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## **Global Forum on Competition**

### **THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES**

#### **Contribution from El Salvador**

-- Session IV --

*This contribution is submitted jointly by the Competition Superintendence and the Consumer Authority under session IV of the Global Forum on Competition to be held on 21 and 22 February 2008.*

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## THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- El Salvador --

### 1. The Consumer and Competition Policy: Its Origin in the Peace Accords

#### 1.1 *The efforts on consumer protection and competition matters*

1. The Constitution in force since December 1983 raised to a constitutional level the State's obligation to promote economic and social development, as well as the defence of consumers' interests, forbidding monopolistic practices in order to insure entrepreneurial freedom and protect consumers' interests.

2. Years later, with the peace negotiations of El Salvador which culminated with the subscription of the Chapultepec Accords in January 1992, various objectives were set forth, amongst others, to contribute to the strengthening of the market economy and the creation of the necessary conditions to improve the population's level of life.

3. As far as the economic and social stabilisation are concerned, parallel to the implementation of the Peace Accords, the Government of El Salvador set forth a five year Economic and Social Development Plan, aiming, amongst others, at creating the necessary conditions to achieve a sustainable economic development and, in the medium term, implement a social program to establish a market economy and the reforms to the economic system.

4. In Chapter V, number 6 of the Peace Accords, two important aspects were included regarding the measures to alleviate the social costs of the structural adjustment programs, amongst which were found those related to consumer protection. In said Accords, the Salvadoran Government committed itself to adopt the policies and create the effective mechanisms in order to insure the consumers' defence, pursuant to the mandate set forth in Article 101 of the Constitution of the Salvadoran Republic. For the enforcement of the aforementioned constitutional mandate, the Government committed itself to present to the Legislative Assembly within 60 days after the subscription of the said Accords, a draft of the Consumers' Protection Law, which would include the strengthening of the Ministry of Economy and would lay down the first step in the eventual creation of a consumers' protection authority.

5. Likewise, a commitment was set forth to adopt the mechanisms to prevent monopolistic practices and, simultaneously, guarantee entrepreneurial freedom and protect consumers' interests, pursuant to Article 110 of the Constitution. The price liberalisation and a free competition market scheme, thus, permitted a normal supply of goods and services and price stability.

6. During 1992, the discussion of the legal framework on free competition to regulate monopolies and oligopolies was also initiated. Nevertheless, these definitions were incorporated in the Consumers' Protection Law.

7. In 1994, the first draft of a Free Competition Law was presented to the Legislative Assembly but did not achieve its approval. The competition issue was practically unknown in the country, hence, various

study delegations were formed by different economic agents' representatives, from both public and private sectors, including assemblymen of the Legislative Assembly, who were part of the commission responsible for analysing the aforementioned draft. The objective of these study visits was to know about the experiences of countries with a long tradition in competition law enforcement. In a ten year period, different draft laws were presented; each one differing from others basically regarding the nature of the authority responsible of enforcing the law, the view point on mergers and acquisitions, and the system of sanctions.

8. Likewise, the 2004 National Meeting of the Private Enterprise (in Spanish, Encuentro Nacional de la Empresa Privada, ENADE), stated the following:

9. "The country must adopt a policy that protects and promotes competition, through adequate mechanisms, strong institutions, and an unmistakable legal framework, insuring the efficient assignment of resources and a market development that benefits all.

10. "Said policy must include, amongst others, the promotion and defence of competition, an engagement against unfair commercial practices -such as smuggling, dumping, fiscal fraud, the informal sector of the economy- the prevention of anticompetitive practices, the promotion of economic efficiency, and the consumers' welfare.

11. "Consequently, a clear understanding must be provided regarding the benefits to be obtained from the economic system as a result of a public policy intended to protect and promote competition with the support of consumers, businessmen, and politicians".

12. In order to comply with the aforementioned constitutional principles and as a recognition of the need to achieve a more competitive and efficient economy, promoting its transparency and access, encouraging its dynamism and growth in order to benefit the consumer, El Salvador found convenient to issue in 2004 the Competition Law in force since January 1<sup>st</sup>, 2006; at the same date, the Competition Superintendence started its operations. It is important to point out that the protection of competition is a constitutional duty; nevertheless, such obligation lacked of detail in the legal framework to make it effective, thus, the new law was a step forward for the consolidation of the constitutional regime.

### *1.1.1 Consumer Protection Law*

- The first Consumer Protection Law was issued in 1992. During this period, the Consumer Protection Division was created as part of the Ministry of Economy, with the objective to safeguard the consumers' interest, establishing a legal framework to protect individuals from fraud and market abuses.

Objective of the aforementioned law:

"Art. 1.- The objective of this law is to safeguard the interest of the consumers, establishing the legal framework to protect individuals from frauds and abuses within the market."

