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The Standard and the Burden of Proof in Competition Law Cases – Note by Costa Rica

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1. The standard of proof in competition law in Costa Rica refers to the level of evidence required to demonstrate violations of competition rules or to evaluate potential adverse effects in the market resulting from an economic merger.

2. In cases of competition law violations, the evidence must meet a standard of sufficiency and relevance to be considered robust and to justify sanctions. This standard is generally understood as the level of evidence necessary to establish the existence of anti-competitive conduct beyond any reasonable doubt. In such instances, the burden of proof regarding the illegality of the conduct primarily rests on the competition authorities responsible for conducting the special competition procedure, specifically COPROCOM and SUTEL.

3. On the other hand, the standard of proof regarding the analysis of economic mergers and acquisitions, pertains to the burden of proof and the level of evidence required to evaluate whether a merger affects competition in the market. This standard is essential, as the analysis aims to determine whether the transaction will negatively impact competition and, consequently, consumer welfare. In this context, the burden of proof regarding the negative effects of the transaction lies with the authority, while the parties are responsible for demonstrating the pro-competitive effects and efficiencies of the transaction within the markets.

4. In Costa Rica, the standard of proof in competition law cases is not explicitly regulated in a single norm; it is derived from a set of legal, regulatory, and jurisprudential provisions that guide the administrative process and judicial review in competition matters. The main legal framework regulating the standard and evaluation of proof required by competition authorities are as follows:

- Act 7472 "Act on the Promotion of Competition and Effective Consumer Defense.
- Act 8642 "General Telecommunications Act.
- Act 9736 "Act for Strengthening Competition Authorities in Costa Rica" and its Regulation Executive Decree 43305-MEIC.
- Act 6227 "General Act of Public Administration.
- Act 7135 "Civil Procedural Code.
- Act 8508 "Administrative Contentious Procedural Code.

5. Competition authorities must adhere to a process for evaluating the evidentiary elements in order to reach a conclusion. Article 42 of the Regulations to Act 9736, establishes that competition authorities may "*utilize all means of proof permitted by public law, even if they are not admissible under common law*." It is also important to consider Article 82 of the Administrative Contentious Procedural Code[1] which states that in contentious-administrative proceedings, all means of proof permitted by both public law and common law may be used, and all evidence will be assessed according to the principles of reasoned judgment. Thus, in competition procedures, authorities can guide the

[1] Available in spanish at:

http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=57436&nValor3=96119&strTipM=TC

evaluation of evidence according to these standards, since their decisions are subject to judicial review under the aforementioned rules.

1. Standard of Proof in the Special Competition Procedure

6. Potential monopolistic practices, unlawful mergers, and other infractions that are not merely observational will be investigated, instructed, and sanctioned by each competition authority. As previously mentioned, in accordance with Article 42 of the Regulation to Act 9736, all means of proof permitted by public law may be utilized to gather the necessary evidence and background information to assess the appropriateness of initiating the investigation and instruction stages, even if such means are not admissible under common law. The following forms of evidence are admissible: information requests and their responses; public and private documents and reports; interviews with third parties and experts; statements from the investigated economic agent; site recognitions; expert opinions; dawn raids; and any other means not prohibited by the applicable regulations.

7. In cases involving proof of absolute monopolistic practices (AMP), these practices are presumed to be inherently harmful and restrictive to competition *per se*. The evidentiary focus is on demonstrating the existence of agreements related to price fixing, sales volumes, market allocations, customers, or bids among current or potential competitors. These agreements may be written, verbal, or tacit, and the challenge in gathering evidence stems from heir secretive nature , which complicates awareness for competition authorities.

8. To obtain these means of proof, Act 9736 grants COPROCOM and SUTEL the necessary authority and powers to collect evidence. This includes programs for exemption or reduction in fines, requests for information, testimonial evidence, dawn raids, and computer forensic analysis. An AMP can be proven through direct evidence, such as documents, statements from participants, minutes or records evidencing meetings; or through indirect or inferential evidence, such as economic analysis of markets, the behavior of those involved, and the existence of factors that facilitate collusion.

9. In the case of COPROCOM, absolute monopolistic practices (AMP) are acts, contracts, agreements, arrangements, or combinations between current or potential economic agents, with any of the purposes outlined in Article 11 of Law 7472 as amended by Article 137(a) of Law No. 9736 of 2019.

10. Absolute monopolistic practices are also known as economic or business cartels, collusions, anti-competitive horizontal agreements, or collusive agreements among competitors. They are considered the most harmful to competition, as they result in a net loss of social welfare, with consumers being the most adversely affected. These practices refer to any form of agreement among competitors with the purpose or object of engaging in anti-competitive conduct, aiming to: fixing prices, establish supply, or distribute market segments, coordinate participation in public bids, or, refuse to buy or sell goods or services.

