NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

Note from the Editor. July: A month of multiple economic and financial regulation proposals. A. Noboa-Pagán.

As of this volume, *Actualidad Regulatoria* (or RB by its English acronyms) will begin to circulate in English under the name of "Regulatory Briefing," along with the Spanish version thereof, for the benefit of our international readers. We have as well included a new section called *Letters to the Editor* with the intent to share interesting feedbacks from our readers. In this issue, we address several economic and financial regulation proposals from the month of July.

The new mission of Ignacio De León, Ph.D., in the DR, as well as the commitments undertaken by the SEIC (Secretaryship of Industry and Commerce) respect to the Antitrust Bill (*Proyecto de Ley de Defensa a la Competencia*), the announcements made by INDOTEL in that the *Regulation of Service Costs and Rates* will be put to circulation for public consultation, and the project on *Exceptional Risk Prevention Program for Financial Mediation Entities* submitted to public review by the Monetary Council point out to us that the subjects on economic effectiveness and solvency and financial feasibility of companies and regulated entities seem to have drawn the interest of the official sector. On the other hand, the Stock Market Superintendence (*Superintendencia de Valores* "SIV") announces the placement of business bonds in USD. Another equally important issue that is worth mentioning is the approval of the DR-CAFTA by the US House of Representatives.

Internationally, recently adopted awards and decisions regarding the subject matter have helped us complete an edition with emphasis on the issue of competition and economic regulation. The case of the *Three Tenors* in connection with unfair competition decided in the US and the investigations conducted by the European Union Commission respect to bidding policies for agreements for the exploitation of hydroelectric companies in Italy, Spain, and France constitute a confirmation of the continuous importance attached to concurring issues on contractual relations. Next September, RB will be publishing its anniversary edition. For such occasion, a special issue will be delivered to you.

Letters to the Editor.

"As a loyal reader of your newsletter, allow me to make one sole suggestion: part of RB's appeal is its quick and easy reading as the information goes right to the point. The inclusion of in-depth articles could somehow change the nature of the publication. Perhaps such articles could be included at the end. At any rate, RB continues to be a great contribution to our nation's legal literature, and for that I commend you once again."

Georges Santoni-Recio,
RVHB Partner-Manager,
Chairman of *Fundación Institucionalidad y Justicia.*

RB Response: We are flattered by your comments and interest in our newsletter's content. Your suggestion on the nature and length of our publication will be very much taken into account.

NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

"Your article on the previous administrative appeal vs. the election of an arbitration jurisdiction is excellent from beginning to end. Congratulations."

José Alfredo Rizek-Vidal,
Instituto Dominicano de las Telecomunicaciones
Acting Director.

RB Response: Thanks a lot. It is good to know that officials in charge of economic regulations are interested in the opinions and issues of interest to business attorneys and companies.

It is also helpful to know that an in-depth article aroused public interest. The solution that we have adopted in this volume is to guide the reader through our web site link, wherein he/she may access the in-depth articles. In that manner, we will not compromise the length of the publication, but will incorporate a greater degree of insightfulness to RB, as we have wished. In addition, the bulletin will at all times include brief opinion articles, such as the one that follows.

Competition. Antitrust Bill: Institutional Infrastructure of Rights in the New Economic Development Model of the DR. By A. Noboa-Pagán

During a recent visit to the DR, Ignacio De León, Ph.D., author of ***Proyecto de Ley de Defensa a la Competencia*** ("Antitrust Bill"), currently under examination by the nation's Senate, was kind enough to provide us with a copy of his upcoming new essay titled: *"El rol institucional de la ideología en la conformación de las reglas de mercado: El caso del intervencionismo estatal en Venezuela"* (*Ideology's Institutional Role in the Making of Market Rules: The case of the Government Interventionism in Venezuela*). In this piece of work, the Venezuelan attorney and economist lays out the reasons why in his opinion, his country and others in the region get frustrated with the application of economic regulation policies restraining business innovation, and their impact on foreign economy - economic regulation meaning any ruling issued by the government to establish the norms of conduct of economic agents in the market.

