

23 November 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****SUMMARY RECORD****LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM****-- Note by the Secretariat --****15th Meeting, 4-5 April 2017, Nicaragua**

This document prepared by the OECD Secretariat is a summary record of the fifteenth meeting of the OECD-IDB Latin American and Caribbean Competition Forum held on 4-5 April 2017 in Nicaragua.

More documents related to the Forum can be found at: <http://www.oecd.org/competition/latinamerica/>.

JT03423525

Latin American and Caribbean Competition Forum

Managua, Nicaragua, 4 - 5 April 2017

Introduction

1. The Latin American and Caribbean Competition Forum (LACCF) is sponsored jointly by the OECD and the Inter-American Development Bank (IDB). The LACCF is used to identify, and disseminate best practices in competition law and policy while promoting a sharing of experiences and networking among the region's competition policymakers and law enforcers. Heads of Agencies and senior officials of Latin American competition institutions participate in the Forum. Competition experts and international organisations are invited to participate to provide additional perspectives and experiences.
2. The fifteenth meeting of the Latin American and Caribbean Competition Forum took place in Managua, Nicaragua on 4 -5 April 2017 hosted by ProCompetencia. The morning of 4 April was devoted to the **Nicaragua Competition Day conference**. The LACCF was followed by the Ibero-American Forum on Competition and the third seminar of the Regional Competition Center of Latin America on 6 April 2016.
3. The agenda of the LACCF included a special luncheon presentation by General Álvaro Baltodano, Presidential Delegate for Investment Promotion and Foreign Trade, President of PRONicaragua.
4. This note will focus on the Latin American and Caribbean Competition Forum (LACCF) and will summarise: i) the discussions at the meeting; and ii) the results of participants' evaluations and suggestions for future Forum topics.

1. Summary of the LACCF meeting

5. The fifteen annual meeting of the *Latin American and Caribbean Competition Forum* (LACCF) took place on the afternoon of 4 April and on 5 April. The agenda included three sessions: i) *Cartels: Estimation of Harm in Public Enforcement Actions*; ii) *Merger Control in Latin America and the Caribbean - Recent Developments and Trends*; and iii) *Addressing Competition Challenges in Financial Markets*.
6. The LACCF was attended by over 60 people representing 14 country delegations, as well as representatives from CARICOM, the OECD, IDB, and the World Bank¹. Once more, the IDB played a key role by providing both financial, notably by financing the logistical arrangements but also intellectual support to the event. Most of the LACCF participants were present in the morning at the Ibero-American Competition Forum.

¹ The fourteen countries were: Brazil, Bolivia, Chile, Costa Rica, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Panama, Portugal, Spain, Trinidad and Tobago, United States. Argentina and Peru was unable to join the LACCF due to last minute logistical issues but did provide contributions.

7. The **Latin American and Caribbean Competition Forum** was opened by Enrique Bolaños, President of INCAE Business School who discussed the relationship between competitiveness and competition as well as the region's strengths and impediments to improving its competitiveness. His discussion was based on the results of the World Economic Forum's (WEF) Executive Opinion Survey which is the basis of the Global Competitiveness Report (IGC). Since 1999, CLACDS (Centro Latinoamericano para la Competitividad y el Desarrollo Sostenible / INCAE has been a regional partner of the World Economic Forum. , On strengths, Costa Rica scored close to the highest global standard on health and primary education, while Panama did so on the macro-economic environment as well as on financial market development and Barbados on technological readiness. Corruption, bureaucracy, taxes, and regulatory barriers were most cited in the survey as undermining competitiveness. A determining factor of competitiveness is the rivalry between firms or competition in the domestic market (Porter, 1990). The fundamental benefit of competition is productivity growth which in turn is key to economic development, as well as the main determinant of consumer welfare. Dr. Bolaños concluded with five key recommendations: i) apply competition law; ii) promote effective implementation of free trade agreements; iii) prioritize the full integration of Central American markets, especially in those sectors with little domestic competition; iv) eliminate barriers to entry of new competitors to the market; v) ensure the independence of administrative and judicial entities that promote competition.

8. Carlos N. Melo Representative of the Inter-American Development Bank in Nicaragua noted the efforts made by Nicaragua, and specifically ProCompetencia to develop competition in Nicaragua while highlighting the important role that competition can play across Latin American and Caribbean to stimulate current low levels of productivity. Luis Humberto Guzmán, President, Procompetencia, Nicaragua cited the progress made to date by Nicaragua in implementing a competition framework while underlining the challenges ahead. Frédéric Jenny Chairman, OECD Competition Committee, then opened the Forum. He observed the changing agenda of the LACCF over the years as an indication of the growing sophistication and experience of the national competition authorities.

