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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from El Salvador

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- El Salvador --

1. Proudly, El Salvador has an independent Competition Law enforcer.* It is well known and theoretically supported that effectiveness of a competition authority is affected by its degree of independence and the coherence among its resources –financial and human- and its objective. Naturally, the independence of a competition agency is frequently praised, including the allocation of sufficient public resources to the effective fulfillment of its competition enforcement and advocacy duties. An authority that lacks independence, be it in law or in fact, will hardly meet the expectations the public - including businesses, citizens, and politicians- have over the promotion and protection of competition. Therefore, independence constraints complicate the attainment of the expected benefits of effective competition law enforcement over welfare and economic efficiency.

1. Independence by Law

2. A competition agency can be granted independence by its Competition Law. In literature, this is frequently referred as *de jure* or formal independence¹ and it is often related with an independent personality and institutional separateness from government.² Overall, independence by law includes those provisions aimed at (1) securing the independence of the competition agency from political interference, (2) conferring it an independent status within the government, (3) granting it sufficient powers to effectively fulfill its attribution and duties, (4) granting it sufficient funds and securing its autonomy to allocate the budget granted, (5) granting it powers to determine its own internal organization and hire the required staff, and (6) establishing objective criteria for the selection of its authorities.³ Broadly, this safeguards the competition agency's administrative and decisional independence.

* SC final note: It is worth mentioning that a great variety of circumstances, acts and/or considerations can occur and those might not necessarily be considered in this contribution. Consequently, this document is illustrative and for its nature it shall not be considered as binding for any act of this institution, staff and authorities including investigations and Decisions issued and/or to be issued. Nothing in this document shall be understood as prejudging the analysis the SC and/or its staff and authorities could perform in specific cases or as an institutional statement. Finally, the SC does not necessarily endorse the reviewed bibliography. [SC, October, 2016]

¹ See: Mark Thatcher, 'Regulation After Delegation: Independent Regulatory Agencies in Europe'. Journal of European Public Policy 9:6. December 2002: 954-972.

<http://eclass.uoa.gr/modules/document/file.php/PSPA113/THATCHER%201.pdf>

² UNCTAD Secretariat 'Independence and Accountability of Competition Authorities' TD/B/COM.2/CLP/67. May 14th, 2008. Ninth Session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, July 15th-18th, 2008. Page 4. http://unctad.org/meetings/en/SessionalDocuments/CCPB_IGE2014_UNCTADNOTE_EMCF_en.pdf

³ See, for instance: Thatcher (December, 2002); UNCTAD Secretariat (May 14th, 2008) ; Sofia Alves, Jeroen Capiiau and Ailsa Sinclair. European Commission. 'Principles for the Independence of Competition Authorities'. Competition Law International. Volume 11. No.1. April, 2015.

3. Often, a competition authority is considered independent if it has its own legal personality and powers, including control over its decision-making and other functions, and if it is separated by law from the central governmental structure.⁴ Independence from central government is considered a means to prevent competition law enforcement is used to privilege, among other possibilities, political objectives unrelated to competition policy or particular interests at the expense of public interest.⁵

4. El Salvador's Competition Superintendence (in this contribution "SC") was created by the Competition Law⁶ as a Public Law Institution, with legal personality and its own patrimony, and given technical character and administrative and budgetary autonomy for the exercise of its powers and duties.⁷ The SC holds administrative and decisional independence. Consequently, it is able to perform its attributions without intrusion from external actors, whether private or public. Those are, among others: investigations of anticompetitive practices, execution of preliminary procedures, issuance of decisions and imposition of sanctions when so merit, elaboration and issuance of market studies, non-binding opinions and other competition advocacy acts, and approval, condition, or denial of merger requests after analyzing those.⁸