His approach draws immediate attention based on three reasons:

(i) It comes from a former Superintendent of PRO-COMPETENCIA, the regulating agency in the field in Venezuela, at the time an institutional model acclaimed by the UNCTAD, who in 1996 suggested to the Dominican Government to promote a legislation of such kind in our country;

(ii) Moreover, the view of this consultant is of interest to us because he has been involved in the regulating reforms on competition policy in various countries of the hemisphere (Uruguay, Paraguay, Bolivia and Nicaragua), and at present in our country through SEIC and CNC; while concurrently providing advise to companies and industrial sectors on the development of their competitiveness, which gives a full vision of the entire issue; and finally,

(iii) because we are well aware that in the Dominican legislation, as in the case of Venezuela under examination herein, there are discretional powers originating in the

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

laws and administrative measures (decrees, resolutions) that create or maintain obstacles (administrative barriers) for the free enterprise and competition in the various markets. As in other countries in the region, the cases of measures of this nature in the Dominican regulation on hydrocarbons, energy, distribution, ground and sea transportation, and professional services are emblematic.

In his assumption, De León states that in Venezuela, the devising and implementation of economic regulations are accompanied by an intervention culture, which at the end turns out to be the root cause that inhibits or restricts the full development of the economic freedoms necessary for the development of a modern capitalist system, based on the accumulation of productive capital and economic competition as a means of promotion, in support of which such normative structures are established.

For instance, his essay finds basis on the datum provided by *Global Entrepreneurship Monitor* in 2003, with respect to the degree of entrepreneurial initiative worldwide, wherein Venezuela ranks second among a sample of participating countries, although its growth competitiveness index compared to the rest of Latin America is below the average for the region and the place occupied by the DR. Consequently *"It is evident that there are reasons deriving from the deficiencies of the* ***institucional infrastructure of rights****; therefore, it is impossible to develop to the maximum the potential that the private investment offers. The distortions generated by government measures are to a good extent responsible for the restrictive entrepreneurial behaviors of competition, whether through the* ***general administrative barriers at the beginning or end, or direct interventions in the industries*** *(...) In Venezuela, as in the rest of developing countries, the combination of weak institutions with the lack of financial recourses often translates into an excess of regulations and administrative bureaucracies*. (Our emphasis). Such conclusions remind us of those anticipated in the UNDP Human Development Report on the poor performance that the economic regulation in the Dominican Republic has had in the building of the critical and deficient index.

The proper legal treatment for the lifting of *administrative market access and exit barriers,* among other aspects, is crucial to the effectiveness of an Antitrust Law. The instrument of law in its substantive and procedural provisions, both administrative and judicial, must generate the necessary counterweights in order to provide individuals with rights and action, strong institutional infrastructures that would effectively protect their rights in favor of competitiveness, an incentive to the sustainable investment, economic growth and individual development of the people.

To such end, as De León indicated to us with regard to the Mexican reform, together with the creation of a new law on competition, a strip down of laws opposing free access to the market must be performed. Such laws are very common in Dominican positive law, residual samples of the legal positivism conceptualized through the *agro-exporter, protectionist, import substitution, comparative advantage development, and intensive labor* economic models to use the

NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

expressions used by President Leonel Fernández-Reyna, when he recently defined before AMCHAM the Dominican development model profiled during the '60s and '70s, and to a lesser extent during the '80s and '90s. In his presentation this past Thursday, July 22, on DR Development Paradigm, during the lunch hosted by AMCHAM, our nation's President favored the integration of new development schemes based on the move to a new economic development model, profiled by an *open service economy*, *as to the development of competitive advantages and intensive knowledge.*

We join such global proposal by our Head of State with the timely statements made by the Undersecretary of Industry and Commerce, Mr. Marcelo Puello, on the occasion of De León's visit, with regard to the undertaking of his ministry to develop an adequate competition policy in the country. We look forward to learning in the near future about the entire activity to be developed by SEIC and CNC, so that the bill submitted to the authorities of such institutions shall serve the purposes outlined by President Fernández.

