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Foreword

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Dear readers,

The OECD Regional Centre for Competition (RCC) in Latin America, known as "RCC-Lima" in the region, enters its fourth year and have been focusing on capacity building activities for competition officials, regulators and judges from Latin America and the Caribbean.

The two workshops of the first semester of 2023 joined more than 190 civil servants from around 20 jurisdictions of the region who have benefited from the RCC trainings. It has been indeed great to see many of you in person in Lima! We hope to continue our in-person interactions more often in the next years.

As in past editions, this Newsletter is divided into three sections: Section I presents a detailed summary of the past RCC workshops and provides an update of the OECD projects in the region; Section II shares an exclusive interview with a head of agency from the region – this time being Ms. Andrea Marván from COFECE in Mexico; and Section III offers contributions of competition 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 information, suggestions or assistance.

Enjoy your reading!

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Section I: RCC activities and updates

RCC activities

Workshop on "Introduction to Competition Enforcement for New Staff" (7-10 March 2023)

The OECD Regional Centre for Competition (RCC) in Latin America together with INDECOPI hosted the Workshop on "*Introduction to Competition Enforcement for New Staff*" during 07-10 March 2023. The event gathered **165 participants** from **22 jurisdictions** in Latin America and the Caribbean (Argentina, Barbados, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Honduras, Jamaica Mexico, Nicaragua, Paraguay, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, Saint Kitts and Nevis, and OECS Commission) including competition officials and judges.

The Workshop presented an overview about the competition application, including competition law basics, common enforcement challenges, and practical tips. This workshop was aimed at new staff of competition authorities in Latin America and the Caribbean, particularly those with less than two years working in competition authorities. On the first day, Paulo Burnier (OECD), and Ana Sofia Rodrigues (Chief Economist of AdC, Portugal), provided a general introduction to the topic. On the second day of the Workshop, the group focused on merger control issues. Paulo Burnier (OECD) presented the fundamentals of merger control, and a hypothetical case exercise was conducted with the participants, who were divided into groups to discuss the key findings of the case. The third day of the Workshop was dedicated to the fundamentals of cartel enforcement with Natalie Harsdorf's (Acting Director-General of BWB Austria) presentation and Ana María Reséndiz (Commissioner at COFECE Mexico), Eduardo Barros (Commissioner at CONACOM Paraguay) and Daniel Ferrés (Commissioner at CPDC Uruguay) shared their country experiences with the audience. The last day of the Workshop focused on fundamentals of abuse of dominance issues, starting with a presentation of Vanessa

Facuse (Lawyer and former head of Litigation at FNE Chile). Alexandre Barreto (General-Superintendent at CADE Brazil), Maria Elena Vásquez (President of ProCompetencia Dominican Republic) and Hugo Figari (Economic Adviser at INDECOPI Peru) shared their Latin American experiences regarding abuse of dominance cases.

Workshop on "Competition in the Civil Aviation" (10-11 May 2023)

The Workshop gathered **180 participants** (in-person and online) from **19 jurisdictions** in Latin America and the Caribbean (Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, in addition to the Andean Community and OECS Commission), mainly competition officials and civil servants from the sector regulators, mainly from senior level. This was the first hybrid event from RCC-Lima.

The workshop provided participants with an opportunity to discuss key competition issues in the aviation sector including the particularities of the sector, the merger review mechanisms, collaboration through airline alliances, advocacy initiatives, regulatory issues such as pro-competitive reforms and slots regulation, in addition to cooperation with regulators. After an introduction to the civil aviation sector particularities provided by Paulo Burnier (OECD), three panels discussed specific aspects of the topic. First, Katherine Speegle (Assistant Chief at US DoJ) examined the collaboration between airlines, focusing on current cases regarding the limits of this collaboration. Then, Francisca Levin (Head of Mergers at FNE Chile) and Veatriz Medina Leal (Executive Director of Mergers and Tenders at COFECE Mexico) provided an overview of the Latin America experience in merger control in the aviation sector. Finally, Ricardo Fenelon (former Director of Civil Aviation Agency in Brazil), who attended virtually, and José Ignácio García Arboleda (Professor at Javeriana University in Colombia) discussed the intersection between competition and regulation in the aviation sector from a Latin America experience view. On the second day of the workshop, a practical exercise was conducted, and attendees were divided into groups to discuss the main issues of the case and exchange views on key findings. After that, Colin Garland (Director of Remedies, Business and Financial Analysis at CMA UK) discussed airport slots, focusing on remedies and regulatory alternatives to them based on the UK

experience. Finally, Cristhian Flores (Economist Executive from Indecopi Peru), Daniel Kanter (Assistant General Counsel, Chief Counsel Antitrust at IATA), Daniel Granja (Intendent for Competition Advocacy at SCPM Ecuador) and Joancy Chavez (Senior official at ACODECO Panama) discussed the competition advocacy in the Aviation Sector based on their regional experiences. The last three participated virtually. Humberto Ortiz (Deputy Director for Competition at INDECOPI, Peru) and Paulo Burnier (OECD) closed the event.

Planning for 2023

The following events will focus on the following topics and will be hosted by INDECOPI in Lima:

	Date	Topic
1.	12-14 September 2023	**Workshop on "Market Studies":** it will build on the OECD Market Studies Guide for Competition Authorities, which presents market studies as a tool to assess the competitive conditions of a given market and to identify issues, which could then be addressed by legislators, regulators or other stakeholders. Market studies require planning and often long-time commitments from team members, who may benefit from comparative experiences. The main target audience is staff members from the economics departments of competition authorities from Latin America and the Caribbean.
2.	28 September 2023	**Heads of Agency Meeting:** it will gather heads of competition authorities from the region during the Latin American and Caribbean Competition Forum (LACCF), and serve to present the RCC activities, collect inputs for future topics and promote exchanges at high-level senior officials.
3.	15-17 November 2023	**Workshop on "Key Challenges for New Merger Control Regimes":** it will address the key challenges related to new merger control regimes including gun jumping, international cooperation and remedies. The main target audience is staff members leading merger cases, in particular those from jurisdictions with young merger control regimes.

OECD regional updates

Accession countries

In January 2022, the OECD Council decided to open accession discussions with six candidate countries to the OECD including **Argentina**, **Brazil** and **Peru** from Latin America. In June 2022, the OECD Council adopted individual Accession Roadmaps for **Brazil** and **Peru,** setting out the terms, conditions and process for accession. Positive discussions continue with **Argentina** on next steps. In September 2022, **Brazil** submitted an Initial Memorandum to the Secretary-General setting out a first self-assessment of the alignment of Brazil's legislation, policies and practices with each OECD legal instrument in force that applies to all OECD Members. In June 2023, Peru also submitted its Initial Memorandum. The overarching objective of the accession process is to support candidate countries in identifying how they can deliver better results for their people by moving closer to OECD standards, best policies and practices. Throughout the accession process, the OECD will work closely with each of the candidate countries to support the adoption of long-lasting reforms to align with OECD standards, best policies and best practices. Further information including the Accession Roadmaps may be accessed here.

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 and training the public sector in detecting bidding cartels. The OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the OECD Recommendation on Fighting Bid Rigging in Public Procurement. In Latin America, **Argentina**, **Brazil**, **Mexico** and **Peru** have sought the OECD's support to improve their procurement practices and step up their fight against bid rigging.

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 civil aviation sub-sectors. The project started in January 2021 and the final report was launched in September 2022, during the week of the LACCF, in Rio de Janeiro, Brazil. The assessment involved the screening of 230 pieces of legislation using the OECD Competition Assessment Toolkit, revealing 550 potential barriers to competition. The report submits 368 recommendations that can mitigate harm to competition. The OECD has also evaluated the impact that the implementation of specific recommendations would have on the economy and a conservative estimate indicates savings between BRL 700 million to BRL 1 billion a year in the benefit of Brazilian consumers. The final report is available here, in English and Portuguese.

Colombia, via its National Department of Planning (*Departamento Nacional de Planeación*, DNP) carried out a competition assessment exercise in the beverages sector with the support of the OECD. The project started in August 2021 and ended in November 2022, with the publication of the final report. While DNP led the project, the OECD provided technical support, including advisory calls, feedback on the outputs produced, and capacity-building workshops for DNP and other public bodies. Following the OECD Competition Assessment methodology, DNP assessed 79 pieces of legislation and identified 37 barriers to competition. After finding the policy objectives of those regulations, DNP presented more than 20 recommendations to make the legislation in the beverages sector more pro-competitive. The project also prepared Colombian officials, particularly those of DNP, to conduct competition assessments in other sectors autonomously. The final report is available here, in Spanish.

