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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Colombia

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Colombia --

1. This contribution contains two relevant and recent topics related to Colombian Broadcast markets from a competition policy and antitrust enforcement point of view. Firstly, we are going to mention general remarks regarding a decision taken by the Council of State in 2012 in which the principle of free competition was protected during the Third Television (TV) Channel Bidding Process. Secondly, we will explain the main features of the IBOPE Case of 2011. The latter probably constitutes the most important precedent on the application of competition law upon broadcast and advertisement markets in the country.

1. Council of state judicial ruling on the bidding process of the third channel in Colombia

2. The Plenary of the Council of State, through judgment of February 14, 2012, annulled the possibility of continuing with the bidding of the third TV channel in Colombia. The action for annulment was brought against the administrative act issued by the National TV Commission, which ordered the public bid opening No. 002, 2010, contained in Resolution 2010-380-000481-4 of May 7th, 2010, and in the statements terms of the Public Bid No. 002/2010, for the grant of the operation and use of a third TV private channel of national coverage.

3. The Council of State ruled that there was a violation of the principle of plurality, which indicates that several bidders are required to hold an auction, where bidding can take place. It was based on the breach of the provision contained in Article 72 of Law 1341/2009, legislation which addresses that the use and exploitation of the electromagnetic spectrum is founded on considerations of free competition, attendance, pluralism, participatory democracy and transparency.

4. In accordance to this, the application of Article 72 of Law 1341/2009, must be conducted under the guiding principles set out in Article 2 of the mentioned Act, as provided by Article 7 of Law 1341/2009, regarding the criteria of interpretation of the law in order to ensure the development of its guiding principles, *"with an emphasis on promoting and ensuring free and fair competition and the protection of users' rights"*. In other words, the rules established in Article 72 of Law 1341/2009 for spectrum allocation processes with multi-stakeholder, are legally understandable only under considerations of free and fair economic competition.

5. The Council also stated that the principle of free competition market with a plurality of stakeholders, seeks, above all, to emphasize and determine procurement processes under real competition trails in order to obtain, through the presence of plural interested bidders interacting, an adequate supply to the market and, therefore, optimal for public contracting.

6. The attendance through the plurality, turns, for the concept of free economic competition, in its legal determinant on the basis of all its foundation. Without it, would be impossible to fulfill the purposes of the constitutional principles as well as the market interaction.

7. The conclusion of the Council was that the selection processes, should be guided by the principle of equality. The absence of a plurality of bidders in the auction breaks with the principle of equality, in

means of adopting covert forms of discrimination substantially disruptive of the purposes defined in Article 72 of the 1341 Act for the auction. For the economic competition, the purpose of equality cannot be other than promoting effective competition through identical treatment within comparable situations involving market participants.

2. IBOPE Case

8. In March 2009, private operating channels, RCN Television Corporation (hereinafter, RCN) and Caracol Televisión Corporation (hereinafter CARACOL), along with the Association of Advertising Companies *Unión Colombiana de Empresas Publicitarias* (hereinafter UCEP), signed a contract with IBOPE Colombia - Simplified Corporation (hereinafter IBOPE), under which the latter would conduct studies of TV audience measurement (also known as INFOMETER¹) and advertising competition (also known as INFOPAUTA²). The agreement between these agents established that CARACOL, RCN and UCEP (contracting entities) were the owners of the studies and the products derived from the TV audience measurement made by IBOPE (contractor).

2.1 Administrative Proceedings

9. The origin of the proceedings was a formal memorandum sent by the Minister of Technologies of Information and Communications to the Superintendency of Industry and Commerce³ (hereinafter SIC). The said contract drew the attention of the Deputy for the Protection of Competition of the Superintendency because: a) it had exclusionary clauses related with access conditions for third parties; and b) it empowered the contracting entities to arbitrate studies costs with the imposition of tariffs to their competitors. The investigation was formally opened by the Administrative Resolution No. 20065 of 2010.

