

**8-9 September 2010, San José (Costa Rica)**

*The attached document from Panama is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.*

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## LATIN AMERICAN COMPETITION FORUM

8-9 September, San José (Costa Rica)

### Session I: Competition Principles in Essential Facilities

#### -- CONTRIBUTION FROM PANAMA --

#### **I. Answers from Panama's Consumer Protection and Competition Authority (ACODECO)**

**9. Please provide a list of sectors in which access to essential facilities is mandated in your country. Give a brief description of the sectoral regulation for access in each of these sectors.**

1. Electricity, Telecommunications. The Telecommunications Sector Act gives the National Public Services Authority (*Autoridad Nacional de los Servicios Públicos*, or ASEP) the power to issue regulatory standards (which are subject to public comment or hearings) and special regulations as needed.

***Does your antitrust legislation have specific rules concerning essential facilities? If so, which are they? What are the conditions to determine that a facility is essential?***

2. Law 45 of 31 October 2007 has no specific provisions on essential facilities. As monopolistic practices, the law prohibits economic agents with substantial power in the relevant market from undertaking unilateral action designed with a view to, or having the effect of, "unreasonably obstructing market access" (heading of Article 16, which defines monopolistic practices). It also prohibits any act that unreasonably harms or obstructs free economic competition and presence in the production, processing, distribution, supply or marketing of goods or services by economic agents with substantial power in the relevant market (Article 16, section 9). This residual clause is broad enough to cover any limitation of free competition and presence by one or more agents with market power, and thus addresses constraints on competition deriving from control of, and refusal of, access to an essential facility owned by an economic agent. However, this regulation on access is insufficient, because direct regulation is required to prevent a

monopolistic actor from continuing to preserve its market power when the conditions governing access are defined, and the competition legislation does not provide this power. Price regulation under Law 45 of 2007 (Articles 199, 200 and 201) is provided for other purposes.

3. Article 17 of Executive Decree 8-A of 22 January 2009, which provides regulations under Title I (On Monopoly) and other provisions of Law 45 of 2007, gives the Authority the ability to issue instructions or guidelines for the public on the application of Article 18 and section 4 of Article 19 of the law. Thus, the Authority can provide instructions or guidelines on when a resource to which access is being demanded meets the criteria for being considered an essential facility.

***What are the roles played by the competition agency and regulatory agency in declaring a facility as essential? Are there overlapping jurisdictional powers? If so, are there any mechanisms in place – formal or informal – to structure interactions between these agencies and to avoid jurisdictional conflicts?***

4. The National Public Services Authority (ASEP), which has direct regulatory responsibility, has the power to regulate essential facilities in public services under its jurisdiction. However, such regulation requires approval by ACODECO, under section 5 of Article 20 of Executive Decree 143 (of 29 September 2006). This text deals with the Authority's functions and authorities, and incorporates by reference "the text of Law 26 of 29 January 1996, added to and amended by Decree Law 10 of 22 February 2006". The latter text addresses "promoting competition and efficiency in public service activities in order to prevent possible monopolistic, anticompetitive or discriminatory behaviour in firms operating these services. For this purpose, the Authority is mandated to issue properly founded resolutions providing the regulations required to maintain competition in the provision of public services under its jurisdiction. The Authority must request approval from the Consumer Protection and Competition Authority (Autoridad de Protección al Consumidor y Defensa de la Competencia) on the specific points of resolutions or regulations that it plans to issue involving public services markets and monopolistic, anticompetitive or discriminatory practices.

5. Resolution AN 1630-Telco of 21 April 2008 exemplifies this process. It "adopts special measures related to users' right to access to public telecommunications services", establishing that:

6. "ONE: The telecommunication networks, along with the works of civil engineering supporting them, installed in buildings, commercial establishments and/or horizontal properties, constitute shared telecommunications infrastructure and essential facilities for the provision of public telecommunications services that should be available to all telecommunications concessionaires in the interest of fair and healthy competition and respect for user access to networks and services, as well as users' right to choose the service provider that they prefer;"

7. "TWO: All public telecommunications concessionaires are prohibited from making agreements or contracts with promoters of buildings, owners of commercial establishments and boards of directors and/or owners' groups of horizontal properties, or with any natural or juridical person whose purpose is to grant exclusive rights to provide such services, or who cede, along with the management of buildings' telecommunications infrastructure, authority that makes it possible to limit other concessionaire's access to these facilities;"

8. "THREE: Public telecommunications services concessionaires are advised that making contracts or agreements in order to create exclusive rights to provide telecommunications services in buildings, commercial establishments and/or horizontal properties, as well as refusing other telecommunications concessionaires the right to own, use or manage the telecommunications infrastructure of buildings, constructions or housing complexes in horizontal property regimes, constitutes a violation of provisions governing public telecommunications services users' right of access and choice, and hence parties

engaging in such violations can be investigated, and sanctions can be imposed on them, under the procedural provisions of Law 31 of 1996 and its corresponding regulations. In addition, such refusal constitutes a practice restricting free economic competition and market presence, by virtue of which fact the Consumer Protection and Competition Authority may investigate and punish such refusal;”

9. “FOUR: Given users’ right to access networks and freely select the provider of their choice, public telecommunications concessionaires must have access to the shared infrastructure and essential facilities of aforesaid buildings, commercial establishments and/or horizontal properties where users request such services, in order to ensure the presence of competition with its optimisation of price and quality of service.”