11. In the telecommunications sector, absolute monopolistic practices (AMP) are considered to include acts, contracts, agreements, arrangements, or combinations thereof between network operators or service providers who compete, as established in Article 53 of Act 8642. In this conext, Article 6 of the "*Telecommunications Competition Regime Regulations*"[2] states that SUTEL may consider various factors as indicators of the existence of an AMP. These factors include: comparing offered sale prices with the international reference price; establishing identical minimum and/or maximum prices for a service or

[2] https://sutel.go.cr/sites/default/files/normaticascompetencia/reglamento_regimen_sectorial_de_competencia_en_telecomunicaciones_alcance_93_la_gaceta_90_23-05-2023.pdf

aligning prices with those set by a business association; observing a positive correlation in the prices of two or more competitors over a period of time without an attributable cause related to production factors; submission or absence of bids in tenders or procurement processes that appear similar or suggest an atypical pattern; indications of geographic market division without justification; agreeing to monitor or control competitors' behavior; meetings or other forms of communication aimed at facilitating monopolistic practices.

12. According to SUTEL's "*Guidelines for Analyzing Anticompetitive Practices"* (2023), direct evidence of an agreement is simpler to assess; however, inferential evidence requires two stages to infer the existence of collusion. The first stage involves producing economic evidence to systematically examine whether the market in which the alleged infringers operate is conducive to the emergence of an AMP. This provides an economic context for interpreting ambiguous observed behaviors, such as price parallelism. To assist SUTEL's examination of whether the market supports the emergence of an AMP, a series of facilitating factors are considered, including market history, entry barriers, potential industry connections, and employee exchanges, among others. In the second stage, economic evidence aims to identify elements that suggest the suspicious behavior is indeed an AMP. This economic evidence does not concern the definition of the relevant market or the estimation of the anticompetitive effects of the behavior in question, as these practices are presumed to be inherently anticompetitive, a presumption that cannot be rebutted with economic evidence.

13. The evidence built from these indications, show that there is no plausible and justifiable reason for the observed behavior, that it is inconsistent with commonly accepted practices, and that it does not align with the individual's own self-interest. Therefore, it is unlikely to stem from an individual or unilateral decision, and it is more likely that it results from a coordinated decision, whether explicit or tacit. In summary, the economic indicators should facilitate the inference that the defendant was acting in accordance with lawful competitive behavior.[3]

14. A practical case in which this standard of proof has been applied by COPROCOM, involved a sanction against an agreement among nine competitors in the agribusiness sector to refrain from purchasing rice from domestic producers until a consumer price decree was published. This action was taken under the absolute monopolistic practice outlined in Article 11, section e) of Act 7472. During the investigation initiated by COPROCOM, it was confirmed that two agreements made during the Assemblies of Rice Agroindustrialists on August 5 and 12, 2019, served as preparatory acts that laid the foundation for a subsequent agreement reached on December 2, 2019, during the Ordinary Session 885-12-2019 of the CONARROZ Board of Directors (agreement 3.2.1). This agreement stipulated that the national rice production would not be purchased until the consumer price decree was published, at this point Act 9736 was in effect and therefore applicable.

15. The actions of the economic agents involved were classified as very serious violations according to Article 118, section a) of Act 9736. For the imposition of individual sanctions, Article 119, section e) of the same regulatory framework was applied, which stipulates that these type of infringements may result in fines ranging from 0.1% and 10% of the total turnover of the economic agent in the fiscal year immediately preceding the imposition of the sanction. According to COPROCOM Ruling-022-2022, dated July 26, 2022, these sanctions imposed on each of the nine agents involved, range from over eight million colones to more than two billion colones, based on the aforementioned parameters.

[3] Anticompetitive Practices Analysis Guide by Sutel (2023), Pg. 18

In total, the sanctions imposed were over five billion colones (equivalent to eight million dollars).

16. The standard of proof in cases of relative monopolistic practices (RMP) or abuse of dominant position in Costa Rica, as well as in vertical restrictions, requires competition authorities to demonstrate that a company with significant market power is leveraging its competitive advantage in the relevant market, to engage in behaviors defined by law that either harm competition or have an anti-competitive object or effect.

