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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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The Role of Competition Policy in Promoting Economic Recovery – Note by Costa Rica

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This document reproduces a written contribution from Costa Rica submitted for Item 2 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/promoting-economic-recovery.htm>

Please contact Mr Ruben Maximiano if you have questions about this document.
[Email: Ruben.MAXIMIANO@oecd.org]

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Costa Rica

1. Overview

1. The document “*Costa Rica: Evaluación del Derecho y Política de la Competencia 2020*” (Costa Rica: Assessment of Competition Law and Policy 2020) (OECD) from July 2020, states that “the main strengths of the Costa Rican competition regime result from the analytic soundness of its competition law, which provides a solid foundation for applying competition policy”, being the efficiencies analysis, the overriding criterion for law enforcement and the resolution of other competition policy topics.

2. In contrast to the strengths of the Costa Rican competition regime highlighted by the OECD, system strengthened by the issuance of the “Ley de Fortalecimiento de las Autoridades de Competencia de Costa Rica” Costa Rica Competition Authorities Empowerment Law, Law 9736, the report also points out how **Costa Rica still maintains aspects that have a negative effect on its performance and results related to competition, opening up space for improvement for the country.**

3. It bears noting that consistency in the legal investigations and procedures associated with the analysis of the different types of possible anti-competitive conducts established in the national legislation, both in the cases assessed by the Commission for the Promotion of Competition (COPROCOM) and by the Telecommunications Superintendency (SUTEL), has been fostered as a result of the issuance of Law 9736, by establishing a special administrative procedure for competition cases. This implementation provides greater predictability in relation to the specific actions that the Competition Authorities of Costa Rica may carry out and define within the scope of each individual administrative procedure for presumed monopolistic practices. This also includes the definition of deadlines for ruling on the procedures.

4. This special procedure establishes specific phases and their respective time frames¹ for the ruling of the different phases of the administrative procedures that might issue sanctions related to competition cases, providing greater predictability and legal certainty in relation to the COPROCOM and SUTEL proceedings of law enforcement.

5. At the structural level, it is expected that there will be strengthening of the operational capabilities for both authorities on the medium-term horizon, in order to provide both institutions with an optimal organizational structure to be able to faithfully comply with Law 9736.

6. In addition to the developing of operational capabilities in compliance with the Law to be implemented by COPROCOM and SUTEL given the issuance of Law 9736, a basic mainstay of the Costa Rican program for compliance with the competition legislation, is and will be the consistency and legal predictability that both Authorities provide in handing down their rulings about cases involving competition enforcement, advocacy work and in the ruling of mergers and acquisitions.

7. As a result of Law 9736, having a legal framework that is unified at the levels of laws, bylaws, and guides for both competition authorities, will foster consistency and predictability in the procedures followed by both institutions, towards issuing jurisprudence

¹Twelve (12) months extendible for six (6) more months for the preliminary investigation phase; ten (10) months extendible for six (6) more months for the instruction phase; and seven (7) months extendible for one (1) more month for the decision phase.

that is in line with the Costa Rican legal standards. This will provide certainty in the procedures to the economic agents that are bounded to the domestic jurisdiction, promoting and benefiting the trust and legal certainty derived from the work of the competition authorities and therefore, furthering competitiveness and commercial dynamism.

2. The COVID-19 situation

8. Within the context of implementing the reforms set forth in Law 9736, Costa Rica declared a national state of emergency in March 2020 due to the COVID-19 pandemic. Global economic shock that has had a cross-cutting effect at the domestic level in all commercial fields and whose impact and length remains unknown.

9. Under this scenario in the months of June and July, both COPROCOM and SUTEL, in their capacities as the National Competition Authority and the Sectorial Authority of Competition in Telecommunications, respectively, **published guidelines related to applying the domestic competition legislation and relevant operating considerations, leading to effective compliance with said standards by both authorities, with the intended purpose of providing to the economic agents, within their respective jurisdictions, transparency and predictability in the procedures related to advocacy and enforcement** that involve and will involve the aforementioned institutions, during the period of time that the economic shock in question is in effect.²

10. Regarding the compliance policy with the competition enforcement legislation, COPROCOM and SUTEL have been emphatic that they should remain unscathed. SUTEL will keep the commitment to ensure that the actions taken by the telecommunications operators and providers during this phase of uncertainty, will seek not to affect the competition level in the markets and that they will remain in line with the contents of the Costa Rican legal system.

