NOBOA PAGÁN ABOGADOS
REGULATORY BRIEFING NEWSLETTER

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Editor's Note. Our Proposal for the Antitrust Law and the Statement of Motives (A. Noboa-Pagán).

It is with great pleasure that we deliver this issue to you as a "late present" of our anniversary edition. It is about our proposal for the *Antitrust Law* accompanied by a comprehensive *Statement of Motives* in the form of an exhibit hereto and published in our Web site www.noboapagan.com.

Our proposal for the **Antitrust Law** is mainly based on the exemplary and effective antitrust system in Spain. It also incorporates ideas suggested by the Venezuelan consultant Ignacio DE LEON, Ph.D., some solutions provided in the Market Regulation Code, based on France's and Peru's legislations, as well as other recent contributions suggested by local attorneys, Marcos PEÑA and Nicole CEDEÑO.

Practices restrictive of the competition, such as *collusion*, *predatory prices*¸ and other banned agreements, along with the modalities of *inside trading*, have been duly typified and sanctioned in the proposal in order to *promote competition.* As in many systems, a *sanctioning administrative regime* typical of *specialized autarchic institutions*, without sacrificing the right to the effective legal protection is chosen. Therefore, the decisions of the created commission may be appealed before the Administrative Contentious Court.

Likewise, our proposal has taken into account the rights of World Trade Organization treaties in connection with the free circulation of goods and services, the latter in its various provisioning modalities with regard to restrictive trade practices and dominant or monopolistic companies and special protocols organizing such rule for some special sectors, namely the telecommunications sector. Furthermore, the proposal is coherent with the general rule on *annulment and impairment* provided in the DR-CAFTA, as in GATT/94, to sanction rules and regulations or initiatives contrary to free trade and competition.

We chose the Spanish legislation as the primary model for the conformance and making of the law, based on various practical reasons:

1. When Spain introduces its competition regime, it does so from a reality defined by market behaviors and structures outside a state scrutiny based on antitrust theories. Consequently, such country's legislative, administrative, and legal matters for the past 25 years have been highly enriching for the study, application, and construction of the subject matter in a country like ours, facing similar challenges. The evolution of a Spanish regime competes properly with French contributions in this subject matter. Their systems are not mutually excluding, as both regimes find basis on the core subject of articles 81 and 82 of the Rome's Treaty, which establishes the European guiding principles on the policy and regulation of competition. Thus, for instance, the French decisions on unfair competition or limitations of the free enterprise and hiring are highly valuable for the hermeneutic study of the Competition Law. On the other hand, the English precedents, as to public services matters, also ascribed to the Rome Treaty, innovate the comprehension of the subject matter, England being the pioneer in the change of the paradigm of the notion on *public services* to the new conception of *private services of public interest.* The

contributions by the Freiburg School in Germany in matters of competition or the decisions of Italian, Belgian, Scandinavian or Portuguese origin published by the European Union Directorate General ("DG IV") are also equally important.

2. Another good reason for the choosing of this model lies in the usefulness to adjust a regime of US origin from the system of another country that also belongs to the German-Roman legal family, as in the case of our country, particularly if we take into account the great doctrinal contributions by the Universities of Barcelona, Sevilla, Girona, Complutense de Madrid, Valladolid and Carlos III in this subject matter, which help in the task of adapting the antitrust analysis to the style of our legal system. Contrary to the United States, where the Sherman Law originates, and its over 100 years' old meticulous and famous jurisprudence, we do not rely on the Latin system with the agility of the system of the precedents of the common law; therefore, the rule for the promotion of the competition must be extremely cautious in the determination of the rules of due process, handling of evidence, determination of flaws, adoption of precautionary measures, and exercise of the controlling, regulating, and sanctioning powers of the Administration. The major advantage of using Spain's Antitrust Law 16/1989, including modifications and regulations thereto, as a model is that the Spanish intellectuality is well ahead in the doctrinal and jurisprudential task of interpreting the best adjustment practices of the US antitrust precedents to the Latin antitrust system.

