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Interim Measures in Antitrust Investigations – Note by Costa Rica

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This document reproduces a written contribution from Costa Rica submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Background

1. Costa Rica has two administrative bodies responsible for enforcing competition regulations, the Superintendence of Telecommunications (SUTEL), a sectoral authority specializing in telecommunications, which subscribes to this contribution; and the Commission to Promote Competition (COPROCOM), for the remaining markets in the country.
2. With the enactment of the General Telecommunications Act, Law 8642, on June 4, 2008, the opening of the telecommunications sector in the country was established, which until then had a monopolistic provision of services.
3. The opening of this sector required ensuring a leveled playing field to compete between the different agents providing their services in that sector. Considering that and the particular characteristics of telecommunications services, the legislators opted for the creation of a sectoral competition regime which is applied exclusively by the Superintendence of Telecommunications (SUTEL)¹.
4. Since then, the sectoral competition regime applies under equal conditions to all network operators and/or telecommunications services providers, whether public or private, without exemptions or exceptions for its application that could limit the scope of SUTEL's intervention.
5. Subsequently, in the framework of the country's accession process to the Organization for Economic Cooperation and Development (OECD), Costa Rica's competition policy underwent a reform that strengthened both the two authorities, the procedures, instruments, and tools at its disposal to fulfil its obligations.
6. Of interest to this contribution, with the enactment of the 2019 Competition Reform Act, Law 9736, of September 5, 2019, the regulation underwent three significant improvements, closely related to each other: i. the institutional design of SUTEL as competition authority, ii. the procedure for determining infringements of competition rules and iii. interim measures.
7. In this scenario, this contribution will include a brief reference to the previous regulation to then refer to the current. It will also briefly describe the applicable procedure, the requirements and the principles applicable to the issuance of an interim measure, to conclude with a reference to SUTEL's experience in the matter.

2. Interim Measures in the Competition Procedures in SUTEL.

8. Since the opening of the market, SUTEL is the competition authority in the telecommunications sector in Costa Rica.
9. In a first stage, from the breaking of the monopoly to the reform introduced by Law 9736, the SUTEL Council served as a decision-making body and had a collaborating team within one of its directorates, the General Directorate of Markets. This team investigated

¹ Articles 52 of Law 8642, 59 of the Law of the Regulatory Authority of Public Services, Law 7593 and 2 of Law 9736

and instructed the procedures for infringements of the competition laws until they were ready for the final decision, when they were submitted to the Council.

10. The procedure applicable at that time was the Ordinary Administrative Procedure, which should be used to investigate and sanction any other administrative misconduct in the country, regulated in the General Public Administration Act, Law 6227, clearly not designed to specifically apply competition rules.

11. Regarding interim measures, Law 8642 states: "*during the procedure, Sutel may impose the interim measures **necessary to ensure the outcome of a sanctioning procedure** (...)*"² Similarly, Article 31 of the Telecommunications Competition Regime Regulation provided for this possibility in specific competition proceedings.

12. That power to issue interim measures at any stage of the procedure was reserved by the law only to the Council of SUTEL³, for which it had to apply in a supplementary manner the provisions of Law 6227 and the Contentious-Administrative Procedural Code, Law 8508. This regulations only establish the power to impose precautionary measures when requested by a party.

13. In a second stage, Law 9736 introduced significant reforms, SUTEL Council continued to be the decision-making body of the sectoral competition authority, but it created a new procedure for analyzing and sanctioning infringements to competition regulations was introduced, a new organizational structure and a new system of interim measures, all adjusted to the needs of the application of competition regulations.

14. About the procedures to be followed in the event of any breach of the competition rules, Law 9736⁴ established a special procedure divided into three stages: the investigation stage, the instruction stage and the resolution stage. Each of these stages is completely independent, according to OECD recommendations and international best practices.

15. The new law also establishes that each competition authority would have a Technical Body (OTC due to its acronym in Spanish) to fulfill its duties.⁵ In the case of SUTEL, the General Directorate for Competition (DGCO due to its acronym in Spanish) was created as the OTC⁶, which is responsible for carrying out and resolving the investigation and instruction stages of the special competition procedure. Each one of these stages is under the responsibility of different officials -the Investigation Officer and the Instruction Officer-, who have different and specific powers. The final decision stage continues to be under the responsibility of SUTEL Council.

16. Regarding interim measures, Law 9736 also establishes a special regime and provides that they may be issued, at any time during each stage of the special procedure, by the respective body (that is, both the Head of Investigation, the Head of Instruction such as the Council of SUTEL), *ex officio* or at the request of the plaintiff or any other interested⁷.

² Article 66 of Law 8642.

³ Article 33 paragraph 29) of the Internal Regulations of Organization and Functions of the Regulatory Authority of Public Services and its Decentralized Bodies (RIOF).

⁴ Articles 30 and following of Law 9736.

⁵ Article 14 of Law 9736.

⁶ Articles 46 bis and 46 tris of RIOF.

⁷ Article 37 of Law 9736.

17. As to the content of the interim measures, the new law states that it is possible to issue those that are: *"...appropriate and necessary to protect and provisionally guarantee the object of the special procedure and the effectiveness of the possible resolution"*.

18. Subsequently, the Regulations to Law No. 9736 "Competition Reform Act of Costa Rica", Executive Decree 43305 of October 29, 2021, specifies that the interim measures issued may contain *"... the conservation of the state of things, or, anticipatory or innovative effects, through the regulation or provisional satisfaction of a substantial factual or legal situation. By his means, the person in charge of the respective stage in which the special procedure is found may impose, provisionally, on any of the parties of the procedure, obligations to act or to refrain from acting."*

19. As it can be seen, **the reform significantly modernized the system of interim measures in the field of competition. It extended the competent authorities to issue them, including the possibility to impose them not only to the Superior Body but to the heads of the investigation and instruction stages, such as those entitled to request them.** It also clarified the scope of these possible measures for the specific case of competition procedures.

