

OECD-IBD PEER REVIEWS OF COMPETITION LAW AND POLICY: EL SALVADOR 2020

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Highlights from the OECD-IBD Peer Review on Competition Law and Policy in El Salvador

The basic pillars of competition law in El Salvador are in line with good international best practices. The latest reform proposals show the efforts of El Salvador to increase the effectiveness of the competition law. El Salvador's competition agency, the Superintendency of Competition (the 'Superintendency') has a mandate to promote and protect competition in order to increase economic efficiency and consumer welfare. At the same time, all institutions and public entities in El Salvador have the responsibility to promote and protect competition. The Superintendency is a committed competition authority with the typical limitations of a small competition authority in Latin America.

Institutional Design and Resources

The current legal framework poses a number of risks to the independence of the Superintendency and of its decision-making

The Superintendent resigns every time a new administration comes into power – a practice that is not adequate for an independent, technical body. The Superintendent and the other Board members are also chosen directly by the President without any formal selection mechanism to ensure they have the expertise and qualities necessary for their role. Their simultaneous appointment creates risks of sudden loss of experience and perceptions of politicisation of the Superintendency. In addition, Board members other than the Superintendent are appointed part-time, while the Superintendent works full-time and is responsible for virtually every aspect of competition enforcement. One concern this raises is that the Superintendent is, formally at least, involved both in investigating and deciding cases. Improving independence and institutional design will alleviate risks concerning the impartiality of decisions, the lack separation of investigative and decision-making roles, and conflicts of interest arising from the part-time role of some Board members.

In line with Central American practice, the authority has limited resources when compared to other economic regulators in El Salvador. Discussion during the fact-finding mission of the peer review noted that the Superintendency's budget is substantially less than that of comparable Salvadoran agencies and is, in fact, among the lowest of the institutions dealing with economic affairs.

Investigation and Enforcement Powers

A challenge for the Superintendency's enforcement efforts, common in Latin America, is that the agency must investigate every complaint received whenever the applicable legal requirements are fulfilled. The Superintendency cannot, therefore, prioritise its enforcement efforts and optimise the deployment of its resources. Similarly, to other countries in the region, the mechanism developed by the Superintendency to address this issue is to introduce a 'preliminary investigation' stage prior to opening formal investigations. In practice, a substantial amount of resources is devoted to trying to review, and mostly reject complaints.

In the past, the Superintendency's enforcement activities have focused on abusive conduct. This has been reflected in limited enforcement against cartels. Such a trend is common among young competition agencies – as they react to complaints instead of unearthing secret collusive practices. However, the effects of unilateral conducts are often ambiguous, while cartel activity invariably results in consumer harm.

As the Superintendency is now a more experienced body, resources should be redirected from fighting abusive conducts – without abandoning enforcement against such conducts where appropriate – to combatting cartels. The 2008 Peer Review noted that the Superintendency needs to demonstrate success in its law enforcement function. A successful anti-cartel programme would also have the beneficial effect of strengthening the public's awareness and support for competition policy and the agency. However, to date the Superintendency has only investigated a single case where evidence was collected through dawn raids. The Superintendency does have a number of the legal tools that it needs to implement a successful anti-cartel programme. The Superintendency should make better and more intensive use of its enforcement powers including its leniency regime, which has proven to be a highly useful tool in combatting cartels.

The country's criminal laws apply to bid rigging in public procurement, as does, competition law. However, few bid rigging cases have been prosecuted under competition law. Experience in other countries has shown that concentrating on bid rigging in public procurement can be fruitful. Such conduct is quite common; it almost certainly exists in El Salvador. Successful prosecutions of this conduct are visible and easily understood, and are likely to increase the prominence and reputation of a competition authority before both the public and other public authorities.

Sanctions

Enforcement also relies on effective sanctions. Although the Superintendency's fining powers are substantial, the penalties imposed are rather small, relying as they do on a multiple of minimum salaries. While the Superintendency can impose penalties based on turnover for 'very severe infringements', this has been used very sparsely – on two occasions at most – and there are currently no guidelines on whether an offence is particularly serious. The main problem with low fines such as these is that they fail to dissuade economic agents from committing anti-competitive practices.

In addition, El Salvador faces very significant issues in collecting fines. The competition law establishes that all fines must be paid within eight days of the issuance of the Board's final resolution. Nonetheless, 42% of all fines have not been paid. The payment of 34% of all fine amounts have been suspended by appeals admitted in the Supreme Court of Justice, and 32 fines are pending collection by the General Prosecutor of the Republic (FGR) despite these penalties no longer being subject to appeal. An important concern in this respect is that the General Prosecutor of the Republic has been slow to open procedures to collect outstanding fines. To date, the FGR has only collected 36 fines. To address this, reforms have been proposed that seek to increase the effectiveness of competition law. Reforms include a proposed reform bill setting out a compulsory enforcement procedure for the collection of fines. These proposals have not yet been adopted, though.

In addition to fines, the Superintendency can issue cease and desist orders against unlawful practices, or impose remedies or other conditions or obligations, both behavioural and structural. However, it is unclear how well the Superintendency monitors the remedies it imposes.

Leniency Programme

The 2007 amendment to the competition law provided that leniency could be granted by the Superintendency. Leniency may be granted only to the first applicant, who must furnish enough evidence of the existence of a cartel and of the applicant's participation in it. This applicant must also fully co-operate with the Superintendency's investigation.

