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DOES COMPETITION KILL OR CREATE JOBS?

Contribution from Nicaragua

-- Session I --

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LINKS BETWEEN THE APPLICATION OF COMPETITION LAW AND EMPLOYMENT

-- Nicaragua --

1. BACKGROUND

1.1. *Economic situation in Nicaragua*

1. Nicaragua is a Central American state which borders Honduras to the north and Costa Rica to the south, it has a population of 5.87 million people of diverse ethnic backgrounds. The official language is Spanish and its currency is Córdoba.

2. Different factors of political, economic and even environmental concerns have helped, according to figures from the World Bank, Nicaragua is now the second poorest economy in America after Haiti's, according to official figures from the Central Bank of Nicaragua its GDP per capita for 2012, the latest available official figures, was US \$ 1730.8 and general GDP was US \$ 10,507.74

3. In recent years an improvement in the main macroeconomic indicators has been presented, with growth prediction of over 3% in the medium term. This result would be supported by strong public investment, consumption encouraged by family remittances and increased supply of private credit.

4. Nicaragua ranks 99 of 148 in the Global Competitiveness General Index from 2013 to 2014.

1.2 *Constitutional reference*

5. The Constitution amended through Law 854, published in the Gazette 32 of February 18th, 2014, refers to several articles (the Preamble and Articles 2, 5, 98-105, 138 and 150, among others) to the economic model that the country wants to develop and the role of State and individuals in the promotion and realization of this model. The reform incorporates the constitutional right to promotion and culture of healthy competition in Article 99. In this sense, the Constitution recognizes freedom of enterprise as the engine of development, while certain limits, for the common good, the State may impose on the exercise of that freedom. It is in this context that Act 601 is inscribed.

1.3 *International economic relations*

6. Nicaragua is a member of the United Nations and maintains permanent relations with different international organizations like the World Bank and the International Monetary Fund. It has also actively developed multilateral and regional relations, particularly in trade matters. In fact, Nicaragua is a signatory of the Free Trade Agreement of Central American countries and the United States, the European Union and Canada, and a member of the Bolivarian Alliance for the Peoples of Our America (ALBA).

7. Nicaragua manages balance of trade deficit since several years ago, largely explained by high oil import costs and increased purchases of goods for industry, transport equipment and building supplies. Nicaragua's main trading partner is the US, followed by the whole of Central American countries, Venezuela and, recently China.

8. The Free Trade Agreement between Dominican Republic, Central America and the United States (CAFTA-DR) entered into force in Nicaragua in 2006. This agreement represents interesting opportunities for the economy of Nicaragua, because of the preferential access to a market of more than 360 millions of consumers who generate more than 25% of world's GDP.

9. The agreements and commitments of CAFTA-DR suppose, in some areas, changes in the internal regulations of the States Parties to comply with the terms of the Treaty. Law 601 is an example.

10. In addition the association agreement between Central American States and the European Union (ADA) established commitments for the creation and strengthening of competition authorities in the countries of Central America.

2. FUNDAMENTALS OF LAW 601. SUBSTANTIVE ISSUES

a) Law 601 Background

11. In the decade of the 90s Nicaragua entered a process of legal and institutional modernization in order to enter the country in a market economy. These efforts intensified since 2001, in the context of negotiations of CAFTA-DR. This Treaty, though it does not contain a chapter on Competition, it does treat the subject within its Program Provisions, and also includes in its Supplementary Agenda the obligation to adopt a competition law.

12. Thus, in December 2006, Law 601 was adopted, with structure and similar content to those of most of the competition laws of the world. Law 601 prohibits anti-competitive practices, it provides a control system for mergers and acquisitions and prohibits acts of unfair competition between traders.

