

Unclassified

DAF/COMP/LACF(2011)10

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

22-Aug-2011

English - Or. English

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

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Unclassified

LATIN AMERICAN COMPETITION FORUM

Session I: Competition Issues in Trade Associations

Contribution from Panama

13-14 Septembre 2011, Bogotá (Colombia)

The attached document from Panama is circulated FOR DISCUSSION under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).

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JT03306022

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Session I: Competition Issues in Trade Associations

-- CONTRIBUTION FROM PANAMA* --

1. Application of the Competition Law on Business Associations

1. Legislation on competition (*Law 45, 2007*) in Panama states, in Article 2 (scope): "This Law is applicable to all economic agents, including natural and legal persons, private enterprises, state and municipal institutions, those involved in **industrial, commercial and professional activities**, profit and **non-profit** entities, and those of any other description that actively participate in any capacity in economic activities" (text highlighted for emphasis). Given that business associations are entities that are governed by private law and made up of commercial, industrial and professional enterprises, it can therefore be concluded that these do come under the competition laws of Panama.

2. Moreover, Article 13, which develops the concept of collusion in *Law 45, 2007*, states: "Absolute monopolistic practices are acts, combinations, arrangements, agreements or contracts between economic agents that either compete or potentially compete amongst themselves, **or through associations** that..." (text highlighted for emphasis). This suggests that business associations clearly have the potential to act as facilitators of collusion.

3. Nevertheless, it is arguable whether or not business associations are directly subject to penalties as, according to the heading of article 13, collusive agreements must be "between economic agents that either compete or potentially compete amongst themselves". Given that business associations, at least in principle, do not compete with the enterprises that belong to them, it is questionable whether this regulation is strictly applicable to them and, consequently, whether they would be subject to the fines pursuant to *Law 45*. The case of second-level business associations (for example, federations and confederations of chambers of commerce) would be dealt with in the same way. There are no specific exemptions for business associations, although those applicable to all other economic agents might be applied.

* This document presented by Oscar García Cardoze, National Director for Free Competition (ACODECO).

4. Furthermore, it should be noted that business associations could carry out activities that serve for the occurrence of collusion as well as actions that facilitate collusion. To this end, the regulations under title I, Law 45 (Executive Decree 8-A, 2009), article 13, describe elements that are indicative of collusion as follows:

“ ...

4. When associations of economic agents issue instructions or recommendations to their members, or allow them to use these as a tool to fix, manipulate or arrange the sale or cost price of goods or services that are identical, similar or a replacement, or to exchange information with the same object or effect.

5. When associations of economic agents issue instructions or recommendations to their members, or allow them to use these as a tool to establish obligations to not produce, process, distribute, commercialise or sell a restricted or limited quantity of goods or to provide a restricted or limited number, volume or frequency of services, as well as obligations to divide, distribute, allocate or impose portions or segments of a current or potential market for goods and/or services.”

5. In the use of legal action in various cases of alleged collusion (other cases were closed due to lack of evidence or application of the argument of bilateral monopoly), in addition to the declaratory judgment stating that their activities constituted a breach of Law 45, ACODECO has asked the courts to order business associations to refrain from being used to exchange information, convene meetings or allow their members to use these agents for dealing with matters regarding competition variables. Due to the fact that a number of cases involving business associations have been brought to a premature close as a result of court settlements, while others are still pending court rulings, at the present time there is still no judicial corroboration of the legitimacy of these orders to not proceed. We are not even certain of the courts' criterion in terms of whether sanctions can be imposed on business associations for activities that “facilitate collusion” between their members.

6. ACODECO is, at the present time, assessing whether to propose amendments to Law 45, 2007, in order to ensure that the actions of business associations, including their representatives (natural persons), clearly fall within the scope of the national competition laws. This would involve making explicit the fact that any conduct that facilitates collusion will be dealt with in a similar way to collusive activities (absolute monopolistic practices). In addition, ACODECO is planning to draw up guidelines on competition policy for business associations as a way of promoting their pro-competitive behaviour.