3. We must confess to be great admirers of the advanced evolution of the Spanish Social Rule of Law as of the 1978 constitutional reform, which among others elevates competition to the constitutional block. The Dominican Republic would not be the first nation in the region attempting to near this model with regard to market issues. In fact, this would not be the sole market legislation in our country to be inspired in a Spanish model. Actually, telecommunications, financial services, and stock market have already to some extent followed the Iberian model. Most steady steps in that direction have been taken by Brazil, Colombia, and Venezuela, which expressly incorporate the Competition Law to the listing of basic rights, as established in the Spanish (and Portuguese) constitutions.

None of the above entails an oversight of the profound differences between the economic and institutional reality of such European nation and that of a developing country, such as ours. The distance separating Dominican and Spanish economic and political realities have been noted throughout several aspects of this proposal:

1. The first one respect to the concentration and merge regime, which was not incorporated in the proposal, on the understanding that for this first legislative stage, it is preferred to keep a purely *ex-post* regulating style. In addition, for similar reasons we excluded the transactional procedure promoted by the administration included in the Spanish system to end a conflict as well as the block exemptions.

2. The second, with regard to the functional and patrimonial autonomy of the administrative authority in charge of heading the administrative processes and promoting competition. Without the budgeting guaranties offered by the Spanish

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State for the competition policy, and in light of the possible deficiencies in the transparency and neutrality of the administrative function, it seemed to us that the best solution possible is to "judicialize" the unfair competition regime; and, with respect to the promotion of competition, to subject more specific toughness to its administrative process, until we can make into a law the magnificent *Draft Bill on the Regulating Law of the Administrative Activity*, recently under review by the *Comisionado de Modernización y Reforma de la Justicia* (Justice Reform and Modernization Commissionate).

3. Third and last, it was necessary to take into account the great support given to the subject matter on the competition policy by the European Community authorities, and also because regional decisions prevail over the local policies of the member nations of the Union. This does not and will not happen with the same effectiveness in the Dominican Republic with the signing of the DR-CAFTA, where unfortunately the chapter on competition, which traditionally accompanies the bilateral agreements subscribed by and between the US and other nations (the case of Singapore and Chile), was excluded.

In light of this reality, we can only propose under the same paragraph of the expressly proposed normative, some minimal regulations that must be approved as guidelines for the financial, sea, air, and ground transportation, energy, public health, education, intellectual property, and professional services sectors, given their transversal relevancy in the economy, and thus complete competition's institutional framework and leave regulated powers that will prevent the use of damaging discretional authority with regard to technical and economic matters.

On that same token, and in application of the principle of decentralization of all power, but nevertheless promoting the unity of the order, the proposal is for sectorial organizations whose legal regimes oversee competition, as in the case of the energy, telecommunications, financial services or industrial property, to maintain such competitions in the administrative headquarters, following at all times the social model of the interpretation market of law's objectives, defined in the substantive body of the proposal. That is, whenever the special law is silent, vague or obscure, the facts will have to be construed from the general rule of competition, the Constitution, and treaties, according to the hierarchical order recognized for each one.

Our **Proposal for the Statement of Motives** seeks to provide congressional authorities and the Dominican Republic President with a useful instrument to understand and support their decision to vote for a Competition Law in recognition of the historical and legal evolution of the right to the free enterprise, trade, and industry in our Constitution. It is appropriate at this time to imply that its attributions are sufficient for it to be approved, without bearing any contradiction or misinterpretation in connection with its misunderstood monopoly banning provision under subparagraph 12 of Article 8 of the Constitution. Its application must be construed from the *economic theory of monopolistic prices or monopoly theory* as done by the international Jurisprudence, that is, departing from the *rule of reason,* which is but a specific use of the constitutional *reasonability principle*.

