

COLOMBIA

Institutional Challenges of Promoting Competition

Conflicts of Authority Among Regulatory Entities

1. Introduction - History.

For nearly 50 years, Colombia has had regulations on economic competition. In 1959, Colombia's Congress passed Law 155, which establishes the prohibition of "agreements or treaties that have as their object the limitation of production, supply, distribution, or consumption of primary resources, products, merchandise, or domestic or foreign services, and, in general, all types of practices, procedures or systems tending to limit open competition and to maintain or determine unfair prices."

In regard to economic integration, Law 155 required companies planning to undertake an operation involving any type of economic integration to inform the State of its plans. Consequently, the State would have the opportunity to analyze the possible effects of the operation on the market and, if it was determined that the operation may have a negative impact, to object to the pending integration.

Finally, Law 155 established regulations on unfair competition. These regulations were eventually overridden by Articles 75 to 77 of the Commerce Code, which were in turn substituted by Law 256, which was approved in 1996.

Thus, since 1959 Colombia has had regulations governing practices restricting competition. Nevertheless, for more than 30 years the application of Law 155 was practically nonexistent. On one hand, the country did not possess a culture of competition to make them effective, and, on the other, the mechanisms necessary to implement the law had not yet been adopted.

It was not until 1991, with the drafting of the new Political Constitution of Colombia, that the country began to take seriously the subject of economic competition. The duty of the State to prevent acts that constituted an abuse of dominant market position was established, and the right to economic competition was considered a collective right guaranteed by the Constitution. From that moment on, Colombia began to be conscious of the importance of regulations on practices restricting competition. This newfound awareness, given further stimulus with the approval in 1992's Decree 2153, was manifested through the approval of a series of regulations governing various aspects of economic competition, from the assignment of duties to various governing entities to the establishment of precedents, primarily through the Superintendent of Industry and Commerce.

2. Current Legislation On Promotion and Competition.

As stated earlier, although Colombia has had economic competition regulations for the last 45 years, they have only been actively and effectively enforced since the early 1990s. Once gravely ignorant of the regulations, Colombia has witnessed a proliferation of regulations and in particular, entities potentially authorized to resolve cases of restrictive competitive practices.

Among the principal regulations on restrictive practices, the following are the most important:

2.1. General Regulations

From the Political Constitution of Colombia, Article 333¹ expressly establishes the right to free economic competition and the responsibility of the State to avert and control activities that constitute abuse of dominant market position. Likewise, Article 334² of the Constitution establishes the possibility of State intervention in the economy, and Article 88³ determines that the right to competition is a collective right that must be protected through popular and group actions.

¹ Political Constitution. "Article 333. Economic activity and private initiative are free, within the limits of the common good. No one has the right to demand prior authorization or requirements to exercise them, without the authorization of the law.

Free competition is the right of all who assume its responsibilities

Business, as a basis for development, has a social function that implies obligations. The State will strengthen those organizations in solidarity with business, and will stimulate business development.

The State, under mandate of the law, will prevent the obstruction or restriction of economic liberty and will prevent or control any form of abuse that persons or businesses make of their dominant market position.

The law will restrict the scope of economic freedom when the Nation's social interest, state of affairs, and cultural patrimony demands it."

² Political Constitution. "Article 334. The general direction of the economy will be under the leadership of the State. The State will intervene, by law, in the exploration of natural resources; use of the land; production, distribution, utilization, and consumption of goods; and public and private services in order to manage the economy for the purpose of achieving an improved quality of life for its citizens, the equitable distribution of opportunities, and the benefits of the development and preservation of a healthy environment.

The State will intervene to utilize human resources and to assure that all persons, in particular those of lowest income, have access to basic goods and services, and also to promote the productivity, competition, and harmonious development of the regions."

³ Political Constitution. "Article 88. The law will regulate popular actions for the protection of collective rights and interests related to public patrimony, space, security, and health; bureaucratic ethics; the environment, free economic competition, and others of a similar nature defined by the law.

The law will also regulate the actions originating in the damage inflicted on a group of persons, without prior judgment of those actions.

Similarly, the law will define the cases of civil responsibility occurring from the damage inflicted on the collective rights and interests.

On a legal level, the general regulations that govern in Colombia are principally Law 155 (amended by Decree 1302 from 1964), Decree 2153, and Law 590 from 2000. These regulations are applicable to all of the economic activities not governed by a specific regulation. They regulate the agreements and unilateral acts contrary to free competition, abuses of dominant market position, and economic integration.

