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LATIN AMERICAN COMPETITION FORUM

Session II: Regional Competition Agreements

Contribution from Peru

3-4 September 2013, Lima, Peru

The attached document from Peru is circulated to the Latin American Competition Forum FOR DISCUSSION under Session II 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 II: Regional Competition Agreements

CONTRIBUTION FROM PERU

1. **Proposal for Peru to strengthen co-operation for investigating anticompetitive practices with trans-border impact in South America**

1. The mission of the State, through its competition agencies, is to protect the interests of its citizens, fostering general well-being and the competitive process. To do so it must ensure that competition in the markets is not falsified or destroyed by illegal actions by any companies that in the end are prejudicial to the common interest.

2. The defence of competition is important from an economic viewpoint because it ensures that the market functions properly and that the allocation of resources is efficient. It is also important from a social viewpoint since competition eliminates hostility among members of a society and gives rise to a duty of co-operation and assistance, which drives the production of goods and services.¹

3. It is therefore important that there be laws sanctioning entrepreneurs that thwart market competition allowing authorities to take action by operation of law enabling them to overcome the following issues: (i) the lack of incentives for market agents to file complaints because the administrative proceeding is relatively cheap; (ii) the problem of time because the proceedings are in general relatively short; and (iii) the problem of information costs since, unlike the parties subject to regulation, the authorities have legal means that facilitate the investigation of conducts.

4. For these purposes the INDECOPI² has at its disposal Legislative Decree 1034, Law on Suppression of Anticompetitive Conducts, whose purpose is as follows:

¹ Julio Pascual and Vicente (2013).

² Acronym for the National Institute for the Defense of Competition and the Protection of Intellectual Property, the Peruvian competition agency.

Article 1.- Purpose of this Law.-

This Law prohibits and sanctions anticompetitive conducts in order to foster economic efficiency in the markets for the well-being of consumers.

5. This law has been used to sanction several anticompetitive conducts affecting the Peruvian market. Nevertheless, there are cases in which practices detected have a cross-border impact and have even been or are being investigated in other countries. Therefore, co-operation among the countries involved is very important.

6. In fact, the experience of developed countries has shown the importance of co-operation among the agencies that fight against cross-border anticompetitive practices such as the abuse of position of dominance, mergers that distort competition and cross-border cartels.³ However, as the United Nations concluded at the Conference on Trade and Development held on April 19, 2012, unlike developed countries, developing countries have not made strides in co-operation among agencies to fight against anticompetitive practices with cross-border impact.

7. In our region, there are two efforts, by the Andean Community and MERCOSUR, to create supranational competition regulations:

- Andean Community⁴: In Ruling 608 anticompetitive practices with effects in two or more Member States are regulated. However, the issue with this regulation is how to enforce the rulings issued thereunder given the lack of institutional arrangements and an adequate structure.
- MERCOSUR⁵: Its competition provisions have not been applied since the anticompetitive practices prohibited domestically and cross-border have not been defined.

8. As a result, knowing all this background, we believe that if the multinational companies engaging in cross-border anticompetitive practices are now organised, competition agencies should also organise. Therefore, on June 17, 2013, the INDECOPI proposed to the South American competition agencies the creation of a **South American Forum of Competition Agencies** with the objective of achieving greater effectiveness of the defence of free market competition in our region.

9. This proposal arose after the current scant co-ordination among South American competition agencies became apparent, for example, in the investigation of the liquid oxygen market carried out in 7 Latin American countries.⁶⁷

³ Possibly secret agreements among companies that operate on the same market whose purpose is to fix prices, distribute the markets among themselves or limit production.

⁴ It is a community of countries voluntarily united in order to achieve integrated development through Andean, South American and Latin American integration. Several countries belong: Bolivia, Colombia, Ecuador and Peru.

⁵ The Southern Cone Common Market – MERCOSUR comprises Argentina, Brazil, Paraguay, Uruguay, and Venezuela. The States comprising MERCOSUR share a commonality of values that are expressed in their democratic, pluralistic societies that defend fundamental liberties, human rights, environmental protection and sustainable development, as well as their commitment to the consolidation of democracy, legal certainty, the fight against poverty and equitable economic and social development. Chile, Colombia, Peru, and Ecuador are associated States.