Furthermore, current sanctions may not be severe enough to incentivise companies to abandon anticompetitive practices or apply for leniency. Even if this were the case, the law does not exempt a successful applicant from fines and other sanctions; instead, it merely grants the Superintendency discretion to potentially reduce the fine by an indeterminate amount. This – when combined with the absence of a formal procedure for leniency applications developed and implemented by the Superintendency – means that companies and individual lack the requisite certainty to come forward and apply for leniency. Thus explaining why El Salvador's leniency programme has been unsuccessful. International experience shows that guarantees of full immunity are required for companies to be sufficiently incentivised to come forward. Finally, since leniency may be granted only to the first applicant, which unduly restricts the incentives of other companies to also come forward and co-operate in an investigation.

Judicial appeal

With respect to judicial appeals, in 2006-2018 only two infringement decisions were overturned by the courts, while 32 appeals were dismissed. Although the Superintendency is very successful in upholding its decisions in court, delays in the issuing of judicial decisions have been one of the main obstacles to the effective application of competition law. Reaching a final decision can take many years from the date an appeal is filed, despite there being a single instance of appeal. The latest reforms to the Administrative Procedure Law set forth deadlines that must be met with the objective of ensuring that judicial appeals reach quicker conclusions, but it is as of yet unclear how effective these reforms will be.

Merger control

By setting its merger notification thresholds high, El Salvador has so far avoided a number of problems that other countries confronted, such as reviewing too many mergers that are unlikely to pose any significant competition issues.

On the other hand, and as already noted in the 2008 Peer Review, it seems that merger notification thresholds have been set too high, leading to too few mergers being reviewed. A recent assessment of merger control thresholds by the Superintendency concluded that the relatively small size of the national economy meant that most transactions with the potential to impact competition in the El Salvador market fall below the current notification thresholds. In the light of this, the latest legislative proposal included a reduction of merger control thresholds in order to adapt them to the reality of El Salvador.

Merger control thresholds should be reviewed to ensure that transactions with the potential to impact competition in El Salvador are subject to review. At the same time, merger control thresholds need not be included in primary law. Instead, they may be set out in secondary legislation, which can be updated by, or upon recommendation of the Superintendency. This would permit better to balance the benefits of identifying anticompetitive transactions with the costs of merger control, and to adjust notification thresholds over time based on acquired experience.

Advocacy and Market Studies

The Superintendency's advocacy efforts are very relevant in El Salvador, since they seek to generate a cultural and institutional change in society, ensuring that the value of healthy competition is internalised. The great efforts of the Superintendency in this regard are evident via number of variables, such as the number of pro-competitive regulatory recommendations. In addition, the Superintendency has entered into inter-institutional agreements with other public institutions in El Salvador, academic bodies and consumer associations. Further, the Superintendency interacts with the public in several ways, including regular communications through press releases, press conferences, informational meetings and articles written by staff members.

The Superintendency has been quite active – and successful – in its pursuit of market studies, which are widely recognised as an important tool to open markets to competition. At the same time, no mechanism requires that public bodies to take into account the Superintendency's recommendations. As a golden mean between taking into account the Superintendency's recommendations and preserving the regulatory and democratic autonomy of the addressees of the recommendations, it is suggested that El Salvador should consider, at least in the context of market studies, imposing a duty on public bodies to justify a decision not to follow a recommendation by the Superintendency.

Key Recommendations

- 1. Enhance the Superintendency's independence and autonomy** by adopting clear and transparent rules set out the conditions of appointment and dismissal of the Superintendent and the Board that results in a public selection procedure, made by bodies that ensure wide-political acceptance and remove the perception of political bias.
- 2. Clearly separate investigative from decision-making roles.**
- 3. Ensure that Superintendency is entitled to prioritise its investigations** in order to optimise resources and direct them where its action will have the greater impact.
- 4. Implement an effective strategy to combat cartels and consider redirecting resources towards cartel from abuses investigations**, without ignoring the latter, using the available legal tools.
- 5. Focus on fighting bid rigging in public procurement concentrating on bid rigging in public procurement** which can be fruitful in terms of increasing the prominence and reputation of a competition authority before both the public and other public authorities.
- 6. Impose deterrent fines and ensure they are collected swiftly** by clarifying that all anticompetitive practices amount to particularly severe offences, and impose higher fines based on the relevant turnover.
- 7. Reform the leniency regime to bring it line with international standards** in order to create incentives for companies to apply for leniency.
- 8. Adopt market definition, market power and anticompetitive analysis tools** in line with international practices
- 9. Remove the requirement of dominance for antitrust enforcement against vertical arrangements**, and clarify the legal framework for abusive practices since dominance imposes a very high threshold that prevents effective enforcement.
- 10. Adopt measures to make judicial review of infringement decisions swifter**
- 11. Amend merger control thresholds** in order to adapt them to the reality of El Salvador's economy.
- 12. Ensure that it is possible for private enforcement to occur before the courts** which can be used to narrow the "enforcement gap" and allow victims to be compensated.
- 13. Consider imposing a duty on public bodies** to justify a decision not to follow a recommendation by the Superintendency.

Peer Reviews of Competition Law and Policy

OECD peer reviews have proved to be a valuable tool for countries to reform and strengthen their competition frameworks.

The mechanisms of peer reviews vary, but they are founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers.

The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

Furthermore, these reviews incorporate recommendations for changes in government policy.



Argentina (2006)

Brazil (2005, 2010, 2019)

Chile (2004)

Colombia (2009)

Costa Rica (2014)

Czech Republic (2008)

Denmark (2015)

Ecuador (forthcoming)

El Salvador (2008)

European Union (2005)

Greece (2018)

Honduras (2011)

Kazakhstan (2016)

Latin America (2006, 2007, 2012)

Mexico (2004)

Panama (2010)

Peru (2004, 2018)

Romania (2014)

Russia (2004)

South Africa (2003)

Chinese Taipei (2006)

Turkey (2005)

Ukraine (2008)

Vietnam (2018)

Access all OECD country reviews on competition law and policy at www.oecd.org/daf/competition