COMPETITION & ANTITRUST LAW

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Antitrust law in Panama: The top four legal issues you should know about

By Claudio De Castro & Diego Marin

The Antitrust legal framework in Panama includes (i) the Constitution, (ii) Law No. 45 of 2007 (the "Antitrust and Consumer Protection Act"), (iii) Executive Decree No. 8-A of 2009 and (iv) Antitrust Authority's Guides.

(i) Panamanian Constitution

Article 295 of the Panamanian Constitution contains three basic principles of Antitrust Law:

- An express prohibition against unfair competition and unfair business practices that could harm consumers: Article 295 of the Panamanian Constitution prohibits, in commerce and industry, any combination, contract or action that tends to restrict or obstruct free trade and competition and/or that has monopoly effects to the detriment of the public.
- Protection of small businesses: Article 295 of the Panamanian Constitution prohibits the practice of one entity or individual operating a series or chains of retail commercial establishments, in a manner that ruins or tends to eliminate competition from small merchants or industrialists.
- Judicial action against monopolistic practices: Article 295 of the Panamanian Constitution expressly establishes a judicial action (a popular action, that could be filed by any affected party, including any consumer) to challenge any agreement, contract or action aiming at establishing monopolising practices.

(ii) Panama's Antitrust and Consumer Protection Act

Panama main legal framework for antitrust issues is Law No. 45 of 2007, as amended by several acts. This Law dictates regulations on consumer protection and defence of competition.

The purpose of this Law is to protect and ensure the process of free economic competition and free competition, eradicating monopolistic practices and other restrictions on the efficient functioning of markets for goods and services, to preserve the best interest of the consumer. Indeed, one of the main objectives of this law is to regulate the concentration of economic power and prevent practices such as monopolies or price colluding.

This law also creates and organises the Authority for Consumer Protection and Defence of Competition (ACODECO) (the "Antitrust Authority"), which is a decentralised public entity of the State, with its own legal status, autonomy in its internal regime and independence in the exercise of its functions.

The first section of this is Law regulates antitrust in Panama and the second section regulates consumer protection.

(iii) Executive Decree No. 8-A of 2009

This Executive Decree regulates and further develops the First Section of Law No. 45 of 2007, which is the section on antitrust. It further develops the procedure by which the Antitrust Authority will investigate the monopolistic practices and economic concentrations in all sectors of the economy where it has jurisdiction. It also explains and develops the concepts of monopolistic practices, relevant market, the existence of substantial power and economic concentrations.

(iv) Antitrust Authority's guides

The Antitrust Authority has also implemented the following guides:

- Guide for the preparation of market studies.
- Guide for a programme to benefit from reduction or waiver of sanctions.
- Guide for licit collaborations between competitors.
- Guide for the control of economic concentrations.
- Guide for competition audit.
- Guide to vertical behaviour analysis.

The mixed enforcement system

Panama has a mixed enforcement system regarding violations of antitrust law. The system has two steps:
First step: Judicial declarative process

The process starts with an investigation conducted (either *ex officio* or by the request of a party, even an anonymous one) by the Antitrust Authority. Where the Antitrust Authority determines, *prima facie*, that a violation has occurred, it will file a claim before one of the Consumer Protection and Antitrust Circuit Courts in Panama. The Claim can also be filed directly by the affected party. The claim will be decided by the Circuit Court respecting the due process of the defendant and granting opportunities to present its case, as well as any relevant evidence.

Should the Court find that the Defendant violated an antitrust provision, it will issue a declarative judgment. This judgment is subject to a recourse of appeals to be decided by the Appellate Court.

If the Appellate Court upholds the decision of the Circuit Court declaring that the Defendant violated an antitrust provision, this decision will become final and binding. The Antitrust Authority will then be notified to proceed with the second process.

Second step: Administrative process to impose a fine/penalty

Once there is a final and binding decision declaring that the Defendant violated an antitrust provision, the Antitrust Authority will start an administrative process to impose a fine/penalty. The objective of this process is to impose a fine against the Defendant. The Defendant will also have the opportunity to present its case and request the Antitrust Authority to impose a low penalty. The Defendant will also have the right to file two administrative recourses against the decision that imposes the fine (reconsideration and appeal).