10. The evidence collected by the Deputy during the investigation included testimonies, interrogatories and down raids. Once the administrative investigation stage finished, the Deputy submitted to the Office of the Superintendent of Industry and Commerce the Final Report, in which in general terms the following was concluded:

- A third party interested in the product offered by IBOPE could not access to the results of the research without having prior authorization from CARACOL, RCN and UCEP to do so.
- International channels (which are competitors of CARACOL and RCN) did not have access to the study for a period of nearly eight months, despite the fact that such information is considered as a necessary element for decision-making within the market of trade of advertising spots.
- The contracting parties settled the costs of the studies to their competitors within the market of advertising in TV, through taxation and increased fees that became effective in September, 2009. These increases were in the range of 20% - 120%. The rate increase led some of the customers of IBOPE to stop purchasing the study.
- The contracting parties and IBOPE, because of the privileged/representative position that they held within the market of studies of audiences' measurement and studies of advertising spots in TV, obtained from their competitors an unlawful competitive advantage derived from the signing of the contract.

¹ The concept refers to the electronic measurement of TV audience in Colombia.

² The concept refers to the monitoring of media regarding advertising spots.

³ Colombian authority for the protection of competition.

11. As a consequence of the above, the Deputy considered that the agreement breached Colombian Competition Law. In his opinion, it caused vertical anticompetitive effects in the market of TV audience measurement, and horizontal anticompetitive effects in the market of trade of advertising spots in TV. Therefore the recommendation was to sanction for the violation of the following provisions:

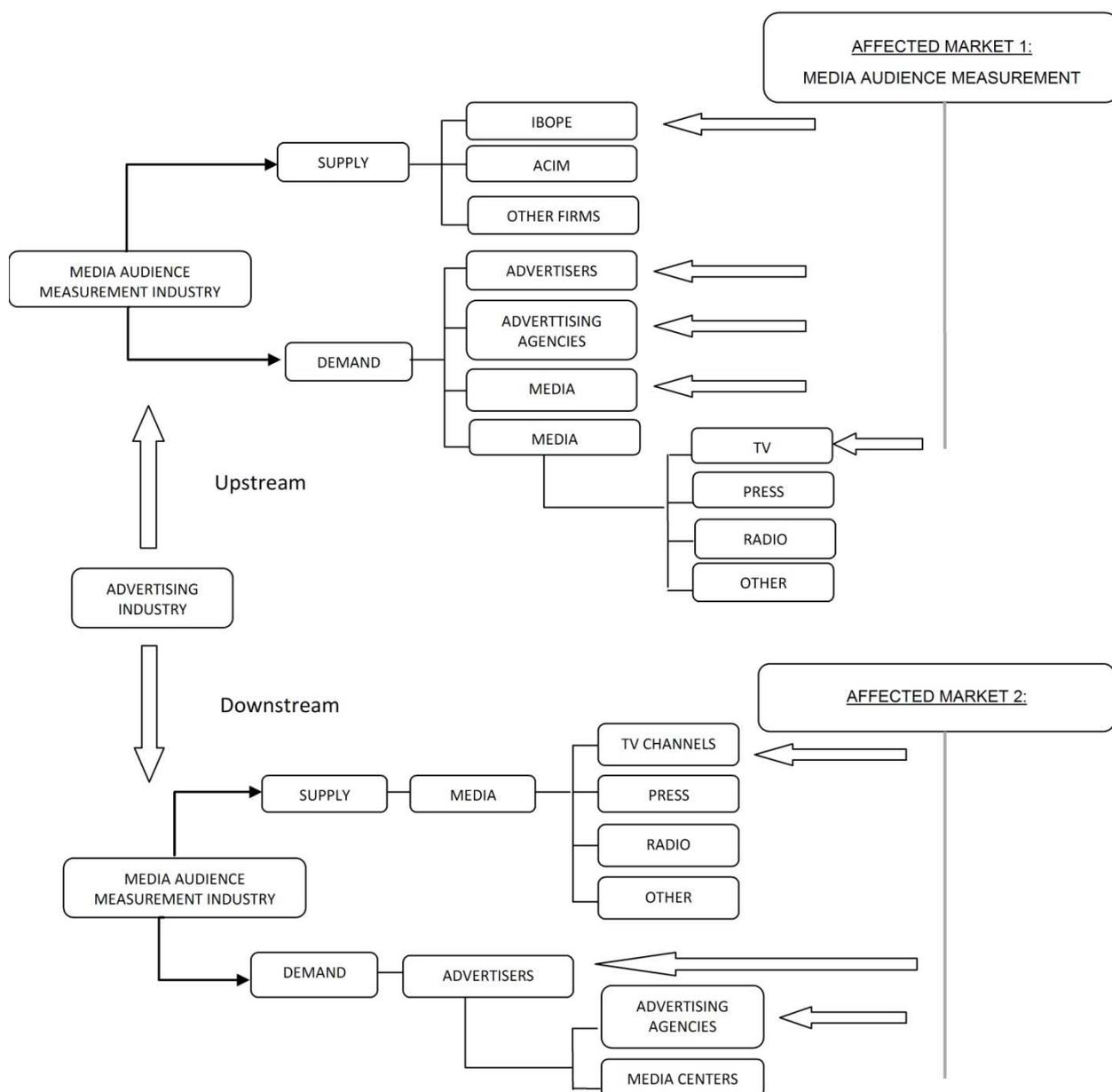
- Article 1, Act 155/1959: This provision prohibits, in a general way, the conclusion of agreements or arrangements which directly or indirectly *"aim to restrict the production, supply, distribution or consumption of domestic or foreign raw materials, products, goods or services, and in general, all the practices, procedures or systems designed to limit competition and maintain or determine unfair prices (...)"*.
- Paragraph 5, Article 47, Decree 2153/1992: This provision establishes as contrary to free competition, among others, all agreements that *"have as object or effect the allocation, distribution or limitation of sources of supply of productive inputs"*.
- Paragraph 10, Article 47, Decree 2153/1992: This provision establishes as contrary to free competition, among others, all agreements that *"have as object or effect the prevention of third parties to access markets or merchandising channels"*.