1.1. Session I - Cartels: Estimation of Harm in Public Enforcement Actions

9. This session discussed different techniques for the estimation of cartel harm, as well as the potential use that competition authorities may make of this quantum in their fine-setting practice. The session benefited from a panel comprised of: Mr. José María Marín-Quemada Chairman, CNMC, Spain, Mr. Eduardo Saavedra P., Judge, Competition Tribunal, Chile, and Mr. Walter Westphal Oberschmidt, Director for Special Procedures, COFECE, Mexico. Ms. Melanie Krebs-Pilotti International Counsel, Department of Justice, United States was unable to join the panel due to logistical issues.

10. The OECD Secretariat presentation by Sean Ennis provided the key findings of the Secretariat's background paper [DAF/COMP/LACF(2017)4]. There are diverging views across jurisdictions, including within the Latin America and Caribbean region, on the relationship between cartel harm and fine calculation. Many competition authorities do not consider the harm from cartels or gain to cartelists in the details of specific cases. Furthermore, different views exist on the objectives of financial sanctions: deterrence, punishment, or disgorgement. How fines are calculated will differ depending upon the objective(s) of the fine. Generally, if deterrence is a primary objective of fines, then the correlation between actual harm and the fine level becomes weaker.

11. In recent years, corporate fine amounts for cartels have sometimes reached levels in which they make a substantial dent in profits for corporations, thus helping to promote deterrence, but also raising the possibility that in some limited cases, fines may be larger than the harm engendered by the cartel. On the one hand, when setting fine amounts, there may be reason to consider whether simple rules that calculate fines based on a percentage of commerce are appropriate across all cases, particularly as some prosecuted conduct may have very small or minor effects, while other prosecuted conduct may have extremely large impacts. On the other hand, estimating the magnitude of harm from a cartel (or cartelist benefit) based on estimations of the price that would have existed absent the cartel (the “but-for” price) can be difficult. In general, competition authorities, when required by law or courts, may wish to consider increasing efforts not only to assure themselves that harm is potentially substantial when fines are substantial, but also to assure courts that fine levels are appropriate.

12. The relationship between fine calculation and cartel harm is complex and jurisdictions often face conflicting arguments on whether damages should be considered, calculated and imposed as part of the sanction. In general, harm alone does not drive the level of sanctions but is often considered as an additional factor. The situation in Brazil in which the Tribunal is divided on the use of sanctions, encapsulates many of the arguments that either support the inclusion of damages, i.e. deterrent and punishment effects, proportionality relative to the advantages obtained by the cartel, leeway to increase sanction amounts; or dissuade from using damages, for example, difficulty to measure accurately the harm in cartel cases, high costs to pursue the quantification methods, and methodological questions. Mr. José María Marín-Quemada Chairman, CNMC, Spain, noted that Spain, like Brazil, up until 2013 faced challenges as the National Court and the CNMC held divergent views on the interpretation of fines. The decision by the Supreme Court in 2015, clarified definitions paving the way for new fining guidelines resulting in a significant reduction in legal uncertainty. The CNMC considers a wide range of factors, beyond harm, such as the effects of the infringement on the rights and interests of consumers, as well as other undertakings in the market. Portugal’s competition act includes a clear fining policy which includes elements that can be linked to determining harm. Harm is not a necessary factor when determining the fine but is taken into account in particular when there is direct evidence that allows the AdC to verify the harm.

1.2. Session II - Merger Control in Latin America and the Caribbean—Recent Developments and Trends

13. This session merger control focussing the discussions on three key areas:

1. Recent developments in the Latin American and Caribbean region on merger control;
2. Factors to take into account when considering structural and/or behavioural remedies;
3. Agency decision making in prohibitions and conditional clearances.

14. The session was chaired by Mr. Luis Humberto Guzmán (President, Procompetencia, Nicaragua) and Mr. Mario A. Umaña (Lead Trade and Competition Specialist Integration and Trade Sector, IDB). The panel consisted of Ms. Amanda Athayde Head of the Leniency Unit and Chief of Staff, CADE, Brazil; Mr. Russell Damtoft Associate Director Federal Trade Commission, United States; Mr. Manuel Emilio Ruiz Gutiérrez Council Member, SUTEL, Costa Rica; and,

Mr. Felipe Serrano Pinilla, Former Head Advisor and Deputy Superintendent, SIC, Colombia.