Similar exercises have been done in **Mexico**, **Portugal**, **Iceland** and **Greece**, amongst other countries. For further information here. They 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).

Latin America and the Caribbean Competition Forum (LACCF)

The LACCF 2023 will take place on 28-29 September 2023. It will be hosted by the *Superintendencia de Competencia Económica* (SCE) de Ecuador. The event will comprise three substantive sessions on the following topics: competition and poverty; competition and sports; and the Peer Review of Dominican Republic. The draft agenda, OECD background notes and country contributions are available at the LACCF website: https://www.oecd.org/competition/latinamerica/2023forum.

Section II: Interview with heads of agencies

Interview with Ms. Andrea Marván, Chairwoman of COFECE in Mexico

ANDREA MARVÁN was appointed Chairwoman of the Federal Economic Competition Commission (COFECE) in Mexico on 15 March 2023. She will serve a four-year term, renewable once. The new Chairwoman holds a degree in Law from the Universidad Iberoamericana and a LLM from the University of Chicago. She has ten years of professional experience at COFECE, where she has served in different positions. In addition, she was a professor at Tecnológico de Monterrey.

Paulo Burnier: **First of all, congratulations for your recent appointment. We are delighted to continue to work with COFECE under your leadership. Could you please share with us what do you foresee as main priorities and key challenges for COFECE during your term?**

Andrea Marván: Thank you very much for your kind words, they are much appreciated. Cofece and the OECD Regional Centre for Competition in Latin America (RCC) have always had a strong and productive relationship and I look forward to further developing it. Regarding the first part of your question, we have identified two priorities for COFECE during my tenure as Chair Commissioner. Our top priority is to enable the necessary conditions for Cofece to fully exercise its legal powers. Competition policy does not have a single front, it has a variety of tools that effectively deter anticompetitive conducts when used as a whole.

It is important to mention that Cofece has already reached important milestones, only last year, we imposed our highest record of fines and disqualified directors for engaging in cartel conduct. However, the Mexican Federal Economic Competition Law provides for interesting tools that are yet to be fully wielded, such as filing criminal complaints related to cartel investigations, injunctions during investigations, filing class actions and strengthening our role in private damages actions of persons seeking the restitution of damages caused by anticompetitive conducts. These and other powers provided for in our Law are an opportunity to diversify the agency's interventions, incorporating both corrective and preventive actions.

As to which sectors to focus, Cofece's 2022-2025 *Strategic Plan* establishes a prioritization of sectors to maximize the impact of the Commission's interventions in terms of consumer's welfare. Thus, during this period, we will focus on conducting studies, investigations and issuing recommendations in the following sectors: health, food and beverages, financial services, transport and logistics, energy, construction and real estate services, public procurement and, finally, digital markets.

On the second hand, we will strengthen inter-institutional cooperation with both federal and state governments, and with all public institutions. This involves building bridges, fostering relationships, establishing frank and open dialogue spaces and finding common ground between other public policy agendas and competition policy. Competition policy cannot and should not be the sole responsibility of competition agencies, it must be a collective effort by all the government and private institutions in order to achieve a common goal: competitive markets that will benefit everyone.

It is our role to increase public and private institution's awareness of the importance of competition law and policy. Thus, it is important that the benefits derived from the Commission's actions are more tangible for the larger portions of the population. Concerning public institutions —and considering that Cofece's regulatory recommendations are not legally binding—this dialogue will help us convey the message that the goals of competition policies converge with those of other policies and

regulations. I am convinced that this dialogue can result in competition becoming a common cause for actors in all the sectors, united in a single front.

Paulo Burnier: **We are also pleased to see a woman appointed again as chairwoman of COFECE (previously chaired by Ms. Alejandra Palacios and Ms. Brenda Hernandez as acting). Other jurisdictions from the region are also led by women at this moment (for example in Colombia, Costa Rica, Dominican Republic, Honduras, Peru, Uruguay and Caricom). What message this sends to the region, and how does it contribute to address gender balance gaps?**

Andrea Marván: On the one hand, I think that the fact that women occupy leadership positions in our region's competition authorities is testament of how these agencies are amongst the most modern and forward-looking organizations in today's Latin American institutional landscape. In this regard, we are all setting an example on the importance of women's participation in the public administration, and on bringing down behavioral and cultural barriers in the workplace. Hopefully this will become a trend in other governmental agencies as well. However, I must say that, while I do think most of the competition agencies in the region are heading in the direction of a more equitable composition of their staffs, gender balance has not yet been fully reached. The fact that women lead a significant number of competition authorities in Latin American does not automatically translate into an equative distribution of positions. To expedite this process, we have to take full advantage of whatever means at our disposal to recruit, foster and retain female talent.

At Cofece, we are constantly implementing human resource policies with the aim of increasing the participation of talented women in all echelons of the organization. This year we implemented a mentoring program for women and other specific actions to achieve gender equality in our agency. These efforts have been recognized by a certification under the Mexican Standard on Labor Equality and Non-Discrimination and by the EDGE Certificate. These awards have considered policies that we have adopted, such as extending maternity and adoption leaves to facilitate job reinsertion; the creation of a recruitment system with non-discriminatory and gender perspectives and organizing trainings on gender issues aimed both at women and men. One new development in this regard is that, as of this year, a number of hiring procedures are open exclusively to women. There are still more that we can do in areas such as the composition of senior management teams, and in the empowerment and development of leadership skills of women. During my tenure, this will be a priority and we will strive to close the gender balance gap.

It is also worth noting that I am aware of the OECD efforts carried out in this front. As such, at Cofece we are enthusiastic to support the OECD Gender and Competition Toolkit to be presented at the next Latin American and Caribbean Competition Forum to be held at Quito, Ecuador, for which I have agreed to participate in its Pre-Launch event among colleagues from Brazil and the Competition Division of the OECD.

Paulo Burnier: **has been very supportive of the OECD Regional Center for Competition (RCC), which is much appreciated. How can the RCC continue to best support the needs from competition authorities in the Latin American and Caribbean region? In particular, what topics would you find most useful to be explored in the RCC capacity building activities next year?**

Andrea Marván: The OECD Regional Center for Competition is a key institution for the Latin American and Caribbean competition community. Its capacity building activities are tailored to the characteristics and needs of our region's agencies and the challenges that they face, and it also contributes to the exchange of knowledge and experiences between agencies that intervene in markets with similar competitive dynamics. My compliments for excelling in this task. Keeping in line with 2022's *Workshop on Competition in the Aviation* Sector, I think that similar activities can be organized for industries that are closely related to the welfare of families and that contribute to sustained economic growth, such as groceries, pharmaceutical, transport, and public procurement. In previous years, the RCC has also offered workshops on the energy, health and financial sectors; perhaps there may be some benefit in revisiting them during the following years, according to the competition trends that may emerge. Of course, there are also several tools and skills that can be the subject of future workshops specially designed for Latin American agencies, such as leniency and compliance programs, the use of digital investigative and analytical tools, analysis of regulated markets, the promotion of second generation agreements and the compensation for damages derived from anticompetitive practices. Whatever activities the RCC organizes in the following years, I am confident that they will be really valuable for Cofece and its staff, just as they have been in the past. Please count with the Commission's support and active participation in these and further projects.

Section III: Contributions from experts

Brazil: iFood commitment case in the market of food delivery platforms

by Alden Caribé de Sousa[1] and Priscilla Craveiro Campos[2]

Since 2020, the Administrative Council for Economic Defense (CADE) has been investigating iFood – the Brazilian most important online food delivery marketplace – for abuse of its dominant position. The investigation began with allegations that iFood's exclusivity policy with restaurants would be hindering the entry and operation of rival platforms in the market. The complaints were made by competitor Rappi and two restaurant associations. In view of the indications of infringement and the presence of *periculum in mora, in* March 2021, Cade adopted a preventive measure prohibiting iFood from entering into new exclusivity commitments, allowing, however, the subsequent renewal of those commitments already established for a maximum period of 1 year.

