N° 3 June 2021

Newsletter

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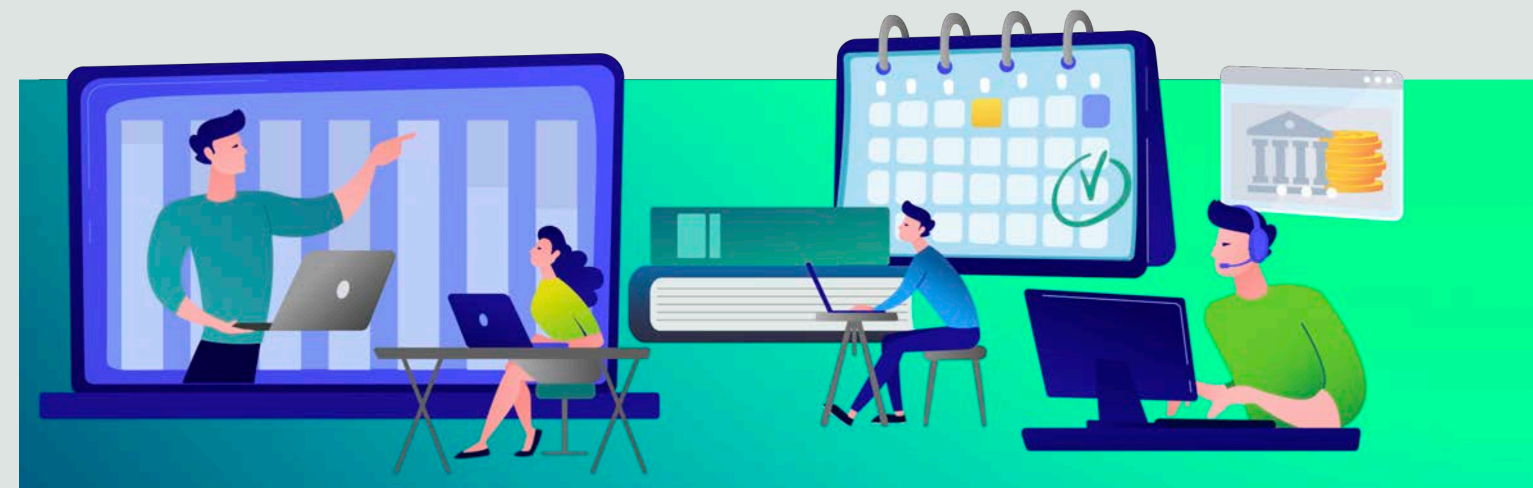

Lima / Paris, June 2021

Dear readers:

After a great first year for the Regional Center for Competition (RCC) in Latin America, we began its second year with high expectations!

In 2020, the "RCC-Lima" has organized four workshops on the topics of Merger Control, Advocacy, Health Sector, Cartel Detection, and Market Definition. They have put together more than 300 competition officials from the region to build capacity, exchange experiences, and develop mutual trust – which is key to promote regional cooperation.

As for 2021, the first workshops were devoted to an Introduction to Competition Enforcement for Junior Staff and Competition in the Financial Sector. They have gathered more than 150 case handlers from 26 jurisdictions in Latin America and the Caribbean, with active participation from attendees and case exercises in order to keep a hands-on approach since this is one of the objectives of the Regional Center.

This Newsletter is divided in the same way as the past editions: Section 1 presents a summary of the last RCC workshops and provides an update of the OECD projects in the region, Section 2 shares an exclusive interview with a head of agency – this time being Guillermo Rojas Guzmán, president of the Competition Authority in Costa Rica (COPROCOM) – and Section 3 offers contributions of experts from the region, often addressing recent cases or advocacy initiatives to promote further exchanges across Latin America and the Caribbean.

Please feel free to contact us for any suggestions or assistance concerning the RCC activities.

Hope you enjoy your reading!*

With our very best regards,

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* This Newsletter benefited from the careful review and assistance from Arturo Chumbe (INDECOPI) and Thaiane Abreu (OECD).

WORKSHOP ON INTRODUCTION TO COMPETITION ENFORCEMENT FOR JUNIOR STAFF

8 - 12 March 2021

The Workshop focused on practical tips of competition enforcement for junior case handlers of competition authorities. In total, 85 case handlers from 18 jurisdictions* attended the training, which was divided into 5 sessions: Session 1 on Cartel Enforcement, Session 2 on Merger Enforcement, Session 3 on Abuse of Dominance Enforcement, Session 4 on Procedural Fairness, and Session 5 of Case Exercises. Sessions 1 to 4 had the same format: one introductory presentation of the enforcement topic followed by practical tips with a couple of senior enforcers or former enforcers.

The Sessions on enforcement topics (Sessions 1-3) ended with a list of 5 top enforcement tips. Participants were then asked to vote on which of the enforcement tips were most useful for them. These were the winning topics: "have a plan including a timeline" (Session 1 on Cartels), "understand the business of the transaction and related markets (Session 2 on Mergers), and "focus first in assessing market power" tied with "match a consistent theory of harm with a comprehensive narrative" (Session 3 on Abuse).

In a nutshell, the workshop provided an introduction to competition enforcement for junior case handlers working in competition authorities. It included practical tips on the everyday of case handlers and it covered anti-cartel enforcement, merger control and abuse of dominance. Practical exercises illustrated hands-on issues and enabled participants to meet and discuss common challenges.

The workshop targeted the junior staff of competition authorities from Latin America and the Caribbean (meaning staff with less than 3 years working in the competition authority).

* Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Curazao, Dominican Republic, Ecuador, El Salvador, Mexico, Montserrat, Nicaragua, Panama, Paraguay, Peru, Trinidad y Tobago and Uruguay.

WORKSHOP ON COMPETITION IN THE FINANCIAL SECTOR

5 - 7 May 2021

The Workshop gathered 73 participants from 17 jurisdictions*. The workshop covered competition issues in the Financial Sector, which has specific features including extensive regulation and concerns about financial stability and systemic effects.

These specificities were highlighted during the first day of the workshop by both Jesús Espinoza (INDECOPI) and Patricia Bascunana-Ambros (OECD). Amongst other reasons, banks are special because of their vulnerability to instability and because they hold a significant share of wealth in bank deposits.There is also a contagion risk since the failure of one bank may lead to the failure of other financial institutions, which explains why central banks have sometimes a final work over merger

* Barbados, Bolivia, Brazil, Chile, Costa Rica, Curazao, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Suriname and Trinidad Tobago.

control procedures. Different institutional setup models were discussed including presentations by Costa Rica and Trinidad and Tobago that have different models – whereas the first have a system of co-existence of analysis by the competition authority and financial regulator in merger review, the second does not apply its competition provisions to the financial sector.

The topic of FinTechs was also addressed during the workshop including the impact of digital disruption and how the finance industry is facing a deep restructuring. The current pandemic context has accelerated this process. In addition to the OECD work developed by Ania Thiemann, both the Portuguese Competition Authority and the European DG-Competition presented their recent initiatives in this field.

Case experiences from the region were shared during the second day of the event. After a panorama provided by the OECD, El Salvador (Imperia-Scotiabank transaction), US (Visa-Plaid transaction), Brazil (foreign currency exchange cartel), Mexico (ongoing inquiry in the payment sector) and Chile (mortgage-related insurance abuse investigation) presented recent cases in all enforcement fronts, namely merger review, fight against cartels and abuse of dominance cases.

On the last day of the workshop, the discussions focused on advocacy issues with heads of competition authorities from Mexico, Brazil, Portugal, and Spain. Also, a practical exercise with the participants closed the workshop and enabled further interactions amongst the attendees.

FUTURE WORKSHOPS IN 2021

The next workshops will focus on the following topics: Merger Control in Times of Crisis and Fighting Bid-Rigging. The dates and format will consider the current Covid-19 crisis and its travel restrictions around the world.

The first workshop on “Merger Control in Times of Crisis” is scheduled for 15-17 September, and it will address the main enforcement challenges to competition authorities including remedies and failing firm defence. It will target senior case handlers (i.e. heads and deputy heads of merger units).

The second workshop on “Fighting Bid-Rigging” is planned for 17-19 November, and it will promote an update and exchanges of experience on recent developments in the region including enforcement and advocacy issues. It will target less mature competition authorities from the region.

COUNTRY PROJECTS ON PUBLIC PROCUREMENT

The OECD is committed to supporting governments to design public procurement procedures that promote competition and reduce the risk of rigging bids. This is why the OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the OECD Recommendations and Guidelines. Against this background, Argentina, Colombia, Brazil and Mexico have sought the OECD's support in the past years to improve their procurement practices and step up their fight against bid rigging. Peru is currently working with the OECD on similar projects.

