



September 1, 2005 • Sto. Dgo., D. R. • Year I, Volume XIII
First Anniversary Edition

Editor's Note. Economic efficiency and social and public interest, indeterminate legal concepts subject to the regulated authority of the Administration. A. Noboa-Pagán.

Several laws, regulations, and projects under discussion on economic law consecrate principles and rules on *efficiency* (price, operative or economic efficiency) while stating the *public and social interest* of their objectives. Such is the case of the **Monetary and Financial Laws, General Law on Electricity, and General Telecommunications Law, as well as the Antitrust Draft Bill.**

Just as *good faith*, diligence of a *good head of the family*, Civil Law, *direct connection* of Procedural Law, *deceitful abuses* of the Penal Code or the *diligence of a good merchant*, Commercial Law, the notions on efficiency and public and social interests are *indeterminate legal concepts*. For an accurate determination, the exploration through the rough scope of freedom entailed in the discretionarily is not possible, explains Professor GARCIA DE ENTERRIA.¹ In this regard, the Dominican legal systems that define the principles on efficiency and consecrate protection guaranties to public and social interest, must find support on the precise rules of the interdiction of the administrative discretionarily that examines their enforcement or violation by the administered ones.

It is essential to distinguish the application assumption of the indeterminate legal concepts of the *discretionary exercise of the administrative authority*. It is also necessary to distinguish them from the *determinate legal concepts*, which delimit the scope of reality to which they refer in a precise and unequivocal way, says the mentioned author. For instance, it would not be the same to determine that a phone company ignores the rights of a consumer if

such consumer gets a distortional bill for unplaced calls, that is, that the price of its offer ignores a similar right to the public consumer.

The first one is a consumer's rights deriving from the *neutrality principle*² of Law No. 153-98, a legal concept determined in the sectorial regulation; the second one, a collective right to every consumer to get an efficient price typical of a competitive environment, also a protected guaranty, except that it is through an indeterminate legal concept called: Public and social interest to *meeting the demand under terms of competition and free access to nondiscriminatory* services, stated in article 3a ii and iii of said law respectively. As for the latter, the enforcer, in this case INDOTEL, shall have to exhaust a careful examination to prevent its legitimate concern for the preservation of the public interest from driving it to adopt discretionary measures that will damage the protected interests of the companies.

"In the technique of the indeterminate legal concept, the law refers a sphere of reality which limits are not clearly specified in the enunciation (...) The law fails to determine with accuracy the limits of such concepts as it is about concepts that do not admit rigorous quantification or determination, but at any rate, it is evident that it is referring to an assumption of reality that, in spite of the indetermination of the concept, it admits to be determined at the time of the enforcement", explains GARCIA DE ENTERRIA. Thus, for instance, in the application of the technique of the stated indeterminate legal concept to the definition of an *efficient provider*³ on the bill for the **Regulation of Services' Rates and Costs** at

¹ Course of Administrative Law, Volume I, Ninth Edition, Thomson Civitas, 2005, Pag. 108 and ss.

² Based on the neutrality principle, the service should be provided taking into account its own conditioning with no distortions through discrimination or arbitrariness in the operation of other markets.

³ "The provider using technology, network design, operation practices which enable it to provide services at the lowest cost possible, consistent with its level of production and appropriate levels of quality"



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present submitted by INDOTEL to public review, the statements in such definition only describe the sphere of reality of the notion that calls for delimitation at the time of enforcement. The concept must be referred by concrete assumptions rather than inaccurate and contradicting vagueness. The description of the circumstance in a specific case only admits solution: An efficient business has a weighed average capital cost, determined according to such model.

“What is typical for every indeterminate legal concept, in any enforcement sector, is that its application only allows for a sole fair solution, the exercise of the discretionary authority allows, on the contrary, a diversity of fair solutions or, in other terms, chooses equally fair alternatives from “the standpoint of the Law,” states the mentioned Spanish writer. Consequently, along with the enunciation, this indeterminate legal concept called “efficient provider,” a rule of interdiction for administrative discretionarily is needed for all steps of the intellectual process of its enforcement. Based on this important consideration, it is our opinion that in the event of approval of this version of the regulation under discussion for the definition of tariffs and costs, the preparation of the *Cost Study* and *model of long-term incremental costs*, mentioned in the proposal of its articles, must be subjected to the rules of the appropriate administrative process that will eliminate instances of decision resulting from discretionary criteria from the Administration or its delegates.

“Discretionarily is basically a freedom of choice between equally fair alternatives, or if you wish, legal indistinctness, because the decision is normally based on extralegal criteria (opportunity, economic) not included in the law and left to the subjective judgment of the Administration. On the contrary, the application of indeterminate legal concepts is a case of law enforcement, as it is about subsuming within a

legal category (shaped, in spite of the vagueness as to its limits, with the intent to delimit a concrete assumption) some specific actual circumstances” points out the administrative law scholar. “This is precisely why it is a regulated process, which becomes exhausted during the intellectual comprehension process of a reality, in the sense the indeterminate legal concept has intended, a process where no will decision by the enforcer interferes, as it is typical of the individual who exercises discretionary authority” (our highlighting).