15. The session opened with a presentation by Mr. Serrano Pinilla providing an overview of merger control which, with few exceptions, is now common across the region. Most countries have adopted the mandatory pre-merger notification system (Barbados, Brazil, Chile, Colombia Costa Rica, Ecuador, Honduras, Mexico, and Uruguay). The Guatemalan and Argentinean Congress are currently reviewing competition law bills that include a pre-merger notification system. Brazil also has guidelines on gun-jumping which are applicable while CADE reviews a proposed merger ex-ante. Paraguay has adopted mandatory post-merger notification. Panama and Venezuela use voluntary notification regimes.

16. Jurisdictions use different definitions to define a transaction as a merger; however, acquisition of majority ownership of a company or its assets is generally accepted. Joint ventures, other forms of association, and the acquisition of a limited number of the target firm's assets that do not represent an operational business, are not consistently characterised as merger transactions in all jurisdictions. Brazil's competition law expressly regards joint ventures, association agreements or consortiums as merger transactions subject to review, while under Colombia's competition law not all joint ventures constitute a merger. Jurisdictions differ on whether they consider the acquisition of minority shareholdings as subject for merger review or not.

17. In Latin America, most merger control regimes (Brazil, Chile, Colombia and Mexico) use objective criteria (assets, income) to determine notification requirements rather than subjective criteria (market share). In the last ten years, LAC authorities have seen a significant increase in the number of transborder mergers acting as catalyst for increased co-operation between agencies, for example in the signing of formal agreements. Mr. Serrano cited the Nestlé-Pfizer case as an example of successful coordination, amongst Chile, Colombia and Mexico.

18. Brazil has one of the oldest merger review systems in Latin America. Merger control started in 1994 based on an ex post control system but in 2012, with the adoption of the new law, the Brazil moved to an ex ante control system. According to Ms. Amanda Athayde, in 2016, CADE took 390 decisions most through the fast track procedure. To promote transparency, CADE produces guidelines which are continually updated and revised. Guidelines on gun-jumping – eleven cases to date - were revised in 2015 and those on horizontal mergers in 2016. New guidelines on merger remedies are expected in 2017.

19. Contrary to Brazil, Chile adopted a merger control system in 2016. CARICOM does not yet have a regional merger control system but convergence amongst the member states is growing towards the consideration and eventual adoption of one.

20. As demonstrated by Brazil, merger control systems are continually being revised and updated. Prior to 2012, Costa Rica's system was based on ex post review. Changes to the legislation now reflect an emphasis on ex ante, but with the possibility for post-merger review. Mr. Russ Damtoft discussed the findings of a USA FTC study that reviewed merger decisions to determine what worked and what didn't. Findings include, for example, that when a remedy involved the sale of an ongoing stand-alone business unit, the remedy was successful 100% of the time. When the divestitures involved less than the whole unit, for example a set of assets, the remedy succeeded around 70% of the time, in terms of restoring or maintaining competition in the market. The FTC has also issued a new set of international guidelines focussing on cross border co-operation. In

particular, Mr. Damtoft cited issues around exchange of information and confidentiality. He stressed the importance of developing trust relationships between not only heads of authority but amongst case handlers as well. It is important to note the differences between common law and civil law traditions as different legal systems may interpret co-operation agreements differently.

21. Portugal recently revised its notification thresholds to increase legal certainty, and improve efficiencies. Merging parties in Portugal also have the opportunity to present remedies to address or eliminate competition concerns.

22. Mr. Manuel Emilio Ruiz Gutiérrez Council Member, SUTEL, explained that in 2015, SUTEL implemented merger guidelines in the Telecommunications Sector, which establish the methodology for analysing mergers. The methodology compares what happens if the transaction goes through with what happens if it does not. First, SUTEL verifies whether the merger should be notified and then it defines the nature of the concentration, relevant markets and structure, possible anticompetitive effects (unilateral or coordinated), efficiencies, and whether the merger results in fewer competitors. Platform convergence, network externalities, essential facilities, interconnection, access fees, etc. are all taken into account when analysing mergers in the telecommunications sector. If the transaction generates anticompetitive effects, SUTEL may order structural or behavioural remedies, including the sale of assets, rights, or shares; partition of a company; the limitation or restriction to provide certain services, among others.