In Brazil, OECD recently published a report assessing the Brazilian public procurement framework in light of the OECD Recommendation and Guidelines for Fighting Bid Rigging in Public Procurement. During the process, the OECD assessed the main rules governing public procurement in Brazil at the federal level as well as procurement practices of major federal procurers. In May 2021, OECD completed its recommendations to improve competition in public procurement, in addition to capacity building activities in preventing and detecting bid rigging. The main recommendations were the improvement of the competition advocacy in Brazil, strengthen the public procurement work force by correcting systemic inefficient practices and improving employment conditions. A webpage containing the report in Portuguese and in English can be accessed here: www.oecd.org/daf/competition/fighting-bid-rigging-in-brazil-a-review-of-federal-public-procurement.htm

In Peru, the Social Health Insurance agency of Peru (EsSalud) has invited the OECD to assess the public procurement framework applicable to EsSalud's purchases in light of the OECD Recommendation and Guidelines for Fighting Bid Rigging in Public Procurement. The OECD sent the draft report to EsSalud and the Peruvian Competition Authority (Indecopi). The team also prepared a draft of the co-operation agreement between EsSalud and Indecopi on law enforcement and advocacy.

COUNTRY PROJECTS ON COMPETITION ASSESSMENT

Brazil has requested the support of the OECD to conduct a competition assessment of the laws and regulations in the transportation sector including ports and airlines sub-sectors. The project started in January 2021 and is expected to last for 18 months.

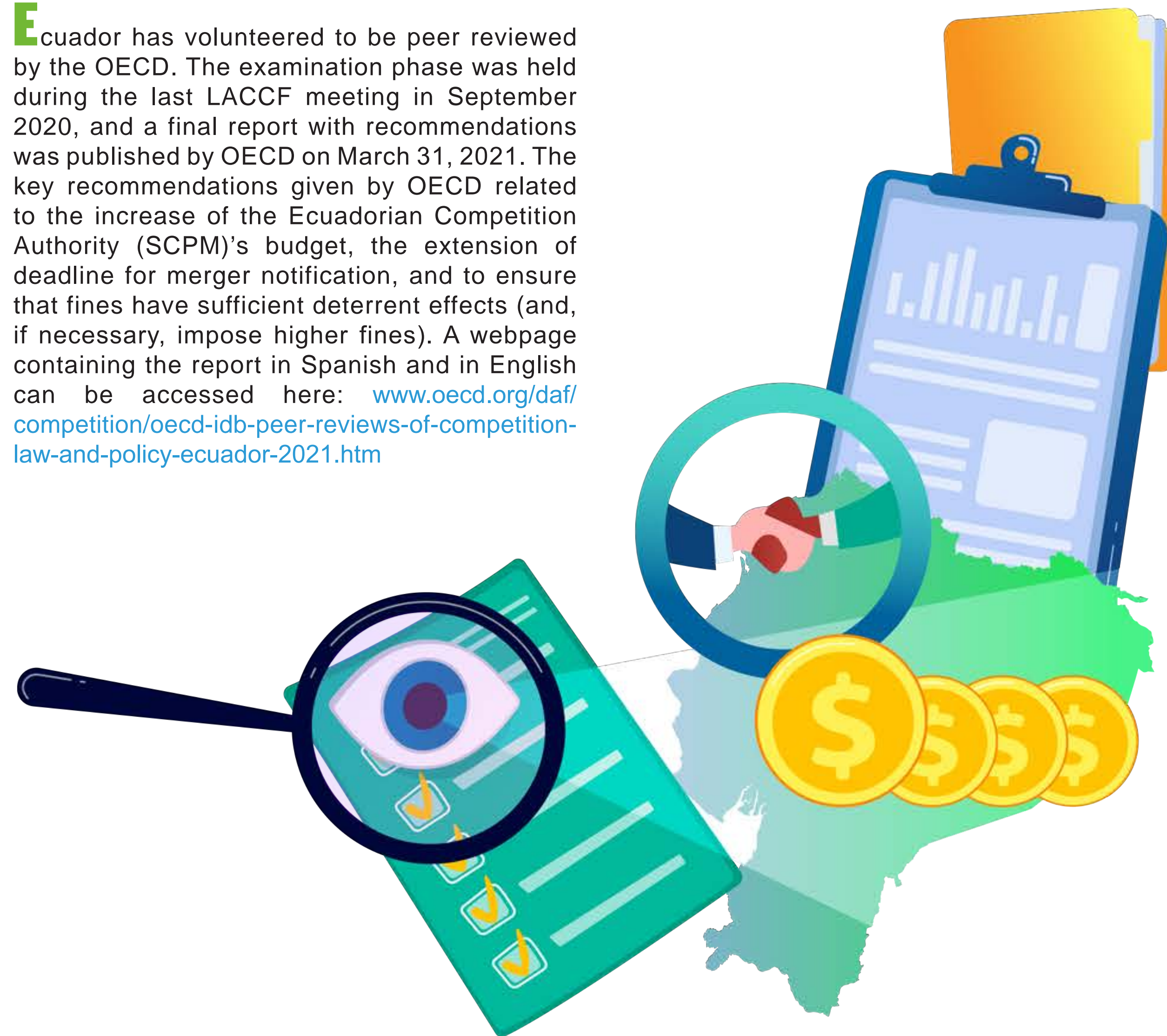
The team is composed of competition experts, economists and lawyers from the OECD and the Brazilian Competition Authority (CADE).

In April 2021, OECD and CADE officially launched the Project by presenting it to the public. It will review the existing legislation and regulation in the selected sectors, and propose pro-competitive reforms, in line with the OECD Recommendation on Competition Assessment (2009).

Phase 1 of this Project was concluded when the team mapped the relevant legal texts and established the priority areas in both sectors. Currently, the team is identifying potential regulatory barriers to competition in those legal texts. Similar exercises have been done in Mexico, Portugal, Iceland and Greece, amongst other countries. For further informatio: www.oecd.org/daf/competition/oecdrecommendationoncompetitionassessment.htm

COUNTRY PEER REVIEWS

Ecuador has volunteered to be peer reviewed by the OECD. The examination phase was held during the last LACCF meeting in September 2020, and a final report with recommendations was published by OECD on March 31, 2021. The key recommendations given by OECD related to the increase of the Ecuadorian Competition Authority (SCPM)'s budget, the extension of deadline for merger notification, and to ensure that fines have sufficient deterrent effects (and, if necessary, impose higher fines). A webpage containing the report in Spanish and in English can be accessed here: www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-law-and-policy-ecuador-2021.htm



LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM (LACCF)

The 19h OECD-IDB Latin American and Caribbean Competition Forum (LACCF) will take place virtually ove r two days on 20-22 September 2021. The 2021 LACCF will be held by the Brazilian Competition Authority (CADE) and will focus on compliance programmes in antitrust enforcement, efficiency analysis in vertical restraints and on competition and payment card interchange fees. For further information: **https://www.oecd.org/competition/latinamerica**

GUILLERMO ROJAS GUZMÁN

President of COPROCOM in Costa Rica since December 2020. He is a lawyer with a wide experience in both the private and public sectors in Costa Rica. He holds a law degree from the Universidad Escuela Libre de Derecho in Costa Rica, and a LLM from Universidad Francisco de Vitoria de Madrid in Spain. He has agreed to virtually meet with Paulo Burnier da Silveira (OECD) to exchange his views about COPROCOM's new institutional setup, as well as challenges and perspectives for the future. The interview took place on 27 April 2021.

Paulo: Thank you very much for accepting our invitation for this interview and congratulations on your recent appointment. The first question we wanted to ask you concerns the recent reform in the competition legal framework that took place in Costa Rica during 2019, when Law nº 7472 (1994) was changed by Law nº 9736 (2019). Could you explain to us the main changes?

Guillermo: MucThank you very much for accepting our invitation for this interview and congratulations on your recent appointment. The first question we wanted to ask you concerns the recent reform in the competition legal framework that took place in Costa Rica during 2019, when Law nº 7472 (1994) was changed by Law nº 9736 (2019). Could you explain to us the main changes?

Guillermo: Thank you so much for this interview. As you said, in 2019, our congress adopted the Law nº 9736, the Competition Reform Act, which reformed the entire competition regime in Costa Rica.

The Law implemented competition committees, recommendations to further align Costa Rica with OECD standards in the competition field. This was the main idea. The main strengths of Costa Rica's competition current regime result from the analytical accuracy of its competition law, which provides a solid foundation for applying competition policy in line with the best international practices. The main criterium for spread over competition law, and other frequently competition concerns, is efficiency-based analysis. This is a very important amendment to our system.