17. Unlike absolute monopolistic practices (AMP), in RMP cases, direct evidence carries less weight, as the same act or agreement can be lawful or unlawful depending on the circumstances of the case, making it difficult to determine whether the act or agreement is illegal. In this context, economic evidence is essential for defining the relevant product and geographical market, barriers to entry and expansion for competitors, and the existence of substantial market power. Indications will also be necessary to establish that the object or cause of RMP is anti-competitive, and to understand the specific legal, economic, and contextual circumstances surrounding the case. Additionally, indications and economic evidence are crucial for the defense presented by the alleged infringers.

18. In the case of the national authority, COPROCOM, relative monopolistic practices (RMP) will be considered any acts, contracts, agreements, arrangements, or combinations, whose object or effect is to improperly displace other market agents, substantially impede their access, or establish exclusive advantages in favor of one or several individuals, in the cases specified in Article 12 of Act 7472. The verification of an RMP is subject to the examination of the assumptions referred to in Articles 13, 14, and 15 of Act 7472, concerning the definition of the relevant market and substantial power within that market.

19. Act 7472 prohibits 15 types of RMP, which are subject to the verification that: "*a) the alleged offender has substantial power over the relevant market and b) the practices are carried out concerning the goods or services corresponding to or related to the relevant market in question*." These types of practices are distinguished by the effects or purposes pursued by those who commit them.

20. The "*Guide for the Analysis of Relative Monopolistic Practices*" from COPROCOM establishes that the evidence necessary to prove anti-competitive displacement will depend on the specific behavior characteristics, as well as the environment in which it occurs; however, such evidence must be consistent with the theory of anti-competitive harm put forth by the competition authority. The evidence can be both quantitative and qualitative in nature.

21. In the telecommunications sector, acts, contracts, agreements, arrangements, or combinations thereof carried out by network operators or service providers, either independently or in conjunction with other economic agents, will be considered RMP if their object or effect is to improperly displace other competitors from the market, impede their access, or establish barriers to entry or exclusive advantages in favor of one or several individuals, as established in Article 54 of Act 8642. In relation to Articles 21 and 22 of the "*Regulation of the Competition Regime in Telecommunications*," Sutel, in addition to demonstrating the applicable circumstances, must examine and rule on the evidentiary elements provided by the investigated parties to demonstrate pro-competitive effects or greater efficiency in the market resulting from the investigated practices.

22. The burden of proving efficiencies or pro-competitive effects resulting from the investigated practice, lies with the network operator, service provider, or group involved, as well as the responsibility to claim and justify any gains in efficiency or pro-competitive effects. They must describe the nature and effects of these efficiencies, quantifying them when possible, and substantiating all these aspects with the means available to them.

23. Regarding RMP, as indicated in Articles 12, 13, 14, and 15 of Act 7472,[4] the definition of the relevant market, substantial market power, and the behaviors concerning the relevant goods and services must be proven through evidence. Sutel's "*Guide to Analyzing Anti-Competitive Practices*" (2023)[5] contains a series of economic evidence types and indicators for defining the relevant market, verifying the operators or service provider´s substantial power in the market, as well as evaluating evidence regarding the object and effect of the behavior. The main sources of evidence and economic proof depend on the characteristics of the products and services involved; empirical evidence of recent market structure changes; quantitative tools; testimonies; and expert documents, identifying the cause, effect, or probable effect, among others. SUTEL will assess all evidence produced in the special procedure following the principles of reasoned judgment, considering its content and not its form, aiming to protect and promote competition and free market entry in the telecommunications sector, while respecting the fundamental principles of legality, reasonableness, and proportionality.

24. In the case of COPROCOM in 2018, several companies in the pharmaceutical sector were sanctioned through Ruling 91-2018 on December 4, 2018, with a significant fine of ¢9,562,579,027 for the alleged violation of sections b) and g) of Article 12 of Act 7472. The infringements consisted of imposing purchasing conditions and engaging in acts that obstructed the entry of new competitors, creating a barrier to competition in the market. These actions strengthened the substantial power of the companies, allowing them to reduce production and increase prices. The lack of current and future competition jeopardizes both competitors and consumers. Regarding the assessment of the practices effects in the pharmaceutical market, it was determined that a margin squeeze took place. The agents' practices were deliberate and aimed at inducing the exit of competitors or preventing their entry. The discounts offered by the agents favored certain market players, making it difficult for independent pharmacies to compete, at the extent that their margins did not allow for effective competition. This led to the displacement of competitors, either through the withdrawal of products or the loss of market share, evidenced by the increased market share of the investigated agents, both at the wholesale and retail levels, to the detriment of other drugstores and independent pharmacies. It was also determined that conditions were being imposed in contracts that affected competition, by limiting the ability of independent pharmacies to acquire products from other suppliers, creating artificial barriers that favored the investigated agents. These conditions, such as exclusivities and purchasing obligations, contributed to the exclusion of competitors and the loss of inter-brand competition. The practices carried out by the involved companies involve actions that monopolize the market for pharmaceutical products, which are essential for human health. These practices occurred at two levels of the market (wholesale and retail), affecting competitors at both levels. It was also notable that the responsible agents belonged to the same economic group.