1.3. Session III - Addressing Competition Challenges in Financial Markets

23. This session was comprised of into three parts: 1) co-operation between competition authorities and Central Banks and other financial regulators; 2) market studies in financial markets; and, 3) a special presentation on class actions in financial markets. The session was chaired by Ms. Marcela Gómez Masís, Chair of the Costa Rican competition authority, Coprocom. The panel consisted of Dr. Kusha Haraksingh Chairman, CARICOM, Professor Márcio Issao Nakane, University of São Paulo, Mr. Manuel Sebastião, Member of the Board of Directors, Redes Energéticas Nacionais (REN) and Professor Spencer Weber Waller, Associate Dean and Professor Loyola University Chicago School of Law.

24. The session opened with a presentation by Mr. Manuel Sebastião on the relationship between competition authorities and central banks and financial regulators. He remarked that there is a potential trade-off between financial stability and competition in banking, but that this does not preclude financial stability and competition from being complementary, rather than substitute public goods. El Salvador then described their success in cooperating with the regulator and central bank on a collusion investigation. Professor Nakane referred to his experience in Brazil where cooperation was lacking. He suggested this had created uncertainty and led to important factors of an investigation being missed. However, on a more positive note, he also identified that the central bank and the competition authority had signed a cooperation agreement to assemble a database that was used in a market study, and which they continued to update. This had made it possible to undertake an ex-post evolution of the study. CADE and the Central Bank of Brazil then each highlighted their successful cooperation in recent cartel cases. Dr. Haraksingh illustrated the challenge by recounting that in the wake of the great financial crisis a governor of the central bank of one of the countries in CARICOM made a public statement that now was the time for competition to take a back seat. In the case of CARICOM he noted that there were additional challenges in a regional authority

cooperating with financial regulators since they were national agencies. He noted that under CARICOM's treaty, member countries are able to withdraw sectors from competition law where there are public interest considerations, however what would constitute a public interest was not clear. Brazil's SEAE finished the session by explaining that their institutional status within the Brazilian Treasury gave them a role in advocating for pro-competitive adjustments to regulations proposed by the central bank. However, they identified that this was very difficult since competition was not one of the big issues for the ministry of finance and so, in the case of high interest loans, the minister of finance rejected their advice.

25. The second session focused on market studies in financial markets. These have become increasingly popular and Peru, Chile and Argentina have each undertaken significant studies of credit and debit cards, which they describe in their written contributions. Indeed Mexico in its written contribution explained that the market study it conducted led it to recommend the implementation of mechanisms for cooperation among the financial regulators, COFECE and the central bank to help COFECE to monitor competition in financial markets and to strengthen the competition analysis conducted by the regulators. CARICOM reported on studies conducted in Barbados and Jamaica and noted that in Barbados no action had been taken following the recommendations made by the FTC. In contrast, in Jamaica the central bank made a number of changes and indeed was now collaborating with the FTC on the creation of the terms of reference for a joint market study that will assess competition in banking.

26. In the third and final session, Professor Waller looked at class actions in financial markets. He explained including these within a legal system can help complement and strengthen a competition agency's efforts to deter anticompetitive behaviour. This is because the economic case for a small claimant going to court on its own to allege anticompetitive behaviour was often extremely weak, regardless of the validity of the complaint. In contrast, the collective case for doing so could be very strong and where actions were certified as class actions, most cases settle since the potential liability is very large. He emphasised that the key to making class actions effective was to make them opt-out, as they are in the US, rather than opt-in as they were in the UK where they were much less effective. Nicaragua wrapped up the session by noting that its competition agency, Procompetencia, investigated a case triggered by a complaint from a consumers association. While not a class action this did lead to a finding of collusion, though the resolution of the case was later revoked by the Supreme Court of Justice, which transferred the case to the financial regulator (thereby illustrating the continuing potential for tensions between financial regulators and competition agencies).

1.4. Final session

27. In the closing session, Argentina proposed to host the next LACCF, with the exact date to be communicated at a later date². This was seconded by the Chair and by the IDB. Honduras/Argentina offered to host the LACCF in 2018 and possibly the Honduras/Argentina.

² 18 – 20 September 2018.

28. The roundtable discussion on future topics revealed a strong desire to discuss mergers, in particular cross-border mergers as well as estimation of harm from cartels and competition in the financial sector. Other topics proposed included a continuation of the discussions on bid-rigging in public procurement

29. Note that a conference call to discuss the 2017 LACCF will take place in July 2016 and as in previous years, a meeting of LACCF delegates will be organised in the margins during the next Global Forum on Competition (1-2 December 2016) at OECD headquarters in Paris. Further details will be provided in due course.