About horizontal restrictive arrangements, they are restricted per se., and agreements to undertake them are legally void. In respect to unilateral conducts and vertical agreements, the competition law stipulates that such conducts are illegal, only if they have a negative effect on competition, if the responsible parties have substantial market power in the relevant market and if those parties fail to provide an efficiency defense. The law clarifies the types of conduct that infringe competition law, and significantly increases the severity of sanctions and fines. About the scope, this an important thing I would like to refer to, Costa Rica identified the actual scope of exemptions and found that they were more limited than anticipated. In any event, most of the exemptions that existed before were not justified from a competition perspective.

COPROCOM has long insisted on the necessity of eliminating them by different and several means, including market studies and opinions.

The Competition Reform Act has significantly reduced the scope of those exemptions, which are now limited to a number of specific acts in five economic sectors: sugar, coffee, rice, regulated professions, and maritime transports.

Concerning mergers, this is another important amendment that our law established. First, it sets up an ex ante notification system, with suspensory effects. It also precluTdes the possibility of transactions to be notified once they have been closed. The law also provides for significant sanctions for companies that infringe merger control notification and review regime.

Secondly, the law adopts the two-phase procedure with an initial stay devoted to identifying problematic transactions in order to quickly clearing non-problematic ones.

Thirdly, the merger notification thresholds were modified to allow for more efficient use of COPROCOM's resources and to avoid the review of transactions without a relevant nexus to Costa Rica's markets.

Lastly, COPROCOM will now be competent to review mergers in the financial sectors, even if financial regulators can exceptionally overrule when a transaction imposes a systematic risk to the financial system. The standard for the analysis of mergers changed to an analysis based on efficiencies and a two-stage analysis procedure.

In addition, another strength of this new Costa Rica's new competition regime is its disposition to discuss policy changes in order to align the country's competition framework with the best international practices.

The competition authorities are in particular active in advocating for issuing numerous opinions directed at other government institutions in an attempt to prevent or modify regulations that could lead to anticompetitive effects. The law now explicitly

empowers the competition agencies – COPROCOM and SUTEL – to conduct market studies regarding examined sectors and conduct reports by requiring addresses of such recommendations to provide resumes to the competition authority for not implementing these recommendations. This is an important new faculty that we are in a dynamic way to accomplish. COPROCOM is now a body that enjoys technical, administrative, political, and financial independence. Its budget will increase exponentially, to around USD four million. It is protected from political interference by law. More members from now will be employed on a full-time basis by members selected on the basis of criteria related to their expertise, including a minimum of 8 years of experience in competition matters, and recruited through a public procedure. This was my case. It is important to mention that the Law confers to the COPROCOM independence to carry out contractual activities, and to handle its services and its patrimony. We can also sign contracts with public and private national or international entities. The Law also provides special labor or employment regimes and recruitment procedures that allow COPROCOM to select and hire its own staff. The Law also introduces a special competition procedure designated with a specific purpose to respond to complexities of competition matters to be applied by both competition authorities (COPROCOM and SUTEL).

The Law also introduces leniency programs and creates and clarifies mechanisms for the early termination of infringement procedures (e.g., archiving a procedure, or entering into settlements and commitments). The Law effectively introduces a leniency program that stipulates the elimination or reduction of fines to economic businesses who collaborate with the authority in the investigation of cartels providing solid evidence. The leniency program improves the detection of cartels, which is essential to prevent consumers from paying overprices in the acquisition of goods or services. The procedure introduces new approaches so that the investigated economic agents have the possibility of requesting the early termination of a procedure. Our Law increases the types of conduct that infringe competition law and the severity of sanctions that businesses can be subject to. Fines are now to be calculated by reference to the economic agent´s gross income during the fiscal year prior to the imposition of the fine. Fines for minor infringements go up to 3% of this amount, while severe infringements can be sanctioned with fines of up to 5% and very severe infringements can be sanctioned with fines of up to 10% of turnover. All infringements of substantive competition law – e.g., all antitrust violations – are now classified as very severe infringements by the Competition Reform Act.

The new Law also empowers COPROCOM to sanction a number of procedural infringements with a view to ensure the effectiveness of competition enforcement. Some of these infringements are classified as minor (e.g., to provide incomplete or delayed information when requested to do so, or to submit a merger notification after the deadline, or to delay an inspection or investigation). Some are said to be severe (e.g., to refuse to provide information when required to do so, also to provide false, altered, or misleading information, or to implement a merger without obtaining prior authorization, or to prevent investigation or inspection from taking place).

As I said, some are very severe (e.g., failure to comply with sanctions requiring companies to cease engaging in the anticompetitive practice, breaching commitments approved by the competition authority, breaching interim rulings, and failure to notify an unauthorized implementation of an illegal merger – to illustrate, a merger that was not notified by the parties and which, in addition, generates anticompetitive effects). For now, these are the main points of our amendments.

> « Let us remember that the lack of competition in the sectors of a country implies not only higher prices, but also lower quality of products and less innovation, affecting consumers. »

Paulo: The competition reform is very impressive. It reinforces the institutional role of COPROCOM and adds value to the protection of competition and consumers in Costa Rica. The second question concerns your plans and priorities as head of COPROCOM: could you expand on them? In addition, what do you expect to accomplish at the end of this 6-yers period of your term?

Guillermo: Indeed, in COPROCOM, we have established some priorities and we set our authority's strategic plan, mainly to follow the commitments assumed with OECD, as well in the Technical Cooperation Project with the Interamerican Development Bank (IDB). With them, the framework of the plan is to strengthen competition authorities, which is one of the goals for the achievement of institutional objectives.

I will start by commenting on the main priorities with relation to the OECD commitments, some of which we have already done by now, such as the Executive Regulation to Law No. 9736, which is pending publication. Also, the Internal Regulations for the Organization and Services of COPROCOM, which has recently been approved by the BOARD and is in the stage of publication. In Costa Rica, you must publish everything in light of transparency. The Regulations for the Sessions of the BOARD have been issued, the purpose of which is to establish the organization and operation of the Meetings of the Board of COPROCOM. And finally, but very important, the Ethics and Conduct Regulations for the staff establishing an Ethics Committee in charge of advising on the interpretation and application of the Regulations, controlling compliance with the criteria and regulated action guidelines, and promote its dissemination.

Moreover, the Extraordinary Budget of this year has been formally presented to the Ministry of Finance and later to Congress. Also, we approved the Regulations about Thresholds for ex ante notification of Mergers. A Comprehensive Training Plan for Competent Authorities was designed, which is also an OECD commitment and is part of the "Capacity Building" Partnership. This plan is being analyzed by the training school for judges. It is an office from our Court of Justice.

Among the main Strategic Alliances with national and international organizations in competition regulation matters, we have signed cooperation agreements with the competition authorities of Brazil, Mexico, Paraguay, Colombia, and Ecuador. In relation to the

studies related to "Sectors partially exempted by Special Law", it should be noted that the Professional Associations Study and the Maritime Transport Study Opinion are well advanced. It seems appropriate to mention in relation to the Rice Sector, COPROCOM is working to present the legal and economic alternatives with their respective recommendation, regarding the regulation of rice prices, so that the Government can evaluate the most suitable lines of action and make the corresponding decision, under the provisions of the law.

Regarding the "Guidelines and Guidebooks", the following are written and in the final validation stage: the Guide and the Manual for the application of the Leniency Policy, pending public consultation, but it is already concluded. In relation to the IBD Cooperation Project, we intend to conclude this year these instruments, amongst others: Technical regulations for the collection of economic mergers; Guidelines for conducting market studies; Medications market study; Study of the sugar sector; Proposal of administrative structure (this is very important, it is the structure of COPROCOM's staff); Guidelines for the economic analysis of decisions on unilateral conduct and vertical agreements; and Guideline for mergers analysis. In addition, the following are forthcoming: Guidelines on treatment confidential information; Preparation of Internal Procedures Handbooks; and Internal Technical Standards that set out specifications, requirements, guidelines, procedures, and characteristics that purpose to ensure our services and systems are well-organized, reliable and consistent. We call this General System of Consistency and Quality.

Last but not least, COPROCOM has determined to enduring spirit and time: Technical Regulations for the definition of the Early Termination Procedure; Technical Regulations for Surveillance and Compliance with Resolutions issued by Competition Authorities; Technical Regulations to establish the Methodology for the Calculation of Fines for Violation of Law; Technical Regulation Promotion and Competition Advocacy; Guidelines to Detect Collusive Bids; and Regulation for Dawn Raids.