2. The pro-competitive role of business associations

7. Aside from the risk, mentioned in the previous section, that business associations could turn into forums which enable their members to collude, these entities clearly also have a potential pro-competitive effect. Several of the ways in which this might be achieved are as follows:

- The adoption of common technical standards and information (for example, regulations on the net contents of pre-packaged goods), which makes comparison easier for consumers and the possibilities of customer migration;
- The publicising of competition legislation. The main business groups in Panama did in fact participate in the discussions that led to the subsequent adoption of competition legislation, and they have participated in the subsequent publicising of the regulations;
- The setting up of a pressure group to influence the National Government to promote greater economic liberalisation through the negotiation of free-trade agreements, the reduction of

subsidies and the elimination of price regulation policies, although this could probably occur in business groups with an influence in the trade and import sector.

8. The *Guide to Licit Collaboration between Competitors* issued by ACODECO states that, while collaboration agreements between competitors as a general rule lead to anti-competitive effects, such agreements may result in benefits for consumers, for example, by enabling goods and services to come on to the market at a lower price, with enhanced value and/or usefulness, or more quickly.

9. Collaboration agreements may result in competitors making better use of their resources and, as a result, obtaining higher profits than they would in the absence of collaboration agreements, profits that ultimately result in the consumer also profiting. These collaboration agreements can be made by competitors through different types of venture such as associations and strategic alliances. Benefits are obtained, for example, when the different resources and/or possibilities of each one within the production process become combined. This gives rise to scope for these associations to generate positive effects on the markets, one way being the adoption of common standards, which implies the need for joint action among competitors.

10. In the case of collusion in insurance, at the end of the court settlement that was reached, it was established that, through APADEA, and with the resources of its members, a series of publicity campaigns would be run to promote consumer rights (bearing in mind that ACODECO deals with both of these issues) and free competition.

3. The anti-competitive role of business associations

11. In practice, the **Autoridad de Protección al Consumidor y Defensa de la Competencia (ACODECO)**, Panama's competition agency, has carried out a number of investigations involving business associations. These are summarised below:

- Asociación Nacional de Avicultores de Panamá (ANAVIP). Proceedings were brought against the national poultry farmers association, together with eight (8) poultry producers, for allegedly exchanging information and agreements to fix the retail price of chicken. In this case, there was evidence that the ANAVIP was used as a forum to discuss competition problems, in particular the aggressiveness of certain companies that were not members of the association;
- Asociación Panameña de Aseguradores (APADEA). Proceedings were brought against insurers for alleged collusion in private car insurance policies and fire insurance (completed judicial procedure). Through the association, a tariff handbook was developed and sensitive information was exchanged;
- Asociación de Restaurantes y Afines de Panamá (ARAP). An investigation was carried out into alleged collusion in the prices of combo meals in fast-food restaurants (the case was dismissed). Notification was sent to the association, bringing its attention to public declarations in anticipation of imminent price rises in its affiliated restaurants, which could be understood to be an ex-ante explanation of the rational behaviour of their members, although this could also be interpreted as being a mechanism for their tacit collusion;
- Asociación de Líneas Aéreas de Panamá (ALAP). An investigation was carried out into five (5) companies for alleged collusion in commissions paid to travel agencies;

- Asociación Nacional de Productores de Leche (ANAPROLE). On various occasions, dairy plants that are members of the association have been investigated for alleged collusion in the prices paid to the producers of raw milk;
- Asociación Nacional de Ganaderos (ANAGAN). An investigation was carried out into alleged collusion for price fixing in the sale of raw milk to dairy plants (the case was dismissed on the argument of bilateral monopoly);
- Associations of retailers of Asian origin (various). Included in a preliminary investigation for the alleged boycott of a drinks wholesaler (the case was dismissed due to lack of interest by the company that was allegedly affected);
- Asociación de Productores de Maíz y Sorgo de Azuero. Included in a preliminary investigation for alleged collusion in the price fixing of corn in this geographical area (the case was dismissed on the argument that negotiation did take place between the corn producers and processors, but that no price was fixed or imposed);
- Asociación de Generadoras de Energía Eléctrica de Panamá (AGP, being formed). An investigation of various electricity generating companies was carried out because of alleged collusion for an agreement to not tender electricity for contracts, but to sell it more expensively at spot-market prices (the case was dismissed). The recommendation was made to the Secretaría Nacional de Energía (the national energy administration) to make express reference in its statutes to the illicit nature of absolute monopolistic practices, as a way of preventing non-compliance with Law 45 due to alleged ignorance of the regulations in the future.

