

Guatemala, September 9th 2016.

## **Competition Law: An instrument for solving current national problems - corruption in processes of public procurement.**

At some point it can become difficult to write a decent article, without taking the risk to sound boring, especially if it is a subject that has been widely addressed in its most important aspects. Such is the case of the status of the approval of the Competition Law and the corresponding Initiative 5074, which has been widely studied and criticized, both positively and negatively, so it's not worth adding anything more in that matter. However, it does not mean that there is nothing important to share, especially because as the Competition Law Institute of Competition Law<sup>1</sup>, we have remained active around this topic, and because certainly there are other important aspects related to the Competition Act, which have been unnoticed, so it's time to talk about them with an open mind and vision.

As was mentioned on a previous article, just over a month after the submission of the initiative 5074 to the Legislature Competition, by the Ministry of Economy, nothing relevant had happened, rather than some academic events and a few opinion and academic articles have been published. Thus, once the disaster was consummated without anything left to do, at least at the level of Ministry of Economy, the IDC co-organized and participated actively in two major forums on competition law, organized by the Spanish Chamber of Commerce, the Guatemalan-German Chamber of Commerce and Konrad Adenauer Foundation. Thanks to their efforts and the excellent network of contacts and friends around the Competition Law that we have built for over nine years, we accomplished the participation of Dr. José María Marín Quemada (Chairman of the National Commission of Competition and Markets Spain) and of our dear friend -of the real coffee Republic- Juan David Gutierrez, who shared his knowledge, experience, cases and invaluable recommendations. It is worth mentioning that we met Juan David when he invited us to participate as bloggers on LaLibreCompetencia.com, and we never imagined having the pleasure of meeting in person, or even, to have him in Guatemala as our guest for an important event and become new friends.

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<sup>1</sup> IDC, From now on.

Representatives of the IDC participated as well in the process of public hearings that took place on August 3<sup>rd</sup> 2016 invited by the Commission of Economy and Foreign Trade of Congress. On that date, we presented our technical approach regarding the Competition Act No. 5074. At this point, its difficult to predict how the final draft of the Act will look like once the Congress approves it, so we must wait and continue generating more information, analysis, reviews and debate as much as we can to increase awareness.

Achieving this space for the IDC was a success by itself, beyond what happens next and what the Congress will decide with the feedback provided. Why? Long before the creation of the IDC in early 2015, we began to work -within our practice as an independent Law Firm-, researching on economics, competition law, creating contacts outside Guatemala, conducting small workshops, and joining efforts with the authorities of the Ministry of Economy at that time<sup>2</sup> and business chambers. We saw the opportunity to be pioneers in a different branch of law<sup>3</sup>, as disruptive innovators.

We knew it was hard work: opening a breach in an unexplored market, in a political complicated context and with the vision of having an important role on what happened last August 3<sup>rd</sup>. Looking back, we know we have taken the right path. We have been witnesses and protagonists in almost everything that has happened on this subject.

Over the time, we got interest in creating an academic institution devoted entirely to the study, dissemination, discussion, etc., of Competition Law in all its manifestations, which could stand out from any other that have existed so far. It was so, that in early 2015 we decided to carry out the plan and founded the Competition Law Institute. Right now, we are working to celebrate the entry of new members with fresh ideas, who will join the effort and share our passion for competition law.

During his recent visit to our country, Juan David, made two specific recommendations: (i) overcome the discussion on the content of the Competition Act; and (ii) make the authorities

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<sup>2</sup> Former Director of Promotion and Competition Department at Ministry of Economy. In late 2006 and early 2007, we had generated the contact between Director Edgar Reyes -RIP-, and us -Marcos Palma and Luis Pablo Cobar-, whom he had established a very positive dynamic work that continued until he passed away in 2012.

<sup>3</sup>Always maintained a dual purpose, on the one hand, the intention to do our work for the country, without representing particular interests of any kind. On the other hand, the plan has always been to develop an area of legal practice on competition law with leadership from the academic point of view.

and everyone in general, understand the competition law, as an instrument to solve some of the major problems that Guatemala faces as a country.