> « The entry into OECD will allow us to have a continuous process of improvement and organization to adhere to legal instruments, which will allow us to effectively exercise our powers. »

It is worth comment a study we are carrying on supermarkets that Costa Rica proposed in Central America's Organization of Competition Agencies (RECAC), which we will present to the IDB to compete with other projects. If our proposal is the winner, we will have an important instrument that will not only promote competition but will result in consumer welfare. At last, it is of the highest importance to emphasize that COPROCOM has the firm commitment to work with the objective of fulfilling the agenda that is proposed through this in the next 2 years. It is a challenge, but we are working on this.

Paulo: Thanks for this great update, which looks very promising! The last question concerns the accession process of Costa Rica to the OECE that is in its final stage. What does this mean in practice in the field of competition policy? What should we expect from COPROCOM once the accession process is complete?

Guillermo: Thank you for the question. It is an honor for the country and COPROCOM to be an OECD member. I understand the discussion to approve the Treaty to finally enter OECD is in our Congress now.

The steps that we can take internally will mark an important change for Costa Rica, so we are making our best efforts to fulfill the commitments assumed with the OECD. Not only to achieve the definitive entry, but because this implies that we advance in our market system. In effect, this means scaling towards better international practices that imply more efficient allocation to distribute resources, increase competitiveness and maximize the socio-economic development of the country.

The entry into OECD will allow us to have a continuous process of improvement and organization to adhere to legal instruments, which will allow us to effectively exercise our powers. This will have a positive impact on consumers, on companies, and, in general, on our country. An authority with the best international practices and a legal framework on competition that is properly implemented will guarantee a fair level playing field and non-discriminatory between competing companies. Not only the entry of new competitors into the market, but also that smaller companies (SMEs) can compete with fewer barriers in the market. Thus, obtaining rivalry between all the market participants and not only the largest companies benefiting, as we will know the competitive process of the market and warranting greater economic role.

The new regulations and their adequate implementation within the framework of OECD principles favor a higher level of productivity and innovation, by eliminating barriers to entry and expanding competition. We are seeking a positive climate for doing business. Let us remember that the lack of competition in the sectors of a country implies not only higher prices, but also lower quality of products and less innovation, affecting consumers (in particular, those with few resources). Clearly, this authority will have full active participation in the meetings of the OECD Competition Committee. In fact, we will present a contribution next meeting about barriers to entry and potential competition. This document refers to the Costa Rica Competition Authorities analyze both these in monopolistic practices, as well as mergers in legal cases. The entry barriers to markets, as well as the participation and interference that these may have in potential competition.

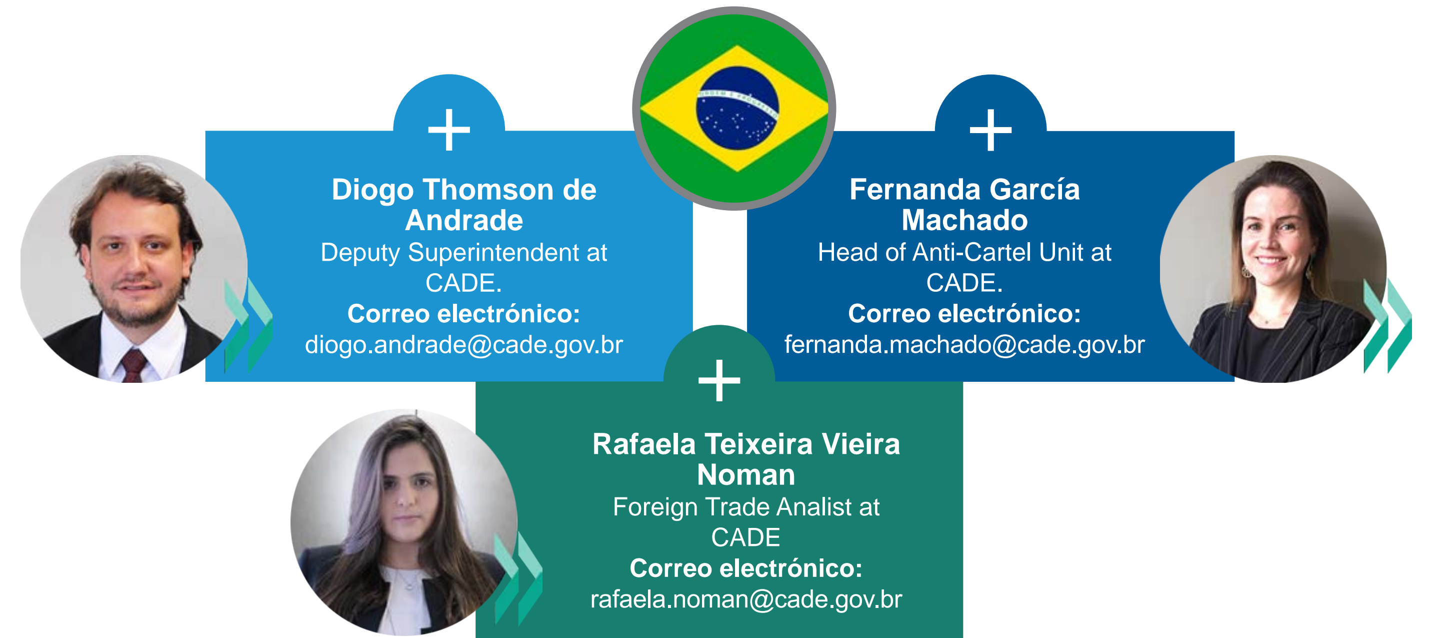
In relation to the issue of developing OECD projects in the country, such as projects to fight the bid rigging, e.g., we consider it extremely important to reflect on the issue of public procurement, which has been fundamental for COPROCOM, since in recent years, the Commission has received a growing number of requests regarding the application of competition principles in various purchasing processes, that show significant limitations to competition. Free competition and public procurement, therefore, the work of COPROCOM has been oriented to a great stand in the area of law, having some success stories. So, we are trying to find this field of our faculties.

Paulo: Thank you so much for your interview and all information. Indeed, fighting bid rigging is also a priority in many other Latin American countries including Argentina, Brazil, Colombia and Mexico, where the OECD has done extensive work in this field together with the national competition authorities. We hope to work with COPROCOM too in Costa Rica! Thanks again and the best of luck for your mandate.

BRAZIL

THE FOREIGN CURRENCY EXCHANGE MARKET CASE IN BRAZIL

By Diogo Thomson Andrade, Fernanda García Machado and Rafaela Teixeira Vieira Noman



The foreign exchange market, or "Forex", refers to trading of currencies. It plays an important role in any modern economy and may influence a country's domestic rate of consumption, levels of investment, imports and exports. It also affects a large number of financial transactions based on the exchange rates. In this way, foreign exchange trading activities consist in one of the largest markets in the world, worth billions of dollars every day.

Although financial markets are highly transparent and market participants monitor each other closely, the interbank operations design makes them particularly vulnerable to cooperative manipulation. In fact, various investigations in different jurisdictions have already revealed evidence of a widespread collusion mechanism between traders of different financial institutions operating in this market.

In Brazil, CADE (Administrative Council for Economic Defence) initiated a Forex trading market case in 2015. Although the investigation has not been finished yet, eight banks have already signed agreements to cease their conducts. In those settlements, companies acknowledge their participation in anticompetitive conducts. Settlements are foreseen in Brazilian legislation and significantly contribute to bring more information about the collusive conducts investigated by CADE and, of course, to deter conducts with the immediate ceasing of the settling companies and respective fining.

INVESTIGATION'S SCOPE

The investigation was initiated following a leniency agreement celebrated with CADE and the Brazilian Federal Prosecutor's Office. Through the Brazilian leniency program, a participant in a cartel may report the illicit act it was part of, disclosing information about other parties participating in the cartel and committing to cooperate with the authorities in the investigation.

The Brazilian probe investigates 15 banks and their employees for colluding to manipulate benchmark currency rates, align positions, and attempt to rig foreign exchange rates. The conducts are related to alleged anticompetitive practices involving foreign financial institutions operating in the offshore foreign exchange market, regarding negotiations of foreign currencies and of the Brazilian currency, called Real.

Although the Brazilian Real is the official currency of Brazil, several exchange transactions carried out by Brazilian entities and companies are made in foreign currencies such as euro, dollar, pound sterling, Swiss franc, amongst others. Additionally, Brazilian clients may have exchanged foreign currencies utilizing international reference indexes during the period of analyses. The financial institution's costumers are, among others, agents that periodically need to perform operations of purchase and sale of currency, such as banks, investment funds, investors, tourists, private companies and government bodies.

