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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Strengthening incentives for leniency agreements

– Contribution from Costa Rica –

27-28 September 2022

The attached document from Costa Rica is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 27 28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session I: Strengthening incentives for leniency agreements

– Contribution from Costa Rica –*

1. Background

1. The Law for the Strengthening of the Competition Authorities of Costa Rica, Law 9736, which entered into force on 18 November 2019, introduced, for the first time in our country, an immunity or leniency program, locally known as the Program for the Exemption and Reduction of Fines, which allows the Commission for the Promotion of Competition (COPROCOM) and the Superintendency of Telecommunications (SUTEL), as sectorial authority, to more efficiently enforce Competition Law in the country.

2. Also called the “PROGRAM OF BENEFITS FOR THE EXEMPTION AND REDUCTION OF ADMINISTRATIVE SANCTIONS,” it contributes to strengthen the ability of competition authorities to more effectively deter, detect and sanction absolute monopolistic practices, and will help obtain information and evidence regarding the commission of such anticompetitive behaviors, offering incentives to economic agents and physical persons¹ that have engaged in, contributed to, propitiated, prompted, participated in, or are participating in, the commission thereof, to disclose and submit evidence of their existence to the corresponding competition authority, and to cooperate in the investigation of such infraction.

3. Absolute monopolistic practices are known in other jurisdictions as economic or business cartels, anti-competitive horizontal agreements, collusion, or collusive agreements between or among competitors. Costa Rican legislation typifies all “hard core” cartels (price fixing, production volume, market sharing and public procurement bid-rigging) as absolute monopolistic practices, and Law 9736 also added the figure of information exchange among competitors for any of the objectives or effects mentioned above.²

2. Program Requirements and Procedure

4. Articles 121 through 128 of Law 9736 set out the requirements and the procedure for economic agents and physical persons to apply for the benefits of an exemption or reduction of a sanction. These Articles of Law 9736 were regulated by means of numerals 184 and 195 of the Executive Regulation to said Law (Executive Decree 43305-MEIC of 29 October 2021).

* Contribution by the Commission for the Promotion of Competition and the Telecommunications Superintendency of Costa Rica.

¹ These include, among others, those that participate representing legal persons or de facto corporations, or on behalf, of and at the behest of, them, as well as public offices that in any manner contribute to, facilitate, propitiate or participate in, the realization of absolute monopolistic practices.

² Although information exchange to set prices was punishable right from the first anti-monopoly regulations in 1995, Law 9736 expanded the prohibition to exchange information for other equally anticompetitive purposes.

5. The crucial characteristics of the program include:
- The program starts once an interested party files a request (oral or written) with the corresponding competition authority³⁴ to receive the benefit of the exemption or reduction of a fine.
 - The requirements to apply for the program include:
 - To expressly recognize before the corresponding competition authority to have engaged in, contributed to, propitiated, prompted, participated in, or to be participating in, the commission of an absolute monopolistic practice.
 - To cooperate, fully and permanently, with the corresponding competition authority during the investigation process and the proceedings, as provided in the Executive Regulations to Law 9736.⁵
 - To cease participation in the absolute monopolistic practice promptly and as dictated by the corresponding authority.
 - To not have taken steps to induce other economic agents to participate in the infraction.
 - The benefit of a full exemption of the fine depends on whether the applicant is the first of the involve economic agents or physical persons to provide accurate evidence, unknown to the corresponding competition authority, and which, in opinion of the authority, can substantiate the request for a dawn raid or prove the commission of an absolute monopolistic practice. Subsequent applicants will receive a less significant reduction depending on their order of application, and must fulfill the same requirements.
 - The benefit of a fine reduction applies when economic agents or physical persons provide accurate evidence, unknown to the corresponding competition authority, and which, **either due to its nature or to its level of detail, allows the latter to better substantiate the request for a dawn raid or prove an infraction** with regards to the commission of an absolute monopolistic practice.
 - In the event of absolute monopolistic practices that consist of so-called “*bid-rigging*,” the exemption also implies not to be disqualified from participating in future government procurement processes, **but only for the first applicant**.
 - The exemption or reduction of a fine imposed on an economic agent will also apply proportionally, as defined by the corresponding competition authority, to legal representatives or board members that have participated in the agreement or decision, provided they collaborate with such authority until such time as the final judgment of the special proceeding is issued.

³ Thus, the chronological order in which program access applications are received will define who is subject to full, or 100%, exemption (first applicant) and, subsequently, who will benefit from partial reductions as follows: 50% for the second applicant, 30% for the third applicant, and 20% for the fourth. Chronological order of submittal will be determined by the corresponding competition authority, which will assign the corresponding score and an application code.

⁴ Applications must meet the requirements contained in Article 185 of the Executive Regulations to Law 9736, and may be submitted even if no investigation is under way by the competent authority, or, if ongoing, up until the pre-trial proceedings initiate.

⁵ Article 188 of the Executive Regulations to Law 9736.