5. Independence must also be preserved in practice by the competition agency officials and employees, within the working relationships those engage in with different subjects. Provisions in the Law related to incompatibilities to hold office, conflicts of interest, independence, procedures for dismissal of officials, and other similar are relevant to protect independence from private interests and political affiliations.⁹ Another potential risk is competition law enforcement capture by politics. Not necessarily total or consumer welfare objectives always coincide with purely political interests¹⁰ and if the later are regarded while enforcing competition law the independence of the agency decisions might be affected. Even though competition laws are often considered socially desirable the abovementioned risk of interference is deemed to potentially exist, among others, because the benefits of effective competition law enforcement are non-sector specific.¹¹

6. In El Salvador, provisions in the Competition Law contribute to protect effectiveness and independence in the day-to-day duties of the Board of Directors and the SC employees. The highest authority of the SC is the Board of Directors¹², whose composition and term are provided by Law. This Board is composed by the Superintendent, two Directors, and three Alternate Directors, appointed by the

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=36385C8D-82BB-4499-B6A0-7D0D6D9364E1>.

⁴ UNCTAD Secretariat (May 14th, 2008). Page 4.

⁵ Sofia Alves, *et al.* (April, 2015) Page 15

⁶ *Competition Law* is available at:

http://www.sc.gob.sv/site/uploads/Ley_competencia_y_reglamento_oct2015.pdf [original, in Spanish]

http://www.sc.gob.sv/site/uploads/Competition_Law_and_Regulation_2015.pdf [free translation to English]

⁷ See El Salvador's *Competition Law*, Article 3.

⁸ For detail please see Articles 13 and 14 of the *Competition Law*.

⁹ See: Sofia Alves, *et al.* (April, 2015) Page 16

¹⁰ On this see: Michael S. Gal 'The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries'. New York University. Law and Economics Research Paper Series. Working Paper No.02-03. 2004. Page 9. <http://ssrn.com/abstract=665181>

¹¹ Michael S. Gal. (2004) Page 9.

¹² Article 6 of the *Competition Law*.

President of the Republic.¹³ All shall last five years in office and may be reelected.¹⁴ The Superintendent Chairs the Board¹⁵, and he is the legal representative of the SC and is in charge of its senior management and the supervision of its activities.¹⁶ Provisions in the Competition Law assure the capacity of the SC officials by listing the necessary eligibility qualifications the Superintendent and the other Directors must hold to be appointed in those positions¹⁷ and the eligibility disqualifications.¹⁸

7. Once appointed, there is one provision in the Competition Law that secures the full-time dedication of the Superintendent to its position to avoid impairing the fulfillment of his obligations¹⁹. The other Board members, Proprietary and Alternate, are not exclusively dedicated to their positions. Since most Board members are not full-time officials, besides assuring their capacity for the position, as it was previously mentioned, the SC safeguards duly compliance with their duties and responsibilities. The Competition Law expressly provides six causes for removal of Board members²⁰ prior of the end of their respective term, including “*when their behavior may jeopardize the seriousness and impartiality of the Superintendency*”.²¹ This suspension from office can be declared by the President of the Republic *ex-officio* or upon request of an interested party, not necessarily tied to the SC, after hearing the affected and following due process, in accordance with Article 11 of the Constitution of the Republic.²²

2. The complementary *de facto* independence

8. The actual enforcement of the competition law is equally important as its adoption, and the effectiveness of the first is up to some extent conditioned by the institutional, including organizational, situation of the agency.²³ Actual or *de facto* independence signifies an independent behavior, procedural and decisional, which is complementary to formal independence.²⁴

9. Naturally, competition authorities shall perform their duties in due regard of their respective competition laws. Satisfactory human and financial resources are essential to guarantee the effective enforcement by the competition agency, and liberty to allocate those resources and to manage staff constructively contributes to secure independent decisions.²⁵ As it was previously stated, in El Salvador, the SC holds administrative and decisional independence.

¹³ Article 6 of the *Competition Law*.

¹⁴ Article 8 of the *Competition Law*.

¹⁵ Article 6 of the *Competition Law*.

¹⁶ Article 7 of the *Competition Law*.

¹⁷ Article 9 of the *Competition Law*.

¹⁸ Article 10 of the *Competition Law*.

¹⁹ Article 7 of the *Competition Law*.