After conducting extensive market consultations and deepening the investigation, in February 2023, Cade signed a Cease and Desist Agreement with iFood ("TCC").

The definition of the relevant product market was a relevant issue in the TCC investigation and negotiation. iFood argued that CADE should consider a broader definition, considering both online food delivery marketplaces and other platforms and tools through which food orders are made. CADE did not consider this option; since other online tools by which you can order food, such as Whatsapp or Telegram, are not included in the same relevant market of online food delivery marketplaces. That's because those tools do not offer a list of restaurants for the customer to choose where to order from and because their commercial policy and business model are totally independent of the restaurant's one. Likewise, the fact that the commitment to exclusivity with iFood does not prevent sales by instant messaging services is another indicator of the absence of rivalry between these tools and marketplaces.

As for the geographical market of online food delivery platforms, CADE considered that there are rivalry elements in two clusters, a national and a local one. There is a national strategy for defining trade policy, prioritizing investments in advertising, and fixing the value of commissions charged. In addition, contracts with restaurants are standard for the entire country. But end-customer support happens locally. The deliverers are governed, the issues related to delivery logistics are defined, and the service is provided locally, taking into account the location of the final customer.

iFood's market share exceeds, from any point of view, the 20% required by Brazilian Federal Law No. 12,529/2011 to authorize the presumption of a dominant position. In addition, in Brazil, iFood enjoys the pioneer advantage, which raises concerns related to tipping effects. Markets with tipping effects usually exhibit intense competition for the market at the outset, which then transforms into a likely period of weak competition in which the winner/monopolist enjoys the profits of his market power.

[1] General Coordinator of Antitrust Analysis of the Administrative Council for Economic Defense - Brazil General-Superintendence.
[2] Investigator of economic order harm of the Administrative Council for Economic Defense - Brazil General-Superintendence.

The main problem identified in the investigation was that iFood boosts its commercial behaviour through its huge and incontrovertible network externality compared to other marketplaces. The network externality meant that more restaurants would attract more end customers and more end customers would attract more restaurants, i.e., the platform usefulness would grow the more the platform itself grows.

Thus, the network externality would naturally already be a significant market barrier, but it was unduly reinforced by the exclusivity agreements that iFood had with many restaurants. That was especially damaging in cases of exclusivity with large restaurant networks, popular with end customers and considered essential to attract users to the platforms in order to access minimum viable scale.

A less visible aspect of the impact of the network externality on that market was the ability to regiment deliverers. Perhaps for that reason, 99Food – one of iFood's main competitors in Brazil, abandoned the full-service model (whereby the platform is responsible for food delivery) in February 2023.

Although it had few exclusive restaurants compared to the total number of restaurants registered on the platform, iFood concentrated a large part of its turnover in these restaurants, indicating that few restaurants would be responsible for a large volume of sales. From what was found in the market tests, these agents were large restaurant chains (McDonald’s, Habib's, Coco Bambu, Outback, etc.).

Uber Eats exited the Brazilian market in 2022, complaining about access to these large networks. In addition to Uber Eats, relevant platforms such as Glovo and James, the latter of the relevant supermarket Grupo Pão de Açúcar, left the Brazilian market in recent years. They cited the lack of access to large networks as preventing companies from gaining viable scale in Brazil.

By closing exclusivity with these agents, using its superior network externality, iFood transformed market dynamics. The platforms stopped competing for orders and began to compete for exclusivity with large restaurant networks, which has not been the most efficient arrangement for this service.

To justify the practice, iFood argued that exclusivity was necessary to offer compensation or benefits that generated efficiency in the market, such as advertising campaigns, personalized advice for restaurants (with indications to increase the average ticket, preparation of the menu, photos that convert more orders, information on where to open new stores, etc.), more visibility on the platform and, quite exceptionally, investment in physical assets, such as dark kitchens.

Although not all benefits are linked to exclusivity (iFood already sells visibility on the platform, regardless of exclusivity), CADE felt that these trade-offs contributed to increasing the operational efficiency of restaurants, especially those with a limited degree of large-scale service delivery, i.e., small, and medium-sized ones. Without prejudice, three concerns emerged from the investigations. Firstly, iFood's exclusivity agreements created extraordinary difficulties for new marketplaces to enter the market (volume denial for access to profitable scale). The second regards compensation. The training/expansion compensations of small and medium restaurants offered by iFood had diminishing marginal efficiency; that is, they can justify exclusivity for a period, but not indefinitely because they are not constantly renewed at the same level. Finally, the third concern had to do with iFood conducts that could bring restaurants to de *facto* exclusivity – something like a violation of the prohibition of exclusivity that existed in a more limited way at the stage of imposing preventive measures in the process.

The agreement signed with iFood sought to address that set of concerns with remedies for each of them.

To address the barriers imposed by iFood's exclusivity agreements on the entry and operation of other marketplaces in the market, CADE imposed the prohibition of celebration or renewal of Exclusivity Commitments, or measures that induce "*de facto* exclusivity", with brands that have 30 (thirty) restaurants or more. They are the restaurants that have few efficiencies in the exclusivity arrangement, since they already have technology for advertising, expansion, agility, and work with delivery service.

In addition, CADE set a national limit of 25% of the total Gross Merchandise Value - GMV - registered by the iFood Platform and a municipal limit of 8% of the number of restaurants active on the iFood Platform for exclusivities. These limits will be adjusted gradually: a transition period of 6 months was agreed to avoid a general breach of contracts between iFood and the restaurants. At the end of the first three months, the GMV of the exclusive ones must be limited to the maximum of 28%, and the number of exclusive restaurants in relevant cities must not exceed 10%. From the first day of the seventh month of the TCC validity, the limits of 25% and 8% must be fully observed.

Hopefully, with the abovementioned limits imposed on the conclusion of exclusivity contracts, competing platforms will be able to gain scale, reducing the already natural barriers arising from the network externalities from which iFood benefits.

To address the need to decrease marginal efficiency of the training/expansion compensations offered by iFood to small and medium restaurants, a general rule was established that exclusivity commitments must have a maximum duration of 2 years, followed by one year of exclusivity quarantine. Quarantine is when the restaurant must remain without exclusivity commitment after having terminated a contract with an exclusivity commitment.

With these obligations, small and medium-sized restaurants can benefit from the compensations offered by iFood. However, they will be obliged to periodically dissociate themselves from the platform within a reasonable period so that iFood recovers the investments made during the exclusivity period.

However, there is an exception to the two years duration rule and subsequent quarantine of one year. This exception is limited to 50% of the exclusivity contracts and may occur whenever the exclusivity commitment results in an investment in the restaurant operation that generates a revenue increase at least 40% higher than the growth of the food delivery market in the previous year. In these cases, the exclusivity may last more than two years and remain quarantine free. If iFood does not meet the performance goal linked to exclusivity, it will have to compensate the restaurant in the profit value relative to the expected and unreceived income.

Finally, regarding the concern about contractual measures or trade negotiations adopted by iFood, which may generate *de facto* exclusivity, a series of prohibitions were imposed to ensure the prohibition’s effectiveness.

The market well-received those measures, and many agents already indicate preparation for permeability at the entrance of new platforms.

Mexico: Collusion in the professional soccer market

by Ana María Reséndiz-Mora [3]

Introduction

In recent years, anticompetitive conducts in labor markets are receiving greater attention from competition authorities and regulators around the world. The labor market can be described as the result of a negotiating process between employees and employers, where buyers are the employers who demand labor services, and sellers, in turn, are the employees who offer their services to employers. Competition agencies are investigating not only traditional monopolistic cartel practices, such as, market sharing, price fixing and exchanging commercially sensitive information, but also non-traditional monopsonist conducts in labor markets, like wage-fixing[4] and no-poaching agreements[5]. For instance, in a recent and somewhat controversial proposal, the Federal Trade Commission has proposed a ban to non-compete agreements[6], with some exceptions.

In a competitive marketplace buyers and sellers tend to be price-takers and the market-clearing price, or wage, results in a tendency to neither excess of supply nor excess of demand. This is relevant because a competitive labor market, or with a fair degree of competition, ensures actual and potential market participants to have a level playing field, to have fair wages, and to reduce wage inequalities, including gender pay gaps.