The same occurs in the exercise of the administrative authority that safeguards all the objectives of public and social interest of Law No. 153-98, such as the promotion of the universal service, the guaranty of the free choice to users, market access, and promotion of competition, among others. The administrative acts for the sake of the public and social interest to limit private interests protected by the legislation, such as the right of providers to obtain *an investment return plus reasonable profitability*, provided in the law as an expression of the constitutional right to the *free enterprise*, must remain duly supported by grounds beyond the free exercises judging the economic reality of the market. Therefore, the legislator anticipated the making of the costs and rates regulation, at present under public review. In the absence thereof, it is very important to keep in mind that the administrative performance may not decide based on its discretionary authority without restrictively having a bearing on the subjective rights protected under the legislation. Meanwhile, the current General Interconnection Regulation points at the international comparison model or benchmark as the test for the reasonability of the efficiency of charges by opposition to mere rough exercises, for cases where the organization must respond and most of all reject the peaceful or conflicting requests from businesses. We encourage INDOTEL, when regulating or invoking the notions of efficiency or public interest, in limitation of the subjective



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rights of providers, to take into account, the administrative technique required by the indeterminate legal concepts.

Letters to the Editor.

"I was not aware of this publication. I am very pleased to find out that thoughtful follow-up is being given to the issue on the regulation of public interest activities. Congratulations to the RB team."

Rolando Reyes,

Technical Assistant Manager to the Dominican Republic Central Bank

RB response: Thanks a lot for your opinion. No doubt, subjects of interest are more that we can cover; however, we try to include either some news or opinion on the regulation of financial services in every publication.

Free Trade. Government Actions in connection with the coming into force of the DR-CAFTA. by J. Velázquez- Morales.

After the ratification of the US-Central America Free Trade Agreement (RD-CAFTA) by the Dominican Republic Senate on Friday, August 26, 2005, the Secretaryship of Industry and Commerce made public the timetable of actions to be carried out by the government with regard to the DR-CAFTA. Such timetable is divided into 13 headings denominated as follows: Prior to the Entry into Force, Upon Entry into Force, Three Months after the Entry into Force; Six Months after Entry; One Year after the Entry into Force; 18 Months after the Entry into Force; January 1, 2007; Two Years after the Entry into Force; Three Years after the Entry into Force of the Preferential Treatment Request; December 31, 2009; Four years after the Entry into Force; Five Years after the Entry into Force; and Commitments for which no terms have been established. Following are some of the most relevant provisions from each heading:

Prior to the Coming into force: Arrangements for the adhesion of the DR to the Agreement on Technological Information Products -IT- from the WTO. **Upon the Coming into Force:** **a.** Model Procedure Rules for the Resolution of Disputes. The Country shall prepare along with other nations parties to the agreement, the rules and procedures that shall serve as guides for the operation of the dispute resolution mechanism. **b.** Rules and procedures of the Free Trade Committee. The country's agency, which is led by the SEIC, and is responsible for the handling of the agreement, must establish its rules, guidelines, and operating procedures. **Three months after the Coming into Effect:** **a.** Establishment of the negotiation group to develop a body of appeals for the investment chapter. **Six Months after the Coming into Force:** **a.** List of arbitrators on general subject matters, financial services, work-related issues, and environmental issues. The country shall present potential candidates and structures for the arbitration systems submitted in the agreement. **One Year after the Coming into Force:** **a.** Issuance of decrees, laws, ordinances or regulations to actively regulate the acquisition and administration of computing programs so that all government agencies at a central level use only authorized computing programs; **b.** Negotiation between DR and Central American countries on tariff treatment for certain products; **c.** Negotiation between DR, Costa Rica, and Nicaragua on the levels of agricultural activation for certain products. **18 Months after the Coming into Force:** **a.** Inclusion collective marks, sound and certification marks and geographical signs, and olfactory marks. **January 1, 2007:** **a.** Interconnection provision based on cost. **2 Years after the Coming into Force:** **a.** Observation procedures that would allow for an effective action against any violation of copyrights; **b.** Adoption or maintenance of risk management systems; **c.** Making available to the public any legal and administrative decision of general application with regard to public hiring; **d.** Application of measures on financial services



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between DR and Guatemala e. Application of measures on banking services between DR and Central American countries. **Three years after the Coming into effect of the Preferential Treatment Request:** a. Preferential treatment request by the importer by way of an electronic origin certification or reasonable trust in importer's information; b. Customs' automatization. **December 31, 2009:** a. Elimination of the terms on the exemption of customs tariffs upon compliance of performance requirements. The review of the Free Trade Zones list must be completed by then in order to be compliant with such mandate. **Four years after the Coming into Force:** a. Adoption of the Law on Collective Investment Plans. **Five (5) years after the Coming into Force:** a. Bargaining of free trade treaties with Mexico and Canada. **Obligations for which no terms have been established:** a. Beginning of consultations with the intent to determine the viability and convenience of including in the coverage of the Public Hiring Chapter, the construction of public works and concession of public works in general between Dominican Republic and Central American countries; b. Rules and procedures of the Free Trade Commission.