Thus, as those conducts may have led to direct and indirect potential effects in the Brazilian territory and may potentially have allowed the operators involved to obtain more profits and to avoid/minimize losses, CADE decided to conduct the Forex trading market investigation in Brazil.

The anticompetitive practices were classified in two categories by the Brazilian authority:

i) Practices involving offshore exchange rate manipulation on spot market of foreign currencies; and

ii) Practices involving the non-deliverable forward (NDF)[1] market of the Brazilian currency.

The collusive conducts appear to be made possible through chats on the Bloomberg platform – sometimes named by the parties as “the cartel” or “the mafia”. The traders, who were direct competitors, typically logged in to multilateral chatrooms on Bloomberg terminals for the whole working day, had daily extensive conversations about a variety of subjects, including recurring updates on their trading activities.

The commercially sensitive information exchanged in these chatrooms related to outstanding customers orders, bid ask spreads (i.e. prices) applicable to specific transactions, open risk positions, details of current or planned trading activities, among others.

The information exchanges, following the tacit understanding reached by the participating traders, appear to have enabled them to make informed market decisions on whether and when to sell or buy the currencies they had in their portfolios.

The conducts related to the negotiation of the Brazilian currency took place from 2009 to 2011, whereas the conducts regarding foreign currencies negotiations lasted from 2007 to 2013.

[1] A non-deliverable forward (NDF) is a cash-settled, and usually short-term, forward contract. The notional amount is never exchanged, hence the name "non-deliverable." Two parties agree to take opposite sides of a transaction for a set amount of money—at a contracted rate, in the case of a currency NDF. This means that counterparties settle the difference between contracted NDF price and the prevailing spot price. The profit or loss is calculated on the notional amount of the agreement by taking the difference between the agreed-upon rate and the spot rate at the time of settlement. (https://www.investopedia.com/terms/n/ndf.asp).

ALLEGED CARTEL'S ANTICOMPETITIVE PRACTICES

There are strong indications of anticompetitive practices to fix prices and commercial conditions among competing financial institutions in the Brazilian Forex market.

According to the evidence, the conducts investigated related to agreements in order to:

a. Fix currencies exchange spreads: spread is the difference between the sell rate and the buy rate. The investigated banks allegedly colluded to have higher spreads, hence making a larger potential profit and harming customers.

b. Coordinate customers' bids and/or the purchase and sale of currencies: banks would coordinate rates given to specific customers (ex. fake quotations) and/or coordinate to buy or sell currencies at a specific cartelised price.

c. Hinder and/or prevent brokers' operations in the Brazilian FX market so as to reduce competition: offshore banks appear to have hampered the operations of highly competitive brokers or brokers that did not agree with their conditions.

d. Influence benchmark rates: reference rates – such as WM/Reuters and European Central Bank – are used as a benchmark by multinational companies, financial institutions and investors which evaluate contracts and assets worldwide, among others. The traders appear to have coordinated to make deals before or at the same time benchmark rates were set, so as to influence the market trend and, hence, benchmark rates.

Evidence also pointed to potential anticompetitive practices of exchanging commercially sensitive information about the exchange market and trading plans, such as information regarding negotiations, contracts and future prices; customer orders; dealing strategies and objectives of negotiations, confidential positions in specific operations and orders; and the number of operations carried out (incoming and outgoing flows).

SETTLEMENT OF AGREEMENTS: THE NEGOTIATION PROCESS' CHALLENGES

As stated before, although the FX Brazilian case has not finished, CADE already settled agreements with 8 of the 15 investigated banks.

In those settlements, the financial institutions cooperated with the Brazilian authority by providing more information about the case and acknowledging their participation in the infringement. In return, CADE granted them discounts related to the expected fine that would be applied at the end of the investigation.

The determination of the due values applied to each one of the banks that would have an agreement with CADE turned to be a challenge for the Brazilian investigating authority. The exchange market is very complex and understanding the facts under investigation was the first barrier faced by CADE. After that, understanding the effects of the practice in Brazil was not a trivial matter neither, since the investigation encompasses different foreign currencies, which are not the official currencies in Brazil.

Additionally, there were discussions about facts already presented in the agreements signed in other jurisdictions, confidentiality issues of the agreement’s terms, especially considering that this market is very “sensitive” to exogenous factors and decisions of regulatory agencies.

Besides that, the exchange currency negotiation is just one among various activities carried out by banks. In defining the expected fines to be applied, establishing a methodology that would appropriately reflect the bank's exchange currency turnover was the most challenging task. Banks from different countries have very diverse ways to register in their accountabilities the turnovers earned from different activities.

In response to those challenges, CADE negotiated with different financial institutes with the most possible impartiality and transparency. In this way, the Brazilian authority came up with an economic methodology for calculating the expected fine, which was based mainly on public data and could be replicable for all the banks.

ECONOMIC METHODOLOGY FOR DETERMINING THE EXPECTED FINES

The methodology for determining the expected pecuniary contributions - which is how the Brazilian law calls the anticipated punishment of the settling companies, calculated based on applying a discount to the expected fine -, to the banks settling agreements with the Brazilian antitrust authority was developed in cooperation with CADE's Department of Economic Studies.

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In order to reflect the differences in the collusive practices regarding the manipulation of exchange rates related to Brazilian Real and to foreign currencies, CADE developed two different methodologies. In both of them, the starting point would be to determine the turnover related to the services affected by the FX cartel in Brazil. This information was not available in a precise or public manner for all the banks.

FOREIGN EXCHANGE SPOT MARKET

Regarding the FX Spot Market, CADE first calculated a "virtual turnover" for each one of the Banks by applying their global market share to the total value negotiated in the Brazilian foreign exchange spot market. CADE assumed that the participation of each one of the Banks in the Brazilian FX spot market would reflect their position in the global market.

The data related to the daily value negotiated in the Brazilian currency exchange spot market was obtained in a 2013 published study of the Bank for International Settlements (BIS)[2]. Based on it, CADE inferred the daily value negotiated in the Brazilian foreign currencies spot market.

To this amount, CADE then estimated each bank's market share in the global FX market 2014 based upon the information presented by Euromoney[3]. After that, CADE estimated the effectively retained revenue by the Banks, consistent with a spread.

And to calculate that spread, CADE mainly used data for a basket of foreign currencies mentioned in the investigation and also obtained data regarding the spreads applied to different currencies published by Oanda[4], which presents some historic average spreads.

The FX spread of each bank was then applied to the daily average value of foreign currencies negotiated in the Brazilian foreign currencies spot market during the period and then the annual amount was calculated considering the business days in 2014. Afterwards, the mentioned value was converted to Brazilian real according to the average exchange rate of 2014.

BRAZILIAN REAL NDF OFFSHORE MARKET

Regarding the Brazilian Real NDF offshore market, the daily average amount of NDF BRL offshore negotiated in the Brazilian market was obtained in the same BIS study.

Similarto the foreign currencies spot market, in order to estimate the revenue effectively retained by each one of the banks, CADE estimated the spread adopted by them. In this case, however, the spread was calculated based on the collected evidence in the investigation regarding the spread adopted by different banks.

The calculated spread was then applied to the daily average value of NDF BRL offshore negotiated and the resulted amount converted to Brazilian Reais by the average exchange rate of 2014 and then considered the business days in 2014 to calculate the annual amount. Afterwards, CADE then estimated each bank's market share in the global market during the year of 2014 based upon information presented by Euromoney[5].

In both cases, when setting the due amount by each bank, CADE took into account, in particular, the serious nature of the infringement, its geographic scope and its duration. All banks involved benefited from reductions of their fines for their cooperation with CADE's investigation. The reductions reflect the timing of their cooperation and the extent to which the evidence they provided helped the authority to understand the cartel's functioning.