- During 1996, the 1992 Consumer Protection Law was abolished and a new law was approved, under the mandate of Article 101 of the Constitution, which states: "It is the State's duty to promote economic and social development, through the generation of the optimum conditions for an increment in the production of goods and services, encouraging, at the same time, the defence of the consumers' interests." On the other hand, the aforementioned law vested the Ministry of Economy with the power to enforce said legal framework through the Consumer Protection General Division.

Objective of said law:

“The objective of this law is to safeguard the interest of the consumers, establishing the legal framework to protect individuals from frauds and abuses within the market.”

As done by the previous law, this one intended to strengthen the conditions in our country for its introduction in the worldwide globalisation process, guaranteeing the participation of the private enterprise, promoting competition, and entitling consumers with the necessary rights for their legitimate defence.

- In August 2005, the currently in force Consumer Protection Law was issued, abolishing the 1996 law.

Objective of the aforementioned law:

“Art. 1.- The objective of this law is to protect the rights of the consumers, in order to procure equilibrium, certainty, and legal security in their relations with suppliers.”

Various elements were taken under consideration when issuing said law, figuring as the principal reason, the need for a better structure and systematic development, as well as a global and preventive vision that guarantees the consumers’ protection.

i) National System for Consumer Protection

13. Article 151 of the aforementioned law institutes the National System for Consumer Protection in order to promote and develop the consumers’ protection. This system is formed by the Authority of the Consumer (in Spanish Defensoría del Consumidor), agencies of the Executive Branch, and other State institutions, vested with the attribution to look by sector after consumers’ rights or watch over enterprises that work with public.

14. Article 153 of the said law mentions the activities of the National System for Consumer Protection, establishing amongst others, the following activities related to consumer protection:

- Training its officers in that topic;
- Register and classify complaints filed by consumers and the sanctions imposed or the supplier’s exoneration, whichever is the case;
- Creation of nets of participants in the System’s officers to execute specific and preventive actions relating to consumer protection;
- Strategically plan the necessary activities for the surveillance and enforcement of the legal framework relating to consumers;
- Elaborate information and communication instruments;
- Elaborate the technical framework, methods, and guides for officers in charge of enforcing the law; and,

- Compile data regarding investigations and other information about the behaviour and attitude of consumers.
- ii) Consultive Council of the Consumer Authority (in Spanish, Consejo Consultivo de la Defensoría del Consumidor)

15. An important element in the Consumer Protection Law is the creation of the Consultive Council. This body is in charge of counselling the President of the Consumer Authority in technical matters. The Council is attended, amongst others, by the Competition Superintendent.

16. Article 64 of the aforementioned law mentions the following attributions of the Consultive Council, amongst others:

- Serve as a counsel body to the President of the Consumer Authority in matters related to the protection of the consumers' rights, as well as to the organisation and performance of the Authority;
- Issue opinions regarding the Authority's internal regulations;
- Propose to the President of the Republic the removal of the President of the Consumer Authority and of the members of the Sanctioning Tribunal, in case of severe infringement of their duties; and,
- Other attributions legally assigned.

### 1.1.2 *Competition Law*

- The Competition Law and Superintendence

17. The objective of the Competition Law is to promote, protect, and guarantee competition, by preventing and eliminating any anticompetitive practice, regardless of its nature, that limits or restricts competition in any way, or that impedes the access of any economic agent to the market, in order to increase economic efficiency and consumer's welfare.

18. In this sense, the Competition Superintendence is created as an independent and technical institution, with a legal status and its own equity, vested with administrative and budgetary autonomy to exercise its attributions and duties, in charge of the compliance of the Competition Law, by means of a technical, legal, and economic analysis system, complemented by support studies and other pertinent activities to perform its attributions in an optimum manner including the prevention, detection, and investigation of anticompetitive practices.

19. In accordance with the aforementioned, Article 42 of said law prescribes the following: regarding an anticompetitive practice stated herein, any person may file a written complaint with the Superintendence against an alleged infringer, indicating the description of said practice. The plaintive shall state all the facts that build the alleged anticompetitive practice. The aforesaid is applicable to any economic agent, including the State's institutions, for instance, the Consumer Authority.

- Legal amendments

20. In November 2007, certain amendments to the abovementioned law were approved in order to institutionally strengthen the Competition Superintendence. These amendments are important for such

institution in order to dully fulfil its objectives, by vesting it with the powers that enable it to act effectively, hardening the system of sanctions, including the maximum fines to be imposed according to an alternate criteria proportional to the severity of the anticompetitive practice committed in order to increase the dissuasive effect of committing such practices.