25. The following were enforced as Corrective Measures:

- **Contracts:** Minimum purchase clauses must be removed, and new contracts should not restrict more than 30% of the agents' total sales.
- **Discounts:** Discounts must be accessible to most pharmacies and applied equitably.

[4] Available in spanish at:

http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=26481

[5] Guide to the Analysis of Anti-Competitive Practices by Sutel (2023) Pg. 60-62

- **Exclusive Products:** Prohibition of unfair practices such as cross-subsidies or discriminatory pricing.
- **Pharmaceutical Prices:** Prohibition on selling products below wholesale prices, except in promotional cases.
- **Monitoring and Supervision:** For 5 years, companies must report semi-annually information on prices, contracts, and market share.

1.1. Case of Torres de Heredia Condominium and Empresa de Servicios Públicos de Heredia (ESPH)

26. Through resolution RCS-074-2023 of the Sutel Council dated March 27, 2023, the network operator and service provider ESPH was declared responsible for committing abuse of dominance or relative monopolistic practices established in Article 54, sections b) and d) of Act 8642, concerning exclusivity agreements and refusal to deal. The case was initiated due to multiple complaints received from residents of the *Torres de Heredia Condominium*, as ESPH was the only internet service provider for the condominium, despite the existence of other competitors interested in providing services in the building.

27. The evidence supporting the facts came from various sources: i) information gathered during site visits conducted by SUTEL at *Torres de Heredia Condominium*, ii) documentary information provided in response to SUTEL's information requests to ESPH and third-party operators and service providers affected by the investigated practices, and iii) testimonies from ESPH employees and the condominium's manager.

28. Two affected relevant markets were defined: i) wholesale market regarding access to the optical fiber network in the condominium, and ii) retail market for residential internet service (individual or bundled). In both relevant markets, it was established that ESPH had been the sole provider since 2017. The existence of a *de facto* exclusivity agreement between ESPH and the condominium administration was substantiated through documentary and testimonial evidence, which constituted the practice typified in Article 54, section d) of Act 8642.

29. As a result of this exclusivity agreement, potential competitors of ESPH were unable to deploy their network within the condominium and offer services, and residents faced restricted options in choosing their preferred provider without better quality, service, or price alternatives, among other factors. On the other hand, the company did not invoke any efficiencies arising from this exclusivity.

30. It was determined that the fiber optic network owned by ESPH constituted an essential facility within the condominium, and the rental prices for ESPH's fiber optic network were set in a manner that prevented access to other competitors in the market, taking advantage of the exclusive benefits they enjoyed in the condominium. ESPH engaged in an "*implicit refusal to deal*" and failed to demonstrate efficiencies related to the management of the network and the investigated practices.

1.2. Case of Illicit Merger between Transdatelecom S.A. and Cable Arenal del Lago S.A.

31. Through resolution RCS-177-2024 of the Sutel Council dated September 12, 2024, the companies *Transdatelecom S.A.* and *Cable Arenal del Lago S.A.* were declared responsible for failing to notify the merger in accordance with the infringements established in Act 8642 and Act 9736. In this particular case, circumstantial or indirect evidence played a crucial role. Although SUTEL could not provide formal documentation proving the

existence of a commercial agreement or economic transaction between the parties; evidence indicated that *Transdatelecom* commenced operations in a specific geographical area, utilizing resources and infrastructure to support networks owned by *Cable Arenal del Lago*. Furthermore, *Transdatelecom* assumed part of the client portfolio previously belonging to *Cable Arenal del Lago*.

32. These behaviors served as indirect evidence that a merger occurred without proper notification, according to Act 9736. The accumulation of circumstantial evidence can build a solid case that can demonstrate the authority's case theory or hypothesis. In summary, indirect evidence has the ability to reveal patterns of behavior that, while not conclusive on their own, can collectively demonstrate an anti-competitive practice or an unreported merger, thus protecting the principles of market competition.

