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Fining methodologies for competition law infringements****- Contribution from Costa Rica -****24-25 September 2019, San Pedro Sula, Honduras**

The attached document from Costa Rica is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 24-25 September 2019 in Honduras.

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Session I: Fining methodologies for competition law infringements

Determining fines for anti-competitive conduct in Costa Rica

- Contribution from Costa Rica* -

1. About the applicable law

1. Law No. 7472, the Law for the Promotion of Competition and Effective Consumer Protection, of December 1994 created the National Commission for the Promotion of Competition (Comisión Nacional para Promover la Competencia - COPROCOM) as the body responsible for applying antitrust regulations in Costa Rica. The same law establishes the fines that COPROCOM may impose on companies engaged in anti-competitive conduct and in other practices that affect the work of the said body (e.g. violation of conditions, delays in submitting information, etc.).
2. In Costa Rican legislation, fines are designed to have the dual purpose of punishing the offender for their infraction as well as deterring other economic agents from engaging in conduct which can harm competition and free access to markets. However, as the OECD concluded in the 2014 Peer Review, the amount of fines, in general, is not sufficient to act as a deterrent. This has led to significant efforts to reform the regulations in order to align them with international best practices, a topic which will be discussed later.
3. The fines imposed by law have been based to date on a salary range of “*up to 680 minimum monthly wages*” for absolute monopolistic practices (including horizontal agreements known as *hard core cartels*) and “*up to 410 minimum monthly wages*” for relative monopolistic practices, which cover vertical restraints and abuse of a dominant position. For recurring perpetrators, or whenever the conduct is considered as particularly severe, the law establishes that a fine may be imposed of up to 10% of the value of the annual sales the perpetrator obtained in the regular course of business, for the fiscal year immediately preceding the final decision.
4. COPROCOM may hold parent companies jointly liable for violations of antitrust regulations by their subsidiaries. It actually investigated a case like this, but was however unable to impose a sanction as it found no evidence relating the parent company to the conduct of its subsidiary, in the sense that it encouraged or financed the sanctioned conduct.
5. Regarding procedure, it should be noted that once the sanction has been imposed, the companies concerned may file an appeal with COPROCOM in order, among other things, to have the fine imposed reviewed, or they can take the appeal directly to court. In accordance with Law No. 7472 COPROCOM’s decisions are enforceable upon issuance, meaning that once the decision is signed, the order to pay the fine imposed must be respected. In the event that the company does not make the payment, it is normal practice to refer collection management to the Attorney General's Office, which is responsible for taking the case to the Courts of Justice to obtain payment of the fine.

* This contribution was prepared by COPROCOM (National Commission for the Promotion of Competition).

6. When filing an appeal with the Courts of Justice to seek a review of the decision which imposed the fine, companies may request as an interim measure that COPROCOM be prevented from collecting the fine until the review has been completed, as in the case referred to, or that it be prevented from making public the size of the fine. These have been standard measures when COPROCOM has imposed sanctions based on a percentage of sales.

2. Methodology for determining fines

7. The valuation criteria for the imposition of the fine established by Law No. 7472 are established in article 29 of Law No. 7472, which indicates: *“In order to impose the fines referred to in the previous article, the Commission to promote competition must take into account as assessment criteria: the seriousness of the infringement, the threat or the damage caused, the indications of intentionality, the participation of the offender in the market, the size of the affected market, the duration of the conduct or concentration, the recidivism of the offender and their ability to pay.”*

8. In this way, the elements that must be assessed to determine the fine to be imposed must incorporate the principles of reasonableness and proportionality when evaluating the participation of the offender in the market, and the threat or damage caused. Just as there is an obligation to assess whether or not the sanction to be imposed is confiscatory for the economic agent by analysing their ability to pay. In this regard, COPROCOM has repeatedly indicated that the payment capacity of a company includes, inter alia, the valuation of the assets that the economic agent owns in order to cover indebtedness and the possible payment of a penalty.