12. The Deputy also recommended the maximum fine to all representatives involved in the conduct based on paragraph 16, Article 4, of the Decree 2153/1992, by which the competition authority can be entitled to sanction any individual person that collaborates, helps, authorizes, executes or tolerates behaviors in violation of the competition protection regime.

13. The Superintendent of Industry and Commerce, by Resolution No. 23890 of 2011, embraced most of the arguments made by the Deputy and ordered all entities involved in the agreement (and their respective legal representatives) to pay pecuniary sanctions. To explain the scope of the conduct, the Superintendent and his team of advisors relied on the market research that exposed the Deputy for the Protection of Competition in its Final Report. That research identified the markets that were affected by the agreement held between CARACOL, RCN, the UCEP and IBOPE, and outlined the main elements that characterized the functioning of these industries and their dynamic interaction.

14. According to the report, the markets that were affected by the agreement were: (i) the market of trade of the information that results from studies of TV audience measurement; and (ii) the market of trade of advertising spots in TV. These two markets are strongly linked. The diagram below summarizes the dynamic between the industries of information related with media audience and advertising spots, and highlights the two relevant markets and their participants:

Structure of the advertising industry



Source: SIC

15. About the first market mentioned, the report said that the ratings measurement in media and broadcast market is essential to the industry of advertising spots due to the impact on investment and purchase decisions. Such measurements provide quantitative indicators of audience needed by the industry to take decisions on the TV programs and schedules.

16. Regarding the market of advertising spots in TV, it was noted by the report that advertisers, advertising agencies and media centers, estimated information related with ratings and advertising investment in TV as basics materials. The appreciation relies on the fact that this information allows them

to allocate efficiently their resources, through the proper selection of TV channels and advertising spots. In other words, the study allows that the choice of these factors, generate economic benefits.

17. At this point, the report emphasized in the privileged position that the investigated agents held in the market of advertising spots in TV. To do this, the Superintendent's advisory team compared the income that the national private channels (CARACOL and RCN) received for sales of advertising spots, to the income that other channels received for doing the same thing. By virtue of the comparison above, it was found that, in the first semester of 2009, national private channels participated together with 81% of the investment in advertising spots that was made by advertisers, advertising agencies and TV media centers.

