

INSTITUTIONAL CHALLENGES TO COMPETITION POLICY IN PANAMA

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After seven (7) years of existence, the authority in charge of implementing competition policy in Panama continues to face institutional challenges in carrying out its functions. This document attempts to enumerate some of these challenges and the remedies utilized to address them. The list presented below does not necessarily represent the order of importance of those institutional challenges.

1. Independence in Administration and Management

Law 29 of 1996 clearly defines the form of organization of the institution, ensuring its directors continuity for a set period without being removed by the political authorities of the State. The nomination system of the directors of this entity is staggered to ensure that the top directors are not changed simultaneously, guaranteeing institutional memory and the continuity of the programs and projects undertaken.

Nonetheless, the succession of political groups in the administration of the State with different economic orientations has endangered the institutional integrity of the competition authority. These attacks on the integrity of the organization can be illustrated from various points of view. In the first, it may be considered that the directors of the organization should be functionaries who can be freely removed by the Executive Branch. This position leaves the organization independent in its decision-making process. A second and more serious attack is the questioning of the necessity of a competition policy as a State policy. This policy puts the organization at the mercy of pressure groups.

2. Funds for Performance

Without a doubt, this is the most important challenge facing our organization. The competition authority is largely financed by transfers of funds from the central government budget, and it is highly difficult to obtain financing at a level at which the administrative outlays might match the size of the economy and the possible instances of illegal conduct that should be investigated.

Additionally, the formulation and implementation of competition policies is not seen as a priority by the State and therefore sufficient resources are not destined to financing them, even at the time that the organization was created. In the case of Panama, this assistance has been obtained by means of donations and loans from international organizations such as the IDB and the World Bank.

3. Administrative or Jurisdictional Justice

The model of administration of justice in the application of competition policy creates a major institutional dilemma. The exercise of administrative justice has the advantage of speed in the finalization of proceedings, but the disadvantage of possibly violating the rules of due process and the risk that the judicial authority charged with reviewing decisions may not have the technical knowledge to understand the material under consideration.

In Panama we have adopted a jurisdictional justice model of administration. The competition authority undertakes an investigation in which it obtains the evidentiary elements of the commission of an illegal practice. For this purpose, the authority obtains authorization from a court of justice to gather information through any means of proof. In contrast to when the court is approached by a particular party, the competition authority is authorized by the court to set up an inquiry and undertake the necessary tests without the presence of tribunal officials. This administrative investigation, whereby the agency is only obligated to respect the constitutional rights of those investigated, does not create a change in the status of the rights or property of those under investigation.

The competition agency has faced two challenges in this regard. The first consists of limiting the judgment of competition issues to courts specialized in this area. This has been brought about by the creation of courts specialized in subject matter knowledge, and the ability of these courts to know in advance, at the plaintiff's request, when the goods or services under investigation have been commercialized in part or in whole within the jurisdiction of the specialized court. With this ability the plaintiff can prove that, although the defendant may be domiciled in a jurisdiction other than that of the specialized courts, the plaintiff can solicit the expertise of the specialized court when the goods have been commercialized in other jurisdictions.

The second challenge has been the training of the judges and officials who work in these specialized courts. The competition agency's training programs have been designed with the participation of the officials of the tribunals of justice, with the intention of accelerating their learning curve in the particulars of this material. Clearly identified are the problems of training judges in economics, which makes the presentation of cases more painstaking. Likewise identified is uncertainty in judges' decision-making because of the poor professional training in economics mentioned above.

4. Recruitment and Training of Personnel

The recruitment of personnel with the professional profile for the exercise of the functions pertaining to the competition agency is a highly relevant issue. While formulating a selection method that permits the identification of candidates with the ideal profile will certainly be an institutional challenge, more important is the certainty that the turnover of officials will be very high.

In formulating the selection methodology, three (3) fundamental elements should be taken into account: professional knowledge of the subject matter; the candidate's inclination

toward research; and the candidate's ability to work as part of a team. If the candidate does not meet these three criteria, he or she does not present the ideal profile.

Another important issue is the turnover of officials. We should expect high turnover of officials, above all because, after being trained, they are subject to offers of employment from law firms and from economists who invite them to join their professional practices. This leads to the conclusion that training should be designed on the basis of several assumptions. There should be an institutional record of every training so that, when officials are replaced, those with the greatest experience and time in the institution will become trainers of new officials. This practice will limit to the greatest possible extent the loss of investment in human resources. Likewise, each training should further the implementation of our processes and proceedings. It is imperative to demand of the organization that what is learned should result in some improvement in our daily performance. If pressure is not exerted for this to occur, training will be transmitted only to the trainees and not to the institution.