It is equally important to encourage civil society organizations, such as FINJUS or PARTICIPACION CIUDADANA to share the criterion already advanced by ANJE and SEIC on such reform, and in that regard, recognize and acknowledge the unequivocal correspondence of their outstanding fight for institutionalism and such reform.

An antitrust law is also an important milestone in the fight for institutionalism and economic justice. It shall not be perceived as one more subject in the business agenda, or even worse, from a section of the business sector, but rather as an institutional reform of general interest. Therefore, and as commendably done in other major reforms driven by their own effort, civil society organizations concerned about the Rule of Law must support this public policy, the standard of the new model of economic development, as it includes a basic column of the *institutional infrastructure of economic rights* of Dominicans and the national or foreign investments interested in providing and multiplying the permanent and efficient sources of development in the country. This is part of its social commitment at the crucial time of the ratification of the DR-CAFTA, which in the opinion of the economist Bernardo Vega, shall become the most determining prescriptive text for the nation's fate, since the Constitution in 1844.

Finally and quoting another leading Venezuelan also very dear to the Dominican Republic: *"One of the most distinctive signs of contemporary constitutionalism is, with no doubt, that of the constitutionalizing of the regulatory principles of the economy." (*BREWER-CARIAS). Through an active participation and discussion in his public hearing, let's give the necessary support to the *Antitrust* bill, organic law of the prerogatives of article 8, subsection 12 of the Magna Charta, which positiveness lies today in the hands of the Nation's Senate.

NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

Energy. Freedom of establishment for the exploitation of hydroelectric companies in France, Italy, and Spain. By J. Velázquez-Morales.

This past month of July, the European Commission made the decision to bring France before the Court of Justice, by virtue of the priority right that it legislation confers upon the outgoing concessionaire, when a renovation of works using hydraulic energy arises.[1]

According to the community administrative body, the system used in France could give rise to an indefinite permanence of existing concessionaires, given than upon expiration of concessions, if they so wished, they may seek protection under the privilege granted by the decree to become the successful bidder of the concession for a new period.

Such type of mechanisms distorts the selection procedure, causing an equal treatment breach among the various economic agents, while concurrently being incompatible with the principle on freedom of establishment, by virtue of which restrictions on the carrying out of economic activities crossborder are banned, and specifically any form of direct or indirect discrimination among community agents.

The commission is of the opinion that the priority right discussed is unreasonable based on the safety of the facilities or energy supply, as in itself, the measure cannot guarantee such objective and, at any rate, it is out of proportion.

Based on similar reasons, the body has also made the decision to report Italy before the Court of Justice, even though, in this country the decision remains stayed for a four-month period, as Italian authorities are currently in the process of putting together a legislative decree proposal aimed at, particularly, suppressing all above-mentioned priority rights.

With respect to Spain, the Commission has formally asked for the modification of the law that contemplates a bidding process for the awarding of hydroelectric concessions. The petition adopts the form of a motivated opinion, making up the second stage of the infringement procedure provided in article 226 of the CE Treaty.

Unfair Competition. Award/Decision *3 Tenors*. By A. Noboa-Pagán.

On July 22, 2005 the Court of Appeals of the US District of Columbia Circuit issued a ruling on the referred case. The decision voted on by the judges was 3 to 0, and sustained the findings of the Federal Trade Commission in the sense that the agreement between *Time Warner* and *PolyGram* not to sell the 1990 and 1994 albums of the Three Tenors (Pavarotti, Domingo and Carreras) was a method of unfair practice that did not reasonably relate to the legitimate joint venture to record a new album with such artists in 1998, so that it would coincide with the World Cup (Source: ABA).