4. The exchange of information between competitors through business associations

12. Perhaps the first thing that needs to be distinguished here is that, if the information on individual competitors that make up an association (for example, the banks that form part of the Asociación Bancaria de Panamá) is in the public domain because it is periodically published by the regulatory body for this activity (Superintendencia de Bancos de Panamá), it will be difficult to prevent and even penalise the business association for then “publicising” this type of information.

13. Something similar would occur with information that, albeit not public, is more historical than relevant information on the current market conditions in which the competitors grouped in the corresponding association operate. Nevertheless, it is arguable how far back in time it should cover in order for the sharing of the information to be not considered as having a potential anti-competitive effect.

14. A third issue that arises is whether the association may legally compile individual information on its members and then disseminate it in aggregate form (for example, in price indexes that “mask” individual prices, or level of sales indexes that give no details of the market share of any company). The risk here is obvious: disaggregated information ends up being leaked although not through the association’s official channels, which, even though it was not their intention, would facilitate collusion between its members.

15. In relation to this last point, ACODECO recently issued a ruling on a feasibility study presented by ANAVIP that summarises the entity’s official criteria on this matter, a summary of which is given below.

16. According to the opinion of ACODECO, retail prices, as end consumer prices, are public knowledge and there is no problem in the way they are dealt with, as regards their facilitating collusion through business associations.

17. The matter of the wholesale or trade price, i.e. the prices that poultry farmers sell to the distributors is, in our opinion, more sensitive in that it determines the way in which they approach selling on this level of commercialisation, which in some ways conditions the product's final price, in addition to the fact that it is on this level of commercialisation where the association's members have to compete.

18. In spite of ANAVIP's reply that: "The mechanism would be the same as when all the information on performance in the industry is used, i.e. it is posted on the ANAVIP website. ANAVIP needs to consolidate the information. We must make it clear that it will not be individualised at any time", ACODECO considers that it is highly complicated to guarantee that information, which has been handled and processed individually, to be then presented in a consolidated way, does not come to the attention of member enterprises, which, although it would not be made public, would enable each of these economic agents to adopt positions when selling to the distributors, whereby ANAVIP would become a channel that facilitates agreed positions to be established between its members, which is prohibited under Article 13 of Law 45.

19. In this regard, ACODECO also considers that, in line with the aforementioned Law 45, it is not feasible for ANAVIP to carry out investigations and monitoring of the selling prices of distributors and to then post them on its website.

20. Pursuant to the above and on the basis that it consists of conduct that, in accordance with the provisions of Law 45, 2007, may promote the exchange of information within ANAVIP, and since the same Law 45 lays down that the mere exchange of information to fix, manipulate, arrange, agree to or impose the selling price or purchase price of goods or services, may give rise to collusion as referred to in the absolute monopolistic practices included in national legislation (of Panama), it is hereby decided to:

- **ONE: GRANT A FAVOURABLE OPINION** to the conduct consulted by ANAVIP regarding the handling and processing of retail information through and in this association, on the basis that it does not constitute a conduct that is an unlawful relative monopolistic practice, in accordance with article 13 and the provisions of Law 45, 31 October 2007.
- **TWO: DENY A FAVOURABLE OPINION** to the conduct consulted by ANAVIP, consisting of the processing and handling of data on the wholesale prices of the members of ANAVIP to the distributors, on the basis that it is an activity that facilitates, and even promotes, the carrying out of absolute monopolistic practices as regards the possibility of fixing, manipulating, arranging, and/or agreeing the selling price or purchase price of goods or services and the exchange of information with the same object or effect; and/or promotes agreement regarding the obligation to produce, process, distribute or commercialise only a limited quantity of goods or to provide a limited number, volume or frequency of service/s.