In 2018, COFECE started its first non-poaching case, as well as other anticompetitive practice, that resulted, in 2021 in the imposition by COFECE´s Board of Commissioners, of fines to 17 soccer clubs, the Mexican Soccer Federation and eight individuals. COFECE determined that the soccer clubs colluded in the market of women and men professional soccer players by engaging in two conducts. The first one was related to an agreement by setting a salary cap for female soccer players. The other was about interclub movement restrictions impose to male soccer players.

[3] Ana María Reséndiz-Mora is Commissioner at the Mexican Competition Authority (COFECE). She holds a master's degree in economics from Georgetown University and from Colegio de Mexico. The views expressed in this article are personal and do not reflect those of the organisations mentioned here.

[4] Wage-fixing agreements are agreements between competitors that limit wages, salaries, or other employee benefits.

[5] Non-poaching agreements refer to actions taken by two or more firms to coordinate their hiring, pay and benefits policies.

[6] https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking

Explaining the main points of the Mexican case

In 2018, COFECE's Investigative Authority initiated an investigation in the Mexican professional soccer labor market for possible collusive agreements by imposing salary caps for female soccer players, as well as imposing anticompetitive hiring restrictions for male soccer players due to a common understanding among the Mexican soccer clubs known as the "gentlemen's agreement or pact" in the sports industry.

In accordance with the Mexico´s Federal Economic Competition Law (FECL), these agreements can be investigated as cartels or collusions, or absolute monopolistic practices in the FECL terminology, which are illegal *per se*. These conducts consist of contracts, agreements, or arrangements amongst competing economic agents, which have as their purpose or effect to fix prices, allocate markets, restrict supply, agree bids in tenders or exchange sensitive information with such purposes or effects.

Such case is important because soccer is the most popular and profitable sport in Mexico and, thus, the possible illegality of these practices was a good opportunity to draw the attention of the media industry and to get a wider coverage that reach a large sector of the population who are not familiar to issues of competition enforcement. It also sent a clear message to other participants in labor markets that may be affected by no-poaching agreements, that such agreements could be deemed to be anti-competitive and could be investigated and sanctioned by COFECE.

In 2021, COFECE´s Board of Commissioners confirmed these two anticompetitive practices. The first one consisted of the agreement between football clubs to apply their alleged "right" of retention of male soccer players, which involved 17 soccer clubs with the assistance of the Mexican Football Federation. These agreements were exercised during the transfer and hiring season for soccer players (known as draft). During the draft, each soccer club registers the players with the Federation, with whom they had a contract, but at its expiration they retained the alleged right to retain them. If a different club was interested in hiring that player, it had to obtain authorization from the first club that had him in its "inventory" and, often pay to the first club a considerable amount for the change. The agreement between the clubs impeded a professional player of the "LIGA MX"[7] to negotiate or choose freely with another club after having finished his contract. In this way, the conduct reduced significantly the player's bargaining power, resulting in a contract with a lower artificial salary. Additionally, this effect stacked over time, since the initial lower salary negotiated as a result of the clubs' misconduct affected any subsequent salary negotiation.

The second conduct was an agreement between soccer clubs to establish a maximum salary cap for women soccer players of the "LIGA MX FEMENIL".[8] The conduct, whose duration was from November 2016 to May 2019 was sanctioned as price manipulation, by preventing clubs to compete for hiring female players and offering better salaries. In particular, the soccer clubs, since the creation of the LIGA MX FEMENIL in 2016, agreed to establish a wage cap consisting of a maximum monthly salary of $2,000 Mexican Pesos (MXN), which is equivalent to approximately $100 US dollars (USD) for those over 23 years old; for those under 23 would earn $500 MXN (equivalent to $25 USD) in addition to a course paid for by their personal training club; and for the players in the Sub-17 category would not

[7] Professional male football division in Mexico. Formerly known as the Primera División de México (Mexican First Division).
[8] Professional female football division in Mexico.

earn any monetary income, though the soccer club could help them with transportation, studies and food expenditures. Subsequently, the agreement was modified in the 2018-2019 season, in which the maximum monthly cap would be $15,000 MXN per tournament (or approximately $750 USD) and only four female players in each team could earn above that cap. Bonuses for performance in kind could not exceed $50,000 MXN per player in the tournament.

The salary cap agreed between competitors, upon in each tournament, reduced the salary of the female players since the clubs have less pressure to compete to hire players since competing clubs would not offer higher salaries.

Additionally, the salary clause for female players not only had a negative impact on the income of said players, but also widened the gender pay gap. Consequently, these agreements between competitors have a significant impact on the professionalization of women in soccer sport in Mexico. In this country, men earn 14% more than women on average across all career fields,[9] but in the case of football, that average cap is greater. Considering that the salary of a female first division player ranges from $2,500 to $30,000 with an average salary of around $10,000 per month while a male soccer player receives $750,000[10] per month[11]. This means that in the major soccer leagues a male player can earn 75 times more than his female counterpart.

[9] https://imco.org.mx/brecha-salarial-de-genero/
[10] Average salary
[11] Calderón Calderón, Francisco David: "La disparidad salarial y laboral en el fútbol mexicano por género". https://ceey.org.mx/la-disparidad-salarial-y-laboral-en-el-futbol-mexicano-por-genero/
https://udgtv.com/noticias/falta-de-igualdad-entre-mujeres-y-hombres-en-el-deporte-la-brecha-salarial-es-mucho-mayor/

Conclusion

This case sets an important precedent and sends a clear message that COFECE will investigate and sanction labor market agreements as cartels and any other anticompetitive practice in such industry.

Agreements between employers in the same labor market that restrict the mobility of employees will be investigated and potentially sanctioned, as they directly impact the wages and welfare of soccer players.

Joseph Stglitz, a Nobel Prize winner in economics, wrote that "[t]*ypically there is some, but limited, competition in the labor market, but it is competition that is insufficient to achieve anything approximating what would emerge in a truly competitive marketplace. But employers often do not like even this limited competition, because even some competition means that wages are higher than they would be with no competition"* [12]. In the case of soccer's professional market, firms colluded, and these agreements reinforced a downward wage trend and imposed rigidity constraints in labor markets, as well as strengthened wage disparities, especially for traditionally disadvantaged populations.

[12] Stglitz, Joseph. "Fostering More Competitive Labor Markets," *Inequality and the Labor Market: The Case for Greater Competition*, Sharon Block and Benjamin Harris, eds., Washington D.C.: Brookings Institute, April 2021.

Panama: Judicial review of competition cases

Joancy Chavez Rivera[13]

Introduction:

This article will address the situation, which for several years has been experiencing legal proceedings filed by the Authority for Protection of Consumers and Defense of Competition (ACODECO) for possible monopolistic practices before the specialized courts of Free Competition and Consumer Affairs belonging to the Judicial Branch.

The changes that have been made to the regulations in this regard will be addressed with the intention of having a jurisdictional procedure, which, in theory, allows decisions in this type of process to be issued in relatively short periods, by introducing reforms that streamline the stage of testing practices within the process.

We have a mixed system, which begins, in the case of ACODECO, with an administrative investigation. If it concludes the existence of anti-competitive practices, it is appropriate to file a civil lawsuit before the competent courts in the matter. If a ruling is obtained in favor of declaring the conduct illegal, the judicial decision being firm and duly enforceable, the sanction can be proceeded with by means of an administrative fine.

Individuals or third parties affected, although it is not common, can legally act before the courts. The experience has been that those affected by an illegal practice file a complaint in the administrative sphere, and in some cases, the least, economic agents come as affected third parties within the process already initiated by the competition agency.

Finally, I will address relevant aspects of the report entitled "Analysis of the Duration of Judicial Proceedings for Monopolistic Practices filed before the Courts of Justice by ACODECO14" (technical report) prepared by the technical team of the National Directorate of Free Competition of ACODECO; with the sole objective of having a complete scheme of the real behavior of the processes and of the judicial and extrajudicial transactions carried out by the entity.

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[14] https://acodeco.gob.pa/inicio/wp-content/uploads/2023/05/IT_DuracionProcesosJudiciales_2023.pdf (spanish version).

Legislation:

With the promulgation of Law 45 of October 31, 200715 (Law 45) that dictates regulations on consumer protection and defense of competition, in force to date, an important change was made to the old Law 29 of 1996, in particular , to the procedural rules; Previously, there was no time limit for the taking of evidence in the processes initiated by the commission of monopolistic practices, which caused very extensive hearings to evacuate evidence, and this, in turn, delayed the judge's final decision.

