

Unclassified

DAF/COMP/LACF(2014)13

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

01-Sep-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN COMPETITION FORUM

Session III - Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean

-- Contribution from El Salvador --

16-17 September 2014, Montevideo, Uruguay

The attached document from El Salvador is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 16-17 September 2014 in Uruguay.

Contact: Mario Umaña, Senior Trade and Competition Specialist, Inter-American Development Bank
Tel: +1 (202) 623-3256; Email: mariou@iadb.org.

JT03361421

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/LACF(2014)13
Unclassified

English - Or. English

LATIN AMERICAN COMPETITION FORUM



16-17 September 2014 • Montevideo • Uruguay

Session III - Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean

-- CONTRIBUTION FROM EL SALVADOR --

1. Incorporation of Competition Protection Policies in the Salvadoran Legal System

1. In El Salvador, the protection of economic and commercial freedom through the prevention and elimination of anti-competitive practices is grounded in Articles 102¹ and 110² of the Constitution of the Republic. This served as the basis for the enactment of the Competition Law (*Ley de Competencia – LC*), which was passed in late 2004, which determined that the measures therein would take effect in 2006, thus allowing a one year period for the dissemination of the law and the publicizing of all practices that would become prohibited once the law took effect, as well as the courses of action that must be taken to avoid breaching it.

2. Since this Law was aimed at changing behavior that was previously considered legal (and even promoted by certain regulations) in anti-competitive practices, it was necessary to inform the general public of its provisions and stress that no sector would be exempted from its enforcement, meaning that all participants in an economic market would be subject to this law.

3. Although the LC is the only body of law for competition protection, the competition principle is addressed in several laws, such as the Law on Government Acquisitions and Contracts (*Ley de Adquisiciones y Contrataciones de la Administración Pública*), the General Electricity Law (*Ley General de Electricidad*), and the recently approved Special Law on Public-Private Partnerships (*Ley Especial de Asocios Público Privados*), to mention just some examples.

¹ Article 102. “Economic freedom is guaranteed, insofar as it does not contravene the public interest. The State shall promote and protect private initiative under the conditions necessary to increase the national wealth and to ensure that its benefits reach as many of the country’s inhabitants as possible.”

² Article 100. “No private monopoly shall be authorized but for the State or Municipalities when the public interest makes this indispensable. State monopolies may be established. In order to guarantee commercial freedom and protect consumers, private monopolistic practices are prohibited. (...)”.

2. Institutional Design of Competition Protection and Advocacy Body

4. When the Competition Law came into effect in 2006, the Competition Superintendency (*Superintendencia de Competencia* – SC) began operations as an independent institution,³ with powers including law enforcement and competition advocacy.

5. In financial terms, approximately 8% of the \$1.9 million dollar budget received by the SC for 2013 was allocated to advocacy activities (including competition conditions analyses, predominantly carried out by external consultants).

6. The majority of the SC's competition advocacy activities are the responsibility of the Superintendent, which is responsible for coordinating the work of the institution, whereas the rest are within the powers of the Executive Committee (*Consejo Directivo*), the supreme authority of the SC, which is chaired by the Superintendent.

7. The powers of the Executive Committee are implemented by the Economic Commissariat (*Intendencia Económica*) and consist of the execution of analyses on competition conditions in key sectors for the national economy and the issuing of opinions on draft legislation and public acquisition and contracts processes from a competition perspective, which can lead (both in terms of analyses and opinions) to public policy recommendations made to the institutions and regulators of the sector concerned.

8. The advocacy activities of the Superintendency⁴ are undertaken by the Competition Advocacy Commissariat (*Intendencia de Abogacía de la Competencia*), which is formed by five individuals (11% of the institution's staff) who, together with the Superintendent, are responsible for:

- Managing national and international inter-institutional relations by setting up and executing inter-institutional coordination and cooperation conventions;
- Developing international relationships for the cooperation and exchange of experiences through the SC's participation and representation in international competition networks and with international bodies, as well as direct exchanges with other counterparts;
- Managing international cooperation provided to the SC to ensure better fulfillment of its functions;
- Acting as a liaison at seminars, workshops, conferences and events to which the SC is invited.
- Representing the SC in Central American integration programs and the Network of Central American Competition Authorities (*Red Centroamericana de Autoridades encargadas de tema de Competencia* – RECAC);
- Representing the SC in the National Consumer Protection System (*Sistema Nacional de Protección al Consumidor* – SNPC), a strategic cooperation and coordination mechanism that involves all State institutions, whose authorities include the direct and indirect protection of consumer rights.