9. COPROCOM recently approved a Guide for Determining Fines which establishes that the correct procedure consists in three stages. A first stage in which criteria are assessed for: the seriousness of the infringement, the threat or damage caused, the intentionality of the conduct, the participation of the offender in the market, the size of the affected market, the duration of the conduct and recidivism, and this for all of the offending companies. Each criterion has the same weighting and is valued according to variables which allow it to be quantified and assigned a level of severity. If in this first stage the evaluation of the criteria exceeds 66% of the maximum that is possible to obtain, it is determined that it is a behaviour that is particularly serious, so it is appropriate to sanction it using the sales of the company. If this is not the case, the penalty imposed is based on minimum wages.

10. In the second stage, the criteria are adjusted for each of the offending companies. The seriousness of the infringement, the threat or damage caused, the size of the market affected and the duration of the conduct are left unchanged, as they are general for all the companies engaged in the conduct, while market share, intentionality and recidivism are adjusted for each offending company. The third stage consists in analysing whether the offender has the ability to pay the resulting fine, and if necessary, adjusting it to the offender's financial situation.

11. This methodology was applied in the most recent sanction imposed by COPROCOM, for relative monopolistic practices in the drug market, which amounted to \$ 20,752,089. However, the procedure is very similar to that used in most cases where sanctions have been determined in the past, with the exception of the first stage which represents the innovation which has been introduced.

12. Given its specificities, there is no higher administrative and judicial jurisprudence in the country for establishing fines with a similar procedure, beyond that issued by the Courts of Justice in their review of the decisions of the competition authority. Nevertheless, the discretion afforded to COPROCOM by the law in the imposition of sanctions was recognised and validated by the country's Constitutional Chamber, which related it to the discretion of a criminal court, indicating: *“The possibility of an accurate legal tailoring of sanctions is directly related to the scope of discretion afforded by the legislator to the jurisdictional bodies responsible for applying the criminal law to specific cases. The broader this scope, the greater the possibility for the judge to properly adjust the sanction to the particularities of the case and the characteristics of the subjects being judged. The fact that there is this scope of discretion for the judge does not represent a violation of constitutional principles, but rather a guarantee that the sanction will be imposed on a case-by-case basis, taking into account the characteristics and circumstances of the particular case (see in this respect ruling number 5191-93 of fifteen hours thirty minutes on the nineteenth of October of nineteen ninety-three (...)).”*¹

3. Judicial review of fines imposed

13. Between its creation in 1994 and December 2018, COPROCOM has sanctioned more than 200 economic agents for anti-competitive conduct. COPROCOM's first sanctions included the implementation of remedial measures, the obligation to cancel anti-competitive agreements, and the payment of fines that ranged between 0 and 100 minimum wages (a limit that was equivalent at that time to 11,120,100 Costa Rican colones or USD 54,749). None of these administrative rulings were challenged in court.

14. Later on, in 1999, a fine was imposed in the case of a hard core cartel of bean retailers², with sanctions including suspension and refraining in future from performing any act in violation of Law No. 7472, as well as the payment of a fine of **637 minimum wages** (which at the time amounted to 76,535,550 Costa Rican colones or USD 273,253). This ruling represented a watershed, not only because of the greater severity of the sanction imposed by the authority, but also for being the **first ruling to be appealed before the Dispute Tribunal, which confirmed COPROCOM's decision**.

15. From that moment on, challenging the decisions of the competition authority became a constant. In 2018, 63% of the sanctions imposed by the competition authorities were challenged in courts. In all the cases in which a relatively high sanction was imposed, the economic agents resorted to judicial proceedings. It should be noted that as of 2002 the fines sought by COPROCOM increased into the region of several million dollars. This was the case for the sanctions applied for: 1) a prohibited concentration in the home appliance market; 2) an agreement between pension operators on the commissions charge; and 3) vertical restrictions in the credit card market. The highest fine by COPROCOM is recent; it was imposed in 2018 for relative monopolistic practices in the wholesale marketing of medicines and was in excess of USD 20 million.

16. However, it is clear from the analysis of the judicial decisions that one of the recurring grievances with regard to form concerns what is perceived to be as a **lack of proper reasoning in the grading of fines**.

¹ Constitutional Chamber, ruling 05692 of 24 April 2013.

² Article 5, COPROCOM Session 19-1999.

