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**LATIN AMERICAN COMPETITION FORUM**

**Session III: Unannounced Inspections in Antitrust Investigations**

**Contribution from El Salvador**

**3-4 September 2013, Lima, Peru**

*The attached document from El Salvador is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.*

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## LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

### Session III: Unannounced Inspections in Antitrust Investigations

#### CONTRIBUTION FROM EL SALVADOR

#### WHEAT FLOUR MARKET IN EL SALVADOR

1. El Salvador's *Superintendencia de Competencia* from this point forward SC, is the agency in charge of competition in El Salvador. Its object is to protect, promote and guarantee competition through the effective application of the Competition Law, from now on LC.

2. One of its emblematic cases began in 2008: "The Flour Cartel"<sup>1</sup>, in which for first and only time until this date, the search warrant was used as an investigation tool.<sup>2</sup>

#### 1. Background

3. Wheat is a cereal used as an essential commodity for the production of wheat flour. El Salvador does not raise nor produce wheat grains; consequently, the country imports a 100% of the grains to transform those in wheat flour. The economic agents involved in the Salvadoran wheat flour market import wheat from countries like the United States of America, Honduras, and Guatemala.

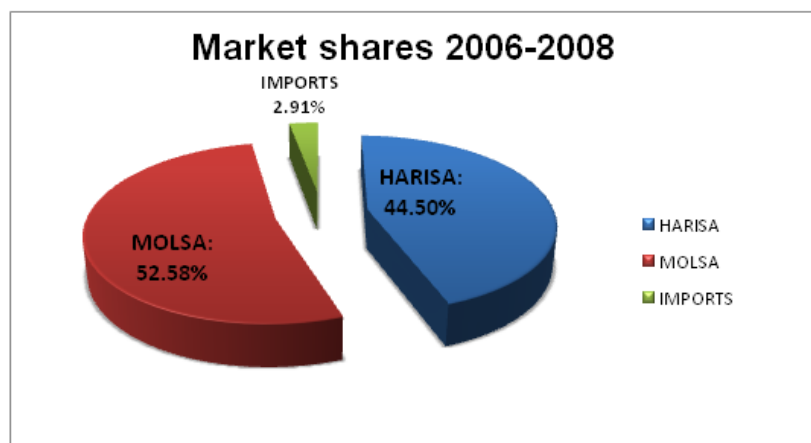
4. A change in wheat flour prices distorts the prices of industries like bakery and other food derivatives, in which is a main input. These changes might stem from diverse factors like an increase in the worldwide prices of wheat, or due to factors as anticompetitive prices among competitors which distort the market, disadvantaging consumers.

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<sup>1</sup> Ref.: 005-O-PA-NR/2008.

<sup>2</sup> According to the LC "*registro o allanamiento*", i.e. search or raid, considering that it will be considered raid in case the economic agent opposes to the search authorized by the judge.

5. In El Salvador, during the investigation term (2006- 2008) the wheat flour market had only 2 participants: MOL, S. A. DE C. V., from this point forward Molsa, and HARISA, S. A. DE C. V. , from this point forward Harisa; the market structure was highly concentrated because imports represented only 2.91% of share in the wheat flour market.



Source: Superintendencia de Competencia. Final Decision of the case: HARISA-MOLSA Ref.: 005-O-PA-NR/2008

6. In 2008, the SC noticed some circumstantial evidence of anticompetitive practices in the wheat flour market: publications in national newspapers by which Molsa and Harisa announced at the same time the introduction of a new product as substitute of the hard-wheat flour; news stories which pointed out an increase in prices in a narrow time frame by Molsa and Harisa; and, public appeals made by the Minister of Economy and the President of the *Defensoría del Consumidor* (consumer protection agency) to investigate the sector.

7. To that date, the SC had new investigative tools, awarded by the amendment to the *Ley de Competencia* (Competition Law) in November 2007<sup>3</sup>. By said amendment new faculties were incorporated to the Law, among others:

- The attributions and duties of the Superintendent were increased, as the power to carry out searches or raids and to issue precautionary measures<sup>4</sup>.
- Fines for anticompetitive practices when the practice is particularly grave (up to 6% of the total annual sales or of the value of its assets, or a maximum of 10 times the estimated profits resulting from the anticompetitive practice)<sup>5</sup>.

### 1.1 *On the faculty to carry out search warrants.*

8. Before the 2007 amendments, the SC had the faculty to carry out inspections, i.e announced visits to the economic agents premises which must be previously notified. This tool was used in some investigations without getting optimal results in any of those.

<sup>3</sup> Legislative Decree No. 436, dated October 18<sup>th</sup>, 2007. Published in the Official Gazette No. 204, Volume No. 377, dated November 1<sup>st</sup>, 2007.

<sup>4</sup> LC. Article 13, letters r and s.

<sup>5</sup> LC. Article 38, 2<sup>nd</sup> paragraph.

9. In consequence, a proposal to amend the Law was made, in order to give more investigative powers to the SC. With the 2007 amendments, in addition to the inspections<sup>6</sup>, the SC has the faculty to carry out search warrants.

