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## *Judicial Perspectives on Competition Law*

-- El Salvador --

### **Interactions between Courts and Competition Authorities**

#### **1. Introduction**

1. The Superintendence of Competition of El Salvador is a public administrative institution that has the faculty to investigate and sanction anti-competitive practices among competitors, non-competitors and abuses of dominant position.
2. The administrative procedure from anticompetitive practices involves two stages in the same instance; the first, a phase of instruction in which the Superintendent of Competition makes the investigation of the procedure, and, the second, a resolutive stage in which the Directive Council of the Superintendence of Competition issues the final decision.
3. In the event that in the final resolution imposes a sanction (fine or behavioral aspects), and the aggrieved part does not agree, it may choose to submit an appeal for review before the same Board of Directors; solved this or not having presented it, the sanctioned economic agent has the right to challenge the decision of the Board of Directors before the judicial authority (Administrative Litigation Chamber and / or Constitutional Chamber).
4. If the sanctioning resolution is not challenged or if the result of the process before the judicial authority is favorable to the interests of the Superintendence of Competition, the sanctioned has the obligation to voluntarily comply with the sanction; If it fails to comply, the legal system authorizes the Attorney General of the Republic, who represents the interests of the State, to make the coercive collection of the fine, among others, to sue the sanctioned - through the executive - in civil courts and mercantile.
5. In view of the foregoing, the following will explain some of the most relevant situations in the processes in which the Superintendence of Competition has been sued or, on the contrary, in which this Institution has sued before the judicial authority.

#### **2. Judicial complaint of resolutions before the supreme court of justice**

6. The judicial proceedings before the Constitutional Chamber (legal protection) and before the Administrative Contentious Chamber (administrative litigation) are very similar in terms of their deadlines and the authorities that instruct and decide; however, its main difference is that the first one knows violations to rights or categories of constitutional rank, committed by any authority, civil servant of the State or of its decentralized organs, among them the Room of the Contentious Administrative in the exercise of its functions; and the second, knows the controversies that arise in relation to the legality of the acts issued by the public administration.

## 2.1. Challenges before the office of the administrative contentious of the supreme court of justice

7. The contested administrative litigation processes are approximately 90% of the procedures sanctioned by the Institution. To date, judgment has been issued in 24 cases, of which 21 have been in favor of the Superintendence of Competition (in some cases the judicial authority has only modified the amount of the fine), 2 were abandoned by the economic agents who challenged them, and 1 was declared against. On this last comment that the procedure was rolled back at the time of illegality and is currently in the process of issuing the final resolution.

8. The work that is done to defend the legality of the actions of the Superintendence of Competition in these processes processed before the judicial authority, is with personnel (lawyers) of the Superintendence of Competition; and in contraposition, the majority of economic agents who sue in court are represented by several lawyers in each judicial process, who represent important law firms and / or consortiums.

9. On the other hand, it is important to express that the Contentious Administrative Chamber analyzes the object of the anticompetitive practices procedure in its judicial proceedings. In this way, the judicial authority has ratified important criteria issued by the Board of Directors of the Superintendence of Competition. Detail of some of them:

### 2.1.1. Rule per se

*"There is no doubt about the power of the Superintendence of Competition to investigate anticompetitive practices. The per se rule is a way to analyze anti-competitive agreements between competitors, whereby, to be proven and punish the commission of this type of illegal practices, the applicator must only prove the adoption of one of the agreements defined in the article 25 of the Competition Law ". Sentence 131-2012, June 28, 2016.*

### 2.1.2. Authorization of raids

*"The judicial authorization so that the Superintendent of Competition can perform registrations and raids must be granted by the First Instance Judge with competence in civil or commercial matters of the town where the property is located or the properties that intend to intervene. This authorization is required in the framework of an investigation carried out to determine the existence or non-existence of anti-competitive practices in order to impose, as appropriate, the corresponding sanctions and order measures to prevent the continuation of the conduct infringing" Sentence 206-2012, October 24, 2014.*