18. The market report also took into account the investment in advertising spots on TV channels that the advertising agencies and media centers belonging to the UCEP made with respect to their competitors. In this regard, it was found that the 15 agencies that belonged to that association, participated with 88% of the total of advertising investment that was made by all advertising agencies on Colombian TV channels. The report also established that the 9 media centers that also were part of the UCEP, participated with 72% of the total of advertising investment that was made by all media centers in Colombia.

19. Given the above, the Superintendent considered that those who signed the agreement were agents that, all together, boasted a significant share in the market for advertising in TV, and that this combined "market power" also affected the market of information of TV audience measurement. The extension of the effects happens because the price to pay the study is based on the share that the agent who has interest on it, has in the market of advertising in TV. By virtue of the foregoing, the private national channels (CARACOL and RCN), the advertising agencies, and the companies belonging to the UCEP were responsible for financing the IBOPE' studies; from here derives their strong bargaining power and influence in the two affected markets.

20. The SIC concluded that the contract questioned was anticompetitive because of its object and its effect. The reproached conduct generated collusive effects in the market that resulted in distortions for TV channels (competitors) to access the market of advertising. That distortion was given for the importance that have measuring studies for the setting of rates of advertising spots and for the marketing process with advertising agencies, media agencies and the advertisers. The share in the market of TV audience measurement was restricted by the anticompetitive advantage of the parties of the contract. The same situation occurred with those advertising agencies and media centers that were not part of the UCEP, because with the reproached conduct they faced barriers to entry the market of purchasing advertising spots, since the studio rates for non-members was substantially higher.

2.2 Judicial Review

21. Once the administrative ruling became enforceable, the agents that were sanctioned filed a suit against it before the Administrative Tribunal of Cundinamarca. Through this resource, they requested the annulment of the resolution by which the sanction was imposed, and, as a restoration of their rights, claimed for the refund of the money paid. Among the different considerations that the Tribunal made in its judgment, it is worth noting the following:

- There is no need to prove the impact that the performance of a contract have effectively generated to qualify a conduct as an anticompetitive practice. In this particular case, it was clear that the channels that signed the contract had dominant position compared to the others channels that did not do it. It was also clear that IBOPE was dominant in the market. Besides, the other channels were needed to acquire the only study available on the subject, at the prices determined by the companies under investigation.

- In Colombia, by virtue of Article 1602 of the Civil Code, the contract is law for the parties involved. Because of this provision, the effects of the contracts should only extend to the parties who sign it; there not should be adversely effects extensible to third parties. However, the clauses of this contract, generated commercial consequences that affected the freedom of competition of persons that did not sign it.
- In terms of violation of the protection of competition regime, the liability is strict, because the intention the investigated person had when the sanctioned conduct was committed, does not matter, but the impact that it generates or that is likely to generate in the market, does.

22. It is also important to point out that the plaintiffs claimed that the copyrights held from the study (because they ordered its elaboration) and the economic rights derived from its funding, were not recognized, since the free disposal of the study had been restricted. On this matter, the Tribunal argued that the sanction imposed by the administrative act issued by the Superintendent of Industry and Commerce did not restricted or limited the exclusive powers of the holders of copyrights. The Tribunal recognized that the plaintiffs, because of the funding of the study, were creditors of the economic rights that derived from it, but also recalled that the clauses of any particular contract cannot go against the protection of competition regime established in the Colombian law.

23. The Tribunal also considered that the parties must have foreseen that the clauses they agreed upon to improve their interests were against free competition and constituted restrictive practices. As the study was the only one on the subject in Colombia, and as it gave them a condition of dominant position in the monopolistic market of rating studies and advertising spots, they should have paid special attention to avoid harm the interests of the other channels, causing a negative effect in the market. Economic rights and copyrights have a particular nature, but their protection must be in harmony with the protection of the market. This represents a control for the arrangement of that kind of rights, because their exercise can not violate the common welfare or the provisions that protect public interests.

24. The Tribunal denied the plaintiffs' claims in accordance with the provisions set on the administrative ruling issued by the Superintendent of Industry and Commerce.