11. For its part, COPROCOM has stated that agreements between competitors violate the Competition Law when the purpose or effect of these agreements is to manipulate prices, divide or segment the market, and/or restrict supply.

12. In reference to pro-competitive agreements between companies, both authorities acknowledge the economic benefits derived for society from possible types of collaboration that are not anti-competitive between economic agents, underscoring the limited duration and scope conditions of said associations, as structural elements that are generally recognized in legally valid collaborative projects.

13. SUTEL and COPROCOM have made expeditious communication channels available to economic agents, for general appraisals and advice related to competition and especially in the current juncture, related to collaborative agreements and efficiencies recognition.

²The guidelines available in both sets of directives, will be applicable in all phases of the economic shock (emergency, realignment, and recovery) and are available at the following addresses:

https://www.coprocom.go.cr/publicaciones/comunicados/Directriz-COPROCOM-03-20%20Medidas_COVID-19.html

https://www.sutel.go.cr/sites/default/files/acuerdo_021-041-2020_para_la_aplicacion_de_las_normas_de_competencia_en_el_sector_telecomunicaciones_producto_de_la_crisis_producida_por_el_covid-19.pdf

14. In connection to possible abuses of a position of dominance, just as with anti-competitive agreements, both authorities have stated that they will be sanctioned in line with the applicable standards with the full stringency set forth in the domestic legal system.

15. Finally, COPROCOM underscores the validity of consortium bids in compliance with the collaborative spirit of the standards for compliance of valid requirements established by the public administration and not for anti-competitive purposes. Meanwhile, SUTEL exemplifies the characteristics that agreements between competitors should have, to not harm the competition legislation (excluding hard-core cartels).

3. The role of competition enforcement and policy in the recovery phase

16. Continuity in applying and promoting the competition regimen set forth in the Costa Rican legislation, comprises a basic backbone in the institutional capacity that supports the domestic economy, both by providing legal certainty in safeguarding the constitutional principle of competition, as well as in practical terms by encouraging embodiment of the benefits derived from free concurrence in the markets.

17. Actually achieving the general benefits derived from the competition process (lower prices and higher quality, variety, and innovation) represents conditions that are even more desirable for an economic system during times of crisis.

18. Pursuant to this line of thought, international organizations such as the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD), as well as competition authorities such as the Federal Trade Commission of the United States of America (FTC), the Anti-trust Division of the Department of Justice of the United States of America (DOJ), and the European Commission (EC), etc., since the beginning of the COVID-19 emergency phase, have emphasized how faced with this unprecedented economic shock, the application and promotion of the principles of competition and free market concurrence, turn out to be of greater importance for overcoming the health, social, and economic challenges derived from the pandemic in the short-run, as well as to promoting stability and robust and inclusive economic recovery in the medium- and long-run.

19. In its document titled “*Antitrust Review at the FTC: Staying the Course During Uncertain Times*,” dated April 6, 2020, the FTC has indicated that the anti-monopoly laws are sufficiently broad to be applied in changing markets, even under conditions of uncertainty and, as experience has demonstrated, under emergency conditions, they are not necessary nor desirable exceptions to the anti-monopoly law.

20. Likewise, within the context of the global efforts to handle the COVID-19 health emergency, it is remarkable the pragmatic and strategic approach that the Government of the United Kingdom set forth in its reconstruction plan “*The UK Government’s COVID-19 Recovery Strategy, Dated May 11, 2020, Updated on July 24, 2020*,” in regard to the selection of priority sectors to promote competition for the for the protection of its international economic competitiveness, focusing on high added value sectors, of outstanding global performance in their respective fields.

21. What the FTC has indicated in the aforesaid document is congruent with the policies set forth by both SUTEL and COPROCOM in attention to the health crisis: SUTEL has stated that “*SUTEL’s first goal will be to protect the telecommunications service users.*” In addition, COPROCOM has stated “*The importance of removing unjustified barriers that hamper the entrance of companies into the different markets is hereby acknowledged,*

therefore priority will be provided to analyzing these barriers to be able to support economic recovery.”

