

# Competition Law and Policy in Panama



## A Peer Review



# **COMPETITION LAW AND POLICY IN PANAMA**

**A Peer Review**

**-- 2010 --**



## ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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## *Foreword*

The OECD has been active in promoting competition policy in countries across Latin America and the Caribbean (LAC) for many years. The partnership between the OECD and the Inter-American Development Bank (IDB) has advanced these efforts. The annual Latin American Competition Forum (LACF) is the cornerstone of this collaboration on competition matters. It is a unique forum which brings together senior officials from countries in the region, to promote the identification and dissemination of best practices in competition law and policy. Eight meetings have been held to date.

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance. Peer reviews are a core element of the OECD's activities. They are founded upon the willingness of a country to submit its laws and policies to substantive reviews by other members of the international community. This process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all.

There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an important part of this process. They are also an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

Their positive application in the competition field encouraged the OECD and the IDB to include peer reviews as a regular part of the joint Latin American Competition Forum. In 2007, the Forum assessed the impact of the first four peer reviews conducted in the LACF (Brazil, Chile, Peru and Argentina) and the peer review of Mexico, which was conducted in the OECD's Competition Committee. The Forum peer reviewed El Salvador in 2008 and Colombia in 2009. The peer review of Panama was conducted in 2010.

The OECD and the IDB, through its Integration and Trade Sector (INT), are delighted that this successful partnership contributes to the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations: supporting pro-competitive policy and regulatory reforms which will promote economic growth in LAC markets.

Both organisations would like to thank the Government of Panama for volunteering to be peer reviewed at the eighth LACF meeting, held in Costa Rica, on 8-9 September 2010. Finally, we would like to thank Mr. Daniel Sokol, the author of the report, John Clark for his contribution to the report, the Examiners (Diego Povoio, Argentina; William Kovacic and Caldwell Harrop, United States), Costa Rica's competition authorities for hosting the LACF and the many competition officials whose written and oral submissions to the Forum contributed to its success.

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### Executive Summary

Panama's National Assembly enacted Panama's first competition law in 1996. The current law was enacted in October 2007. In most respects, the current law is consistent with many international competition best practices.

In general, the *Autoridad del Protection del Consumidor y Defensa de la Competencia* (ACODECO), Panama's competition agency, has managed to perform quite well, given scarce resources and limited government support. Practitioners and the business community hold ACODECO's competition team in high regard, as do the members of the judiciary who focus on competition issues.

Given the Agency's limited resources, case selection has been relatively effective. ACODECO eschews bringing large numbers of cases of marginal value in favour of a few cases that are strong both on the facts and on the law. Given the competition problems in Panama, however, particularly in the area of cartels, ACODECO brings too few cases.

ACODECO has instituted only a handful of dominance cases in the past several years. The law provides for merger control, but notification is not mandatory. ACODECO reviews a few mergers each year under this system and approves most of them. Two have been approved with conditions and one has been blocked. The introduction of a mandatory notification system for mergers should be reassessed once ACODECO's competition enforcement resources are increased to ensure effective *ex ante* review of structural changes in local markets.

The new law provides for higher financial penalties and it introduced leniency, but thus far the fines imposed in cartel cases have been too low to act as a deterrent, and there have been no leniency applications. ACODECO must strengthen its anti-cartel efforts in order to increase the probability of detection which will improve the effectiveness of the leniency programme.

ACODECO now plays an important role in overseeing competition issues in regulated industries. The Agency has been proactive in creating better working relationships with sector regulators. As a result, strong inter-agency co-operation now exists with a number of regulators, while co-operation with others is at a nascent stage. ACODECO must continue to improve its working relationship with sector regulators.

Unlike a number of other Latin American countries, Panama does not suffer from significant delays in the judicial review of competition cases. While there remain some delays with cases subject to the earlier Law 29/1996, under the new competition law the 45-day limit for evidentiary hearings should reduce problems of this kind. Nevertheless, to support and strengthen judicial decision-making additional training in economic analysis could be advisable.



The increased use of negotiated agreements could improve both the effectiveness and efficiency of Panama's competition system. A settlement procedure exists in Panama, but to date it has been seldom used (though its use is increasing). It is unclear whether this procedure has been under-utilised because it is ineffective or because the rules for its use are not sufficiently clear.

ACODECO has responsibility for both competition and consumer policy. However, while the consumer programme has benefited from increased resources, the investment made on the competition side has been significantly less. This can, to a large extent, be attributed to the lack of a competition culture in Panama. Competition policy has little visibility in the country, either within other parts of government or among the general population. ACODECO can leverage its success in consumer protection to raise the profile of competition policy.

The report offers several recommendations for the improvement of competition policy in Panama. ACODECO is urged to expand its competition advocacy at all levels, with the aim of fostering the competition culture that is currently lacking. To move competition policy further up the political agenda, ACODECO needs to make the case for competition as a tool for enhancing country competitiveness and economic development. This should be accompanied by increased anti-cartel enforcement efforts, particularly in government procurement. This would demonstrate the benefits of competition law enforcement to both citizens and government. As a part of this increased emphasis on cartels there should be an effort to impose higher fines upon cartel operators.