[1] French Decree 94/894 of 13.40.1994, art 12.

NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

Telecommunications: Indotel examines the Regulations of Service Tariffs and Costs and submits PTFs. By J. Velázquez-Morales

Through notice published in the July 19, 2005 edition of *El Caribe* newspaper, Instituto Dominicano de las Telecomunicaciones (INDOTEL) announced the release within two weeks of the proposal of the Service Tariff and Cost Regulation. Mr. Vargas stated that the regulation is intended to regulate prices of phone rates, which have been inflated nearly 48% as a result of the hikes of providers' rates and taxes of the tax reform in October of last year. The proposal will be submitted to a public review with the interested sectors. Once the opinions of every sector have been heard, Indotel shall reserve its decision on the reform.

Likewise, INDOTEL has submitted to public review the Fundamental Technical Plans of Transmission, Tariffing, Synchronization and Access from May 19 for 60 days.

Financial. July 7, 2005 Resolutions by the Monetary Council. By A. Noboa-Pagán and J. Velázquez-Morales.

Two resolutions issued on July 7 by the Monetary Council (Junta Monetaria "JM" or "MC") were made public by the Monetary and Financial Administration in the July 23 edition of the "*El Caribe*" newspaper. Following is a description of the most relevant provisions in each Resolution:

(1) The **Fourth Resolution** authorizes the publication of the ***Proyecto de Reglamento de Aplicación de la Ley No. 92-04*** **(Regulation Proposal for the Enforcement of Law 92-04)** that creates the **Exceptional Risk Prevention Program for Financial Mediation Entities (*Programa Excepcional de Prevención del Riesgo para las Entidades de Intermediación Financiera*)** to get the opinion from interested sectors. The objective of the regulation proposal is to define the criteria and procedures that shall be followed by the Monetary and Financial Administration for the enforcement of the *Exceptional Risk Prevention Program for Financial Mediation Entities*. The scope of the Regulation proposal encompasses the criteria regarding the enabling of the program, determination of the financial feasibility, operating conditions, guaranty of obligations, and legal competition to avoid any systemic risk.

Whenever the Superintendence of Banks (*Superintendencia de Bancos* "SIB") determines that one or more financial entities have problems related to liquidity or solvency, or financial viability, including capitalization goals, they shall undergo an assessment process. The SIB must determine if there are any bases indicating that the financial system may suffer a **systemically contagious negative effect**, in order to introduce such entities to the Monetary Council so that they may be subjected to the Exceptional Risk Prevention Program. In the event no contagion possibility is found, the entity will undergo the Monetary and Financial Law (*Ley Monetaria y Financiera* "LMF") dissolution process.

The MC must rule over the petition by way of a motivated resolution, with the non-objection from the nation's President. Meanwhile, the SIB must put in place a

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

system of intense supervision. The decision, as well as the actions and measures of SIB shall be enforceable in spite of the appeal in order to assume the control of the entity subjected to the program**.**

A top level **Coordinating Committee**, represented by the Central Bank ("CB"), the Ministry of Finance, SIB and the members of the MC will be formed to facilitate the enforcement of the law, and regulation thereof, through an **Instruction Booklet** to be put together by the SIB and MC. The MC shall authorize SIB through an approval resolution to issue the necessary administrative acts to protect the entity's depositors and other creditors, prevent any systemic risk, and minimize the cost to the Nation, and any negative monetary impact on the entire domestic economy. It shall also be able to suspend the rights of shareholders and directors, and dismiss any hierarchically equivalent managers and officials.

Upon issuance of the **approval resolution** by the MC, the SIB shall submit to the MC the **proposal for the entity's restructuring**, with adherence to the law that creates the Program and Regulation, including estimated costs of the proposed alternatives. It shall also engage the services of professional experts to prepare a **Report on the viability and/or solvency of the financial mediation entity** undergoing assessment, and determine the estimated costs for its restructuring. The opinion of the SIB, based on the report or its own opinion shall be submitted to the MC. Such resolution shall be made public at the request of the interested party.