There is a current concern surrounding corruption in public institutions that is tangible, and the flaws in the procurement processes at all levels in the ministries of the Executive, Congress, Judicial Branch, municipalities, autonomous institutions, etc. are well known. More sensitive cases of collusion in bidding processes could refer to: purchase of medicines (The Guatemalan Institute of Social Security and the Ministry of Public Health and Social Assistance); roads and infrastructure (Ministry of Communications, Infrastructure and Housing); and products and services of various kinds in municipalities and other entities. Some of these cases have cost human lives. Nobody is focusing on how to solve the problem and the current legal framework does not seem to offer any solution in the short, medium and long term. I mean the Competition Law as a tool to combat corruption in public procurement processes!

For more clarity, we look at the road that Mexico has walked to combat collusion in public procurement processes. During the Latin American and Caribbean Forum on Competition, held in April 2016 in Mexico City, representatives from COFECE mentioned their progress in this struggle, as well as aspects of modernization that have been developed. Mexico implemented a number of changes following the recommendations of the OECD, which included in-depth evaluation of laws and procurement practices at all levels of government as well as reducing the risk of manipulation by the effective design of procurement processes and detection of collusive practices during the bidding process.

The recommendations go through the implementation of six major guidelines: Know the markets; genuine maximizing of the number of bidders; use of clear requirements and avoid predictability; reduce communication between suppliers; establish clear criteria for awarding contracts; training staff on the risks of bid rigging. If the staff does not understand the importance of their good work, all the effort would be almost like throwing away resources.

In Guatemala, the legal framework on public procurement contained in the Government Procurement Law and its Regulations (Decree No. 57-92) and the new Regulation contained in Government Agreement No. 122-2016 should be revised deeply. The last amendment to the Law on Government Procurement, by Decree No. 9-2015, adds nothing significant,

rather than imposing a maximum fine of Q.25,000.00 (equivalent to USD.3,250.00), which is ridiculous if we take into account the economic benefits that cheating bidders could generate. Therefore, it makes sense to criminalize at least the collusive practices in public procurement processes, because in addition to the restrictive effect on competition, they are also defrauding the economic interests of the State.

Prices affected by collusion can damage a public institution as well as the economy. According to data from six economic studies in Mexican markets<sup>4</sup>, the presence of cartels and collusive arrangements can raise prices of certain products to over 30% of its real value. That is, if public institutions are victims of collusive arrangements for any product or service, they could be paying a third more than they should. To have an approximation on the amount of wasted resources caused by these practices it should be calculated from the moment they began and forward. Can you imagine what it could be done with all those wasted resources? Do you realize that competition is more than ethereal economic concepts and sophisticated terminology?

Honestly, it's time to open our eyes, and get interested in what is happening with the approval of the Competition Act, because it goes far beyond a group of opportunistic lawyers and economists as it has been said, or some economic sectors who seek to perpetuate their privileges at the expense of our pockets; it goes beyond mediocrity or lack of commitment from some public officials. This has to do with saving lives and prevent disasters. It is our duty to see what is going on and demand that things must be done well. The Competition Law is wide and is related to many aspects of our work and daily life, and could well be part of the solution that many are seeking to solve important problems of our Nation, as long as we are willing to give it a try and take away the ideological veil from our eyes, minds and lips. It is time to get ready to compete and stand by our capacity and creativity.

We have always used football (soccer) as an analogy to explain the process of economic competition and the role of the competition authority in the markets, which always works wonderful to capture public attention. We often use photographs of the very famous retired referee Pierluigi Collina, as example of the thoroughness that the authority in competition should have, with eyes almost out of their sockets, showing yellow and red cards right and left everywhere!

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<sup>4</sup> Combat against collusion in public procurement processes in Mexico. CFE OECD 2015

Taking advantage of the footballing analogy to conclude the article, the most beautiful sport in the world, as described by Luis Omar Tapia in the kickoff of every game, it makes come to my mind the famous writer Eduardo Galeano<sup>5</sup>. In his excellent book "*Soccer in Sun and Shadow*" where he describes masterfully poetic and daring, the intricacies of the sport, and referring to the language of doctors of soccer reads: *As we said on Sunday recent past and so we affirm today, with head erect without mincing words, because we have always called a spade a spade and continue to denounce the truth even if it hurts many, no matter who falls and what it costs...*

Sincerely,

**Luis Pablo Cobar & Marcos Palma**

**-Both INTEGRUM Partners & Competition Law Institute cofounders-**

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<sup>5</sup> Writer born in Montevideo Uruguay in 1940, author of several books, translated into more than twenty languages and profuse journalistic work. Among his major works: Open Veins of Latin America, Vagamundo, The song of us, The Book of Embraces, among others.