With the entry into force of Law 45, in its article 128, a reform is introduced regarding the processes in the matter of monopolistic practices, establishing that the court must reserve up to forty-five (45) consecutive business days in the calendar of hearings for the practice of evidence, within the act of ordinary hearing; term that according to the law, can be extended, only once, for a period of thirty (30) additional consecutive business days; thus evacuating the practice of evidence in a relatively short period, which in theory should contribute to a faster substantive decision, at least in the first instance of the process.

Unlike ordinary civil processes, those filed by the alleged commission of monopolistic practices, according to Law 45, are duly delimited in their first instance, with the precision of each stage to be fulfilled, which goes from the presentation of the claim, with a transfer for a term of ten (10) business days, going through a preliminary hearing that cannot be postponed, and with an ordinary hearing that can be postponed only once. In addition to the reserve of forty-five days (45) for the aforementioned evidence, and it was established with a term of five business days, for each party, for the presentation of the oral or written arguments of conclusion.

It is worth mentioning that the incidents presented in this type of process, in general and in accordance with the law, are decided in the substantive sentence.

There are currently only two courts that exclusively and privately know monopolistic practices: eighth and ninth circuit court, civil branch, in the First Judicial District of Panama, as well as the superior court located in the country's capital; Although the law mentions a tenth court, to date it has not been created.

For the rest of the country, in the provinces, these cases would have to be settled by the ordinary civil circuit courts.

[15] https://acodeco.gob.pa/inicio/ley-45-de-31-de-octubre-de-2007/ (spanish version).

Technical report on the duration of the processes:

From 2015 to date, ACODECO has monitored the duration of the processes for monopolistic practices, seeing that they took years to obtain a pronouncement by the judicial authorities.

The idea is to obtain, year after year, precise information on each judicial stage, from the presentation of the claim to the decision on the merits, in order to have a complete overview of the time and resources that each process absorbs, whether or not there is speed. in the decisions of the judges, that is, a complete x-ray of the Panamanian reality in this matter.

The technical report has been useful for carrying out competition advocacy, raising awareness about the importance of resolving, in a timely manner, these illegal behaviors that do so much damage to the country and to consumers.

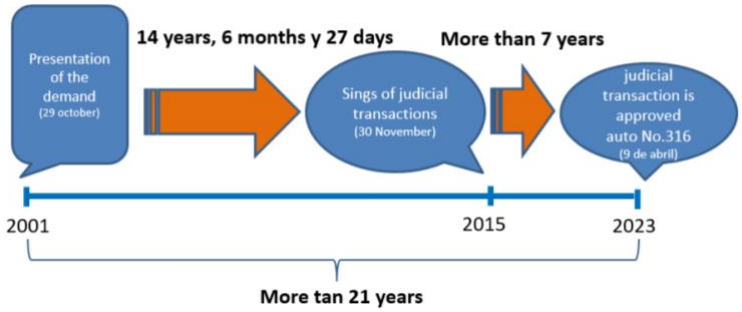
Also within this report, an analysis has been made on the duration of judicial or extrajudicial transactions, I will not address them in this writing, but they have become the best alternative for ACODECO as a means of resolving the conflict; Although legal procedures for approval by the Office of the Attorney General of the Nation and the Cabinet Council must be complied with, the transactions have been the quick way to correct illegal behavior and to have a legal and effective mechanism that allows monitoring of behavior of the economic agents involved either in administrative investigations or in legal proceedings.

It is fully intended to teach in this matter through the Technical Report, but it can also be a wake-up call or alert to judicial management, to raise awareness about the importance of speed in decision-making within the processes regarding competition.

One of the factors that could be influencing judicial default is that the specialized courts created to rule on monopolistic practices also have jurisdiction over other matters such as: consumer protection, copyright, unfair competition, others, which They generate the greatest volume of files, without being an excuse, they are attracting the most attention.

As shown in the graphs below, according to the technical report, the sectors with the longest duration in legal proceedings are: air, fuel, and beer, which have taken 21, 19, and 14 years, respectively, a time that increases as then having to go through a sanctioning administrative procedure, damaging the deterrent effect of the application of a fine and also generating a loss of confidence in public management.

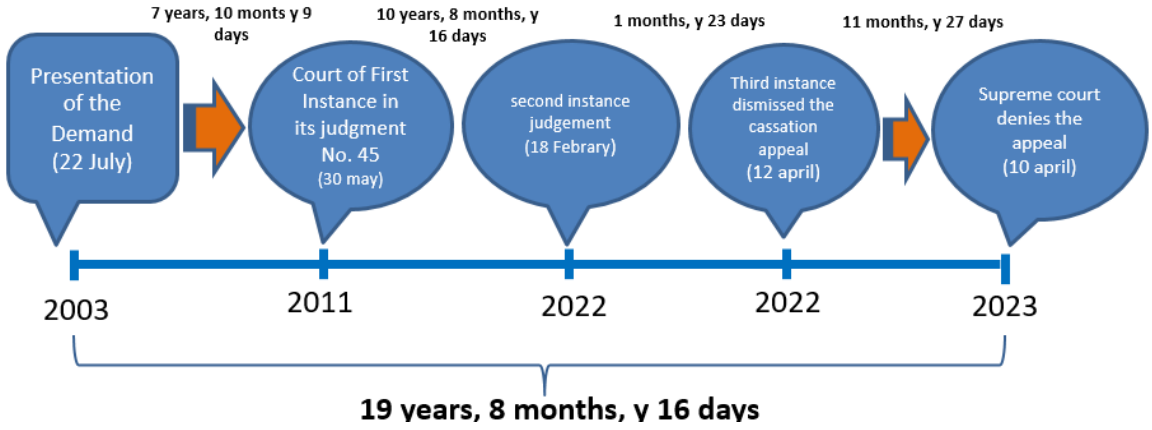
Case airlines[16]**:**



The case against airlines, for example, has been waiting for almost 8 years for a substantive ruling that puts an end to the case, being a process in which there is a group of travel agencies that claim to have been affected as a result of the absolute monopolistic practice (cartels) by the airlines.

This case is still awaiting a final ruling; To date, both ACODECO and the travel agency lawyers regularly submit procedural briefs as a legal tool to end the process.

Case of fuel distributors[17]**:**

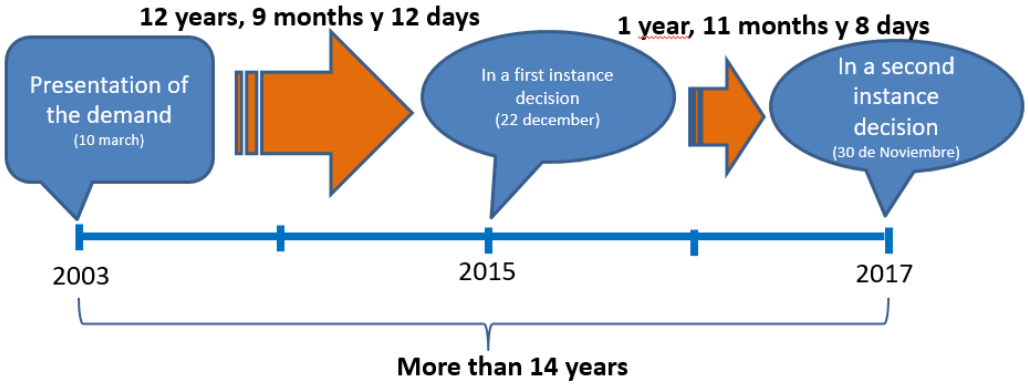


[16] Technical report, page 44. (spanish version).
[17] Technical report, page 45. (spanish version).

The process against the wholesale fuel distributors obtained a ruling in favor in 2022, the defense of the companies defeated in the process filed a factual appeal before the Civil Chamber of the Supreme Court of Justice, which was resolved on April 10, 2023.

Now it is up to the National Direction of Free Competition to initiate a sanctioning procedure, in this particular case, for absolute and relative monopolistic practices, whose sanction according to the applicable law at that time (Law 29 of 96) was from twenty-five thousand to one hundred thousand balboas for the practice. absolute and for the relative practice from five thousand to fifty thousand balboas, that is, applying the maximum sanction, only each fuel distribution company could be fined, for a maximum amount of one hundred and fifty thousand balboas for both illegal conducts, which is insignificant. after 20 years of a long process.