21. The amendments include the following attributions and duties:

- The Superintendent
  - Carries out searches or raids, with a prior order issued by the corresponding civil or commercial judge of the jurisdiction where the property to be searched or raided is located;
  - Orders during the investigation, the necessary precautionary remedies when an imminent risk to the market exists, when competition might be limited, when the investigated practice might result in damages to third parties or to public or collective interests, amongst others;
  - Accepts guarantees for the suspension or modification of anticompetitive practices;
  - Accepts the recognition of an economic agent who has been involved or is currently involved in agreements amongst competitors, as long as the economic agent fully complies with the requirements determined by the law (be the first to inform of the existence of such an agreement, collaborate with the Competition Superintendence, and carry out the necessary actions to guarantee the termination of his/her participation in the alleged anticompetitive practice).
- The Board of Directors
  - Issues, at the request of a third party or ex-officio, opinions on drafts of laws, ordinances, or regulations, and the procedures for public acquisitions and contracts, which might significantly limit, restrict, or impede competition;
  - Determines structural conditions and obligations, amongst others, ordering an economic agent to disinvest in a certain economic activity;
  - Attenuates an economic sanction when sufficient guarantees have been given, ensuring the suspension or modification of the investigated anticompetitive practice or has collaborated with the Competition Superintendence in the investigation of an agreement amongst competitors.
- New system of sanctions

22. The system of sanctions has been hardened, including maximum fines to be imposed according to alternate criteria proportional to the severity of the anticompetitive practice committed in order to increase the dissuasive effect of infringing the Competition Law. The fines may go up to 6% of the total annual sales made by the infringer, or up to 6% of its assets' value during the prior fiscal year, or a fine equivalent to a minimum of twice and up to a maximum of ten times the estimated profits resulting from the anticompetitive practice, whichever is higher.

23. Furthermore, fines have been established for those agents who do not comply with the obligation of requesting prior authorisation of a merger or acquisition, to those who do not comply with the

conditions imposed by the resolution authorising a merger or acquisition, and to those who do not comply with the precautionary remedies ordered.

- 2006-2007 Activities

24. During its first two years of operations (2006-2007), the Competition Superintendence received 30 complaints and initiated 8 ex-officio investigations, regarding alleged violations to the Competition Law committed by economic agents from different sectors of the Salvadoran economy. Twenty seven cases concerning anticompetitive practices were analysed, 15 of which were for abuses of dominant position. Seven anticompetitive practices were sanctioned. 6 merger and acquisition notifications were received, 5 of which were authorised and 1 was declared not to require the prior Superintendence' authorisation, pursuant to Article 31 of the Competition Law.

#### Cooperation and technical assistance agreements for the enforcement of the Competition Law

- With Government institutions

25. Internationally, cooperation and collaboration agreements have proven to be useful tools for the effective enforcement of the Competition Law. Since its creation and during 2006 and 2007, the Competition Superintendence has subscribed cooperation and technical assistance agreements with various regulators in order to strengthen the investigative process and the access to information. It is important to point out the agreements signed with the Electricity and Telecommunications General Superintendence (in Spanish, Superintendencia General de Electricidad y Telecomunicaciones, SIGET), the Maritime Port Authority (in Spanish, Autoridad Marítima Portuaria, AMP), the Financial System Superintendence (in Spanish, Superintendencia del Sistema Financiero, SSF), the Science and Technology National Council (in Spanish, Consejo Nacional de Ciencia y Tecnología, CONACYT), the Civil Aviation Authority (in Spanish, Autoridad de Aviación Civil, AAC), the Securities Superintendence (in Spanish, Superintendencia de Valores, SV), the Pension Funds Superintendence (in Spanish, Superintendencia de Pensiones, SP), and the Central Reserve Bank of El Salvador (in Spanish, Banco Central de Reserva de El Salvador, BCR).

- With Competition Authorities

26. In order to exchange experiences and know about diverse techniques, the Competition Superintendence signed cooperation and technical assistance agreements with different competition authorities such as the National Competition Commission of Spain (in Spanish, Tribunal de Defensa de la Competencia de España, hoy Comisión Nacional de Competencia de España), the Tribunal for the Defense of Competition of Chile (in Spanish, Tribunal de Defensa de la Competencia de Chile), the National Economic District Attorney's Office of Chile (in Spanish, Fiscalía Nacional Económica de Chile), the National Institute for the Defense of Competition and the Protection of Intellectual Property of Peru (in Spanish, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual - INDECOPI- de Perú), the Authority for Consumer Protection and Defense of Competition of Panama (in Spanish, Autoridad de Protección al Consumidor y Defensa de la Competencia de Panamá), the Federal Competition Commission of Mexico (in Spanish, Comisión Federal de Competencia de México), and the Commission for Competition Promotion of Costa Rica (in Spanish, Comisión para Promover la Competencia de Costa Rica).