2. Standard of Proof in Merger Control Analysis

33. As previously mentioned, the standard of proof in the procedures for controlling economic mergers and acquisitions, aims to anticipate whether the operation will negatively affect competition and, consequently, consumer welfare. Act 9736 established a new procedure for submitting these analysis requests, consisting of two stages. The applicant must explicitly indicate whether the transaction benefits from any of the favorable presumption hypotheses in Article 150 of the Executive Regulation of Act 9736, whether it generates specific efficiencies, or if it is a rescue transaction to prevent a market participant from exiting to the detriment of consumers, providing the evidence and the factual and legal reasons that support this assertion.

34. According to the "*Notification and Analysis Guide for Economic Mergers*" from COPROCOM, the applicant may claim efficiencies; however these may not be sufficient to mitigate the effects of an operation that results in in the creation of a monopoly. The types of efficiencies that can be invoked include productive efficiency and dynamic or innovative efficiencies. Furthermore, to determine whether to approve an operation based on Article 101, fifth paragraph, subsection "a" (efficiencies), the notifying parties must provide: The burden of proof regarding the nature, magnitude, and likelihood of the claimed economic; the efficiencies must be inherent to the operation; aimed at compensating for the restrictive effects on competition produced by the operation and improving consumer welfare. The efficiencies must be verifiable, transferable to the consumer, and should be timely, probable, and sufficient to mitigate the adverse effects defined by COPROCOM.

35. If there are any reasonable doubts regarding the truthfulness, reliability, integrity, or robustness of the evidence provided by the notifying parties, it will be considered as insufficient elements to invoke the application of Article 102 of Law No. 9736 and Article 150 of its Regulation. Consequently, the analysis will be deepened, and the production of the necessary evidence will be undertaken to conduct a conventional effects analysis and determine whether the notified operation produces any of the anticompetitive effects outlined in the third paragraph of Article 101 of Law 9736.

36. In 2023, of the total 45 mergers processed by COPROCOM, only one was denied, corresponding to the operation in which SPIRIT AIRLINES, INC planned to transfer all its share capital to JETBLUE AIRWAYS CORPORATION. COPROCOM analyzed this merger in a second phase after several requests for information were made. The evidence and the commitments offered by the involved parties were not sufficient to counteract anticompetitive concerns and mitigate adverse effects on competition and consumers on

specific air transport routes, such as *San José-Orlando, FL.* and *San José-Miami, FL*. The evidence in the file indicates that the operation facilitates unilateral and coordinated effects.

37. In accordance with the "*Notification Guide for Merger Analysis*" from Sutel, if the applicant claims efficiency gains, they must provide the documents and evidence to support them, such as: i) cost reductions and/or the development of improved products; ii) quantification of efficiencies and the methods used for calculation; iii) an explanation of how these efficiencies will be passed on to consumer; iv) justification for why these efficiencies cannot be achieved by any means other than through the transaction. SUTEL is authorized by law to request information from any other individual, economic agent, or public or private entity to investigate the possible effects of a merger in the market. It will also consider the opinions of interested third parties who have taken the initiative to submit comments on the concentration procedure. These points may be demonstrated using any means of proof permitted by law.

3. Use of Evidentiary Tools

38. Coprocom, regarding its authority to carry out dawn raids, has planned an additional budget approved by the Legislative Assembly of the Republic for the year 2025 to purchase servers, forensic software and hardware, as well as the climate control and security systems required for the forensic collection of possible evidence stored in digital formats, as established in Act 9736 and its regulations, as well as in the Guide of the Exemption and Reduction of Administrative Sanctions Benefits Program, given that the resources for this purpose have been vetoed by the Executive in previous years.

39. In 2024, Sutel successfully acquired hardware and software tools to facilitate dawn raids in accordance with the terms established by Act No. 9736. These tools enhance the forensic collection of potential evidence stored in digital formats, mitigating the risk of loss or destruction during investigations into infringements of the competition regime. Specifically, SUTEL has acquired software capable of creating forensic images, processing them, allowing for in-depth analysis, and generating reports, including portable files if required by judicial authorities. Additionally, devices for creating forensic images in the field, write blockers to ensure the integrity and security of devices under investigation during data extraction, and a significant number of portable hardware units for the transport of forensic images, have been purchased.

40. On the other hand, the system known as SMAC (*Telecommunications Market Monitoring and Alert System*), designed by Sutel, is currently under development and is organized into three thematic modules: regulation, public procurement, and market behavior. Each module has various nodes that serve as information sources, allowing for the efficient collection of relevant public data. By integrating these modules, SMAC not only collects and analyzes large amounts of data but also highlights elements considered potentially significant for Sutel as the sectoral competition authority. The implementation of SMAC emphasizes interdisciplinary collaboration, where the diversity of knowledge contributes to a stronger analytical framework. Additionally, by utilizing open-source tools, this project was executed with minimal financial investment.