***An example: the TELERED case***

10. The firm TELERED voluntarily entered into a judicial transaction with the Consumer Protection and Competition Authority. The sixth clause, which it negotiated and approved, provides that:

11. “SIX: TELERED ... commits itself to establishing a membership process for merchant acquisition, to allow shareholder and non-shareholder member banks to sign contracts to install and operate POS terminals that accept and process CLAVE debit transactions. TELERED states and, the Authority accepts, that this membership process may be reviewed and modified by TELERED, provided that it maintains equality of conditions between shareholder and non-shareholder banks. TELERED also states that as long as it is the owner of the CLAVE network, it will uninterruptedly support the membership process for merchant acquisition, unless market conditions eliminate it.”

12. As to whether there are overlapping jurisdictional powers, the competition authority cannot declare a facility essential, since authority to determine this belongs to Specialised Commercial Tribunals as a part of the investigation of restrictive practices. Thus, there is no room for overlapping jurisdictional powers.

***Does the competition authority have the legal authority to order the vertical disintegration of an essential facility or impose conditions on vertically integrated monopoly?***

13. The competition authority does not have the legal ability to order the vertical disintegration of an essential facility or to impose conditions on a vertically integrated monopoly. However, in cases of economic concentration where its determination that concentration is present leads it to believe that the concentration is of the type prohibited by Law 45, it can request the Tribunal to order vertical disintegration. Also, it does have authority over written approval prior to issuance of a regulation or resolution by the ASEP relating to specific matters covered by Article 29 of Executive Decree 279 of 14 November 2006, which contains regulations pursuant to Law 26 of 29 January 1996 as amended by Decree Law 10 of 22 February of 2006”, which article includes the following language:

14. “Article 29. Approval. The [National Public Services] Authority shall request written approval from the Consumer Protection and Competition Authority before issuing a general regulation or regulatory resolution regarding any of the following specific issues:

- “Determination of the pertinent market;
- “Determination of substantial power or dominant position in the pertinent market;
- “Writing of general provisions that may lead to regulated economic agents’ engaging in conduct considered monopolistic, anticompetitive or discriminatory.”

15. The Authority shall request approval, explaining the need for it, and the Consumer Protection and Competition Authority must specify reasons and supporting information for its decision. The Authority shall be deemed to have approved a provision it fails to pronounce itself on the matter within ten (10) business days of the request.”

***Has your antitrust agency heard any cases in which the definition of a facility as essential was the main point of controversy? If so, please provide details.***

16. See the cases mentioned in response to question 2.

***Has your competition authority prosecuted the owner of an essential facility for anticompetitive behaviour regarding its downstream client-competitors? What sanctions and/or remedies were imposed, if any?***

17. As of the time this questionnaire was filled out, the Authority has not prosecuted the owner of an essential facility for anticompetitive behaviour regarding its downstream client-competitors.

***Does your competition agency have jurisdiction to investigate and sanction acts of discrimination by the owner of an essential facility? If so, does it have special technical expertise to do so and how has this expertise been developed?***

18. Yes. Section 7 of Article 14 of Executive Decree 8-A of 22 January 2009, “which provides regulation under Title I (On Monopoly) and other provisions of Law 45 of 31 October 2007”, states that “the establishment on even one occasion of different sales prices or conditions for different purchasers in equivalent transactions, when such conduct is not justified in terms of economic efficiency”, if carried out by an economic agent with market power, constitutes action that unreasonably harms or obstructs the process of free competition and market presence as defined in Article 16 of the Competition Law.

19. In addition, section 16 of Article 86 of Law 45 of 2007 makes it one of the functions of the competition authority to investigate, hear and determine the presence of cases of monopolistic, anticompetitive or discriminatory practices by firms or entities providing public services, pursuant to the present law and in accord with relevant sectoral public services regulations and legislation. For this purpose, the authority shall request the support and collaboration of the SEP technical staff. The competition authority does not have broad experience in determining the costs of infrastructure access, although it recognises the importance for ACODECO of its technical personnel being duly trained by entities such as the OECD Competition Committee on different subjects relating to market regulation, including, among others, the regulation of essential facilities.