With the approval of the restructuring proposal and based on the identification of losses indicated in the report, the ***Fondo de Consolidación Bancaria*** **(Banking Consolidation Fund)** shall cover the imbalance between assets and liabilities to bring the entity into conditions that would allow for its proper negotiation or assignment. The SIB shall initiate the determination of any appropriate civil and criminal liabilities.

The SIB shall ensure that the financial entity undergoing the Program does not have any loans due and payable; that the financial entity's administration has become stronger, and that the FCB designates the members of the entity's Board of Directors, all of whom shall have good reputation and integrity as required by the FCB.

Upon making the adjustments and acknowledgements of appropriate provisions with no gradualness, the SIB shall calculate the entity's solvency coefficient to determine whether it is higher or lower than the **minimum required**. In the event SIB determines that the solvency coefficient of the entity subjected to the program is below the **minimum required**, it shall proceed to remove or dismiss those responsible for any banking wrongdoings and begin a **forensic audit** to establish individual liabilities for fraud and/or deceit so that the appropriate civil or criminal actions may be brought against them.

An **Extraordinary General Shareholders' Meeting** will be called by notice in a newspaper of national circulation to offer the option to increase and

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

incorporate the necessary capital to meet the minimum regulatory solvency coefficient.

The maximum amount of FCB resources that shall be used for the entity's capitalization shall be determined by the difference between the net equity value required to reach the minimum regulatory solvency coefficient and the net equity value of the financial entity as determined by SIB. If due to limitations in the law that creates the Program, FCB is unable to meet the capitalization needs and the Government had no resources available to give to the fund, CB shall be able to provide credit assistance until obtention of the necessary equity so that the entity may reach the minimum regulatory solvency coefficient.

Once the referred coefficient is reached, the entity's Board of Directors shall begin taking steps to contact potential investors interested in the ***acquisition*** of the entity. In the event no offer is received, FCB shall direct ***merge*** proposals to other banks. All assets and liabilities excluded from the financial entity undergoing the Program shall constitute the balance of a new financial entity, which license shall be granted by the Monetary Council. The order of exclusion of assets and liabilities shall be as established by the LMF, all ***first-class privileged obligations*** being the first to be excluded. SIB decisions on the assignment of assets and obligations shall not require any legal authorization and are exempted from payment of taxes and assessments.

In accordance with Law No. 92-04, the CB shall be able to give credit assistance to financial mediation entities subjected to the Program until an ***opinion on the entity's feasibility or unfeasibility*** is issued by the MC**.** The maximum amount shall not exceed 1 ½ times the subscribed and paid-in capital of the entity under the Program, in Dominican pesos with the non-objection of SIB. To such end, a request for liquidity assistance shall be submitted to the CB with the supported opinion from the Supervisory Body. The term of such credits shall be a six-month term, with a maximum two-month extension provided the supported opinion from SIB so requires it. Extraordinary extensions of up to three month for exceptionally consecutive times shall be admitted whenever the vote is favored by the entire MC. Such entities shall not be able to grant credits nor new investments above and beyond the caps reflected on their books on the date of the credit disbursement, except for those charged to collectibles.

FBC shall be organized as a nonprofit entity and provided with cash resources, Central Bank Certificates, Dominican Government Bonds, and any other assets of similar nature as determined by the Monetary Council.

All financial mediation entities shall make ***compulsory contributions to FCB***, to be determined on the basis of applying to the total public fund raising the minimum annual rate of 0.17% established under Law No. 92-04 or any other as established by the MC based on it. Any time the amount of contributions exceeds the aggregate 10% of the net funds approved by the Government, the Central Bank shall proceed to refund the excess.

The ***maximum amount of FCB resources*** shall equal the total first-class

NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

privileged obligations of the financial entity or entities subjected to the program.