²⁰ Article 11 of the *Competition Law*.

²¹ Article 11(d) of the *Competition Law*.

²² Article 11 of the *Competition Law*.

²³ Michael S.Gal (2004). Page 11.

²⁴ Sofia Alves, *et al.* (April, 2015) Page 16.

²⁵ Sofia Alves, *et al.* (April, 2015) Page 16.

10. The Competition Law empowers the SC to autonomously determine its internal regulations²⁶ and organization²⁷. Regarding its budget, it is approved by the Legislative Assembly, the standard procedure for governmental institutions.²⁸ The SC holds budgetary autonomy by Law, although its main source of funds is the Country's General Fund. However, the SC budgetary assets may exceed the allocations determined to it in its budget.²⁹

11. Actual independence can be highly related to external factors, such as the agency's budget amount, and internal factors, such as the agency's officials, internal regulations, workplace culture and environment. Ideally, the agency's staff should be sufficient to conveniently execute all strategic plans and the planning of activities should be developed realistically. That implies the agency's available resources cannot be disregarded because the strategy must be designed accordingly.

12. Besides having enough staff the competition agency funds shall be enough to attract and retain skilled staff. The professionalism and technical expertise of the competition agency staff are essential to guarantee the actual independence of the authority. All the attributions of the competition agency, especially the investigations of anticompetitive practices and merger requests analysis, shall be performed with a sound technical sense and be based on objective evidence.³⁰ Duly reasoned decisions shall be reached after a thorough legal, factual and economic assessment.

13. In El Salvador, provisions in the Competition Law contribute to safeguard this agency's independence from the start, that is from external ties interference and unscrupulousness when appointing officials and hiring employees³¹. Regarding the execution of its mandate, El Salvador's SC aims to ensure compliance with the Competition Law through a system of legal, technical and economic analysis that shall be complemented by support studies and other relevant to optimally carry out its activities.³² To fulfill its mandate, the SC makes use of its knowledgeable staff, with technical and empirical expertise in competition and on the matters of their specialty. The three main operational units are the Investigations Office³³, the Economics Office³⁴, and the Competition Advocacy Office³⁵.

14. Propitious public policy outcomes are only secured by non-politicized and non-discriminatory decisions. Consequently, resolutions of a competition agency with the following characteristics are highly encouraged in academic documents: transparent, neutral and independent, including from interference of private or political interests.³⁶ The degree of independence of a competition authority might potentially

²⁶ See Article 15 of the *Competition Law*.

²⁷ See Article 5 of the *Competition Law*.

²⁸ For complete and precise detail please see Article 21 of the *Competition Law*.

²⁹ For complete and precise detail please see Article 20 of the *Competition Law*.

³⁰ UNCTAD Secretariat (May 14th, 2008). Page 3.

³¹ *'The spouse or relatives of the Superintendent, up to the fourth consanguinity degree or second affinity degree, cannot be officials or employees of the Superintendency'* Article 16 of the *Competition Law*.

³² See El Salvador's *Competition Law*, Article 4.

³³ Composed by ten full-time employees, including the Chief of the Office.

³⁴ Composed by twelve full-time employees, including the Chief of the Office.

³⁵ Composed by seven full-time employees, including the Chief of the Office.

³⁶ UNCTAD Secretariat (May 14th, 2008). Page 3.

have an impact over the incentives for investment and innovation of privates, and over the effectiveness of the agency.³⁷

15. In El Salvador the procedures before the Superintendent can initiate *ex-officio* or upon request.³⁸ The SC does not have discretion to decide which cases it undertakes and which it does not if receiving a complaint, provided it is deemed admissible. The SC's Board of Directors, has among its attributions to decide cases and to apply sanctions pursuant the Competition Law.³⁹ Its reasoned resolutions shall be reached by the majority of its members.⁴⁰