3. About the Procedure, Standards and Principles

20. In the event of an interim measure request, in accordance with the provisions of Law 9736⁸, the standards and the procedure established in Law 8508⁹ must be followed, also developed in the Executive Regulations of Law 9736¹⁰

21. For the procedure, in the event of a request to impose an interim measure, the parties must be given a written hearing for three days. After this period, it is necessary to analyze the request in order to determine if the standards are met with the elements provided at the time. The foregoing, unless an oral hearing is deemed necessary.

22. The possibility is also provided, in cases of extreme urgency and at the request of a party, of ordering interim measures, without the need to grant a hearing, being able to set surety or adopt any other kind of counter preventive measure. In these cases, the parties must also be given a written hearing for three business days, without suspensive effects for the enforcement of the measure imposed. Once the term has elapsed, it must be assessed whether the provisions are maintained, amended or revoked.

23. Regarding the standards: *"... The interim measure will be appropriate when the execution or permanence of the conduct subject to the procedure produces serious damages, current or potential, impossible or difficult to repair with respect to the alleged situation, and provided that the claim is not reckless or blatantly lacking in seriousness. Also, when the final decision loses effectiveness over time."*

24. To grant or deny any interim measure, the principle of proportionality must be considered, especially, weighing the eventual injury to the public interest, the damages and losses caused by the measure to third parties, as well as the instrumentality and provisional nature, so that the legal situation of third parties is not seriously affected.

⁸ Article 37 of Law 9736.

⁹ Article 21 and following of Law 8508.

¹⁰ Articles 97 and following of the Executive Decree 43305.

25. Contentious-administrative jurisprudence has developed these aspects and has established that, when assessing an interim measure, compliance with three requisite standards¹¹ must be verified, which can be summarized as:

- **-Fumus bonis iuris:** "... hypothetical judgment of probability or plausibility derived not only from the seriousness of the claim, but also from the probability of the acceptance of the main issue; in this sense, it is considered that this initial appearance of seriousness will suffice, for compliance with this requirement".
- **Periculum in mora:** "... fear or danger, objectively ascertainable that the delay in carrying out the main proceedings entails loss, deterioration or frustration of the substantial legal situation alleged, which would be linked to the futility of the judgment of merit in such assumptions." regarding the damage, it has been indicated: "... for the interim measure to proceed, the damage caused by the execution or permanence of the administrative conduct in question must be serious, that is, the mere allegation of the damage is not sufficient for the granting of the measure, but it is necessary to prove or demonstrate the damage and also that this damage is serious".
- **Weighting of interests at stake:** "... weighing the possible injury to the public interest, damages and prejudices caused by the measure to third parties (...) Thus, when the damage that may be caused to the public interest or to the interests of third parties, is of a greater magnitude than the one the promoter of the interim measure could suffer in case of being denied, the latter must be rejected".

26. The following structural features must also be taken into account in its decision:

- **Provisionality:** "... they are transitional and not definitive, that is, they are extinguished when issuing the sentence of the process".
- **Instrumentality:** "... correspondence of an instrumental nature with the substantive judgment or with the main process."

27. In summary, when assessing interim measures, the Authority must consider whether all the aforementioned standards are met: *fumus boni iuris*, *periculum in mora*, weighing of interests at stake, as well as provisionality and instrumentality.

28. Having issued an interim measure, if the circumstances that led to its adoption change, the person in charge of the stage in which the case is, *ex officio* or at the request of a party, may modify or suppress it. In the same way, if the circumstances that gave rise to the rejection vary, imposing it can be analyzed again.

4. SUTEL Experience

29. Despite having been empowered since its creation to issue interim measures in competition proceedings, SUTEL's experience has been limited, which makes it difficult to determine the scope, effectiveness, and follow-up actions required.

30. Prior to the reform introduced by Law 9736, two requests for interim measures were registered, both in procedures related to vertical restraints, which were rejected by

¹¹ See Contentious-Administrative Tribunal, resolution 282-2019 of 15:46 hours of January 28, 2019 and Superior Contentious-Administrative Tribunal, number 1437-2020-T of 13:25 hours of September 15, 2020

SUTEL Council on the grounds that not all the standards¹² were met. Since its implementation, two requests have been submitted, both during the preliminary investigation phase, one for alleged vertical restraints and the other one related to a possible case of bid rigging. None was imposed by the Head of investigation, since it was also considered, in both cases, that not all the standards requirements were met.¹³

31. For purposes of legal certainty, and the efforts to generate internally the necessary capacities for the correct application of the new competition regulations, according to the commitments assumed as a country in the process of accession to the OECD, *a Guideline of Interim Measures Procedure* is being prepared.

32. In terms of its possible content and effectiveness, SUTEL must develop capacities and experience for the issuance of the most effective interim measures for each case, as well as the follow-up actions required.

¹² Resolutions of SUTEL Council numbers RCS-101-2012 of 11:40 hours of March 23, 2012 and RCS-314-2019 of 11:15 hours of December 3, 2019.

¹³ Resolutions of the Head of the Investigation Unit numbers ROTC-00006-SUTEL-2020 from 08:45 hours of February 28, 2020 and ROTC-00003-SUTEL-2022 from 14:10 hours of January 13, 2022 (*this last confidential, since the special procedure is in the Investigation stage*).