10. The amendment provides for the SC to request an authorization from the corresponding civil or commercial judge of the jurisdiction where the premises to be searched are located. Said judge has a 24 hours period to decide if it authorizes or not the procedure. This request must comply with some requirements established in the Competition Law, among those: the indication of the persons authorized to carry out the procedure, its starting time, its aim (anticompetitive practice intended to be proved), its locations, and the evidence intended to be collected. Also, there is no limitation on the type of objects or places that can be covered by the procedure in so far as it is stated in the petition and authorized by the judge.<sup>7</sup>

11. The execution of an unannounced search concerns the Superintendent and the persons authorized by the judge with the possibility to be aided by the public force, i.e. police accompaniment. The only limitation established for the search is that it must start in business hours, without providing any maximum time for its execution or any other limit.

## **2. Commencement of the sanctioning procedure and other acts of the SC related with the wheat flour**

12. Given the circumstantial evidence obtained about possible problems in this market, on April 1<sup>st</sup>, 2008 the SC initiated an *ex officio* sanctioning procedure against Molsa and Harisa, as sole participants in that market to that date, under suspicion that those had among them a market allocation agreement; a conduct typified under the agreements among competitors prohibited in El Salvador by the Competition Law.

13. During that investigation, the SC carried out for the first time and with a prior authorization of the corresponding civil or commercial judges of the jurisdiction where the premises to be searched were located, a search warrant in the premises of Harisa and Molsa. The SC obtained valuable and forceful evidence which proved that both economic agents were committing the anticompetitive practice provided in article 25, letter d) of the LC.

14. The raid was carried out by all the SC staff, which divided in two teams searched the offices of employees of both economic agents and their computer equipment to obtain hard evidence of the agreement; finding in both places printed and digital files which demonstrated the exchange of information about clients, prices and sale volumes, through which they monthly made effective a compensation system in case one had exceeded its assigned market share.

15. Based on all the evidence collected against both agents, on September 4<sup>th</sup> 2008 the SC Board of Directors (*Consejo Directivo*) decided that Molsa and Harisa committed grave infringements to the LC by allocating the wheat flour market through an agreement amongst competitors. The agreement consisted in holding a 55% market share for Molsa and 45% for Harisa with respect to the total sales.

16. The SC Board of Directors (CD) imposed fines equivalent to 3% of the annual sales obtained by each one in 2007, representing for Molsa a fine of \$1,971,015.16, and for Harisa of \$2,061,406.20. In addition to the economic sanction, aimed at halting the wheat flour market affectation and through this protecting the consumer, the SC ordered the cease of the anticompetitive practice.

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<sup>6</sup> LC. Article 44 2<sup>nd</sup> paragraph.

<sup>7</sup> LC. Article 44 3<sup>rd</sup> paragraph and subsequent.

17. On September 12<sup>th</sup> 2008 Molsa and Harisa filed a petition for review before the SC Board of Directors<sup>8</sup> contesting the final resolution pursuant to which they had been sanctioned; the review appeal was admitted on September 30<sup>th</sup>, 2008. On October 14<sup>th</sup> of the same year the CD upheld the final decision against Harisa and Molsa.

### 3. Contentious administrative action

18. Every economic agent has the opportunity that the Contentious Administrative Chamber of the Supreme Court of Justice carry out a judicial review of the final resolution declared by the Public Administration, and that it rules upon the legality or illegality of the administrative acts issued.

19. On October 28<sup>th</sup> 2008 Molsa filed a lawsuit before the *Sala de lo Contencioso Administrativo* (Contentious Administrative Chamber), from this point forward “The Chamber”, for an alleged illegality of the final decision pronounced by the SC Board of Directors. Harisa also sued for an alleged illegality of the acts of the competition agency, on January 8<sup>th</sup>, 2009.

20. On December 1<sup>st</sup> 2011 the Chamber declared illegal the sanctioning procedure carried out by the SC on the grounds that the authorization obtained from the corresponding civil or commercial judge to carry out the search warrant in MOLSA was illegal because it did not fulfill all the legal requirements in force to that date in the criminal procedure legislation (*legislación procesal penal*), referring in this case to the non-consignment of the objects to be searched for throughout the procedure, in spite of the statement made by the SC in petition of the objects to be searched for in the search.

21. Consequently, the Chamber declared illegal all acts of the SC subsequent to the raid, even though it was not specifically grounded upon the legality or illegality of the administrative acts issued by the SC in the sanctioning procedure.

### 4. Amparo proceeding

22. Facing the abovementioned situation, the SC deemed necessary to bring an *amparo* lawsuit for considering the Chamber acts were violating constitutional rights.

23. On March 7<sup>th</sup> 2012, the SC filed an *amparo* lawsuit before the Constitutional Chamber of the Supreme Court of Justice, against the sentence pronounced by the Contentious Administrative Chamber, on the grounds that the declaration of illegality of the judicial action violated legal certainty, article 2 of the Constitution of the Republic (*Constitución de la República*), for two reasons: first, is beyond the faculties of said Contentious Chamber to review an act of judicial nature since it is not a purely administrative act; and second, lack of motivation (reasoning) of why a civil judge has to apply supplementary the criminal procedure rules and not the civil procedure ones.

24. The *amparo* lawsuit filed by the SC was admitted by the Constitutional Chamber but it is in process (evidentiary period), in consequence no ruling exists. Also, the final ruling of the recourse filed by Harisa is still pending.

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<sup>8</sup> The petition for review is a right of the economic agents, pursuant to LC article 48: “*The act that definitely resolves the procedure shall admit a review recourse, properly submitted and in due time, in which the illegalities of the process may be alleged(...)*”.