2. Results of participants' evaluations and suggestions for future work

30. The participants considered the Forum to have been successful, judging by their feedback in the concluding session. Rather than the habitual evaluation form, a letter will be sent to delegates requesting their thoughts and ideas for the future to the LACCF, in particular to ensure its ongoing relevancy to the authorities of the region.

31. All the meeting documentation, including the calls for contributions, background papers and country contributions, was made available in English and Spanish prior to the meeting.³

3. Additional meetings held alongside the Latin American and Caribbean Competition Forum

32. The *Ibero-American Forum on Competition* was held before the LACCF in the morning of the 6 April. A principal aim of this Forum is further co-operation between the Heads of Latin American competition authorities, as well as the Heads of the competition agencies in Spain and Portugal. This year, the event included two sessions. A Roundtable on International Co-operation was moderated by Mr. Oscar García, Administrador General, Autoridad de Protección al Consumidor y Defensa de la Competencia de Panamá. The speakers in this session included, Mr. José María Marín-Quemada, President, Comisión Nacional de los Mercados y la Competencia (CNMC), Spain; Ms. Alejandra Palacios, President, Federal Economic Competition Commission (COFECE), Mexico. Mr. Ivo Sergio Gagliuffi Piercechi, President, National Institute for the Defence of Free Competition and the Protection of Intellectual Property (INDECOPI), Peru and Mr. Esteban Greco, President, Comisión Nacional de Defensa de la Competencia, Argentina were invited to present but unable to attend. The second Roundtable entitled, "Enhancing cartel detection: tools and strategies" was moderated by Mr. Luis Humberto Guzmán, President, Instituto Nacional de Promoción de la Competencia (PROCOMPETENCIA), Nicaragua. Three panellists provided presentations to the delegates: Ms. Margarida Matos Rosa, President, Portuguese Competition Authority (AdC); Mr. Diogo Thomson, Deputy Superintendent, Administrative Council for Economic Defence (CADE), Brazil; and Mr. Alejandro Domic, Lawyer, Antitrust Division, Fiscalía Nacional Económica (FNE), Chile.

³ Full documentation is available in English and Spanish on the website of the Latin American and Caribbean Competition Forum at: www.oecd.org/competition/latinamerica, as well as on OLIS.

33. The discussions engaged authorities present in a peer-exchanging exercise, with agencies sharing case studies and data in a lively discussion. While the first session focused on the growing urgency to deepen co-operation in light of increasing integration, the second session shared practical knowledge on methodologies and techniques to enhance cartel detection.

34. The sixth *Seminar for the Regional Competition Centre for Latin America* took place during the afternoon of 6 April and focussed on the objectives and future of the RCC behind closed doors.

Annex I.

EVENT SUMMARY

EVENT TITLE	LATIN AMERICAN COMPETITION FORUM
PLACE	Managua Nicaragua
DATES (DAY, MONTH, YEAR)	4 - 5 April 2017
OECD/IDB STAFF AT EVENT	Antonio Gomes (OECD), Lynn Robertson (OECD), Sean Ennis (OECD), Angélique Servin (OECD); Frédéric Jenny (Chair OECD Competition Committee; Mario A Umaña (IDB)
EXPERTS (NAMES AND COUNTRY)	Ms. Melanie Krebs-Pilotti, International Counsel, Department of Justice, United States (unable to attend); Mr. José Maria Marín-Quemada, Chairman, CNMC, Spain; Mr. Eduardo Saavedra P. Judge, Competition Tribunal, Chile; Mr. Walter Westphal Oberschmidt, Director for Special Procedures, COFECE, Mexico; Ms. Amanda Athayde, Head of the Leniency Unit and Chief of Staff at CADE's General Superintendence, Brazil; Mr. Russell Damtoft, Associate Director, Federal Trade Commission, United States; Mr. Manuel Emilio Ruiz Gutiérrez, Council Member, SUTEL, Costa Rica; Mr. Kusha Haraksingh Chairman, CARICOM; Professor Márcio Issao Nakane Professor, Economics Department, University of São Paolo; Mr. Manuel Sebastião Member of the Board of Directors, Redes Energéticas Nacionais (REN); Professor Spencer Weber Waller Associate Dean and Professor Loyola University Chicago School of Law
TOTAL NUMBER OF PARTICIPANTS	Approximately 60
PARTICIPANT COUNTRIES (NUMBER FROM EACH)	Brazil (4), Bolivia (1), Chile (2), Costa Rica (3) , Dominican Republic (2), El Salvador (1), Honduras (2), Mexico (4), Nicaragua (12), Panama (2), Portugal (2), Spain (3), Trinidad and Tobago (1), United States (1)