AGREEMENTS CELEBRATED BY THE BRAZILIAN AUTHORITY			
Comitting Parties	Proceding Number	Amount	Practices involving the FX Brazilian Real
Barclays PLC	08700.006946/2015-99	BRL 21.1 millions	Foreign Currencies + NDF in Brazilian Real
Deutsche Bank S.A. – Banco Alemao	08700.007064/2015-41	BRL 51.4 millions	NDF in Brazilian Real
JPMorgan Chase & Co.	08700.007074/2015-86	BRL 11.1 millions	Foreign Currencies
Citicorp	08700.007418/2015-57	BRL 80.0 millions	Foreign Currencies + NDF in Brazilian Real
HSBC Bank PLc	08700.007789/2015-39	BRL 19.9 millions	Foreign Currencies + NDF in Brazilian Real
Royal Bank of Canada	08700.001412/2017-38	BRL 12.6 millions	NDF in Brazilian Real
Banco Morgan Stanley S.A.	08700.002534/2017-41	BRL 30.3 millions	NDF in Brazilian Real
Natwest Markets PLC	08700.004648/2019-98	BRL 7.0 millions	Foreign Currencies
Total		**BRL 234.4 millions**	

[2] http://www.bis.org/publ/qtrpdf/r_qt1403h.htm
[3] http://www.euromoney.com/Article/3455276/Euromoney-FX-survey-2015-results-revealed.html
[4] https://www.oanda.com/lang/pt/
[5] http://www.euromoney.com/Article/3455276/Euromoney-FX-survey-2015-results-revealed.html

CHILE

FNE's cases in the MORTGAGE-RELATED INSURANCE INDUSTRY

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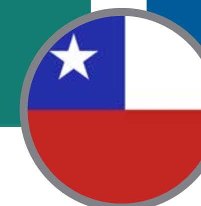

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The Chilean National Economic Prosecutor's Office (Fiscalía Nacional Económica or "FNE") conducted two ex-officio investigations regarding the mortgage-related insurance industry. In the first investigation, case N°2416-17[1], the FNE reviewed over 300 tenders, and analyzed whether there were restrictions on competition (exclusionary or abuse of dominance practices)[2] . The investigation concluded that regulatory changes were necessary, and as a result, several recommendations were made to change legislation and industry-specific regulation. The second investigation, case N°2495-18[3], was much more specific, analyzing the existence of unilateral anticompetitive conducts in a particular tender process. It led to the filing of an action against a bank at the Chilean Competition Court (Tribunal de Defensa de la Libre Competencia or "TDLC").

INDUSTRY BACKGROUND

Banks are the main suppliers of the mortgage credit industry in Chile, reaching a market share of more than 90%. Banks are frequently related to insurance companies and insurance brokers[4], and they can provide services to bank clients.

Every mortgage agreement subscribed by a financial institution with its clients must include both life and fire insurances[5]. Until 2011, each financial institution selected an insurance company and broker to provide these services to their entire debtor portfolio. Despite the fact that clients could choose another company to provide these services to them individually, in practice, only 5% of them exercised this right[6]. Therefore, in the absence of genuine competitive pressure, vertically integrated banks selected their related companies for insurance provision, resulting in high prices and a lack of transparency in selection processes[7].

[1] Investigation Report, case N°2416-17 FNE, dated August 8th, 2019 ("Report N°2416-17"), available in: https://www.fne.gob.cl/wp-content/uploads/2020/11/doc_2416-17.pdf (Spanish only). / [2] Normative Recommendation Filing, case N°2416-17 FNE, dated August 13th, 2019, available in: https://www.fne.gob.cl/wp-content/uploads/2019/08/Resoluci%C3%B3n-RN.pdf (Spanish only). / [3] Lawsuit against BCI Bank, case N°2495 FNE, dated August 8th, 2019 ("FNE vs BCI"), available in: https://www.fne.gob.cl/wp-content/uploads/2019/08/Requerimiento-BCI.pdf (Spanish only). / [4] Report N°2416-17, pp. 9-10. / [5] Report N°2416-17, p. 14. / [6] Investigation Report, case N°1763-10 FNE, dated December 3rd, 2012, p. 12, available in: https://www.fne.gob.cl/wp-content/uploads/2013/01/inpu_075_2012.pdf (Spanish only). / [7] Report N°2416-17, p. 18.

In 2012, Law N° 20.552 made it mandatory for financial institutions to conduct bidding processes in order to select the company that would provide insurance to their clients. According to this law, the contract must be awarded to the insurance company that offers the lowest overall price (insurance premium plus broker's commission) for a period of up to two years[8].

Each financial institution has to elaborate their own bidding rules, in which they could: (i) request the mandatory inclusion of an insurance broker; and, (ii) establish the right to replace the broker included in the winning offer with another of their choice, matching its commission[9].

Among the positive consequences observed by the financial regulator following the implementation of this new law, we can highlight that mortgage insurance prices dropped by 62% in the life segment, and 34% in the fire segment[t].

However, only one broker (usually the one related to the lender) participated in the bidding processes of each financial institution[11].

FIRST CASE: RECOMMENDATION OF REGULATORY CHANGES

In 2017, the FNE opened an ex officio investigation concerning possible unilateral competitive conducts related to the aforementioned bidding processes. All processes conducted between 2012 and 2018 were scrutinized during the investigation.

The main findings were related to the insurance broker segment[12] and will be explained in the following paragraphs.

The first problem identified by the FNE was that financial institutions raised artificial entry barriers for non-related insurance brokers. The terms included in the tendering process, demanded the insurance brokers to comply with requirements that were easily fulfilled by the institution's related broker, but difficult to fulfill for other insurance brokers. For example[13], they required to own or have available a specific network of branches that had the same locations as the financial institution's attention centers; or required to have complex interconnectivity standards, which had already been implemented by the related broker[14]. These requirements established significant levels of uncertainty and increased costs to participate for non-related brokers.

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« Among the positive consequences observed by the financial regulator following the implementation of this new law, we can highlight that mortgage insurance prices dropped by 62% in the life segment, and 34% in the fire segment . »

The second issue identified by the FNE was related to the financial institutions' faculty to require bidders to include in their offer the services of an insurance broker. Also, since regulation allowed it, they established in the bidding rules the right to replace the broker included in the winning bid with a broker of their choice, provided that they matched the offered commission. This clearly inhibited competition, because even if a non-related broker tried to participate, there was a high probability that they would be replaced by a broker related to the financial institution in the end[15].

FNE recognized both of these findings as competitive restrictions that deterred non-related brokers from participating in bidding processes[16].

Some facts might be useful to illustrate the practical implications of this situation: (i) only in 5.2% of the analyzed tenders where the financial institution was related to an insurance

[8] Law 20.552, Article 1, N°8, 4, available in: https://www.bcn.cl/leychile/navegar?idNorma=1035180 (Spanish only)
[9] Law 20.552, Article 1, N°8, 3. / [10] Superintendency of Securities and Insurance (in Spanish, Superintendencia de Valores y Seguros or "SVS"), Press Conference Presentation: SVS reports final results of the first round of mortgage related insurance tenders, available in: https://www.cmfchile.cl/portal/principal/613/w3-article-14409.html (Spanish only) / [11] Report N°2416-17, pp. 35-36. In addition, after some time, the number of tender participants began to decrease. / [12] Also, the findings of the investigation include: a) the existence of indirect methods (such as contracts between a financial institution and a broker) to receive income that recharges the insurance costs without being subjected to a competitive process; b) the bidding processes of smaller financial institutions are less competitive at the insurance level, which translates into higher prices of the financial institutions premiums; c) some entities offer individual insurance that is unrelated to the mortgage credit, and; d) determining the premium is a complex process, so it is important to have information of the portfolio that allows evaluating its risks, and that the calculations made by insurers are as accurate as possible (Report N°2416-17, p. 72-73). / [13] Other mechanisms FNE spotted during the investigation used by financial institutions that could inhibit nonrelated broker company's participation, are: the requirement of premium collection, the requirement of having attention offices and personnel available at the financial institution, mandatory warrants, and a permanent call center (Report N°2416-17, p. 49-60). Although, the regulation stipulates that the additional services cannot be fulfilled only by the related insurance or broker company (D.S. N° 863-1989).
[14] Report N°2416-17, p. 49-60. / [15] Report N°2416-17, p. 44. / [16] Report N°2416-17, pp. 77-78.

broker, there was an offer with an independent broker. In all the remaining processes, only the related broker was included in the bidding offers , (ii) the related brokers' commissions were[17] substantially higher than non-related brokers (on average, 70%), and they could reach even a quarter of the insurance price[18].

Furthermore, broker services are not essential for the provision of these insurance services. In fact, there are financial institutions that have successfully operated without the presence of a broker[19]. Also, in some cases, the related broker subcontracted several services stipulated in the bidding rules with its own related institution[20] .

Under the situation described above, the FNE concluded that regulatory changes were necessary to increase competition in bidding processes. This would allow mortgage debtors to access lower insurance prices.

Thus, in exercising the attribution to make normative recommendations within anticompetitive conduct investigations vested in DL N°211, art. 39 q), the FNE proposed to the President[21], through the Minister of Finance[22], different legal reforms to address the identified issues:

- Firstly, we proposed to clearly establish which services, activities, or requirements could be demanded of insurance companies and brokers in the tender processes' rules, allowing solely those that are essential for the execution of the insurance, in order to avoid the establishment of tailor-made service specifications that could raise barriers for non-related brokers[23].