Given the wide scope of these norms, the entity of the State charged with enforcing these regulations is the Superintendent of Industry and Commerce. Due to the range and importance of its decisions, as well as the number of cases it faces, the Superintendent of Industry and Commerce is Colombia's central authority in matters relating to economic competition.

2.2. Specific Regulations.

In addition to the general regulations cited above, the Congress of the Republic, the National Government, and some regulatory authorities have approved regulations for particular sectors of the national economy in which they specify the range of certain actions or create obligations for participants in those sectors.

Without compiling an exhaustive list of Colombia's specific regulations on economic competitiveness, the following examples are illuminating:

2.2.1. Domestic Public Services.

Law 142, passed in 1994 (modified by Law 689 of 2001) establishes Colombia's regime of domestic public services,⁴ fixing rules and principles of economic competition for the regulated services and empowering the President of the Republic to allow the regulatory commissions (potable water and basic health; combustible gas and energy; and telecommunications) to develop the applicable standards in each sector.

Law 142 and its reforms charge the Superintendent of Domestic Public Services with the enforcement and application of its regulations since said institution is responsible for sanctioning violations of economic competitiveness in those sectors.

⁴ Law 142 of 1994 defines the following public services as domestic: water, sewage, garbage, electricity, gas distribution, basic fixed telephone service, and local mobile telephony in rural areas. The law also applies to other services such as national and international long distance telephone service.

It is important to remember that 1992's Law 143 establishes some guidelines in regards to competition in the electricity sector.

2.2.2. Financial and Insurance Sector.

The regulation governing Colombia's financial and insurance sector is Decree 663, approved in the year 1993. Decree 663 contains sectoral guidelines and grants the Banking Superintendent the power to oversee, control, and sanction noncompliance of its rules and anti-competitive conduct by sector participants.

2.2.3. Television.

For both open and closed television systems, the governing regulation is Law 182, passed in 1995. This law appoints the National Commission on Television as the entity responsible for the application and development of policies for television service. This includes policies related to economic competition. The National Commission on Television is also charged with supervising the conduct of television service operators and sanctioning noncompliance.

2.2.4. Others.

Finally, some specific regulations govern sectors such as shipping and transportation (Law 1 from 1991 and Decree 804 from 2001), or health (Decree 1663 of 1994), but the Superintendent of Industry and Commerce has the power of supervising and controlling the regulations.

3. Difficulties.

Obviously, multiple sets of regulations preside over economic competition in various markets in Colombia. It must be recognized that, in many cases, these specific regulations are required to regulate aspects of certain economic activities that are not generally applicable due to their specialized and technical natures. Nevertheless, it is important to take into account that the general principles governing the right to competition in Colombia remain in force in the majority of sectors. This demonstrates that Colombia has become aware of the importance of, and community benefits generated by, free and open market competition and market participants who conduct themselves according to established principles.

On the other hand, the greatest challenge to the right to competition in Colombia is the multiplicity of institutions charged with enforcing competition standards. In many cases, this multiplicity produces uncertainty among market participants as to which regulatory entity is actually in charge in their sector. This is especially true when one considers the existence of the many grey areas in which it is unclear whether a specific activity should fall under the authority of a sectoral entity or the Superintendent of Commerce and Industry. In addition, the multiplicity of authorities can generate a wide variety of interpretations of the law, which produces further confusion and uncertainty among economic actors and even the state entities themselves. This uncertainty manifests itself in bureaucratic delays that obstruct the flexibility required by the market to make decisions on economic competition.

4. Challenges.

Given the situation described above, the efforts being undertaken in Colombia to establish the right to economic competition are leading to the conclusion that the Superintendent of Industry and Commerce should be the sole authority charged with supervising compliance of the various regulations governing free economic competition. To ensure this objective positively affects the market, the existence of sectoral authorities is necessary to manage the technical aspects specific to their sector. For that reason, the authorities must stay in constant contact among themselves. They must also collaborate permanently with the Superintendent of Industry and Commerce to keep that entity informed of possible practices restricting competition in their markets. They must also collaborate with the authority in charge when specific technical information is needed.

The benefits that would result from these policies would be greater security for economic agents due to consistent legal interpretations and the certainty of knowing which entity legitimately supervises economic competition in each sector.