### 2.1.3. Confidential information

*"The Superintendence of Competition is empowered to request the collaboration of economic agents, who cannot hide behind the confidentiality of the information so as not to provide it, since the regulator is obliged to safeguard said confidentiality." Sentence 259-2007 dated March 1, 2011.*

10. Finally, to that State the Administrative Litigation Chamber issued a ruling in which it was declared illegal by the Superintendence of Competition in which it was considered that, although the sanctioning procedure had complied with the provisions of the Law on Competition, it was necessary that "once the administrative file was

integrated and prior to the issuance of the act that concluded the investigations of the Superintendent and ordered it to be forwarded to the Board of Directors, the [administrator] would have access to the non-confidential documentation with the purpose of (...) adequately exercising its defense, opening in consequence a stage of conclusions, in which the one administered with full knowledge of the contents of the file, could exercise the aforementioned right ". Sentence 254-2009, June 18, 2013.

11. In addition, there was another sentence, which was declared legally, the Chamber ordered, as to the count of the days to impose the fine, that "although there is an obligation of the economic agent to comply with the information requirement, this must be done in the days in which the offices of the Superintendence of Competition are authorized to receive it, [for which the fine] must be calculated on the basis of the business days that make up the period of delay (...). Thus, the contested act is illegal only in the determination of the fine." (Sentence 151-2014, June 5, 2017).

## **2.2. Before the constitutional room of the supreme court of justice**

12. The resolutions by means of which the Superintendence of Competition sanctions the economic agents for the commission of anti-competitive practices may be challenged before the Constitutional Chamber of the Supreme Court of Justice, for violations of constitutional rights and guarantees committed within the investigation procedure of the same.

13. To date, the Institution has been sued in three cases, which were accumulated, and in all of them the Constitutional Chamber has issued a favorable ruling for the Institution.

14. The economic agents involved sued this institution for the alleged violation of the fundamental right that every person has "not to declare when he has been accused of committing an infraction", since the plaintiffs considered that the Superintendent of Competition required them to prepare a series of reports and graphics that, in his opinion, contained statements and explanations harmful to his interests.

15. In this regard, the Constitutional Chamber noted that despite the request for information "represented for the pretensioners to play an active role in the preparation of certain reports, the elements that had to be provided only sought to disclose technical, financial and administrative information related to the general activities of the companies without it being possible to establish, from said elements, some confession or subjective statement directly related to their participation in the anti-competitive practices that were questioned in the respective sanctioning procedures ". Sentence 16-2009 and cumulative Constitutional Chamber, July 13, 2011

16. Consequently, the Chamber has provided important support to this Institution in terms of its powers to request information, by insisting, in the same judgment, that "the power to require from any person related to the economic activities investigated the information that is estimated necessary has been granted the Institution in order to ensure effective market competition, sanctioning monopolistic practices and behavior that threaten or harm the freedom of companies and the welfare of consumers. In the same sense, has stated that "The refusal of the agent or economic subject to whom the information is requested or the presentation of the required without meeting the terms formulated represents an obstruction to the performance of the work of the Superintendence of Competition and, with this is true of the principles on which the country's economic public order is based on the provisions of Article 110 of the Constitution."

17. On the other hand, this Superintendence has the faculty to interpose demands of protections before the Constitutional Chamber of the Supreme Court of Justice, for violation of its constitutional rights within the framework of processes in which it has intervened as part, including the administrative contentious processes that the economic agents initiate to contest, of illegal, the resolutions that impose fine on them commission of anticompetitive practices.

18. In view of the previous thing, this Institution has demanded in protection in two occasions to the Administrative Contentious Chamber, the Constitutional Chamber having ruled in one case in favor and in another against the Institution.

19. In the process of protection 206-2012 of the Constitutional Chamber, this Institution considered that the judgment issued by the Administrative Contentious Chamber had violated their rights to a motivated resolution and, consequently, to legal security within a process initiated against him by a sanctioned economic agent, since he invalidated the judicial search authorization carried out in the framework of an investigation procedure for anticompetitive practices, due to a supposed non-observance of a provision contained in a legal body different from the Law of Competition, without explaining the reasons why it considered that said legal precept was applicable to the specific case.