All of this leads us to adopt a method of continuously perfecting the institution's processes and procedures to make performance more effective every day. In order for this to be accomplished effectively, it is necessary to adopt some model of quality assurance. In our particular case the ISO 9001 quality assurance system has been adopted.

5. Jurisdiction and Relation with Other Regulators

The most serious problem in the relationship between the competition agency and other regulators is a reticence to exercise the instruments of competition policy for the benefit of the market. This reticence goes beyond the competence or jurisdiction of the competition agency, as it is a human attitude toward the relationship of collaboration that should exist among regulators. This attitude is manifested in a variety of forms. The normal tendency of the sectoral regulator is to ensure that it is the only authority competent to oversee the issues related to the regulated sector, including competition, even when this may not be a priority of the sectoral regulator. Even worse is a scenario in which an attempt is expressly made to exclude the competition agency from having knowledge of issues in the regulated sector. Clearly in evidence is the lobbying of pressure groups to obtain a favorable legal framework, above all when the competition agency has demonstrated efficiency in its performance.

While it is clear that there can exist the problem of jurisdictional overlap in the issue of the competency for regulated sectors, the greatest problem is that of inter-institutional collaboration among officials in public administration who should support one another in the benefit of a common end.

In the particular case of Panama this situation is not critical from a legal point of view, as the competition law clearly states the competition agency's power to investigate the commission of illegal practices in any sector of the economy, thus enabling it to take action in the name of and on behalf of society before the competent authority, whether administrative or judicial. Let us remember that Panama's competition law utilizes the

system of specialized tribunals within the judicial branch of government to resolve disputes, and even when the competent authority is found in an administrative headquarters, the competition agency is equally enabled to take action before it regarding the commission of illegal practices.

Any argument would center on establishing which is applicable: the special sectoral law or the general competition law. Experience has shown us that when sectoral law makes reference to issues of competition (antitrust), it does so only in a very vague and superficial manner. For this reason, the general norms of competition are generally applied. In the case that sectoral competition norms exist, these norms are applied, and general norms in a supplementary manner, although generally the latter should be applied for a coherent interpretation of the economic analysis.

6. Instruments for Compliance with the Law

An adequate competition policy cannot be carried out if the competition law does not provide the agency with the legal instruments to undertake tests and adequate procedures for the expeditious processing of investigations. In Panama, the competition law authorizes the competition agency to gather information or undertake trials by administrative or judicial means.

By administrative means, the competition agency is authorized to request information from any State party or administrative official. In the event that an information request is refused, the agency can issue a citation for an individual to testify before the agency and to present the documents requested in the citation. Failure to appear before the agency will provide grounds for contempt, which will be punished by a daily fine until the individual appears before the competition agency. The maximum amount of the reiterative daily fine is US\$1,000.

By judicial means, the commission can solicit from the specialized courts created by the competition law, or from any court of civil law, authorization to gather evidence by any appropriate means of examination, whether by exhibitory actions, visual inspections, inspection of records, expert assessment, or testimony, among other means. Once the request to gather evidence is granted, the competition agency can execute the authorization without the presence of the officials of the court of law and is obligated only to respect the constitutional rights of the party being investigated.

It is not only necessary that there exist efficient instruments to undertake tests, but there must also be an adequate procedure for the expeditious resolution of processes. As we explained above, in Panama the competition agency engages in an administrative investigation to determine the commission of illegal conduct. Upon establishing the commission of these acts the agency will take action before the courts of law, where in this instance the arguments will be heard and due process will be preserved. Panama's competition law has introduced a special summary process for dispute resolution.

The basis of this oral proceeding is the holding of a preliminary hearing for the simplification of the disputed points and an in-depth hearing to present evidence and hear arguments. Nonetheless, in practice these processes have been very long for the following reasons: the judge has not taken his role as director of the process in order to avoid dilatory actions and postponements of procedural stages; and litigating attorneys have abused the practice of dilatory actions in the process. I make the comments presented above without fear of error as the same legal norms are used in Panama for the maritime jurisdiction with excellent results regarding the time in which cases are resolved. The difference with the competition tribunals is the attitude and the personality of the judge, who does not take the same leading and disciplinary role as do the maritime judges, and the attitude of the litigating attorneys who, rather than seeking the resolution of the underlying dispute engage in a great number of dilatory actions. Nonetheless, I must comment that a change is being observed in the attitude of the competition judges with the goal of disciplining the proceedings.