13. The Law created PROCOMPETENCIA, which formally began operations in 2009, and it granted the power to investigate anti-competitive and concentration practices, make certain prior control of concentrations, to perform important functions of competition advocacy and know complaints of unfair competition.

b) Scope of application and exceptions

14. Law 601 applies to the actions of economic agents in any sector of the economy, to the extent that such actions may produce anticompetitive effects in the domestic market (Article 2). The actions promoted by the State with the aim of ensuring health and food and nutrition security of the Nicaraguan population are excluded from the application of the rule (Article 4).

Prohibited practices

15. Law 601 prohibits anticompetitive practices carried out by economic agents competing among themselves, as well as those that involve agents that do not compete with each other.

16. Article 18 of Law 601 prohibits anti-competitive agreements between competing economic agents and classifies as prohibited agreements on price fixing, market allocation, limiting the supply of goods or services, collude in bidding, as well as agreements to limit access to other market agents.

17. Law 601 does not indicate explicitly that "per se rule" should be applied in these cases. However, it does not either state that any additional element to the mere realization of practical must be demonstrated, from where PROCOMPETENCIA has inferred that the practice must be understood in itself prohibited, once its existence is proven.

18. Article 19 defines the "vertical" anti-competitive practices or between non-competing agents, and it includes unilateral conduct of market power abuse. Among others, the exclusive distribution, the imposition of prices or resale conditions, tied selling, purchasing or sale subjected to the condition of not using or acquiring goods or services offered by thirds, unjustified refusal of treatment, the application of dissimilar conditions for equivalent compensations, and the sale of goods or services below marginal costs.

19. To determine the illegality of practice, Article 20 of Law 601 establishes as additional elements the dominant position of the alleged offender in the relevant market, that practices are carried out in respect of goods or services corresponding or related to the relevant market, that prevent or restrict competitors' access to the market, or move them from it, and in any case, that harm to the interests of consumers occurs. In addition, Article 23 of the Regulation of the Law 601 describes efficiency gains that Authority may consider to assess them against the anti-competitive effects of the practices and then determine the net effect, which is considered to some extent an approach to the behavior exam under the "rule of reason".

20. Law 601 anticipates a "leniency program" (Article 48) according to which each economic agent which informs the Authority of any anti-competitive practice in which participates or has participated, may be released from the corresponding penalty. This mechanism has not been used and it is expected that its application could experience practical difficulties arising from the business environment, the fear of trade retaliation from other economic agents and, in general, a possible distrust that might exist in the system. On the other hand, it would seem that the leniency program is also applicable to vertical practices, what does not seem appropriate.

21. The Penal Code (Article 273) also criminalizes the commission of anticompetitive agreements involving the imposition of resale price, setting limits on production, market allocation and the exclusion of economic agents in the market, when restricting competition and endangering the country's economic stability, or affect essential goods. Any anti-competitive practice in criminal law has been judged, yet. It would be appropriate to anticipate that in these cases, PROCOMPETENCIA could exercise support and technical specific functions.

2.1 Concentrations

22. Article 24 of Law 601 provides that there is concentration when a change in control of the companies involved occurs, regardless of their modality, and it gives PROCOMPETENCIA the power to review and authorize concentrations. The criterion to assess whether or not a concentration is authorized is if it creates or strengthens a dominant position that may prevent or limit competition.

23. The Concentrations that reach the following thresholds (Article 25) must be notified: a share exact or more than 25% of the relevant market, or a combined gross income exceeding 642.857 minimum wages (approximately 87 USD million). The criteria of the relevant market is not direct, and the threshold of 642.857 minimum wages seems high for a relatively small economy like Nicaragua's.

24. The procedure begins with a request to PROCOMPETENCIA previous to the Concentration, which must be accompanied by the payment of a fee. The application must be analyzed within the deadlines established by Law and the result may be the prohibition of the Concentration, its total authorization, or its partial or conditional approval, that is, subject to compliance with certain conditions.