⁶ Panama, Chile, Argentina, Brazil, Colombia, Mexico and Peru.

⁷ Information based on UNCTAD – COMPAL “Lessons Learned Based on Liquid Oxygen Cases in Latin America: Recommendations to improve co-operation on investigating cartels.” Document presented at the

10. This investigation was carried out because the multinational companies supplying liquid oxygen to hospitals in 7 Latin American countries, through domestic subsidiaries, engaged in collusive practices in public bidding processes. However, despite the practice being sanctioned by virtually all the countries, including Peru,⁸ there was no co-ordination among the competition authorities.

11. This lack of co-operation among the countries is primarily due to the following reasons:

1.1 *Difficulty related to the low levels of co-operation among South American competition agencies*

12. While competition agencies in the region have entered into several co-operation agreements, there is still a problem of availability of effective instruments for co-operation and trust among agencies; this results in little actual co-operation among agencies and the failure to detect anticompetitive practices with cross-border impact.

13. Based on the absence of effective instruments for co-operation, several reasons were identified that explain the scant regional co-operation among competition authorities, particularly in developing countries. The causes are: the lack of experience and institutional capacity of the authorities (most of the agencies in the seven jurisdictions are relatively young), the lack of monitoring of the activities of the cartels and other anticompetitive activities, as well as the abuse of dominant position and mergers that restrict competition, plus the fact that it can be costly and complex to analyse the information that may be exchanged due to the legal requirements of each country, especially for countries that lack experience and strong administrative structures.

1.2 *Difficulty in exchanging information in investigations*

14. The exchange of information has become one of the biggest obstacles to detecting and halting anticompetitive practices with cross-border impact. Even co-operation agreements among the competition authorities rarely include provisions for the exchange of information.

15. There are three levels of information that can be shared among competition agencies to improve their effectiveness in the battle against anticompetitive practices with cross-border impact:

- **Public information:** These are the resolutions issued by agencies as well as legal rulings on cases resolved by competition agencies that reached the courts. Studies and reports that have been published and announcements published on the status of cases.
- **Non-public, non-confidential information:** This is the information that has been produced by the competition agency but has not been made available to the public or disseminated. For example: in the case of cartels, the findings on their structure and their agents, as well as the situation of competition in a given sector (including indications of anticompetitive practices).
- **Confidential information:** This is “confidential information” as defined in each jurisdiction (normally laws protect companies trade secrets as “confidential information”). On another (surely less protected) level we have the information provided by parties in the context of an investigation; it may be protected by the duty of secrecy or discretion at least during the course of the investigations, despite not being “confidential information” in the strict sense. We also have

International Seminar on Public Contracting, Quito, Ecuador March 12-13, 2013. Drafted by Pierre Horna as part of the Regional Component of the COMPAL Program See at: http://unctad.org/meetings/en/SessionalDocuments/IntBidRig_Backnote_ES.pdf

⁸ See Resolution No. 051-2010/CLC-INDECOPI of August 13, 2010.

(even less protected) information generated by the competition agency in the context of an investigation.

16. As one can see, the exchange of confidential information is what triggers the biggest problem among competition agencies. Following is a series of factors that contribute to this fact:

- There are various definitions of the concept “confidential information” in the various countries; this implies that certain information may be shared by some agencies but not by others. This has created significant limitations with respect to the type of information that can be shared (for example, information generated by the competition agency). This can result in a vicious circle, since because there is no common definition of this concept, an agency cannot know what another agency in the region is investigating in the same case.⁹
- The apparent lack of commitment to the exchange of confidential information may be explained by the effect of the competition agreements. The agreements between these countries are relatively recent and since they have been in force there have been no cases in which the exchange of confidential information have been necessary to resolve cases of cross-border anticompetitive practices, which does not imply that if there had been an exchange of information, the level of investigations might have been greater.
- Confidentiality affects not only progress on investigations, but it can also harm the legitimate interests and right of the subjects or companies subject to investigation, which may have signed professional and business confidentiality agreements.
- Lack of mutual trust among the competition authorities.
- Legal viability of the exchange of confidential information resulting from trade agreements.