³ Competition Law, Article 3, first subsection: "That the Competition Superintendency be created as an Institution of Public Law, with legal capacity and its own assets that it be technical in nature, with administrative and budgetary autonomy for the exercise of the authorities and duties stipulated herein and in all other applicable legal provisions.

⁴ And with the support of the Communications Unit with regard to dissemination.

- Basic orientation of citizens' consultations on the interpretation and enforcement of the LC and its regulation, and addressing academic and/or research consultations;
- Development of a pro-competition education program by means of training activities, courses, diplomas, producing educational materials, internships, etc.;
- Holding institutional events to disseminate the results and work of the SC, and to spread knowledge about competition;
- Managing the Documentation Center of the Competition Superintendency (*Centro de Documentación de la Superintendencia de Competencia – CENDOCSC*), which includes attending to internal and public library inquiries; this center comprises the country's most specialized public-accessible collection in competition matters, and;
- Participating in talks and negotiations for all international competition treaties and/or conventions.

9. Each of these activities is intended to create and promote a national culture of competition and aims to position the institution internationally.

10. National inter-institutional cooperation activities include working closely with the public acquisitions and contracts regulation body⁵ to draw up intensive training programs for the officials of this institutional area and to produce a technical guidebook for identifying potential collusions or manipulation of its processes.

11. One example of the success of these advocacy activities is the SC's sanctioning of collusive bids as anti-competitive practices in a case that emerged from a training program delivered at one of the country's Ministries. Following the training session, the head of the institutional procurement unit reported indications that one of its procedures may have been manipulated, subsequently seeking the intervention of the SC to investigate and eliminate such behavior. This resulted in the first penalty for practices of this type.⁶

12. With regard to the education program, various competition-specific courses have been held in recent years. These are offered by SC personnel and targeted at judicial staff (trial judges, administrative-law judges, and employees of the Supreme Court of Justice), the Office of the Attorney General, Consumer Associations, and other professionals interested in investigating the issue further. Training days are also held (less intensive than diplomas or the above mentioned specialization courses), where all matters in relation to the enforcement of the LC and other institutional products, such as research outcomes and opinions, are comprehensively addressed by analyzing case studies.

13. A paid or social-service⁷ Intern Program is developed every year as part of the education program, whereby students studying a range of competition-related degrees at universities which have cooperation agreements in place with the SC are able to support staff in performing their functions. This provides them with hands-on learning and direct contact with institutional work.

⁵ Government Acquisitions and Contracts Regulation Unit (*Unidad Normativa de Adquisiciones y Contrataciones de la Administración Pública – UNAC*) of the Ministry of Finance

⁶ Ref. SC-001-O/PA/NR-2009 – Ex-officio investigation into the issuing of airline tickets and connected services market – Agreement between Travel Agent competitors pursuant to Article 25, sections a), c) and d) of the Competition Law.

⁷ The fulfillment of a set number of hours of unpaid social service is a prerequisite for university graduation and the award of undergraduate degrees.

14. Another effective way of promoting competition is to hold institutional events such as the presentation of the outcomes of competition conditions analyses carried out in different sectors of the economy; the preparation, release and explanation of educational materials, such as handbooks and guidelines, produced for the purposes of clarifying theoretical concepts, and facilitating understanding of the subject among different segments of the population (academics, professional, economic agents, lawyers, etc.); the annual hosting of Competition Week, which is already ingrained within the institution, bringing together various events that address different areas of Competition Law (presentation of specific cases, citizen accountability, discussion panels between academics and technical staff, target population workshops, etc.).

3. Incorporating Competition Policy in Domestic Policy

15. Since the issue was first introduced to the domestic legal agenda, competition policies have consistently been set out in the government programs proposed by presidential candidates. However, once elected to the position, and despite their long-term government programs continually stressing the importance of the issue, the strengthening of the issue is still a work in progress, to the extent that these policies are barely present in the everyday discourse of those responsible for domestic economic policy.