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We are also offering legislators and the Head of the Government a statement proposal that justifies key aspects of the proposal backed by advanced criteria from the most important local and international experts that have conducted research on issues regarding Public Economic Law contemplated in the proposal, as well as in the major antitrust awards in Europe and the United States. Among the leading authors, we wish to mention the well-know Judge Richard A. POSNER in connection with matters regarding the promotion of competition (Chapter I), and the two famous British friendly associations BELLAMY & CHILD and WHISH & SUFRIN. These five Anglos-Saxon authors are widely known for their contributions to the understanding of the antitrust analysis and research on the rich American and European doctrine and jurisprudence over the determination of the notions of market power, relevant market, appreciable effect, monopolization and monopolization attempt, presumption of inefficiency of monopolistic prices, occasional benefits of monopolies, rule of reason, *per se* rule, among other aspects.

Also, in order to lay the foundations of the proposal contained in this chapter, we reflect the ideas of university professors and Spanish authors, Luis ORTIZ-BLANCO, (Complutense de Madrid) and Juan Ignacio FONT GALAN (Sevilla) on the Right of Competition and Economic Competition; Carmen HERRERO-SUAREZ, (Valladolid) and Raúl BERCOVITZ-ALVAREZ (Complutense de Madrid) both on the systematic organization of the Right of Competition and Intellectual Property Rights; the wonderful doctoral thesis of Elena BOET-SERRA, (Girona) on the Right of Competition in regular line sea transportation, the recently published work of CHILLON MEDINA, wherein he organizes the right of the competition of our telecommunications law No. 153-98; and also the solutions provided by Pilar MAESTRE-CASAS, Fernando ZUNZUNEGUI-PASTOR (Spain) and Ignacio LOYOLA (former governor of the Central Bank of Brazil), on the concurrence in the highly regulated financial services.

With the intent to motivate the *socialization of the objectives and judicialization of the process of the repression to the unfair competition* (Chapter IV), we studied the work of Silvia BARONA-VILAR, (Universidad de Valencia), Antonio ROBLES MARTIN LABORDA (Universidad Carlos III de Madrid), Juan Ignacio FONT GALAN from Spain, as well as the Brazilian author Gilberto DE ABREU SODRE CARVALHO and his interesting perspective on the *concurrent civil liability*.

As for the institutional issues (Chapter II), we relied on the wise appreciations of Miguel S. MARIENHOFF (Argentina), Eduardo GARCIA DE ENTERRIA (Spain), and Alexandre SANTOS ARAGAO (Brazil), on the regime of independent organizations, which justify their *legal capacity, functional independence*, *and separation from the conventional administration* without preventing that at least the Commission becomes attached (although non-dependent) to a ministry, which in the case of Spain, is the Treasury Department, and in the case of the Dominican republic, it could be the Secretariat of Industry and Commerce.

The safest path to propose a *sanctioning administrative regime of the competition* (Chapter III) for the sanctioned conducts in Chapter 1, as well as to grant controlling, regulating, and dissolving

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powers, was to follow the guideline of the Draft Bill of the Regulatory Law of the Administrative Activity and incorporate solutions of due process of the Spanish law provided for the administrative headquarter.

Finally, by defining the key Governing Principles of the law proposal that will allow to bring near the concurrent regime to the constitutional regime and thus ensure the enjoyment of its guarantees, there is nothing better than to welcome the articulated thinking of José Joaquim GOMES-CANOTIHLO (Portugal) over the basic rights and other constitutional issues, and particularly, the basic correspondences of the right to the free enterprise and competition.

The preparation and putting-into-circulation of this task, led and coordinated by the undersigned, has been possible thanks to the enthusiastic collaboration of four young professionals highly committed to the study of the Right of Competition with whom I have had the pleasure to work in my law firm: Arlene CRUZ CARRASCO, JD, and the college students Luis Armando VERAS-SEPÚLVEDA, Jesenia VELÁZQUEZ-MORALES, and Binell ROA-MATEO.

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