16. El Salvador's Competition Superintendency privileges a sound reasoning from the start of an investigation. The Law requires the SC to issue a reasoned resolution to instruct the investigation, which includes, among others, a concise summary of the facts justifying the same, the identification of the type of infringement, and the indication of the right to make use of all guarantees of the legal due process.⁴¹ The Superintendent, in the exercise of its powers, may require reports or relevant documents to privates and public institutions to perform the investigations and citing to declare those who are related to the case in question. The Superintendent may conduct the necessary investigations for the proper application of the Competition Law, including searches and dawn-raids⁴². Every economic agent to whom the SC requests information is compelled to give the necessary cooperation to this agency, providing all the information and documents required in the investigation of infringements to the Law.⁴³ The SC also has among its powers⁴⁴ to issue precautionary measures at any time during the sanctioning procedures, also through a reasoned resolution.⁴⁵

17. Regarding the SC decisional independence, once the case file is made, the Superintendent shall conclude the investigations and submit the case to the Board of Directors who shall issue a resolution within a timeframe no longer than twelve months from the date the complaint was filed or the investigation started. This period may be extended once if circumstances so merit, pursuant a reasoned resolution by the Board.⁴⁶ The final decision of any case allows review recourse in front of the SC Board of Directors.⁴⁷

18. The competence and credibility of the competition law enforcer and its decisions are indispensable to effectively address anticompetitive conducts.⁴⁸ Unfavorable perceptions about the competence, effectiveness and credibility of the competition agency may potentially limit the possibilities of its advocacy efforts to develop a pro-competitive culture in the country and can negatively impact its preventive effects aimed towards discouraging engagement in anticompetitive conducts by raising awareness of competition and its benefits over welfare and economic efficiency. Additionally, regarding

³⁷ Sofia Alves, *et al.* (April, 2015) Page 15.

³⁸ Articles 40 of the *Competition Law*.

³⁹ The Powers and duties of the Board of Directors are listed in Article 14 of the *Competition Law*.

⁴⁰ See Article 6 of the *Competition Law*.

⁴¹ For complete and precise detail please see Article 43 of the *Competition Law*.

⁴² For complete and precise detail please see Article 44 of the *Competition Law*.

⁴³ For complete and precise detail please see Article 50 of the *Competition Law*.

⁴⁴ For detail please see Articles 13 and 14 of the *Competition Law*.

⁴⁵ For complete and precise detail please see Article 13 s) of the *Competition Law*.

⁴⁶ For complete and precise detail please see Article 45 of the *Competition Law*.

⁴⁷ For complete and precise detail please see Article 48 of the *Competition Law*.

⁴⁸ On this see Michael S. Gal. (2004) Page 12.

the enforcement acts of the competition agency, perceivable deficiencies over its effectiveness, competence and/or credibility and mistrust about the fruitfulness of the agency's sanctioning decisions may impact the enforcement expectations of the economic agents, as well as the deterrent effect of the enforcement actions and the incentives of the subjects of the competition law to transgress the same.⁴⁹

19. Competition advocacy is an essential task of competition authorities in developing countries. These activities are broadly aimed, among others, at raising awareness of the impact and benefits of competition and of the concept itself, and to promote a competitive environment by disseminating the detrimental effects of barriers to entry or expansion of economic agents in the marketplace, including those created by Law.⁵⁰ It is particularly relevant to convey an easily-understandable message beyond the traditional technical legal and economic concepts, and to find suitable means to engage with the public, making the most of the available resources and embracing technological advances. The SC, by Law, is independent to determine its public training strategy to promote a competition culture⁵¹, and its success at implementing is constantly increasing.

20. The SC autonomy allows it, among others, to subscribe cooperation agreements with peers and with key stakeholders such as the academy and governmental institutions. For instance, the first allows the SC to: (1) benefit from technical assistance to strengthen the technical capacities of the staff, (2) facilitate specialized training on competition to key audiences, through the participation of international experts in the SC competition advocacy events, and (3) expedite the experience exchange and technical assistance with peers. The latter enables the SC, among others, to: (1) offer training and courses on competition to university students and to promote advocacy campaigns such as the "SC Tour"⁵² among younger audiences, and (2) to facilitate coordination and inter-agency work with other governmental institutions, including training and specific projects.