Consumer: Passing of the Bill for the Protection of Consumer or User Rights. By B. Roa-Mateo.

This past July 26, the Dominican Republic senate passed the Bill for the Protection of Consumer or User Rights, which was reintroduced and proposed by the Chairman of the House of Representatives (*Cámara de Diputados*), Mr. Alfredo Pacheco-Osorio on August 16, 2004. Although it was increased as to its extension, there were no major variations as to the content respect to the version summarized in the previous edition of the RB (or AR by its Spanish acronyms). You may access it by visiting www.noboapagan.com/pdfs/Boletin_8_001.pdf

Securities. Proposal for Housing Financing through the Stock Market. By J. Velázquez-Morales.

The SIV through the superintendent, at the July 25, 2005 Economic Encounter of the newspaper HOY, informed that recently a proposal was made to *Instituto Nacional de la Vivienda* (INVI) so that such entity may obtain resources through financial instruments, such as mortgage bonds for the financing of housing projects, as it has occurred in many other countries. For illustrative purposes, the Superintendent mentioned the case of El Salvador, where all major housing projects are funded through the stock market with resources from the retirement fund. The Superintendent sustained that "*Dominican Retirement funds may be perfectly used to finance infrastructure works and service projects, both in the public and private sectors. The only thing missing for the investment diversification is the "final decision," that players from the appropriate public sector make the decision and that private sectors believe in the stock market. Once this occurs, there will be a true incursion of retirement funds in the market in the short term.*"

Competition: WTO designates arbitrator in the disagreement regarding cigarettes between Honduras and the DR. By B. Roa-Mateo.

In October 2003, Honduras requested to hold consultations with the Dominican Republic with respect to certain measures affecting the import and domestic sale of cigarettes. In Honduras' view, the Dominican Republic establishes for imported cigarettes less favorable competition terms than those for national brands; demanding that importers placed bonds and other administrative charges, and enforcing special rules, procedures, and practices to determine the value of imported cigarettes for the application of the Selective Consumption Tax.



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At Honduras' request, a Special Group was put together. Such group stated through a report that the temporary surcharge, commission, and stamping requirement imposed by the Dominican Republic on cigarettes among other measures, were not compatible with the 1994 GATT, a report that was later accepted by the court of appeals of the Dispute Resolution Body empowered with the present claim. At the June 13, 2005 meeting of the Dispute Resolution Committee (*Órgano de Solución de Diferencia (OSD)*), the Dominican Republic confirmed its intent to enforce the recommendations and resolutions of the DRC with regard to such disagreement and stated that it would need a "prudential time period" to do it, pursuant to paragraph 3 of article 21 of the *Understanding regarding Rules and Procedures Governing Dispute Resolutions*.⁴ The World Trade Organization by way of a joint letter dated July 21, 2005, along with Honduras and the Dominican Republic, asked Mr. John Lockhart, Member of the Body of Appeals, to act as an arbitrator to decide over the prudential term for the enforcement of the rules issued by the Dispute Resolution Committee. Later Dominican Republic and Honduras desisted from Mr. John Lockhart's actions and mutually agreed on prudential terms so that the Dominican Republic may apply the recommendations and resolutions of the Dispute Resolution Body.

According to Mr. John Lockhart's report, the parties agreed as follows: with regard to the temporary economic stabilization surcharge, stated to be incompatible with the 1994 GATT provisions, the Dominican Republic shall make immediately the measures compliant with the obligations pertaining to such provisions. As for the requirement to adhere a stamp to all cigarette packs in its territory and under the supervision of all local tax authorities, the Dominican Republic will immediately make the measure compliant with the appropriate obligations by

virtue of the 1994 GATT. With respect to the exchange commission, declared to be incompatible with the provisions in paragraph 1b) of article II of the 1994 GATT, the DR shall make the measure compliant within a 24-month period as of May 19, 2005, the date of the adoption of the reports from the Special Group and Body of Appeals. Furthermore, Dominican Republic and Honduras also agreed that the DR would immediately stop demanding from cigarettes exporters the bond placement stated in the Special Group report.

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⁴ WT/DSB/M191, paragraph 27.