Once the administrative recourses have been decided, the Defendant still has the possibility of filing a judicial recourse (before the Third Chamber of the Supreme Court of Justice) against the administrative decision that imposed the fine.

The application of the rule of reason in horizontal relationships

Article 5 of the Antitrust Law introduced the global principle of economic efficiencies,

also known as the rule of reason. Under this principle, even if a horizontal transaction restricts free enterprise and/or market competition, such transaction would be valid if it promotes economic efficiency. Although, for this principle to apply, consumers must not suffer any damage because of the transaction, being that consumer protection is the bedrock of Antitrust Law. The firms that benefit from the transaction have the burden of proving its economic efficiency. Pursuant to the Guide for licit collaborations between competitors, the efficiencies must be palpable and verifiable by the Antitrust Authority. Normally, an economist expert witness is required to prove economic efficiency.

The Antitrust Authority has dedicated hundreds of pages to defining what economic efficiencies mean, often relying on the opinion of Antitrust Law authors. As an example, in Technical Note No. 22 of 18 October 2011, the Antitrust Authority defined economic efficiencies using the concept put forth by Colombian economist German Coloma, Ph.D., referring to the concept of Pareto efficiency "*In economy, a situation is efficient if as a result of it is impossible to make an individual better off without making*

another worse off". Thus, to conclude if an act is economically efficient one must conduct a balancing test keeping in mind the best interests of the consumers. Coloma further defined economic efficiency as "*a situation that maximises the sum of benefits for the consumers and firms.*"

The verification process for market concentration transactions

The Antitrust Law creates an administrative procedure in which the Antitrust Authority verifies transactions that may result in market concentration infringements (the "verification process"). Unlike most jurisdictions, Panama does not require a pre-approval of any transaction without regards to the implications the transaction may have in a market concentration analysis.

Although the verification process is not mandatory, the Antitrust Law creates an interesting incentive for firms to submit their transactions to the consideration of the Antitrust Authority – immunity from challenges on the verified issues. The verification process is conducted confidentially and no intervention from third parties is permitted. Pursuant to Constitutional regulations, the Antitrust Authority must rule on the viability of the transaction in a maximum of 30 days.

As we explained before, the Constitution grants every person standing to challenge an act that may have monopolistic effects and the challenge may even be anonymous. Being that a transaction can be under scrutiny from not only fellow interested competitors, but also from any person, it is in the best interest of transacting firms to submit transactions to the verification process. Once the verification process is completed and the Antitrust Authority gives approval, no one can judicially challenge the validity of the transaction on market concentration grounds.

The Antitrust Law provides a caveat with regards to the immunity of transactions after passing the verification process. If a firm provides inaccurate or incomplete information to the verification process and the Antitrust Authority relies on such information to approve the transaction, the immunity would be revoked and anyone, including the Antitrust Authority, could challenge the transaction.

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Known for his advocacy skills and thorough knowledge of Panamanian legal framework and proceedings, Mr Claudio De Castro specialises in representing foreign clients and multinational companies facing complex arbitration or litigation proceedings in Panama or involved in multijurisdictional disputes that include a Panamanian component.

Claudio developed his international experience working in the International Arbitration Departments of Shearman & Sterling in Paris and Wilmer Cutler Pickering Hale and Dorr in London. He has a Postgraduate Degree in International Commercial Litigation from Université Paris Est and an LLM in International Commercial Law from Université Paris 1 Panthéon-Sorbonne. He has also been a contributor for the World Bank's Doing Business Report since 2015.

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Diego Alejandro Marín first joined the firm in 2017 and became an associate in 2024, in the Litigation and Arbitration group. Mr Marin specialises in representing local and foreign corporations and individuals in complex arbitration and litigation cases. During 2023, Diego gained valuable international arbitration experience working as a legal intern at White & Case offices in Washington D.C. and Miami, Florida. In 2021, he worked as a clerk in the Third Chamber of the Supreme Court of Panama. He has a Master of Laws in International Arbitration, University of Miami School of Law and a Bachelor of Laws (Licenciatura en Derecho y Ciencias Políticas), magna cum laude, Santa Maria La Antigua University.