A written communication from the nation's President to the Monetary Council stating his ***non-objection and authorization for the use of public funds*** for the Program's execution is anticipated. The Secretary of Finance, in accordance with the Constitution, shall determine the required budgeting resources for the repayment by the Government to the Central Bank of any advances paid by the CB and promote his/her ***approval*** in the National Congress via the Executive Branch.

In the case of ***non-viable and/or non-solvent entities*** where no other company is willing to acquire the first-class privileged obligations of such entity or after exhaustion of all the possibilities to assign assets or liabilities to another entity, the FCB shall proceed to honor the deposits of such entity. Deposits from ***overseas transactions (offshore or crossborder)*** shall never be taken into account for payment purposes.

The SIB shall keep a ***list of non-eligible individuals*** under Law No. 92-04 to participate in the financial system because they were serving in other capacities, such as administrators, directors, managers and general agents for the financial mediation entities at the time of subjection to the program.

The **Second Resolution of July 7, 2005** grants a three-month period to any financial mediation entities which had submitted the ***transformation*** application[2] prior to June 30, so that such entities may complete their files and procedure. Those entities that failed to begin their transformation process or complete such process within the above-established terms shall be subject to the application of sanctions established in the LMF. The SIB shall remain in charge of preparing an itemized report for the MC with regard to the entities that failed to file their transformation petition, including appropriate recommendations.

Securities. Placement of Business Bonds Begins. By J. Velázquez-Morales.

The Dominican Stock Market made public in the July 26 edition of the newspaper "*Hoy,"* the beginning for the first time in Dominican history, of a placement of business bonds in USD. The Securities Superintendent explained that out of the US$12.0 Million contemplated for the first placement period, US$3.7 M have already been applied to the stock market.

Generally, the placement of bonds involves the so-called process of "switch of expensive debt for cheap debt." By using such means of collection, companies obtain the capital directly from investors (individual or corporations) thus avoiding having to resort to an indirect mechanism such as the commercial banking. The specific advantages of this mechanism include: a lower financing cost, greater flexibility at maturity, and image perfecting.

[2] According to they type of financial mediation entity established in Article 34 of the Financial and Monetary Law.

NOBOA PAGÁN ABOGADOS
ACTUALIDAD REGULATORIA BOLETIN INFORMATIVO

August 1, 2005 • Sto. Dgo., D. R.• Year I, Volume XIII

Financial. Bill Regulating Credit Bureaus becomes approved. By J. Velázquez-Morales.

On July 26, the bill regulating credit bureaus was enacted into a law by the House of Representatives (*Cámara de Diputados*) with the intent to ensure respect to privacy and rights of information holders. Expect more on this subject in our next issue.

Coming in August. We invite you read the lecture series presented at the Seminar on *"Competition and New Markets. Discussion of a New Regulation for the Dominican Republic."* ANJE.

Visit the web site of *Asociación Nacional de Jóvenes Empresarios*, www.anje.org to have access to the power point presentations by I. De León, Ph. D., P. Ramírez-Pequeño and J. Vicente, A. Noboa-Pagán, including the opening statement by R. Lueje. By connecting to www.noboapagan.com/pdfs/ProyectoLeysobrecompetenciaauspiciadoenANJE.pdf you shall be able to read the full text presented by A. Noboa-Pagán, at such event.

News from our Firm. Academic Leave of Absence for Arlene Cruz-Carrasco, JD.

Arlene Cruz-Carrasco, JD, NPA Associate Attorney will be absent from her duties at the Law Firm to pursue a Master's Degree in International Law, with concentration in Public Services, at the University of Avignon in France. A scholarship was awarded to Ms. Cruz by the French government based on her academic excellence and personal merits.

Editor: Jesenia Velázquez-Morales.
Chief Editor: Angélica Noboa-Pagán

NOBOA PAGÁN – Abogados
Av. Los Próceres, Plaza Diamond, Arroyo Hondo
Phone (809) 334.5717 • Fax (809) 334.5716

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