- Economic agents and physical persons are not able to invoke a fine exemption again if they have previously participated in absolute monopolistic practices that affect the same market.
- Additionally, Law 9736 provides that a person or economic agent under investigation may inform the corresponding competition authority on the existence of another absolute monopolistic practice that the authority is not aware of; in some jurisdictions, this tool is called “*leniency plus*.” In this case, once the legal requirements are met, the applicant will receive the following benefits:
 - 50% reduction of the fine applicable to the practice investigated by the corresponding competition authority.
 - 100% exemption of the fine for the additional practice disclosed and which had not been identified by the corresponding authority.

3. Data Confidentiality

6. Regarding confidentiality in the leniency program, and the documentation gathered, Law 9736 and its Executive Regulations provide that the competition authority may not reveal the identity of the economic agent and the physical persons applying for the leniency program. Applications will be included in a separate, confidential docket, along with all information and evidence provided. This docket is only open to the applicant and to the officers designated by the corresponding competition authority.⁶

7. As another assurance of the program, when an application is declined for not meeting the lawful requirements, or when conditional benefits are revoked, the corresponding competition authority must return all evidence presented by the applicant and may not use such evidence, unless access to such evidence has been obtained through other means.⁷

8. Additionally, the temporary or final decision to reduce or exempt the fine is only reported to the person and/or economic agent benefitted. Confidentiality is kept throughout the entire process and even upon termination of the relevant special procedure.

9. Under the Costa Rican legislation, any officer of the competent authority that discloses information identified as confidential by the competent authority, either in benefit of such officer or of third parties, is committing a serious offence and will be dismissed without employer liability and subject to due process, besides any other applicable criminal sanctions. The authority will file a complaint at the Office of the Public Prosecutor.

⁶ Nevertheless, information provided by the applicant may be used during the investigation, either initiated by, or carried by, the corresponding competition authority, at all times holding the applicant’s identity confidential.

⁷ Article 125 of Law 9736 and Articles 187 and 188 of the Executive Regulations to Law 9736.

4. Future Challenges

10. As apparent from the above, when designing the Program of Benefits for the Exemption and Reduction of Administrative Sanctions for Law 9736, issues with this type of instruments in other countries were examined carefully, with the goal to avoid them. These include a reduction in enforcement, in part justified by civil actions to which program beneficiaries might be exposed. To partially offset that risk, Article 128 was added to specify that participation in the program does not exonerate responsible economic agents from eventual damages caused to third parties; however, the civil liability of the first economic agent claiming this benefit will be subsidiary to that of the other offenders.

11. Subsidiary liability for the first to accept the program means that said party will only have to pay eventual damages caused to third parties upon proving that other cartel participants cannot meet their payment obligation. Other economic agents in the cartel will hold joint and severable liability for eventual damages to third parties. This is a joint obligation they must all compensate.

12. Although these measures were taken to ensure an effective program, private actions are not common in Costa Rican anti-trust law. Firstly, local regulations require a final decision by the competition authorities before resorting to courts of law. Therefore, sanctions under the Competition Law are applied through an administrative procedure. However, decisions adopted by the corresponding competition authority may thereafter be examined, if so requested by the interested parties, in judicial court.

13. To this date, and after penalizing 16 cartels in the country, no cases have been taken to civil court claiming eventual damages. This occurs, in part, because the protection of collective interests is not yet consolidated in the country despite the existing regulations, which have not been sufficient to ensure the effective protection of such interests.

14. With all the above, the main risks that the program is expected to face are more related to: a) the perception of economic agents about the ability of competition authorities to detect anti-competitive behaviors, and b) the difficulties faced, in the practice, to hold confidential the identity of one or more program beneficiaries in such a small country and with some highly concentrated markets. Notwithstanding, the competition authorities are currently working on the best way to address such risks.

15. In the meantime, and since the leniency program is so new to Costa Rica and no requests have been filed to date, COPROCOM and SUTEL believe it is critical to give the economic agents and physical persons Guidelines related to this program,⁸ which seeks to promote transparency, predictability and legal certainty in the steps they must follow to access the program, and to set out the criteria that the competition authorities will apply when defining whether or not to grant the benefits. Recently, this last May 2022, the Guidelines were officially made available through a series of stakeholder workshops (including judicial authorities, academia, specialized law firms, chambers, consumer associations, and overall economic agents).⁹

⁸ The Guidelines to the Program of Benefits for the Exemption and Reduction of Administrative Sanctions was developed through the financial support of the Inter-American Development Bank (IDB) and may be visited on the following websites: <https://www.sutel.go.cr/guias-competencia> and https://www.coprocom.go.cr/publicaciones/Guias_para_investigacion/Prog_BenExonReduSanciones.html.

⁹ The program also has an internal manual to complement the Guidelines, and offers instructions and recommendations to COPROCOM and SUTEL officers on how to contribute to the effective implementation of this program.

16. In addition, there is an internal Manual for this program, whose objective is to offer instructions and recommendations to COPROCOM and SUTEL officials to contribute to the effective and consistent implementation of the instrument, said Manual is a complement to the Guide.

17. Finally, authorities have worked on an information campaign that includes infographics and similar instruments to introduce the program and explain the benefits that can be access by economic agents who decide to participate in such program.

APPENDIX 1

How does the Clemency Program work?



HOW DOES THE LENIENCY PROGRAMME WORK?