20. In this regard, in the respective ruling, the Constitutional Chamber warned that, in effect, the Contentious Administrative Chamber "had damaged the rights to due motivation and legal security on having had invalidating the above-mentioned judicial authorization of search without being authorized to do so, given that the legal provision used as a basis did not apply to the case and, furthermore, did not explain the reasons why it was considered applicable".

21. Of there, that the Chamber determined that this Superintendence had acted within the legal framework, since the practice of the search in question was carried out fulfilling all the requirements established in the Law on Competition which applies the procedure of this Institution.

22. In addition, he warned in that judgment, that it was necessary to insist that in cartel investigations, it was difficult to find tangible or material evidence from which anti-competitive behavior could be directly established, for which the regulator had to assist the evidence by indirect evidence or evidence to start their investigations and, in case of having strong suspicions of the commission of such illicit, proceed to verify by other means the facts attributed to a determined economic agent.

23. On the other hand, in the process of protection 175-2015 was filed because of this Institution considered that the Contentious Administrative Chamber, it would have damaged his rights to legal and defense security, within the framework of a contentious process initiated by an economic agent against the Institution, invalidated the procedure initiated for the investigation of an anti-competitive practice, arguing said Administrative Contentious Chamber, that there is a gap in the investigation procedure established in the Competition Law, as it does not regulate the opportunity to know and refute the information obtained in the evidential term, since there is no further stage in which final claims can be made.

24. The Superintendence of Competition considered that such a conclusion violated its defense rights since it was not heard on such an argument, which in turn was not a violation that could be attributed to the Institution, since it was acted in strict adherence to the applicable regulations according to their competences.

25. In this regard, the Constitutional Chamber warned that there was no violation of the rights of legal security and defense of the Superintendence of Competition by the Contentious Administrative Chamber when invalidating the procedure followed by this Institution, on the grounds that The aforementioned Contentious Administrative Chamber would have realized an interpretation of the sanctioning administrative procedures in accordance with the Constitution and the jurisprudence issued by the Constitutional Chamber.

26. Although the resolution was adverse for the Institution, it is necessary to point out that the violation indicated by the Contentious Administrative Chamber is not directly attributable to the Superintendence, since, as the Chamber warns, this was always acted in accordance with the provisions of the Competition Law and it was a legal vacuum.

27. In conclusion, it can be pointed out that there are two cases in which this Institution has demanded proceedings of the Administrative Contentious Chamber, with the result of one in favor and the other adverse.

### **3. Judicial collection of fines imposed by the superintendence and enjoying administrative firmness**

28. Once the administrative firmness of the sanctioning resolutions issued by the Superintendence of Competition has been reached and the respective term for the payment of the fines has expired, there are realized all those formalities tending to promote, before the General Attorney office of the Republic, the beginning, follow-up and attainment of the collection of the sanctions imposed, in the Courts of the Justice Body.

29. With the certification of the resolution that imposes the sanction (document with executive force), the Office of the Prosecutor must initiate before a Civil Judge an executive process so that, by means of a judgment, the defendant is condemned to the payment of the fine or compliance with the behavioral measure imposed at the administrative headquarters. If the sentence is not complied with voluntarily, the Judge initiates to instance of the part the forced execution of the sentence.

30. At present, the fined economic agents do their best to delay the collection of the fine judicial headquarter, alleging lack of availability of demand by means of allegations, for example, regarding lack of executive force of the base document of the action because it is regulated in the regulations of the Competition Law, regarding the prejudiciality because the Contentious Administrative Chamber is aware of the legality of the act, even if this one the act has not ordered the precautionary measure of suspension of payment; in some cases, the judges have proved them right, in others the Office of the Prosecutor has filed an appeal and the top court has reverse the failures of the judges.

31. This situation is worrisome for the Superintendence of Competition since there is no unification of criteria by the judges, some fail in favor of the Institution, others against. Likewise, it is dangerous for the effectiveness of the imposed sanctions, since if all the judges accept the allegations presented by the sanctioned agents -simple nonconformities with resolution by the Institution- there would be obstructed the judicial collection of the fines that initiates the General Attorney of the Republic.