1.3 Little progress on the implementation of clemency programs in Latin America, with the exception of Brazil and Chile

17. The absence of international mechanisms to suppress anticompetitive practices with cross-border effects such as cartels plus the lack of effectiveness of clemency programs in Latin America countries (with the exception of Brazil) make the discovery and prosecution of anticompetitive practices very complicated.

18. However, in the latest versions of competition laws in Peru (2008), Mexico (2011), Brazil (2012) and Costa Rica (2013), the provisions on clemency programs are more detailed and in harmony with international standards, common practices and local conditions (with the notable exception of Costa Rica). For example, while the INDECOPI has not had the opportunity to exchange information with other jurisdictions in the context of a clemency program, the competition law of Peru includes provisions related to effective co-operation in the context of this program that could in theory be applied to cross-border investigations.

⁹ This is the case for Central American countries, where the difficulties in implementing agreements among agencies led to the complete prohibition of exchanges of confidential information. For example, the Costa Rican authority entered into institutional agreements for co-operation in matters of competition with the Commission for Defense and Fostering of Competition of the Republic of Honduras, the Institute for Fostering of Competition (Pro Competencia) of the Republic of Nicaragua, the Competition Superintendency of El Salvador and the Consumer Protection Authority of Panama and others. While these agreements are intended to foster free market competition in the region, these efforts have been eclipsed by the lack of agreement on the exchange of confidential information among the authorities due primarily to the limitations of their national laws on the subject.

1.4 Adequate recognition of evidence gathered abroad

19. Evidence in investigations of cartels and other anticompetitive practices with cross-border scope are frequently found abroad. However, due to the low level of co-operation and the lack of mechanisms permitting the exchange of information, investigators have no access to evidence located outside their territory. Furthermore, there is little or no discussion and note comparing among investigators of a given case at the various agencies; this hinders the progress of the investigation and improved defense against the arguments of those investigated.

20. If the evidence necessary for conviction is spread out among various jurisdictions and cannot be shared for legal reasons, even when an authority has sufficient information to carry out a successful process, other jurisdictions that may have been affected by the anticompetitive practice may be incapable of obtaining that information.

21. All these issues may be overcome by countries through co-operation in the pre-investigation, investigation and post-investigation phases through the creation of mechanisms permitting the exchange of information on the strategies used by the competition agencies as well as by the companies investigated. It would also be appropriate to develop legal mechanisms permitting the exchange of information and documents and, in a much more advanced phase, that even permit carrying out joint proceedings.

22. In order to implement these improvements, just as we mentioned at the beginning of this document, the INDECOPI has proposed to South American competition agencies in the following countries: Argentina, Brazil, Chile, Colombia, Ecuador, Uruguay and Venezuela that co-operation mechanisms be strengthened in order to achieve greater effectiveness in the defence of free market competition through the creation of a **South American Forum of Competition Agencies** with the following initial objectives:

- Hold at least one annual work meeting.
- Form a work team responsible for creating a Virtual Platform where rulings and sanctions of transnational cartels and other anticompetitive practices with cross-border impact can be uploaded, where all the members have access to the information. Financing can be sought from international organisations to carry this out.
- Form work teams responsible for studying laws and practices to defend competition in each of the member countries and for drafting two key documents for co-operation: (i) **“Master Co-operation Agreement for the Investigation of Anticompetitive Practices with Cross-border Impact”** for the exchange of information; it would cover the pre-investigation or preliminary phase as well as the actual investigation and the post-investigation phase; and (ii) **“Handling of Information Agreement”** that would permit ensuring that the information exchanged will not be disclosed.
- Carry out joint investigations and actions to defend free market competition.
- Facilitate the exchange of officials among the agencies for the defence of competition that are members of the forum.

23. While this is an ambitious proposal, we are convinced that it is necessary to satisfactorily apply competition regulations in the regions, taking into account that it is a reality that some multinational companies engage in anticompetitive practices with cross-border effects and thus competition agencies must have the capacity to respond with the same capacity for action and co-ordination.