Beer case:



The particularity of the beer case, like that of fuel distribution, is the pronouncement in the second instance, and that in these two cases the final decision was issued in a period of 1 year; something different from what is happening with the case of airlines, which has been waiting for the same second instance decision, for more than 7 years, with the demand in the case of beer and fuel presented later (2003) than that of airlines, presented in the year 2001.

Final remarks:

Most of the processes for monopolistic practices presented before the judicial authorities are subject to the filing of multiple appeals and incidents by the lawyers in defense of the economic agents, which also affects the delay in final decisions. However, the technical report has shown, in several cases, that the wait lies in the mere issuance of the pronouncement of the judge to put an end to the process.

Since the peer review carried out in Panama in 2010, the need has been seen for the issues of competition in the judicial stage to advance, this sought the reform of the law, despite the fact that the times in the evidentiary hearings have improved, It is still a Panamanian reality that the final decisions of cases for monopolistic practices are not decided as quickly as expected.

In Panama, it has been decided to carry out transactions or agreements with the economic agents investigated or sued, as an alternative to immediately correct the illegal practice, restoring the conditions of competition, which ultimately translates into saving resources for the entity. and an economic contribution to the national treasury, although these transactions do not depend on ACODECO but on the companies that are being sued or investigated so request.

There remains an important challenge for competition law and policy in Panama, to assess maintaining a mixed organizational structure in terms of free competition or to make a radical change to the law, to create a purely administrative institutional design that resolves cases of illegal acts. contrary to competition law; despite the fact that attempts to change an administrative system have already been criticized by different sectors, as they are considered a concentration of power in the figure of a single person, in this case an administrator, as the highest authority for decision-making in this matter.

Which system is the best, which generates greater efficiency in competition cases, will always be the subject of discussion in various forums, the truth is that we must apply the best international practices to protect and promote competition for the benefit of all.

Paraguay: Collusion in Public Bids - the Imedic and Eurotec case

by Eduardo N. González[18]

I. INTRODUCTION

The case of which we wish to expose in this article is the one referring to an investigation initiated in June 2020 by the Directorate of Investigation of the National Competition Commission (CONACOM) for the alleged collusive conduct of two private companies in eight public bidding processes for Medical Supplies carried out by entities of the health sector of the Paraguayan State between 2018 and 2020.

The case in question initially involved three companies that were related to each other by family members, who were called by the Paraguayan press the "Ferreira Clan" since its members have been pointed out as the controllers of the beforementioned companies.

II. CONTEXT

The proceedings of the IMEDIC and EUROTEC case began in other instances in 2018 when the Comptroller General of the Republic revealed a series of irregularities in the awarding of medical supply contracts in public hospitals in Paraguay. The relationship between these contracts was established by a journalistic investigation that exposed the alleged participation of the same family in both companies.

According to the journalistic investigations regarding the link between those cases, the prices of medical products sold by IMEDIC to public hospitals were much higher than the market average.

The CONACOM initiated an investigation summary on June 5, 2020, against the Paraguayan companies *Insumos Médicos SA (IMEDIC)* and *Eurotec SA (EUROTEC)* and *Medical Pharma SA (MEDICAL PHARMA),* on suspicion of the Competition Defense Law n. 4,956/2013 transgression. In particular, the analysis consisted of the possible violation of Article 8 of the referred Law during eight bidding processes carried out by Paraguayan public sector entities, most of them between 2018 and 2020[19].

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[19] Law 4956/13 Article 8.- Competition Restriction Agreements. Any agreement, decision, or concerted or consciously parallel practice, whether written or oral, formal or informal, which has as its object, produces or is likely to have the effect of preventing, restricting, or distorting competition in all or part of the national market is prohibited.

According to data on these procedures reported by **Paraguay's National Directorate of Public Procurement** (DNCP), the companies abovementioned received awards equivalent to around USD 34 million.[20]

The Directorate found reasonable and sufficient evidence to justify the investigation of the facts exposed by the Investigation Directorate in the Request, which was opened on June 11, 2020.

On January 15, 2021, the Investigations Directorate requested an expansion of the summary investigation to include the brothers Patricia Beatriz Ferreira Pascottini and Marcelo Rubén Ferreira Pascottini, who appeared as heads in the indicated companies. The CONACOM Board of Directors approved the request.

On February 24, 2021, the Investigations Directorate filed an accusation against the firms EUROTEC and IMEDIC, and against Mr. Marcelo Rubén and Mr. Patricia Beatriz Ferreira Pascottini, for being part of an agreement restrictive to competition, and imposed the corresponding sanctions, as well as dismissed the investigation against the firm MEDICAL PHARMA. The CONACOM Directorate agreed to the terms used by the Investigations Directorate to formulate the accusation and granted the request for dismissal of MEDICAL PHARMA's investigation.

III. CASE ANALYSIS

The Investigations Directorate proved that in a single bid between the two companies, they submitted 57 offers without coinciding. Finally, the contracts with the solicitor were this time signed by members of the Grupo Familiar, however fixing domicile in the same physical place, in addition, led the investigative body to conclude that both accused firms became aware of and/or shared information about the call and its conditions, even before the invitation of the convener. Also, although the award was a lot system, both EUROTEC and IMEDIC made their bids by item of each lot, that is, each company bided partially, but their offers were complementary since each company bided for the lot items the other company omitted.

[20] https://www.ultimahora.com/direccion-nacional-contrataciones-publicas-a1801

Table 1. – IMEDIC and EUROTEC participations in Bids Investigated by CONACOM

Licitación	Monto total adjudicado en Gs.	Monto adjudicado a EUROTEC en Gs.	Cuota de mercado EUROTEC	Monto adjudicado a IMEDIC en Gs	Cuota de mercado IMEDIC
339483	₲ 114.817.588.200	₲ 8.610.903.000	7,50%	₲ 20.852.359.200	18,16%
346797	₲ 429.735.043.567	₲ 18.628.974.735	4,33%	₲ 47.278.157.535	11,00%
347619	₲ 366.692.501.910	₲ 29.180.657.700	7,96%	₲ 18.874.537.360	5,15%
356521	₲ 12.359.929.405	₲ 166.729.500	1,35%	₲ 44.436.000	0,36%
364251	₲ 44.699.603.360	₲ 1.930.962.000	4,32%	₲ 3.179.461.580	7,11%
369711	₲ 17.208.980.900	₲ 11.749.500	0,07%	₲ 155.400.000	0,90%
373448	₲ 11.217.440.400	₲ 757.014.000	6,75%	₲ 166.094.800	1,48%
382317	₲ 85.220.500.000	₲ 37.268.000.000	43,73%	₲ 47.952.500.000	56,27%

Source: CONACOM – File 01/2020 and National Directorate of Public Procurement

The Investigation Directorate concluded that these companies agreed to complement their offers, avoiding competing with each other for the same item. This avoidance cannot be explained in any other way than as a prior agreement between them, considering the history of offers and the proven links.

The Investigations Directorate found the pieces of evidence summarized as follows:

a) Type 1 - Competitors socialize regularly: Evidently the companies' presidents investigated are relatives (siblings) and share information regularly in different areas, including the formal and informal.

b) Type 2 - Competitors have the same address or telephone number: the companies IMEDIC and EUROTEC indicated in the documentation presented in the bids the same physical address; that is, both worked at the same address. In some notifications, there is also the same personal email address used by both companies.

c) Type 3 - Competitors submit similar applications or materials: The Investigation Directorate was able to verify that the guarantees and insurances presented by both companies were issued by the same insurer and had correlative numbers

d) Type 4 - A company submits its offer and documentation for the bid along with that of a competitor: The same natural person took both biddings offers on the day of the tender, although they had different legal representatives.

e) Type 5 - The bidders entrust the same persons with the performance of tasks inherent to the bids: The Investigation Directorate indicated that there is a strong presumption that the same natural persons received notifications, managed documentation, and submitted the offer of both companies.

f) Type 6 – Apparently, the companies took turns to be the winning bidder: in 98% of the cases the firms had a well-structured behaviour of not presenting offers together; that is, the companies might have agreed to share the bids, not standing together in the same bidding items.

Therefore, although there was no direct evidence of collusion, the authority identified a concerted practice between IMEDIC and EUROTEC proven through indirect evidence and the analysis of the companies' conduct in bids.