16. Furthermore, the opinions issued by the SC – both in terms of legislation and public procurement processes – are not binding, and therefore the adoption of the public policy recommendations issued is at the discretion of the receiving institution. Therefore, influencing public policy makers is a goal that must be achieved gradually. Nevertheless, the SC has been invited to participate in recent discussions for the preparation of a technical opinion on the Legal Stability for Investments Law (*Ley de Estabilidad Jurídica para las Inversiones*) currently being prepared by the Legislative Assembly.

17. Another breakthrough made in terms of opinions is that recent reforms to sectoral legal frameworks such as the Organic Law on Civil Aviation (*Ley Orgánica de Aviación Civil*), the Law on Public-Private Partnerships (*Ley de Asocios Público Privados*) and the General Electricity and Telecommunications Law (*Ley General de Electricidad y Telecomunicaciones*) have made requests for SC opinions an essential stage of the internal processes institutions should follow, which shows that the SC has gained considerable ground in its efforts.

18. As a mechanism of strategic cooperation and coordination between state institutions, the National Consumer Protection System has become a suitable platform for promoting the adoption of recommendations issued by the SC, as it encourages the System to take up recommendations and support them before the institutions to whom they were issued (which are predominantly part of the System), thus lending them more weight.

19. In the case of the regulated sectors, the SC holds all powers in matters of competition, thus obliging these sectors to take actions on the opinions issued (or recommendations made) to regulators in the event of economic concentrations.⁸ One example to mention is that mergers between economic agents in the financial sector must first be supported by the SC before being authorized by the regulator. The same is true of the telecommunications sector.

⁸ Competition Law, Article 36.- “For concentrations of economic agents that are subject to the regulatory oversight of another audit institution: Financial System Superintendency, Pensions Superintendency, Securities Superintendency, General Electricity and Communications Superintendency, Civil Aviation Authority, Sea Port Authority; the Superintendency must issue an opinion on its legitimacy in accordance with this Law. This opinion shall be binding for the audit institution.”

20. Furthermore, it is important to mention that when privatization processes were enacted in the sectors that previously constituted state-reserved activities, there was no enforceable competition legislation in place; as such, there are several market failures resulting from this statutory gap that must be corrected, reduced or – at the very least – closely monitored by the SC and the regulator to prevent anti-competitive practices resulting from these failures.

21. There are some sectors which, due to their importance and possible impact on the population, have price regulations in place, such as the medicinal products sector, where a price control was recently enforced to reduce behavior perceived as abusive by its economic agents. In such cases, price controls are not intended to counteract potential anti-competitive practices, although this may be an indirect result. However, no data exists at present to support this theory.

22. Furthermore, there is no national analysis or research to provide reliable data on the role of competition policies in reducing poverty, controlling inflation, controlling public spending, economic growth and industrial productivity; however, these are considered potential benefits of competition policies in the SC and are promoted in issues of advocacy.

23. Given that the country has a growing economy where many of the participants across the different markets are SMEs, competition policies need to be reconciled with SME development policies and industrial policy by working together with the institutions responsible for these matters, and efforts in advocacy are targeted at raising awareness of the relationship between these issues. Indeed, the objectives of each issue need not be sacrificed to achieve those of the others. Therefore, the SC, working together with the National Commission of Small and Medium Enterprises (*Comisión Nacional de la Pequeña y Mediana Empresa – CONAMYPE*) with the support of an international foundation, is in the process of launching the project: “*Overcoming the obstacles of SMEs as public sector providers in El Salvador: a competition approach.*”

24. Currently, one of the SC’s main advocacy objectives is to promote more openness in the country’s regulatory and statutory improvement processes so that competition policies are always taken into account during planning and preparation, thus reducing the possibility of statutory barriers existing that may impede or hinder competition across different markets.

25. The SC therefore considers it fundamentally important that regional work is carried out with the RECAC – in terms of regional studies of competition conditions, the events it holds,⁹ and the current process for negotiating a competition standard and institutional framework¹⁰ – since the national competition authorities have a clear commitment to strengthening opportunities for different governments to provide greater regional and national support for this issue.

26. The recognition of the RECAC by other international competition bodies has already helped position not only the network, but also the work carried out by each of its members.

⁹ Such as the annual Central American Competition Forum (*Foro Centroamericano de Competencia*).

¹⁰ Supported by the national Trade Ministries, working hand in hand through Trade-Competition workshops in the interests of ensuring the fulfillment of regional competition objectives and commitments.