2.2 Unfair competition

25. Unfair competition practices are usually related with private disputes between economic agents who only in very rare cases affect the competition process itself. Law 601 recognizes that unfair competition practices may affect collective interests and gives PROCOMPETENCIA the power to know

them. Article 23 condemns, thus, acts of deceit, denigration, comparison, harmful scheming, confusion, fraud, induction and imitation.

2.3 Consumer's protection

26. In Nicaragua Consumer's Protection and Competition is performed by different authorities. The Law on Protection of Consumers and Users -Law 842 designates as the body responsible for its application to the Directorate General of Consumer's Protection, which is part of the Ministry of Development, Industry and Trade.

3. INSTITUTIONAL ISSUES: PROCOMPETENCIA

27. PROCOMPETENCIA is a Public Law institution, with legal personality and its own assets, technical, with administrative and budgetary autonomy. It is focused on research functions as well as on case resolution.

3.1 PROCOMPETENCIA bodies

28. The highest body of the institution is the Board of Directors, which corresponds to "dictate the policy of prevention, promotion, protection and guarantee of free competition and supervise its execution." It consists of the Chairman, three Directors and their respective substitutes, appointed by the President and ratified by the National Assembly for a five - year period.

29. For his part, the Chairman is in charge "of implementing the policy to promote, protect and guarantee free competition according to Law", responsible for the technical and administrative management of PROCOMPETENCIA. The Chairman has most of the decision-making power in the Institution.

30. Even if a more complete organizational structure for PROCOMPETENCIA was anticipated, the significant budgetary constraints to which the institution is facing from the beginning of its activity have forced it to be simplified, So that, in addition to the Board of Directors and the Presidency, there are only the Financial Administrative Unit, the Legal Directorate, the Prosecutor's Office and the Economic Directorate.

3.2 Human and financial resources

31. PROCOMPETENCIA's heritage consists mainly of national budget allocations, fees for services and resources from international cooperation. However, the approved budget for the institution since its inception has been very limited (although it has been growing, it was only USD 374,000 for 2012), which explains the big difficulty faced to fulfill its mission functions, and even to give back its staff.

3.3 Independence, transparency and accountability

32. *Even if PROCOMPETENCIA's institutional design would favor, in principle, its independence, in reality its capacity for action, and therefore this independence, seems reduced by the budgetary constraints mentioned.*

33. In relation to the issues of transparency and accountability, PROCOMPETENCIA must inform the National Assembly and the general public on the results of its administration (Article 14 of Law 601), which it has done since its creation.

34. On the other hand, PROCOMPETENCIA has a web site in which it publishes the most relevant information about actions of the Authority.

35. Finally, PROCOMPETENCIA's decisions are subject to review by the Judicial System, but there is still insufficient technical mastery of the subject by those who are called to exercise this control; hence the importance of advocacy work with the group of judges.

3.4 Strategic planning

36. Budget constraints give PROCOMPETENCIA little space to plan; it is difficult to do it without knowing for sure what resources will be beyond the very short term. Still, PROCOMPETENCIA set its priorities, in particular, a list of key sectors to analyze cases and a plan of actions for competition advocacy.

4. EMPLOYMENT RESOLVED RELATED CASES

37. PROCOMPETENCIA's main actions in Nicaragua related to the creation or elimination of jobs are linked to the economic concentrations, indeed it has been managed to have an impact on avoiding mass firings through conditions (remedies) established in the resolutions of conditional authorization of economic concentrations these remedies are imposed as a condition to authorize concentrations, ensuring job stability.

38. In 2014 PROCOMPETENCIA tracked the performance of five resolutions on economic concentrations having various measures, the audit area has been created for the compliance of concentrations, which responsibility is to ensure that economic agents comply the revision of Solve of each resolution to require appropriately the economic agents the reporting and documentation evidencing compliance of the established conditions.

39. Once these reports are received, the appropriateness of the documents attached according to the request made by this authority and according to the case, is checked, bilateral follow-up meetings and field inspections are conducted. Additionally, the database about the state of each of the concentrations on the fulfillment of the conditions established is regularly updated.

