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-- Session III: The role of economic analysis in judicial decisions --

Note by El Salvador

Basic structure of the Salvadoran judicial system

1. Under article 172 of the Constitution of the Republic of El Salvador, the judicial branch has exclusive power to issue and carry out judgments in constitutional, civil, criminal, commercial, labour and agrarian matters, and in the realm of administrative disputes, as well as in other areas as determined by law.
2. The judiciary has a pyramidal structure: at its base are the justices of the peace, and at its pinnacle is the Plenary of the Supreme Court of Justice (CSJ), and in between are the courts of first instance, the chambers of second instance, and the four chambers of the CSJ, dealing with civil, criminal, constitutional, and administrative cases.
3. When it comes to the defence of competition in El Salvador, there is only one body in either the administrative or the judicial realm, and its rulings can be appealed to the CSJ. There are no other bodies. The Superintendency of Competition (SC) is the only competent administrative body: once it has taken a final decision, that decision can be appealed only to a separate body, the court. An "administrative dispute action" can be filed before the Administrative Disputes Chamber of the CSJ, to review the legality of SC actions, and appeals for *amparo* (constitutional protection) may be brought before the Constitutional Chamber, if some constitutional guarantee is alleged to have been violated.

Decision-making procedure in the competition authority

4. As stipulated in article 3 of the Competition Act (*Ley de Competencia*, LC), the SC is an institution under public law with its own legal personality and financial structure, of a technical nature, with administrative and budgetary autonomy for the exercise of the powers and duties conveyed upon it in the LC, and other applicable provisions.

5. The LC assigns investigative functions to the Superintendent, and decision-making to the Executive Council (CD). During an investigation, the Superintendent can, *ex officio*, provide evidence and move proceedings forward. It may be said, then, that the proceedings (investigation stage) before the Superintendent serve as an adversarial system for the defence of competition.

6. The CD is responsible for enforcing sanctions, ordering the cessation of anticompetitive practices, and hearing motions for review, among other matters.

7. In El Salvador, the SC is the body responsible for enforcing the LC and for conducting investigations to determine whether one or more economic agents have violated that Act. To this end, the SC can initiate proceedings *ex officio* or upon referral. Such proceedings may begin with a preliminary investigation, designed primarily to gather evidence supporting the alleged anticompetitive practice, but this is not a mandatory step in the procedure. If there is enough evidence available to make a preliminary phase unnecessary, it is possible to move directly to formal investigation under the sanctioning procedure.

8. During the sanctioning procedure, the alleged violators are notified by resolution containing a statement of considerations and an indication of the practice allegedly committed, and the defendants have 30 calendar days to present arguments and allegations in their defence.

9. The Act next establishes a time limit of 20 working days for the presentation of evidence. The investigation procedure then culminates, and the case is remitted to the CD, who issues the final substantiated decision. Once that final decision is notified, the parties have five days to submit a motion for review to the CD. That motion is optional for purposes of the above-mentioned administrative dispute action. Once that motion is resolved by the CD, the administrative procedure is concluded.

Relationship between the Superintendency of Competition and the Judicial Branch

10. Once an administrative decision has been made finding violation of the Competition Act, and the remedy of review before the CD has been exhausted, as stipulated in article 48 of the LC (if pertinent), the administrative route ends and the decision issued becomes final. Upon exhaustion of the administrative route, economic agents may appeal the decision to the Chambers of the Supreme Court of Justice.

11. It is in cases where administrative decisions of the SC are appealed to the Administrative Disputes Chamber (SCA) of the CSJ that direct interaction comes into play between an administrative authority (the SC) and the judiciary.

12. Thus, pursuant to article 56 of the Organic Law of the Judiciary, "the Administrative Disputes Chamber shall hear disputes arising over the legality of acts of the public administration, and other matters as determined by law".

13. That article deserves careful attention, as it confines the scope of action by the SCA in reviewing those cases where the public administration is alleged to have proceeded illegally. Consequently, the SCA does not go into the substance of the [SC's] decision with an economic, technical or legal analysis and it does not, for example, consider the definition of relevant markets and dominant position.

14. A second relationship between the administrative process of the SC and the judicial branch comes into play when an economic agent considers that the SC's resolution violates a constitutional right, and presents an appeal to the Constitutional Chamber.

15. A third interaction occurs when an administrative order issued by the SC is disregarded by the economic agent. Because decisions issued by the SC are not automatically executable, the SC must apply to the Prosecutor General's Office to defend the interests of the State by bringing suit for contempt of an administrative order.

Economic aspects of judicial resolutions

16. Given the nature of the juridical good protected, the resolutions of a competition authority have an eminently economic basis, the purpose of which is to apply the economic theory of competition in a framework of juridical action and decision.