17. One example is the court ruling which partially overturned COPROCOM's decision in a case involving several telecommunications companies in a state tender³, as it was indicated in Vote No. 070 -2015 of the Dispute Tribunal, Section Four, San José, at eight o'clock on July 13, 2015, that:

“The reasoning used in decisions issued with regard to punitive law on the occasion of the administrative procedures instituted in COPROCOM, requires a careful and detailed evaluative analysis of all the arguments and evidence, with express indication of the parameters or objective criteria used to impose the sanction in each particular case, which is not satisfied by a simple description of the assessment criteria and a generalised analysis thereof, in light of what is ordered by the regulations under analysis with regard to paragraphs one hundred and thirty-three and one hundred and thirty-six of the General Law of Public Administration, a requirement which is lacking in the decision issued by the Commission for the Promotion of Competition, which is reviewed here”. (Highlighting intentional).

18. In this case, the court partially overturned the fine imposed and returned the case to the administrative office so that COPROCOM could issue the decision once again in accordance with the said court's indications.

19. Another instance of this issue is the judicial ruling of 2009 regarding the cartel of industrialists in the rice sector⁴. COPROCOM's decision was overturned⁵, on the grounds that it was considered that there was a lack of rationale and individual reasoning behind the fines imposed on each of the companies sanctioned, as well as a lack of objective criteria and parameters used by the Administration to impose the said amounts on the parties investigated for the same conduct. Therefore, the court determined that the parties were unable to defend themselves, as they were prevented from knowing the reasons behind the quantification of the conduct, information to which the sanctioned part is legally entitled. Accordingly, in decision 000250-F-S1-2011 of the First Chamber of the Supreme Court of Justice at nine hours and fifty minutes on March 10 2011 it was considered that:

“On the other hand, the fact that the sanctioned monopolistic practice comes from a concerted approach of wills, in which, it could be said, everyone participated equally, does not support the argument, as claimed, that the joint analysis of the illegal conduct eliminates the need for the case-by-case assessment of the fine imposed, since within the parameters to be weighted for each of them, is the ability to pay, which is not necessarily uniform, so it becomes essential, as a requirement derived from the duty of justification that is part of due process, that the imposition of the fine is justified individually (...). Then, a timely analysis is essential that allows the sanctioned agent to understand and review the parameters within which it was imposed.

20. COPROCOM has analysed the courts' rulings and has endeavoured to adapt its decisions to the provisions of the aforementioned bodies.

³ COPROCOM Vote 13-2012.

⁴ Dispute Tribunal decision 100-2009-SVII, decision in Second Instance 31-2010-VIII, and Cassation Court decision R250-F-SI-2011.

⁵ Article 8, COPROCOM Session 22-200.

4. Reforms introduced in the new law

21. On August 29, the Law for the Strengthening of the Competition Authorities of Costa Rica was approved, legislation which will introduce a series of changes that will enable a better and more efficient application of competition regulations in the country.

22. This regulation, which will enter into law as of its publication at the end of September, introduces, in terms of what is relevant to this contribution:

- Deterrent penalties based on a percentage of company sales.
- A leniency programme designed to help detect cartels.
- Voluntary Compliance Programs. If provided for by COPROCOM, these may be taken into account when analysing the intentionality of the conduct, if the offender demonstrates that it has adopted, prior to the start of the investigation a compliance programme that meets the requirements established by the regulation, and that it has ceased the said conduct.
- Mechanisms for the early termination of proceedings before the admission of guilt of the investigated company, which include the reduction of the penalty.

23. The weighting criteria used for determining fines are maintained in the new law; however, the possibility of not using any of the criteria has been added, although the authority must provide justification for doing so. In addition, the law establishes the duty for the competition authority to issue guidelines for promoting transparency, predictability and legal certainty on various issues, including sanctions.

24. In this way, one of COPROCOM's tasks, which must be addressed promptly, is to review the Guide for the Determination of Fines so that it incorporates the changes introduced by the law, best international practices, as well as the parameters that court rulings have made clear are to be taken into account when determining fines so as to avoid violating the principles of due process or the rights to defence of economic agents.