40. In monitoring such cases, coordination and collaboration of the Economic Directorate is essential when financial or statistical information is presented to corroborate the accuracy of the information.

41. In line with international trends, PROCOMPETENCIA has conditioned concentrations in obliging the economic efficiencies that occur are passed on to consumers.

42. The efficiencies occurred from an integration are determining factors in approving the operation. Therefore, if for the competition authority, the expected efficiencies produce, counteract, and even are more than the eventual restrictive effects that it would have on the market, it would not be justifiable to object this operation. However, to ensure that the benefits in efficiency are passed on consumers, PROCOMPETENCIA, based on the powers granted by Law, has imposed conditions to ensure that goal.

43. It should be stated that each authorization of economic concentration has general and specific conditions. So far all concentrations authorized by PROCOMPETENCIA have the following general conditions:

44. Free competition: The goal is to warn the economic agent involved in the concentration operation to continue to participate in the domestic market by promoting and respecting free competition between different economic agents participating in the country, without making any anti-competitive practice.

45. Employment stability: The objective is to warn the economic agent resulting from a concentration, to respect Employment stability for base workers on their production and marketing operations for a period of twelve months, subject to the termination for a fair cause that may occur as designated by the labor legislation force and restructuring carried out at administrative and managerial levels.

46. Economic contribution: The goal is to strengthen technical capabilities of consumer advocacy organization; promoting healthy consumption habits; research and development of energy friendly to the environment; promotion and development of a healthy environment; and promote the participation of Micro, Small and Medium Nicaraguan Entrepreneurs in International Fairs.

47. Non-competition clause: This clause is intended to ensure that the vendor will not profit everything developed, to start a new line of business by their own or other's. Legally, non-competition clauses can be constructed as an obligation of not to do (do not compete) assured by a stipulation or penal clause to pay a certain amount.

48. Until now, all operations of economic concentrations authorized, have been assigned with conditions that must be fulfilled in time and date set. The economic agents who were authorized with economic concentration with conditions are:

1) **SUN VALLEY FOODS OF CENTRAL AMERICA LTD, TIP TOP INDUSTRIAL SA, RICA FOODS INC and PIPASA CORPORATION OF NICARAGUA SA.;** Authorized on March ^{24th} of the year two thousand eleven.

49. It was authorized with seven conditionings:

- a) Free competition: fulfilled
- b) Maintenance and expansion of distribution channels: fulfilled.
- c) Strengthening of Responsible Consumption and Food Safety. Allocation of US 50,000 annually to MIFIC, for three years, intended for Consumers Associations legally constituted so that these associations promote training workshops for its partners, developers and represented on Responsible Consumption and Food Safety as a contribution and strengthening the allocation that the State of Nicaragua makes with these Consumer Associations. Fulfilled.
- d) Support program for small and medium producers: Conduct support programs to small and medium associated producers, and extend them in benefit of non-member producers, through technical visits, distribution of technical or information documents on the handling of birds and workshops on best practices in the poultry market.
- e) Job stability. Fulfilled
- f) Pollo Real brand Sale. Sale was disposed for a year and it was not acquired. Fulfilled.
- g) Non-competition clause. Fulfilled.

50. This economic concentration, after having fulfilled all the conditions established and expired in 2014, it was proceeded to the file record and comprehensive evaluation on the effects that these conditionings had on the market; the methodology for analyzing post concentrations is still in the design stage and the goal is that when year 2015 ends we can present a paper on the assessment of the economic concentration.

2) INVERSIONES EN COMBUSTIBLES Y LUBRICANTES DE NICARAGUA S.A (UNOPETROL DE NICARAGUA) and ECCLESTON Co. Ltd (CHEVRON TEXACO); Authorized on October 31st, two thousand eleven. The resolution establishes 12 conditions.