The defendants representative pointed out as a defence that it is a holding company case, "[...] which, without going so far as to define the independence or otherwise of EUROTEC and IMEDIC because they respond to a controlling or a common controlling group, at least calls into question whether those firms are not part of the same group or economic unit […]", which is also evidenced by the fact that the shareholders are members of a family group.

In this sense, the following table shows the shareholding composition of both companies.

TABLE 2.- Shareholding composition of the companies investigated

Accionistas de EUROTEC	Participación	
Marcelo R. Ferreira		18%
Metaway S.A.		19%
Patricia Ferreira	*36%*	*6,8%*
Marcelo Ferreira	*36%*	*6,8%*
Petrona Pascottini de Ferreira	*28%*	*5,3%*
Woking S.A.		18%
Carlos Borrel	*80%*	*14,4%*
Vanessa Borrel	*10%*	*1,8%*
Marcela Borrel	*10%*	*1,8%*
Glasgow S.A.		10%
Patricia Ferreira	*33%*	*3,3%*
Justo Ferreira	*34%*	*3,4%*
Carlos Borrel	*33%*	*3,3%*
Nelly Sosa		10%
Marcelo Arce		25%

57%

Accionistas de IMEDIC	Participación	
Patricia B. Ferreira		15%
Metaway S.A.		43%
Patricia Ferreira	*36%*	*15,5%*
Marcelo Ferreira	*36%*	*15,5%*
Petrona Pascottini de Ferreira	*28%*	*12%*
Woking S.A.		15%
Carlos Borrel	*80%*	*12%*
Vanessa Borrel	*10%*	*1,5%*
Marcela Borrel	*10%*	*1,5%*
Glasgow S.A.		10%
Patricia Ferreira	*33%*	*3,3%*
Justo Ferreira	*34%*	*3,4%*
Carlos Borrel	*33%*	*3,3%*
Nelly Sosa		17%

85%

Source: CONACOM file 01/2020 and other public sources

From the chart above, IMEDIC S.A. and EUROTEC S.A. have as common shareholders METAWAY S.A., WOKING S.A., GLASGOW S.A., and one natural person. In addition, it appears that, through these companies, the members of the Family Group investigated own 64.70% of IMEDIC shares and 43.60% of EUROTEC; another Family Group owns 18.30% of IMEDIC shares and 21.30% of EUROTEC shares; and a natural person owns 17% of IMEDIC shares and 10% of EUROTEC shares.

In sum, the stakeholders of 100% of IMEDIC shares also hold 74.90% of EUROTEC shares.

Thus, the case under analysis is not a simple kinship relationship but rather what is called a holding company.

The Public Procurement Law of Paraguay, Law 2051/03, indicates in its Article 40 paragraph g)[21] that *"The following may not submit proposals in the contracting procedures provided for in this law, nor contract with agencies, entities, and municipalities: [...] (g) Participants who submit more than one bidding offer on the same item of goods or services in a procurement procedure, submitted on their behalf or behalf of a third party and who are bound together by a common partner or associate*."

[21] https://www.bacn.gov.py/leyes-paraguayas/159/ley-n-2051-de-contrataciones-publicas

In this context, however restrictive the possible interpretation of Article 40, paragraph g) may be, the companies accused by the Investigation Directorate not only have the Ferreira Brothers as their representatives to prove the link between them; but that they have closer ties that could prove that both companies are part of the same business group. Consequently, they would not have the independence required to regard them as competitors.

It is also indicated that the same Competition Law of Paraguay, Law No. 4956/2013, in its article 2, paragraph 4 states literally that [22] *"The exercise of an exceptional right, faculty or prerogative granted or recognized by law, will not be considered an anticompetitive practice or abuse of dominant position"*. For this article application, it is not necessary to deepen the analysis of the degree of dependence or independence of the aforementioned companies; since it is sufficient to find that they are linked by four (4) common partners or shareholders, representing 85% of IMEDIC shares and 57% of EUROTEC shares.

In accordance with the Law, the CONACOM Board of Directors understood that the defendants would only have acted in contravention of Article 40 (g) provisions if the companies had bid on the same items, which was the conduct of market distribution for which they were accused. The companies, in fact, did not participate in the same bid to avoid being prevented to participate because of their economic group situation, which was also not a desirable scenario.

In short, CONACOM had no choice but to dismiss the firms based on the rules set forth. The Paraguayan Procurement Law leaves no alternative for the bidding companies than the need to coordinate the presentation of signatures with shareholders or else they would be eliminated from the bidding process. CONACOM also concluded for the need to initiate an advocacy process to seek solutions to the Procurement Law issue in the new Public Supply Law that was under study at that time.

The CONACOM advocacy document indicated that the articles of the Procurement Law[23] restrict competition by prohibiting the participation in public bids of two or more bidders "*who are linked to each other by a common partner or associate*", since the law requests the mere verification that a link between companies exists, without analysing the real control exercised by them. This is even more complex when the companies public traded ones.

CONACOM also concluded that article 40 paragraph g) of Law 2051/03, due to its extend, has the effect of forcing the communication and coordination of independent companies by the mere fact of having shareholders in common, making unnecessary the analysis of the existence of an economic group among the bidders and risking the inoperability of the provisions regarding the sanction of collusive conduct in some cases.

[22] https://www.bacn.gov.py/leyes-paraguayas/4775/defensa-de-la-competencia

[23] https://www.conacom.gov.py/noticias/la-conacom-emitio-una-opinion-sobre-la-version-modificada-del-proyecto-de-ley-de-contrataciones-publicas

OECD: Recent developments on digital markets regulation in Latin America

by Vivian Salomão Ianelli [24]

1. Introduction

Digital markets have raised significant concern for competition authorities throughout the world in both anticompetitive conduct and merger cases. Unlike traditional markets, the digital ones influence countries around the globe almost simultaneously and, therefore, require concomitant responses from all of them to avoid anticompetitive practices. Those responses need to be coherent between themselves to avoid, among other reasons, legal uncertainty for companies and conflicting policies. At the same time, policies must supply tools for competition authorities to reduce anticompetitive practices based on each jurisdiction's reality and economic behaviour.

The *ex-ante* regulation of platforms or digital companies is an alternative contemplated by some jurisdictions such as the European Commission with the "Digital Markets Act"[25] and Germany with the 19th Amendment to the Competition Law[26]. The UK (with the Digital Market Bill)[27] and the United States (with some relevant legislation under discussion in Congress)[28] are also drafting *ex-ante* regulations for digital markets. However, even though the DMA and other countries' regulations create significant digital markets framework, it is not the only solution. Because governments are still developing ways to interact with big tech companies to ensure that there are no fundamental rights violations, especially of consumers, there is no consolidated manner to treat this sector and its problems. The legal experience of countries in controlling digital markets is very recent and may change in the future.

[24] Vivian Ianelli is a competition lawyer in Brazil and currently part of the OECD Competition Division team. She is also a Master degree candidate at the University of Brasilia.

[25] European Commission, Digital Markets Act, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC

[26] Bundeskartellamt, Amendment of the German Act against Restraints of Competition, Press Release, 2021, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

[27] CMA, Digital Markets, Competition and Consumers Bill, 2023, https://bills.parliament.uk/bills/3453

[28] H.R.3826 - Platform Competition and Opportunity Act of 2021, https://www.congress.gov/bill/117th-congress/house-bill/3826; H.R.3849 - ACCESS Act of 2021, https://www.congress.gov/bill/117th-congress/house-bill/3849; H.R. 3825 - Ending Platform Monopolies Act, https://www.congress.gov/bill/117th-congress/house-bill/3825.

Notwithstanding, the *ex-ante* regulation creates normative controls for economic agents before any behaviour happens, and it has been the chosen way to deal with digital markets by the countries beforementioned. OECD has already stated that "*there seems to be a broad consensus that some form ex-ante regulation is needed as a complement to competition law enforcement to deliver fast and effective action against structural barriers and risks of anti-competitive practices in rapidly evolving digital platform markets.*".[29]

The *ex-ante* regulation, however, is not new. Most countries, including Latin America and Caribbean ones (LAC), already detain regulations for specific markets such as aviation, telecommunications, and data protection. Companies from these sectors must comply with principles or rules imposed by regulatory agencies before their market activities take place.