7. Authority Exclusively in Competition or in Other Areas (Especially in Smaller Economies)

One topic that we consider addressing, especially for small economies, is the suitability of having an agency exclusively for competition or one that may also address other related topics. Here we face the dimension of the costs to the State of maintaining the agency, the public's perception of a bureaucracy that requires many resources, that the final products are not very visible in the short term, and the possibility of leveraging with other functions distinct from that of competition policy.

I can state with total certainty that the existence of Panama's competition agency would not be viable if it did not have the functions of a consumer protection agency as well. Both functions, which up to a certain point are complementary, give the agency a public profile with simple but visible actions from day to day. The perception of day-to-day action in consumer protection issues gives the agency community acceptance of the competition policy that requires many man-hours to reach a determination in an investigation. It should be added that the creation of agencies with exclusive knowledge of only one issue enlarges the State, creating greater bureaucracy. A multi-issue agency model allows the State to benefit from economies of scale in the construction of the organizational chart and makes it possible for the achievements and successes in areas of great public concern to strengthen the formulation of a policy, like that of competitiveness, which is not easily understood by the public.

8. Competition Law and Public Administration

The greatest efforts in advocacy of competition that our agency has undertaken have been directed at the public sector. The principal strategy has been active participation in the drafting of laws in the legislative branch in order to prevent new laws from introducing limitations into the process of free competition in the market. This action has been decisive, and many institutional resources have been employed. There has been the opportunity,

though in very limited cases, to introduce corrections to legal norms that present obstacles to free competition.

Another strategy that has been utilized is oversight of public contracting processes. Expense statements of State purchases have been examined at length, ensuring that this instrument does not become a limitation to the participation of all possible economic agents.

On the other hand, the agency has participated actively in the drafting of technical regulations that establish the requirements and minimum standards for products and services sold in the country. As in the cases noted above, this assures that these regulations do not present unnecessary requirements that might exclude the participation of all possible offers, or that regulations become the authorization for monopoly power for a particular firm.

9. Competition Law and a Culture of Competition in the Private Sector

A great challenge to the competition agency is to create a culture of competition among the economic agents that participate in the market. This culture of competition can only be developed by means of an aggressive dissemination strategy that makes it possible to transmit to economic agents the reason for being of competition policy. The dissemination strategy can have reactive or proactive components.

In the reactive component we may mention actions such as the following: visits to opinion programs on public communication media, the development of academic study programs with universities and professional unions, dissemination of research findings through public communication media, and the promotion of feasibility studies for economic agents.

The proactive component requires not only more determined action by the competition agency, but also willingness to cooperate on the part of the economic agent. In this sense, in Panama we have initiated a corporate compliance program that includes visiting different economic agents and reviewing contracts, commercial practices, or any issue that could produce any violation of the competition law. This action will call for the good faith of the economic agent, who will open his information for the scrutiny of the competition agency, but at the same time this will make it possible to correct any practice that might later be considered illegal in the short or medium term. The advocacy of competition will be exercised in an individualized form and in proportion to the economic agent. This corporate compliance program will not be limited to the initial assessment visit, as the program will be maintained through a periodic competition audit by the competition agency. The aggregate value for the economic agent, besides knowing that he is not in risk of violating the law, will be the authorization of a seal or distinction that will distinguish him from his competitors and which he will strive to maintain. This program has had great reception and economic agents very representative of the economy have voluntarily presented themselves for the pilot plan of this program.

10. Transparency and Predictability

The competition agency should be transparent in regard to the interpretation and fulfillment of the competition law, as well as the form of implementing the assumptions established in the law. Toward this end, the strategy has been managed at various levels. The first of these has consisted of developing by legal regulation the general norms of competition law. This adds greater clarity to the interpretation of the legal norm. Not only is the development of the legal norm important, but also the process for arriving at that norm. The utilization of the mechanism of the public hearing, in which participants include professional unions, chambers of commerce, professional litigators, consumer associations, and any other expression of civil society, will not only give all of those mentioned the opportunity to participate, but will also make their participation more clear and transparent.

At another level, the competition agency will be able to formulate guidelines and instructions for the interpretation and application of the law. Guidelines for economic concentrations, and for the analysis of vertical and horizontal practices, among others, will give economic agents the knowledge of the analytical methodology utilized by the competition agency.

These efforts by the competition agency to inform economic agents of its manner of proceeding will make its action more predictable and will facilitate the process of commercial decision-making.