- a) Keep averages differences and historical trends published by PLATS and INE prices: PLATS is a Reference market for futures and options of products derived from petroleum (international price). Fulfilled.
- b) Send details of the chain structure with operating costs to INE and PROCOMPETENCIA. Fulfilled.
- c) Send investment plans of the first five years to MEN and INE, include wider distribution of kerosene in the public service stations. According to report the following works are being performed: UNO Los Encuentros (CH): UNO 7 Norte; UNO La Virgen: UNO Masatepe, UNO Metropolitana, UNO Las Flores, according to reports they change tanks and pipes fuel and submersible pumps. UNO San Juan del Sur; Perimeter wall and removal of three tanks; UNO International: completion of interceptor system. Design, permission and installation of kerosene tank. At requesting from Procompetencia. NTON adequacy projects. Cortijo tanks extraction, July 11th, Cogran INA, Nejapa Country Club. Design, permissions and possible execution EMBUSA and Avícola la Estrella. Possible installation of Nuevo Carnic, Diesel and Bunker Navinic. Expansion of Kerosene sites of sales: In total there are 15 and 3 that permits were requested. Fulfilled.
- d) Complete the adjustments of the service stations that are pending and operate under its brand. NATIONAL REQUIRED TECHNICAL STANDARDS FOR THE ENVIRONMENTAL MANAGEMENT OF USED LUBRICANT are applied. According to reports, the adaptation Las Colinas, Las Flores, Ticomo and Guanacaste have been completed. Fulfilled.
- e) Perform operations diligently according to technical standards and specifications of quality and industrial safety. The economic agent must develop plans and programs of maintenance of the facilities with the aim of reducing environmental incidents and accidents. Fulfilled.
- f) To assume the commitments and obligations in environmental matter and industrial safety of concentrated business. Fulfilled.
- g) To avoid supply shortages and lack of hydrocarbon of products they sell. Fulfilled
- h) Submit to PROCOMPETENCIA a plan to improve customer assistance in all service stations involved in the economic concentration, including security, air and water service for vehicles, availability of rest rooms in hygienic conditions and selling lubricants to customers. Fulfilled.
- i) Offer publicly to sell or rent the station, except in those cases in which the closure is ordered for reasons of social or regulatory interest. According to reports there has been no need to look for rent any station. Fulfilled.
- j) Job stability. Fulfilled.
- k) Strengthening research on renewable energy and environmental security. It was allocated US\$50,000 annually for 3 years to the Engineering University (UNI) to promote research and projects to be executed in favor of renewable energy to communities that lack electricity service or replace the use of fossil fuels with renewable energy in coordination with the Ministry of Energy and Mines. Fulfilled.

- 1) Non-competition clause. Fulfilled.

51. So far all conditionings have been fulfilled. During the deadlines for compliance with conditionality, there were delays in reporting so we called a meeting with their representatives, which did occur on three occasions, they came with their advisers. We requested a meeting with the Oil area director of the Nicaraguan Institute of Energy (INE) who explained to us that the economic agent resulting from the operation, had not submitted reports either. We met again with their representatives and we were asked for time to present them, what did happen in the order of time (thirty days). We reviewed the documents presented, we requested explanation about some of them and they actually did it. At the moment we asked them to complete the documents presented, for example the names and locations of petrol stations that had expanded the sale of kerosene among others, verifying the information submitted. The fulfillment of all the conditions are properly documented with the reports of the conditional economic agents, which are duly safeguarded in the record. To finish this concentration monitoring field visits will be scheduled for each of the service stations with the addition of Kerosene sales service and random check of other stations to verify compliance with the provisions of the resolution.

3) ASTRO CARTON DE NICARAGUA S.A y FABRICA DE EMPAQUES NICARAGUENSES S.A (FENICSA); Authorized on December 1st of the year two thousand eleven. The resolution establishes three conditions.