Even though regulated markets are common in LAC countries, they still do not have a consolidated and specific regulation targeted to digital markets, but they are already under discussion. Alongside these regulations, various ongoing market studies ongoing in LAC countries contribute to developing a more realistic approach to digital market analysis. This article aims to gather the most relevant LAC countries' initiatives in regulating digital markets and their direct consequences on competition.

2. LAC countries' digital regulation

The countries in the table below have relevant Law Projects related to digital platforms and digital markets. It is important to note that, differently than the approach of the DMA, at least for now, the LAC countries aim at regulating specific sectors that have significant consequences in digital environments such as labour in digital platforms, fake news, and payment services.

Most of these countries also already have data protection laws that aim not only at digital companies but at all those that collect, use, and transfer data, which nowadays reflects at all companies with relevant sizes in the market[30]. This chart assembles those initiatives related specifically to digital markets/platforms.

[29] OECD, Ex ante regulation and competition in digital markets, 2021, https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf

[30] Filipe Da Silva and Georgina Núñez, La libre competencia en la era digital y la pospandemia: El impacto sobre las pequeñas y medianas empresas, 2021 https://repositorio.cepal.org/bitstream/handle/11362/46663/1/S2100020_es.pdf

Table 1 – Law Projects related to digital markets in LAC countries

Country	Legislation or regulation draft	Year	Main goals	Competition related clauses
Brazil	Fake News Law Project[31]	2020	The ongoing project still under discussion in the Brazilian Congress aims to regulate mainly the responsibility and transparency of social media and message service companies regarding fake news.	Transparency with consumers and economic agents is one of the core principles of this project (Section V).
	Draft Digital Platform Regulation[32]	2022	Ongoing draft under analysis aiming to regulate the organization, functioning, and management of digital platforms in Brazil.	Regulation of digital platforms should address, among others, the maintenance of free competition and the repression of abuse of dominant economic power. (Art. 4, I and V and Art. 5)
Chile	Draft Digital Platform Regulation[33]	2021	Ongoing law project that regulates digital platforms. There are no exceptions to the applicability of the regulation. The law includes all platforms, no matter their size.	The project defines a non-discrimination provision for digital platforms (Art. 9)
Costa Rica	Draft of Individuals Transportation digital platforms[34]	2023	Ongoing law project that regulates the paid transportation services of individuals made by intermediation of digital platforms.	Effective competition for workers in digital platforms and free competition between economic agents are core principles of this project. (Art. 5, b and e)

[31] Law Project n. 2630/2020, 2020, https://www.camara.leg.br/propostas-legislativas/2256735.

[32] Law Project n. 2768/2022, 2022, https://www.camara.leg.br/propostas-legislativas/2337417.

[33] *Boletín 14.561-19*, 2021, https://www.senado.cl/appsenado/templates/tramitacion/index.php?%0bboletin_ini=14561-19

[34] Law Project 23736 *Ley de Transporte Remunerado No Colectivo de Personas y Plataformas Digitales*, 2023, https://delfino.cr/asamblea/proyecto/23736

Mexico	Law Project of Protection to the Digital User[35]	2021	There are still no developments of the draft proposed in 2021 that provided high-level principles for strengthening the protection of digital users and added explicit references to them in the data protection and consumer protection laws.[36]	One of the main basic principles of the Mexican project is the avoidance of coercive and disloyal commercial methods against consumers; and the imposition of abusive clauses when providing digital services (Art. 4, VII)
Peru	Set of Law Drafts for labour regulation in digital platforms[37]	2016-2021	Ongoing law projects that aim to regulate labour in delivery and taxi apps. Digital platforms are considered a new way of employment and need some control from the government. None of the projects were yet approved.	Those projects aim to compare digital workers with the existing labour in Peru. This might mean a cost increase for digital companies and avoid new entries, or even it can encourage labour cartels. This conclusion is very speculative and might not reflect the countries' reality, but anyhow, those legislations can impact the market's competitive status.

Source: Author's elaboration.

Other LAC countries had discussions about digital platforms but do not have ongoing law projects yet. Colombia is one of them. Despite proposing laws in 2021 and 2023 defining a limitation for transportation apps (such as Uber)[38] and regulation for hiring working force for digital companies and platforms[39], respectively, the Colombian Congress decided to suspend the first and discontinue the latter. The regulation of transportation platforms is still under heavy debate, especially because of the public reaction to the law restrictions.

[35] Ley Federal de Protección al Usuario Digital, 2021, http://sil.gobernacion.gob.mx/Archivos/Documentos/2021/02/asun_4135655_20210209_1612903477.pdf

[36] OECD, Ex-Ante Regulation and Competition in Digital Markets – Note by Mexico (IFT), 2021, https://one.oecd.org/document/DAF/COMP/WD(2021)59/en/pdf

[37] Alejandra Dinegro Martínez, *El Desafío de Regular las Plataformas en Perú: Iniciativas legislativas para regular el empleo en las plataformas digitales de taxi y delivery 2000 – 2021*, 2021, https://library.fes.de/pdf-files/bueros/peru/19572.pdf and Martín Ruggiero Garzón, *La regulación de la prestación de servicios de los trabajadores de plataformas digitales*, 2022, https://polemos.pe/la-regulacion-de-la-prestacion-de-servicios-de-los-trabajadores-de-plataformas-digitales/#:~:text=Finalmente%2C%20en%20agosto%20de%202021,laboral%20de%20la%20actividad%20privada.

[38] Law Project n. 199/2020C, 2020, https://www.camara.gov.co/plataformas-tecnologicas-1

[39] INCP, *Proyecto de ley regularía la contratación en las plataformas digitales*, 2023, https://incp.org.co/proyecto-de-ley-regularia-la-contratacion-en-las-plataformas-digitales/

Costa Rica, on the other hand, despite the law project already mentioned, created a National Code for Digital Technologies[40] targeting governmental digital initiatives to increase the service quality, safety, accessibility, and transparency for consumers. Even though the document is destined for the public sector, it also encourages private agents to comply with it's provisions and suggestions.

Brazil also has studied digital markets based on the Competition Authority's jurisprudence aiming to compile the most relevant findings, including market definitions, theories of harm, barriers for entry, rivalry in each sector within digital markets, such as e-commerce, digital maps, delivery, social media, transportation apps, online publicity, online search.[41]

Although the projects beforementioned are not necessarily related to competition law, there can be relevant consequences, especially for countries aiming to regulate digital platforms. The ex-ante regulation might control specific features of digital companies that could facilitate anticompetitive conduct. For example, the Chilean project holds a determination of non-discriminatory conduct towards users. The Brazilian project also detains companies with access to essential facilities to abuse their dominant power and encourages free competition and consumer defence. The Mexican project determines that the users have the right of protection against disloyal and coercive commercial methods and abusive clauses.

3. Conclusion

Digital markets are a hot topic for jurisdictions around the world and have been under the LAC countries' analysis. Even if the ex-ante regulation is not the only way to avoid abusive

[40] MICITT, *Código Nacional de Tecnologías Digitales*, 2022, https://www.micitt.go.cr/wp-content/uploads/2022/04/cntd_v.3.0_-_firmado_digitalmente_y_marca_de_hora.pdf

[41] CADE, Mercados de Plataformas Digitais, 2021, https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf

conduct from digital platforms, there has been an increasing development, or at least discussions, of digital regulation. Brazil, Chile, and Mexico aim at a digital platform regulation but focusing on different aspects. Whereas Mexican legislation has the digital user and not the platform itself as a target for protection, Brazil and Chile are adopting a more similar approach to the European countries and trying to regulate the digital platforms.

It is also interesting to mention that Peru, Colombia, and Costa Rica aimed specifically at delivery and digital taxi apps (i.e., Uber) regulations. Those markets have directly impact consumers' daily routines and a high relationship with the countries' economies. Those markets ascended fast in LAC countries without any regulation, changing a previous consolidated market structure. Even though regulating a specific niche, those projects also carry relevant competition principles to be followed in every sector.

Even if those projects are not converted to laws, they are feeding a discussion on digital platforms in various aspects. On the other side, from the digital platform perspective, those legislations should have at least some coherences between themselves to avoid extra charges for companies that would have to comply with different, and maybe conflicting, regimes, reducing their capacity to expand between countries or create more effective solutions. The discussion of digital platforms is only beginning and will have multiple developments to keep an eye on, especially in the LAC region.

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