22. Thus, **both competition authorities have stated their commitment to enforcing the Costa Rican competition standards.** Therefore, the legal framework set forth in Law 9736, which has been categorized by the OECD as an analytically sound instrument, makes it possible to establish an equitable setting in commercial terms, to promote competition and innovation.

23. The OECD has pinpointed a series of areas where the competition authorities have a role to play related to the health crisis caused by COVID-19 and the subsequent recovery process. It is considered that, **in the particular case of Costa Rica, the actions taken by the competition authorities in the recovery period must revolve primarily around advocacy and competition promotion actions**, as detailed below.

3.1. The Role of Competition Advocacy and Promotion

24. Law 9736 states that one of the **main COPROCOM and SUTEL functions is to engage in competition advocacy and promotion activities.** Their purpose is to encourage and boost improvements in market competition and concurrence, to remove and avoid distortions or barriers to entry, as well as to increase public knowledge and awareness in relation to the benefits of competition.

25. The methods used by both competition authorities will be non-coercive and the priorities will be established each year to ensure compliance with the objectives and actual resource allocation. The Law urges the Costa Rican Competition Authorities to coordinate activities with other state institutions, to promote national-level competition in priority sectors.

26. The Costa Rican Competition Authorities continue to be committed by legal mandate, to due compliance with the advocacy actions that the Law has granted them. They include market studies that were begun prior to the pandemic. Even so, clearly the situation caused by COVID-19 requires additional promotion actions.³

27. As for COPROCOM, it has remained particularly active during the health crisis caused by COVID-19 in issuing press releases relative to high-demand markets during the crisis, alcohol and insurance for tourists, or basic food products such as rice.

28. This has become a major tool for promoting competition in response to government initiatives and decisions that have not included technical competition criteria in their decision making and which may result in inefficiencies and loss of social and economic well-being in the case of Costa Rica.

29. Thus, it is appropriate to indicate the actions undertaken by COPROCOM related to advocacy during the health crisis caused by COVID-19.

- Opinion 02-2020 related to the importance of **doing away with the alcohol monopoly in Costa Rica.** This has been a production scheme that, up to this point, does not have the ability to satisfy the domestic demand for alcohol. This situation was exacerbated by the COVID-19 crisis since the country needed to have sufficient supply of alcohol to guarantee the health measures that were needed.

³ Currently, SUTEL is in the process of preparing two market studies. They both have potential direct positive effects on competition in the telecommunications sector. They include analysis of access to common telecommunications infrastructure in entrepreneurial condominiums and public institutions procuring telecommunication services.

- Statement related to the irrelevance of establishing a single authorized supplier to provide travel insurance nationally to the National Insurance Institute (a company owned by the state). This not only went against its own national tourism sector recovery process, but also turned out to be contrary to the principle of competitive neutrality.⁴
- Statement related to the need to **remove the rice pricing regulation** at all commercial levels. This price has been regulated in Costa Rica for more than 50 years, despite the fact that numerous studies have concluded that the justification for the rice pricing regulation policy, does not meet the need to increase its production or to improve the conditions for small farmers. On the contrary, it has brought about major earnings for all the rice importers and rice industrialized companies, which have been benefited by the differential between the low international rice prices and the high sale price at the domestic level.⁵ This situation has a particular effect given the current loss of employments and income for Costa Rican citizens.

30. For its part, the SUTEL efforts have revolved around holding meetings with telecommunications operators to answer questions about how to apply the competition standards during the health crisis and to clarify how the authority will act in that area in the future.

31. Despite the aforementioned advocacy efforts, there is an evident need to continue with the competition promotion work and to lead additional efforts in advocacy in multiple settings, where legal initiatives that lack competition criteria in their design, continue to be promoted.