- Secondly, we proposed to forbid lenders to establish the mandatory inclusion of a broker in insurance companies' offers, and to eliminate the replacement right[24 y 25].

These recommendations were well received and, on April 13th, 2021, a law incorporating all of FNE´s recommendations was published[26]. According to our estimation, the benefits tto consumers could range between 28.2 and 37.8 million dollars per year, in an industry with approximately 1 million clients[27].

SECOND CASE: LAWSUIT AGAINST BCI (FNE VS BCI)

During the former investigation, the FNE noticed that, in a specific bidding process for life insurance, BCI Bank ("BCI") arbitrarily excluded the lowest-priced offer in favor of an offer that included its related insurance broker, BCI Corredores[28].

According to the FNE, this conduct constituted an infraction of article 3rd, subsection 1st, and art. 3th, subsection 2nd, b) of the Chilean Competition Law (DL N°211)[29]

As a consequence, debtors were exploited because they were denied the best offer, which was rejected for unjustified reasons, based on a breach of a formality not specified in the bidding process' rules[30], and they paid in excess more than 2 million dollars, according to the official estimates[31].

The FNE filed a lawsuit against BCI Bank in the Chilean Competition Court for this arbitrary behavior, from which BCI benefited; requesting a fine of 3 million dollars[32]. The case is still awaiting sentencing.

CONCLUSION

As we have seen, the FNE developed normative recommendations with an advocacy perspective and an enforcement case based on an analysis of competition restrictions in a specific regulation.

[17] Report N°2416-17, p. 36. / [18] Report N°2416-17, p. 2. / [19] Report N°2416-17, p. 32. / [20] Report N°2416-17, pp. 26-33. / [21] Normative Recommendation Filing, case N°2416-17 FNE. / [22] A copy of both Report 2416-17 and Normative Recommendation Filing was sent to the Commission for the Financial Market (in Spanish, "CMF"), which is the sectoral regulator of the finance market. / [23] Report N°2416-17, p. 71. / [24] Report N°2416-17, p. 70. / [25] Other recommendations were made, such as: a) adjust tender deadlines for brokers to have sufficient time to implement the requirements made by the financial institution through the bidding rules; b) restrict the charges that financial institutions can make to brokers regarding the bidding process, and assure that the collection of the premium is made by the financial institution; c) study the implementation of mechanisms that could help increase competition in the bidding processes of smaller entities; d) adopt measures aimed at preventing the packaging of insurances unrelated to mortgage services, and; e) review the sufficiency of the information that financial institutions are currently required to provide to insurance companies. (Report, p. 71-74). / [26] Although, there are still reglementary adjustments to be made, in addition to CMF´s regulations and amendments. / [27] Report, p. 74. / [28] FNE vs BCI, p.1. / [29] The article 3th, subsection 1st states that whoever executes or enters into a contract, individually or collectively, any fact, act or convention that prevents, restricts or hinders free competition, or tends to produce said effects, will be sanctioned. The article 3th, subsection 2nd, b) states that among others, the following will be considered as facts, acts or conventions that prevent, restrict of hinder free competition, or tend to produce such effects: b) the abusive exploitation by an economic agent, or a group of them, of a dominant position in the market, setting purchase or sale prices, imposing on a sale that of another product, assigning zones or market shares, or imposing similar abuses on others. / [30] FNE vs BCI, p. 10. / [31] FNE vs BCI, p. 22. / [32] FNE vs BCI, p. 23.

EL SALVADOR

COOPERATION BETWEEN THE COMPETITION AGENCY AND THE FINANCIAL REGULATOR IN MERGERS

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El Salvador is a developing economy in Central America with small financial markets compared to other more developed jurisdictions. Nevertheless, the local competition authority, Superintendencia de Competencia (SC), has gone through its fair share of transactions related mainly to banking and insurance activities. Since its inception in 2006, around 10% of all mergers reviewed have been related to the financial sector. Moreover, additional mergers and acquisitions may be coming, as the country witnesses the entry and reconfiguration of global players and the deployment of financial consolidation strategies from incumbents, mainly as means to reap the benefits from economies of scale and scope and for revenue enhancement.

For a small, relatively young competition agency, reviewing mergers in the financial sector requires a solid long-term relationship with other government institutions, specifically, the financial regulator and supervisor. The competition agency benefits from a close collaboration with the regulatory bodies as it gathers relevant information and understanding for its market analyses and forecasting of the transaction's effects on competition. However, caution should be exerted as the regulator's objectives differ widely from those of the competition authority.

INSTITUTIONAL SETTING FOR MERGER REVIEW IN THE FINANCIAL SECTOR

The interplay between Competition law and sectoral regulation requires a parallel review and approval of mergers in the financial sector, as both the regulator and the competition authorities have concurrent jurisdiction over mergers. This implies that economic agents interested in proceeding with a merger must

file a written request for approval to the sector regulator and the competition authority.

The financial regulator (Superintendencia del Sistema Financiero, SSF) oversees and approves mergers between financial system members as part of its aim to guarantee the stability and integrity of the financial system, among other policy objectives[1]. Concomitantly, the SC reviews all proposed mergers and acquisitions that meet the criteria established by the Competition Law[2] across all markets[3], including those that occur within the financial sector, in order to prevent a "significant limitation of competition" arising from these transactions.

As part of its merger control, the SC may authorize, deny or condition the request for approval from interested parties based on its own evaluation of the competitive effects of the transaction in an ex ante regime that seeks to ensure competition.

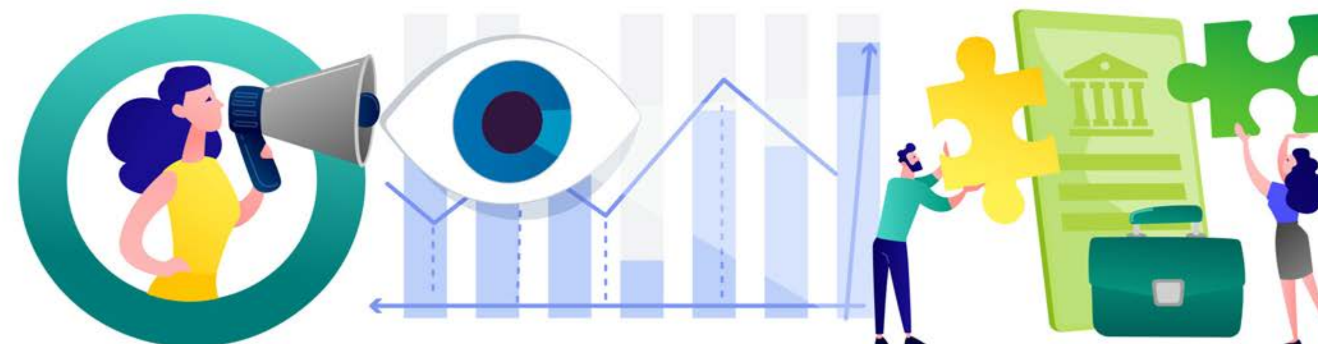
In El Salvador, the decisions made by the SC regarding mergers are binding in nature and therefore, must be integrated within the procedure and decision of the regulator. This regulatory design divides powers in order to avoid conflicting decisions coming from the financial regulator and the competition authority but may also be interpreted as a call for close cooperation between them.

COOPERATION BETWEEN COMPETITION AGENCY AND FINANCIAL REGULATOR

Given its mandate, the position of the financial sector regulator in the market is much different from that of the competition agency. The financial regulator has a permanent, more frequent interaction with the ongoing activities of the firms in its charge. This results in a profound understanding of market participants and their performance on the part of the regulator but also a clearer awareness of the role of the regulator and its procedures on the part of the firms involved, which is not necessarily the case for the competition agency. Furthermore, the legislators did not give the regulator a clear objective to promote competition when reviewing mergers, but they did provide a general mandate to cooperate with the competition authority, according to the applicable legal framework.

In this context, in order to contribute to a clearer understanding of its role and procedure, the SC begins its conversation with the regulator as soon as there is a filing for merger approval. This informal first contact allows all institutions involved to elucidate general steps and timeline of the process from both ends, as well as relevant features of the transaction, to create a common ground that will contextualize forthcoming interviews and information requests from the competition authority, in addition to future inquiries by the parties involved in the transaction.

In recent years, the financial regulator has provided valuable information and technical assistance to the SC when evaluating the potential effects of mergers. This cooperation is particularly relevant for a competition agency in a developing context, like the SC, because it facilitates information gathering,



necessary for market analysis and evaluation of merger effects (which in turn reduces administrative costs from market participants). Besides, it gives the agency access to consult specific issues with financial sector experts, whose perspective is important to enrich the SC's independent decision.