17. The defence of competition involves three areas of knowledge: law, economics, and a third area that requires specific familiarity with the relevant market in question, which also has a strong economic component. A clear and satisfactory explanation of the economic and technical terms is essential to help officials of the CSJ, who work in a purely legal framework, to grasp the substance and context in which the competition authority has acted.

18. It must be recalled that the law is of comprehensive application, even if there are branches of law that focus on specific matters. In El Salvador, because there are no specialised courts or judges dealing with competition law, the explanation of all the technical and economic elements considered by the competition authority in taking its decision must be expressed in language that, without compromising its technical content or economic meaning, will be readily understandable to legal professionals hearing appeals brought before the SCA, for example.

19. There is no argument that the defence of competition and economic analysis must be mutually complementary. As Luis Berenguer declared in a recent paper on economic analysis in the application of competition law,¹ economic analysis provides competition law with decision-making rules and criteria and instruments for case-by-case analysis. All these decision-making rules, criteria and instruments must be set down in an administrative resolution in narrative language, which is the standard in the legal world, so as to make the economic and technical analysis just as understandable as the legal aspects, the language of which by its nature is narrative.

20. Similarly, the review of the legality of administrative acts does not necessarily confine itself to reviewing the observance of time limits, notification requirements, rights to a hearing or appearance etc., but must also determine whether the administrative authority has followed the guidelines stipulated by regulation for applying the economic concepts and criteria of competition law, such as definition of the relevant market, determination of dominant position, or other concepts used for imposing sanctions and, generally, the conduct of the proceedings.

21. With respect to the foregoing, it should be noted that although the review of the legality of administrative acts includes verification that the criteria stipulated by law have been observed, the review does not concern itself with the outcome of that observance. An example here is the definition of relevant market, a basic concept of competition law and one that is regulated in the Competition Act. That definition of which must unquestionably follow the criteria set forth in the Act, which, when combined

¹ Fuster, Luis Berenguer President of the CNC, "ANÁLISIS ECONÓMICO EN LA APLICACIÓN DEL DERECHO DE LA COMPETENCIA", presented at Santa Cruz de la Sierra, 28 April 2008

with economic and technical information, will establish a basis for analyzing the case as a whole. In this way, any fact must be analyzed and assessed against the pertinent legal aspects, and these in turn must be stated in a manner that facilitates the judge's understanding.

22. In this respect, the review of legality in competition law cases requires the reviewer, for example the SCA, to understand the terms directly involved in this area—the economic terms and concepts that are found in the Act and those that result from its application, which at this time could constitute an obstacle to the proper conduct of judicial proceedings concerning decisions of the Superintendency of Competition.

23. Although the CSJ could hire economic advisers, the opinion of such consultants is not likely to be taken during proceedings as expert testimony, since, as noted above, the SCA has its own expert legal staff. Those experts could in any case serve as internal advisers who would assist the court in understanding the economic aspects involved, as a necessary frame of reference in reviewing the legality of administrative actions of the SC.

24. With respect to the presentation of economic theories in court proceedings, the SC has had the opportunity to do so in cases involving liquid fuels and the electricity sector, where it clarified the line of economic analysis pursued, among other matters. That explanation was provided by the SC's internal staff. Because this process is still pending resolution, it is not possible at this time to conclude whether the explanation was effective.

Conclusions

- a) In competition cases, the SC has the only say in determining whether a practice violates the LC, and the action of the Supreme Court of Justice is limited by law to reviewing the legality of the SC's procedural action in cases where an economic agent initiates an administrative dispute action before the SCA. If an appeal is brought before the Constitutional Chamber, it too would be limited to reviewing whether there has been a violation of a constitutional right.
- b) To date, proceedings initiated in the CSJ against the SC have involved situations where, for example, the SC has taken too long to respond on matters of importance for the interests at stake, adversely affecting the work of the SC and the fulfilment of its purposes.
- c) In the case of El Salvador, the courts are not responsible for enforcing decisions on cases brought by the SC, because the SC itself is the only institution with oversight power under the Competition Act. Failure to observe decisions and to respect cease-and-desist orders issued by the SC constitute an offence that will be prosecuted by the Prosecutor General's Office (FGR), and if a fine is imposed and not paid, the FGR will bring civil suit for enforcement.
- d) At this time there are no specialised competition courts and consequently the CSJ faces the intrinsic difficulty of deciding on the legality of an administrative procedure in which it must conduct not only a legal but also a technical and economic analysis, without having any experience or personnel trained in this area. In its competition advocacy work, the SC sponsors a training program for the staff of that body [SC or CSJ??] with a view to disseminating the technical, legal and economic concepts and criteria commonly used in its decisions.
- e) In considering whether a specialised court would be useful, it must be recalled that in small economies such as El Salvador, where generating a culture of competition is still a work in progress, a necessary precondition is to train a critical mass of lawyers and economists

specialised in competition law. Over the longer term, consideration could be given to creating courts that are specialised not only in competition but also in regulation.