21. In El Salvador, the public versions of products of the SC enforcement, including all final resolutions⁵³ and the advocacy acts are available for the citizens in the agency's website, and the news and press releases are uploaded to it as well. Additionally, the SC is active in social media, and created an App⁵⁴ that allows its users to read main facts of a case or a market study and its public policy recommendations, in a couple of minutes, from the date the final resolution was issued. This App won the 2014 ICN-WB Competition Advocacy Contest.

22. In general, openly publishing the agency decisions may tangentially constrain political attempts to influence the competition authority, but it is indispensable to assure the protection of confidential information.⁵⁵ El Salvador's Competition Law assures confidentiality of business, commercial and official information in the SC records⁵⁶, declared as such⁵⁷ if those meet the requirements.⁵⁸ Moreover, the

⁴⁹ Michael S. Gal. (2004) Page 12.

⁵⁰ On this see Michael S. Gal. (2004) Page 8 and 16.

⁵¹ See Article 13 n) of the *Competition Law*.

⁵² Advocacy campaign: Fair Markets, Opportunities for Everyone, available in @SCompetencia social media as #GiraSC

⁵³ By Law those must be published. See Article 13 j) and 51 of the *Competition Law*.

⁵⁴ Casosenlinea.sc.gob.sv

⁵⁵ Michael S. Gal. (2004) Page 20.

⁵⁶ See Article 13 f) of the *Competition Law*.

⁵⁷ Article 13 f) of the *Competition Law Regulation*.

⁵⁸ In Article 49 of the *Competition Law Regulation*.

Competition Law forbids officials, employees or any person who serves at any title to the Superintendency to disclose any information acquired as result of the performance of its duties or to take advantage of the same. Non-compliance causes removal from office and sanctioning in accordance to the Law, notwithstanding any possible criminal liability.⁵⁹

23. Additionally, decisional independence is guaranteed by several means. For instance, all the before mentioned subjects working for the SC are forbidden from receiving, directly or indirectly, any gift, present, or other effects from economic agents subject to El Salvador's Competition Law.⁶⁰ Moreover, Board Members and SC officials and employees must excuse themselves from hearing matters in which they can gain a direct or indirect benefit. Interest on a matter is presumed if there is a personal connection to it. Superintendency officials may be challenged by reasoned submission at any stage of the procedure and is the Board who decides the pertinence of the challenge.⁶¹

24. Independence and accountability can, in practice, be different across jurisdictions, according to legal, social and economic specificities.⁶² The competition agency must continuously preserve both attributes, from the design of its legal framework to its enforcement.⁶³ Once the competition authority is established it must preserve its independence, acquired by law, but it also shall safeguard its decisional *de facto* independence from domestic pressure groups and/or interests contrary to the objective of the Law, if necessary.

25. There is ample support in the international community for independent competition authorities, for instance among organisms such as the United Nations Conference For Trade and Development (UNCTAD), The World Bank (WB), the World Trade Organization, The Organization for Economic Cooperation and Development (OECD), and the International Monetary Fund.⁶⁴ Since 1998, the OECD conducts voluntary in-depth country reviews of competition law and policy, including an assessment of the effectiveness of the competition agency.⁶⁵ After two years of operation of the SC, El Salvador took the OECD Peer Review of its competition law and policy.⁶⁶ The Peer Review publication concluded, among others, that competition policy in El Salvador was off to a good, or excellent, start, and that this country experience could serve, at least partially, as a model of an effective way to start implementing a competition policy.⁶⁷ The Peer Review included several conclusions and recommendations.⁶⁸ The SC took those into account when amending its legal framework in 2008. Currently, the SC is advocating for other competition law amendments, some of those considered the 2008 Peer Review.

⁵⁹ For complete and precise detail please see Article 18 of the *Competition Law*.

⁶⁰ For complete and precise detail please see Article 19 of the *Competition Law*.

⁶¹ For complete and precise detail please see Article 12 of the *Competition Law*.

⁶² UNCTAD Secretariat. (May 14th, 2008). Page 4.