27. Several studies on competition conditions have been completed in the following sectors: Cargo, terrestrial transportation, liquid fuels, medicines, electricity, eggs and chickens, liquid fuel gas, and telecommunications. Furthermore, two internships in the Swiss Competition Authority (COMCO) were concluded.

28. Likewise, relations for information exchange are maintained with institutions such as the Federal Trade Commission and the Department of Justice of the United States of America.

## **2. Competition Policy as Core of Economic Efficiency and Consumer Fundamental Rights Protection.**

29. Due to its scope and dynamism, competition policy, together with the fiscal and political policy, constitutes the fundamental milestones of the economy. Hence, the competition authority must be viewed as enforcer of the economic policy of the country and not as a mere enforcer of the Competition Law.

30. And this is so because competition policy fits within its broad concept; it refers to all the government measures which may influence the intensity of competition in the national markets or which may impact on the freedom of economic agents to carry out profitable or non-profitable economic activities. Thus, the competition law of any country is part of its competition policy, as well as other laws and policies, including commercial policies, measures to attract direct foreign investment, regulations of enterprises at a national level, privatisations initiatives, consumer protection law, amongst others.

31. Currently, there is an almost unanimous criterion that the objective of competition policy must be the promotion of economic efficiency and consumer welfare. Notwithstanding the aforementioned, there is still some debate on whether to include in this objective other goals of social and distributive nature. Nevertheless, there is unanimity as to include consumer protection in the objective of competition policy, even though for competition purposes the meaning of the term changes to the more commonly used definition.

32. Under the context stated herein, it is important to point out that, contrary to the consumer protection policy, the competition policy does not consider the consumer as the principal core of its activities. This is due to the fact that the objective of competition policy is to preserve competitive conditions in the market. For the abovementioned policy, the consumer is an indirect beneficiary of the consequences resulting from fair competition amongst economic agents in the market.

33. Nevertheless, it is necessary to emphasise that for competition policy the aforesaid does not mean a lesser importance of the consumer, because when a possible remedy for an anticompetitive practice is presented, the remedy that benefits consumers the most will be preferred, without diminishing economic efficiency and the legitimate rights of all economic agents to participate, giving preference to the generation of added value to all phases of the value chain.

34. Hence, the objective of competition policy is to protect, guarantee, and reestablish competitive conditions in the market and its economic efficiency, which indirectly, result in benefits for the consumers.

35. In spite of the above mentioned, the relation between both State institutions is vital and necessary but understood within each other's roles. As it can be understood from the mere reading of the cited legal frameworks, the Competition Superintendence has wrongly been included in the National Consumer Protection System, due to the fact that it is not a duty of the Superintendence to protect consumers' rights on a sectoral basis or watch over enterprises that operate with public, its objective is far beyond the aforesaid: economic efficiency and consumer welfare understood pursuant to the concepts stated herein.

36. Furthermore, the Consumer Authority is also an economic agent for the purposes of the Competition Law, and, thus, must file complaints pursuant to the requirements determined by the law and not because of a mere belief of the existence of anticompetitive practices, complying with Article 42 of the aforementioned law.

37. On the other hand, it is of utmost importance to emphasise the concept of competition policy as a pivot for the establishment of healthy competition in the different markets, as a means to guarantee the economic and social development of the country, as well as the defence of the consumers' interest, through the prevention and elimination of anticompetitive practices, thus, achieving a more competitive and efficient economy, promoting its dynamism and growth for the benefit of consumers.

38. Hence, in order to contribute to the development of competition and competitiveness of productive activities, both in local and foreign markets, it is vital to have a clear and transparent scheme of action which impedes the existence of discriminatory barriers to economic agents.

39. That is why it is not only necessary to adopt a competition law but also to enforce a competition policy which recognises the identification and elimination of anticompetitive agreements, the abuse of dominant position, and also, to have sound instruments to control mergers and acquisitions that allow an increase of a healthy competition, an increase of investment, and promote the voluntary adoption of good business practices in favour of economic efficiency.

40. To summarise, in the country's policies, the Competition Law and the Consumer Protection Law play a determining role in the establishment of the rules of the game that serve as a guide to enforce other economic and social policies which are the basis for the development of the country. Nonetheless, both authorities must join efforts to accomplish, within their respective legal frameworks, the objective of each one's law, respecting each others' attributions and duties.

41. There are still other pending chores to carry out for the consolidation of the competition culture, such as the signature of cooperation and coordination agreements with the consumer protection authority, which as an economic agent, may considerably contribute to achieve a better enforcement of the Competition Law and a better understanding of the society in general, in order to make sure that the market, as a good of our society, is understood as an authentic style of life and of development, rather than just a mere economic concept.