However, the competition agency has also learned that caution should be exercised when considering information or opinions from the regulator as part of its own analysis, since their policy objectives are different and may not necessarily adjust to those of the competition agency.

Take for example, information gathering for market shares. Even though the financial regulator compiles statistics using its own accountability norms, the competition agency may need to capture other relevant market dynamics employing different data, to better understand substitutability and rivalry among market players. This means that further information may need to be processed by the regulator or requested directly to market participants to complement that provided by the regulator.

Another example may involve the evaluation of theories of harm based on vertical or conglomerate effects in upstream, downstream or adjacent markets that are not related to the financial sector, where the regulator would not have supervision capabilities, but where the competition authority would need to intervene in order to ensure that no restrictions to competition arise from the merger.

In conclusion, competition agencies benefit from a solid bond with the sector regulator as this relationship may be capitalized in a more robust competition analysis of mergers that protect consumers more effectively, but they also need to consider the different policy objectives of both authorities in order to appropriately channel this interaction.

[1] In addition, the Central Reserve Bank is the sector supervisor responsible for issuing the prudential guidelines and regulations applicable to the financial sector and is also relevant for the Competition agency's efforts regarding merger review.
[2] According to the Salvadoran Competition Law, a merger exists when economic agents that have been independent from each other perform, among others: acts, contracts, agreements, arrangements, with the purpose of merging, acquiring, consolidating, integrating or combining their businesses in all or in part; and When one or more economic agents that already control at least one other economic agent, acquire by any means, the direct or indirect control of all or part of more economic agents. To be subject to merger control, the involved parties' size must exceed USD 182,500,000.00 in assets and USD 219,000,000.00 in income (current thresholds as of May 24th,2021).
[3] As in other jurisdictions, the Salvadoran Competition Law is formulated in abstract terms, without reference to any industry.

MEXICO

INVESTIGATING THE MEXICAN CARD PAYMENT SYSTEM

INCEPTION, PRELIMINARY OPINION AND FUTURE IMPLICATIONS FOR COMPETITION

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This paper presents an insight into the preliminary opinion issued by COFECE´s Investigative Authority regarding the existence of barriers to competition in the Mexican Card Payment System. First, the paper describes the inception of this investigation that began in 2018. Then, the paper explains the main competition concerns detected during the investigation and the recommendations and orders suggested in the preliminary opinion to solve them. Finally, the paper presents the future impact that this case could have.

INCEPTION

In January 2014, a structural financial reform was published in Mexico, several laws were amended, and new financial regulation was issued by the Mexican Congress. As part of this structural reform, COFECE was mandated by Congress to publish a market study analyzing competition conditions of the financial sector. By July 2014 COFECE published the market study. Several financial markets were studied, among them was the card payment system, where some competition concerns were detected.

COFECE´s market study identified that the card payment system might not be balanced, due to low the number of points of sale (POS)[1] that accept cards in the country compared to the number of cards issued by banks. This means that few merchants accept card payments in Mexico. Additionally, the fact that the new financial regulation orders that the interchange fees[2] must be set by an agreement among banks was another concern.

By 2018 competition concerns detected in the market study remained, so COFECE's Investigative Authority began a market investigation. COFECE´s market investigations are procedures that aim to remedy barriers to competition[3] and ensure efficient access to essential facilities[4]. During a market investigation, COFECE´s Investigative Authority gathers information to assess competition conditions in the relevant market. After the investigation process, if the evidence suggests that there are no effective competition conditions due to a barrier to competition or to inefficient access to an essential facility, the Investigative Authority must issue a preliminary opinion. The preliminary opinion must propose to COFECE´s Board of Commissioners remedies that effectively fix competition problems. The remedies can consist of mandatory orders to economic agents or recommendations to other authorities.

The preliminary opinion ends the investigation process and a second phase of the procedure

[1] POS is the time and place in a merchant´s establishment at which the sale is consummated by payment. / [2] The fee that the bank that provides the merchant´s POS services (known as acquiring bank) must pay to the bank that issued the card involved in the payment transaction. / [3] According to the Mexican Competition Law a barrier to competition could be a structural market characteristic, an act performed by economic agents or a legal provision that distorts the process of competition and free market access. / [4] According to the Mexican Competition Law an essential facility must be indispensable for the provision of a product or service, impossible to replicate due to legal, economic or technical aspects, and it must be in control by an economic agent with market power. Regulating the facility must generate efficiencies to consumers. The circumstances under which the economic agent came to control the facility must be considered in the analysis.

begins, where economic agents with standing may assert the arguments they best consider and bring before COFECE´s Board of Commissioners the evidentiary means they deem pertinent to address the findings of the preliminary opinion. Finally, COFECE´s Board of Commissioners must issue a final decision regarding addressing the competition problems found in the preliminary opinion and, if applicable, mandating remedies.

PRELIMINARY OPINION

The investigation process of the Mexican card payment system began in October 2018, and by December 2020 COFECE´s Investigative Authority issued the preliminary opinion. The opinion analyzed the card payment service, which is consumed simultaneously by two groups: on one side the card issuer banks and the cardholders, and on the other side the acquirer banks and the merchants; where the participation of one group increases the value for the other group. Therefore, the relevant market was studied in the preliminary opinion as a two-sided transactional platform.

First, the preliminary opinion analyzed competition conditions among different card payment systems, and it concluded that there is no competition in Mexico due to the lack of suitable regulation. Since 2014 international companies like Visa and MasterCard have been actively trying to enter the Mexican market with their own card payment system without success. Therefore, in Mexico, there is only one card payment system integrated by two local providers (switches) that provide to the issuer and acquirer banks the authorization[5], clearing[6] and settlement [7] services required to process a card payment.

The impossibility to establish new competing card payment systems is generated by the fact that there are no legal provisions that allow multiple competing card payment systems. According to Mexican regulation, the overall administration of the Mexican card payment system is determined by agreements between the issuer and acquirer banks, those agreements establish the communication protocols and processing rules of the system, as well as the interexchange fees. Until regulation provides the means for new competing card payment systems to determine their own communication protocols, processing rules and fees competition among systems will not be possible.

The preliminary opinion addressed this market condition as a barrier to competition that should be eliminated by proper regulation. Consequently, the opinion proposed as a remedy a recommendation to Mexico´s Central Bank to issue the necessary regulation to allow and promote competition between different card payment systems.

Secondly, the preliminary opinion analyzed the competition conditions among the participants of the existing card payment system. Competition between switches was found to be distorted, due to the fact that the two local switches are owned by the acquirer and card issuer banks. Each switch provides services, primarily, to their owners. Lack of appropriate investment in security was also found during the investigation. The integration between banks and switches also impacts competition among card issuer banks and acquirer banks. According to the findings, through their switches banks have applied several commercial strategies to benefit their position in the market and reduce competition. These banks have benefited from sensitive information about a competitor to which they have access through their switches' Board of Directors. The preliminary opinion addressed this market condition as a barrier to competition that should be eliminated by a mandatory order to divest 51% of the switches´ shares.

FUTURE IMPLICATIONS

Los hallazgos y remedios propuestos por el dictamen preliminar aún deben ser decididos por la Junta de Comisionados de la COFECE. Terminales mexicanos, bancos y, probablemente, otros agentes económicos llevarán ante la Junta de Comisionados de la COFECE los medios probatorios que estimen pertinentes. Si la decisión final del Directorio confirma la opinión preliminar, este caso ordenará la primera desinversión por parte de la Autoridad Mexicana de Competencia. Este poder incremental fue otorgado a la COFECE mediante una reforma constitucional en 2013 para fortalecer la competencia en México.

Aún no se ha determinado el impacto total de esta investigación, pero este procedimiento ya demostró la importancia que tienen las investigaciones de mercado en México como herramienta de competencia. Permiten a la COFECE analizar las estructuras del mercado en una perspectiva holística y remediar las fallas del mercado que no pudieron corregirse a través de las herramientas tradicionales de cártel o dominio.

[5] The authorization is the communication process that the payment switches carry on with the card issuer bank and the acquirer bank to assure the merchant that the cardholder has the necessary funds for a purchase.
[6] The clearing is a daily process of the payment switches to calculate the settlement obligation of the issuer banks and the amount due to the acquirer banks, net of applicable fees and charges.
[7] The settlement is the process by which the payment switches facilitate the exchange of funds on behalf of issuers and acquirers, according to their net positions calculated during the clearing.

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