⁶³ See : UNCTAD Secretariat (May 14th, 2008). Page 3.

⁶⁴ UNCTAD Secretariat (May 14th, 2008). Page 3.

⁶⁵ OECD. 'Country Reviews of Competition Policy Frameworks' <http://www.oecd.org/regreform/sectors/countryreviewsofcompetitionpolicyframeworks.htm>

⁶⁶ OECD 'El Salvador –Peer Review of Competition Law and Policy', 2008. <http://www.oecd.org/daf/competition/41597078.pdf>

⁶⁷ OECD, 2008. Competition Law and Policy in El Salvador. Page 38.

⁶⁸ See pages 38-44 of the publication.

Transparency and accountability

26. Competition authorities, even if administratively and decision-making independent, regularly function with public funds. Consequently, it is expected those might be accountable in front of the government and the citizens about the appropriate use of its budget and, perhaps, even of its annual results. Transparency enlightens the citizens and the government to monitor the agency's effectiveness. Accountability and transparency allows scrutinizing the degree of formal and actual independence of a competition agency. Moreover, this enables the citizen to form its independent opinion, without having to rely exclusively on the competition agency's discourse.

27. When transparency exists, the actions a competition authority undertakes to fulfill its duties are open for the scrutiny of citizens. Accountability of governmental authorities is essential to openly demonstrate the effective use of public funds -which ultimately constitute citizen's contributions- for their intended purposes. The SC is subject to the periodic inspection and monitoring of its operations and accounting by an in-house auditor.⁶⁹ Regarding visiting independent audits, the SC is subject to the inspection and supervision of an external auditing firm who renders its reports to the Board of Directors, and as any other public institution, the SC is also subject to the supervision of the Court of Audit of the Republic.⁷⁰ Over the years, the SC has been beneficiary of different cooperation and technical assistance projects, and it has been subject to its respective audits, if the Projects so demanded. To this day, the SC has outstandingly trump all independent project auditing.

28. El Salvador's SC complies with the country's Public Information Access Law and its Regulation⁷¹ through a Transparency gateway⁷² in its website⁷³, and by answering information requests formally filed to the SC's Public Information Officer, in conformity with the abovementioned regulations. The SC uploads to its transparency website its primary internal regulations, minutes of the Board of Directors sessions, Operative Annual Plan, budget and financial statements, index of reserved information, list of official missions, among other material that allows the public to review the use of the public funds assigned to the institution. The transparency gateway complements the SC website. Additionally, the SC offers a variety of free-of-charge services to everyone interested. For instance, the SC answers queries by telephone, email, or in the office, and, by request, lends bibliographic material about competition and related topics from its institutional collection to everyone interested, following the rules for the use of the Documentation Center (CENDOC)⁷⁴. Finally, the SC publishes its annual report and its accountability report of the acts performed in a twelve months period. The latter is launched in a public event.

⁶⁹ See Article 23 of the *Competition Law*.

⁷⁰ See Article 24 of the *Competition Law*.

⁷¹ -*Ley de Acceso a la Información Pública*. Approved by means of Legislative Decree No. 534 of December 12, 2010, published in the Official Gazette No. 70, Volume No. 391, of April 8th, 2011.

Available at <http://www.iaip.gob.sv/?q=ley-y-reglamento/ley-de-acceso-la-informaci%C3%B3n-p%C3%BAblica-decreto-no-534> [Spanish]

-*Reglamento de la Ley de Acceso a la Información Pública*. Approved by means of Executive Decree No. 136 of September 1st, 2011. Available at <http://www.iaip.gob.sv/ley-y-reglamento/reglamento-de-la-ley-de-acceso-la-informaci%C3%B3n-p%C3%BAblica> [Spanish]

⁷² <http://publica.gobiernoabierto.gob.sv/institutions/superintendencia-de-competencia>.

⁷³ Superintendencia de Competencia <http://www.sc.gob.sv/home/>

⁷⁴ <http://cendoc.sc.gob.sv/opac/index.php>.