- a) Free competition. Fulfilled
- b) Job stability. Fulfilled
- c) Promotion and Development of Micro, Small and Medium-sized Companies at international level. Allocate US \$ 20,000.00 per year for a three year period to PRONICARAGUA to promote the participation of Micro, Small and Medium companies Nicaraguan Entrepreneurs in International Fairs. Fulfilled

52. On the established dates they submitted reports and documents which show compliance of conditionality, proceeding to review them. On two occasions we met with the representative of the economic agent resulting from the operation, to request certain details of the delivered, explaining the situation of the documents submitted. Currently this record is filed by having fulfilled in a timely manner with the approved conditions, maturing in 2014.

4) NESTLÉ INC. AND PFIZER INC. Authorized on May fifteenth, two thousand and thirteen. The resolution established seven conditions.

- a) Disinvestment process. Rent for 10 years, the current acquisition comprising a sale/purchase of assets and a transitional arrangement Licensing Use of Trademarks, according the following: assets, licenses, inventory, distribution contracts or of any other nature related with Pfizer Nutrition business in Nicaragua. Currently the economic agent is analyzing potential buyers interested and we have not been notified that this operation has been completed.
- b) Strengthening the Education and Support of Breastfeeding. Contribute to strengthening education and promoting food security around the importance of breast milk, and promote responsible consumption of substitute products, through a public education campaign, conducted by a natural or legal person legally constituted in Nicaragua, the campaign must contain at least: Development of audiovisual, graphics and printed materials. Nestlé S.A. will award the winner of the tender for the development of the campaign, a total of US \$ 25,000.00., it was ordered to make public education campaign, developing audiovisual, graphics and printed materials, the content would be authorized by PROCOMPETENCIA and the authorities designated by the Ministry of Health. Fulfilled.

- c) Strengthening of technical capabilities. US 25,000 were allocated annually for three years to Food Laboratory (LABAL) from MIFIC to contribute to strengthen technical capabilities as requirements and needs prioritized by LABAL. Fulfilled.
- d) Maintenance and expansion of distribution channels. Complied with date, due in January 2016.
- e) Environmental Protection. Complied with date, due in January 2016.
- f) 295 Law Enforcement. Complied with date, due in January 2016.

5) PLASTICOS MODERNOS S.A. and PLASTICOS DE NICARAGUA (PLASTINIC). Authorized on February seventh, year two thousand fourteen.

The resolution establishes two conditions.

- a) Free competition. Fulfilled.
- b) Promotion and Development of a healthy environment: to deliver twenty thousand plastic bags large size for garbage collection, to each of the surrounding Local Government Municipalities of its principal plant in the municipalities of Dolores, Diriamba and Jinotepe plant, within a period which shall not exceed twelve months.

53. So far conditionings have been fulfilled. Meetings with the representatives of the economic agent resulting from the operation have been requested for the coordination of compliance with the conditions and field inspections are conducted to verify the contents of the reports.

54. If verifying compliance, economic agents concentrated to meet the conditions would be obliged and ultimately, to decentralize the ones which do not fulfill, all based on the powers granted by Law 601 PROCOMPETENCIA.

5. CONCLUSIONS

55. If it is true, it is controversial State's intervention for the establishment of certain measures that could be considered detrimental to the right of free enterprise, we believe that the role of a competition authority, as PROCOMPETENCIA of Nicaragua, is to ensure that the economic benefits being announced in applications for economic concentrations have effective transfer to society and consumers.

56. For this purpose, Law 601 endows the legal instruments that facilitate the imposition of conditions to economic agents that request authorization of concentration. One of the most used tools used by PROCOMPETENCIA is the defense of employment, the guarantee of job stability for workers and technicians who are the majority of positions that could cause an undesirable impact for the State and society as a whole if losing many positions that guaranteed labor stability for many families.

57. Indeed in the economic context of Nicaragua, being a developing economy, defense of employment becomes a priority and that sensitivity has been reflected in the performance of PROCOMPETENCIA of Nicaragua in five resolutions which are subjected to a rigorous process of compliance.