32. In that regard, multiple initiatives that have been submitted for processing with the Legislative Assembly during the health crisis caused by COVID-19 have been found, that failed to have an analysis of the impact on market competition, even favoring execution of economic activities by companies belonging to the Costa Rican Government in detriment of the principle of competitive neutrality. Some examples are the following:

- **File 22.074**, Law on Medication Pricing Control (setting final prices and brokerage margins for medications and medical devices, creation of governmental entities for the effects and prohibition of discounts, etc.),
- **File 22.128**, Law on Recovering, Regaining, and Strengthening Companies and Mortgages in a Vulnerable Situation and Production Stimulus (nationalization of companies and private loans, strategic and operating management of companies in all industries for a period of five (5) years by the Banco Nacional de Costa Rica, centralization of private commercial risk management by public and private financial institutions in relation to the Banco Nacional de Costa Rica, nationalization of mortgages, breach of the principle of competitive neutrality, etc.),
- **File 22.144**, Law for Creating the National Guarantees and Bonds Fund to Support Companies Affected by COVID-19 and Economic Reactivation (public funds managed by the National Insurance Institute to guarantee business loans, breach of the principle of competitive neutrality on the insurance market, the trust created to issue these guarantees must not comply with the provisions in the Administrative Procurement Law, etc.).

⁴ Available at: https://www.coprocom.go.cr/publicaciones/comunicados/COMUNICADO_COPROCOM_SEGUROS%2oCOVID-19.html

⁵ Available at: https://www.coprocom.go.cr/publicaciones/comunicados/COMUNICADO_COPROCOM_ARROZ.html

33. The preceding examples of draft bills of law, are a clear indication that actions are required to deepen the competition culture in the country and, in that regard, there is a need for proactive actions of advocacy and promotion of competition by COPROCOM and SUTEL, and the importance of said actions, that must be properly handled at the different pertinent governmental levels.

34. It is considered that the active involvement of the Costa Rican Competition Agencies, in the issuing of recommendations on the subject of competition, by taking advantage of the stock of technical knowledge developed by both institutions, towards the governmental decision making process, will facilitate the design of public policies of robust and sustainable economic and productive content. These policies are needed in the phases of emergency, realignment, and recovery, in the context of any kind of economic shock, including the case of the COVID-19 pandemic.

35. Likewise, guidance by the Competition Agencies in designing and implementing public policies that boost the principles of competition, free concurrence, and competitive neutrality in the markets, would also facilitate a selection of public policies based on technical criteria, related to the priority productive sectors to handle⁶ and avoid the generation of any public policies that may distort the market competition processes and affect the recovery process in the future.

3.2. Other Spaces for Intervention for the Competition Authorities.

36. Finally, another relevant issue that has been mentioned by the OECD is the role that would be played by the competition authorities in pre-merger control, once the recovery process begins, particularly regarding the failing firm defense.

37. In relation to the above, it is pertinent to point out several advantages of the Costa Rican pre-merger control scheme, that facilitate both in times of crisis and in regular times, expeditious integration between economic operating agents or holders of commercial assets within the Costa Rican jurisdiction,⁷ including:

- The definition of merger in the Costa Rican legal system requires the transfer of economic control from one particular economic agent (or group of economic agents) to another economic agent (or group of economic agents).
- Thresholds for joint sales or assets and individual sales or assets, make possible to currently freely merge economic agents whose joint sales or assets do not exceed a value close to US \$22,500,000 and individual sales or assets in the amount of US \$1,000,000 (belonging to at least two of the economic agents that are part of the merger).
- The procedure for reviewing mergers in Costa Rica establishes that within 30 calendar days after submitting the pertinent documentation, approval or approval with conditions (if applicable), would be granted to economic mergers that do not bring about any risk to the market competition process (first phase analysis). For mergers that require greater analysis (second phase analysis), a maximum period of 90 calendar days is established for the pertinent ruling to be issued by the respective Competition Authority. This could, unconditionally approve the

⁶ Priority industries are defined to be any type of industry where the impact and production chains that are derived, produce a greater magnitude impact on the Costa Rican economy.

⁷ This criterion establishes direct economic impact (incidence) on the Costa Rican legal system as set forth in Article 89 of Law 9736.

transaction, with the remedies provided by the merger applicant determine that possible anti-competition effects could be offset or to prohibit the merger.

38. Thus, the procedure for analyzing mergers that will be used by both SUTEL and COPROCOM, will evaluate the possible effects on the market derived from the announced transaction, while offering the operational economic agents under the Costa Rican jurisdiction, an expeditious pre-merger control scheme based on an analytically sound competition law, which favors economic dynamism.