The financial resources for ACODECO's competition functions should be increased. Consumer protection and competition policy are both important for making markets work well for consumers, but the latter has been underfunded for the past several years.

## 1. Foundations and Context

### 1.1. *The Historical, Economic and Political Context*

The Republic of Panama (*República de Panamá*, hereinafter “Panama”) is situated in Central America, bordered by Costa Rica to the northwest, Colombia to the southeast, the Caribbean Sea to the north and the Pacific Ocean to the south. Panama covers an area of 75,420 km<sup>2</sup>. Panama’s geographical territory is divided into nine provinces and five “*comarcas*” (indigenous territories). The capital is Panama City, founded in 1519. Spanish is the official and dominant language, spoken by practically all of the country’s inhabitants. With an annual population growth rate of 1.5 per cent, the 2009 population estimate for the country stands at 3,360,474 inhabitants, of which 73 per cent reside in urban areas. In terms of population, Panama is the smallest Spanish-speaking country in Latin America.

Panama is distinct from other countries in Central and South America in terms of its history and economic development. Panama was a province of Colombia until it declared its independence in 1903. The new country signed a treaty with the United States that allowed for the building of the Panama Canal – the only waterway between the Atlantic and Pacific oceans. The 1989 United States invasion that ousted dictator Manuel Noriega enabled the democratically elected government of Guillermo Endara to take office. During Endara’s tenure as the country’s president, the economy was able to make up for lost economic opportunities that resulted from the last years of the Noriega dictatorship.

The country has exhibited strong economic growth in recent years. It recorded growth of 9.2 per cent in 2008, 11.5 per cent in 2007, and 8.5 per cent in 2006. Fiscal management has been conservative and highly prudent, with the country’s public sector recording overall fiscal surpluses in each of those years. Foreign Direct Investment was US\$2.4 billion in 2008. In 2009, the country’s Gross Domestic Product (GDP) reached approximately US\$24 billion,<sup>1</sup> making the country the 13th largest economy in Latin America.<sup>2</sup> The Panama Canal created the basis for a strong services sector. Today services account for approximately 75 per cent of Panama’s GDP. In recent decades, services have expanded beyond the Panama Canal to include a large financial sector providing international banking and insurance services, the Colón Free Zone, container ports, flagship registry, company registry, tourism, and an incipient regional medical services centre,

among others. Other important sectors in the country's economy are industry (18 per cent of GDP) and agriculture (6 per cent of GDP).

A number of factors account for Panama's strong economic fundamentals and performance. First, in the midst of the recent global economic recession, Panama was one of the few Latin American countries to experience economic growth, with GDP growing by an estimated 2.4 per cent in 2009. Also, in 2010, S&P upgraded Panama's corporate credit rating to BB+, which represents a very strong rating for a developing country. This rating translates into a lower cost of borrowing in international financial markets and an incentive for foreign and local investors to establish themselves in the country.<sup>3</sup> In addition, investment in 2009 reached almost 27 per cent of GDP.<sup>4</sup> Panama's economy is relatively open to international trade and lacks foreign exchange controls. Finally, Panama ranks 59 out of 133 countries in the 2009-10 Global Competitiveness Index. According to the Global Competitiveness Index, the two most important problems facing the country are corruption and an inefficient government bureaucracy.<sup>5</sup>

GDP per capita was US\$11,900 (in PPP) in 2009. The labour force is made up of 1.423 million people. Unemployment is 7.1 per cent of the labour force, down from about 14 per cent in 2004. Despite such progress, about 37 per cent of the country's population remains below the poverty line, while income distribution is one of the most skewed in Latin America. The Gini coefficient is estimated to be about 56 per cent of national income.

Panama does not have a central bank. The official currency is the Balboa, which is pegged to and fully convertible to the US dollar (i.e., the exchange rate is 1:1) as a result of a 1904 Monetary Agreement with the United States. The monetary system, which adjusts itself automatically, has operated effectively and efficiently for over 100 years, contributing positively to the country's economic development. As a result, inflation has remained at or below international levels. In 2009, inflation was estimated to have risen by only 2.3 per cent.

Politically, Panama is a representative democratic republic. The constitution establishes a presidential regime. The President is both the chief of state and head of government. The President is elected by popular vote for a five-year term. The Vice President is elected on the same ticket as the President. The President appoints the Cabinet. The President and Vice-President are not eligible for immediate re-election. Instead, they must sit out two additional terms of office (ten years) before becoming eligible for re-election. Legislative power is vested in both the Government and the National Assembly ("*Asamblea Nacional*"). The National Assembly is a unicameral body and has seventy-one seats. Its members are elected by popular vote to serve five-year terms. There is a multi-party system, with

two major political parties and several smaller ones, many of them represented in the Assembly.

The last election of both branches was held on May 3, 2009. The current President is Ricardo Martinelli and the Vice President is Juan Carlos Varela. The Government is made up of a right of centre coalition. The Democratic Change Party and the Panameñista Party lead the coalition.

There is universal suffrage in Panama. Those 18 and older may vote in national elections but voting is not compulsory. Presidential elections require a simple plurality. In fact, Panama's last three presidents were elected with the support of only 30 to 40 per cent of voters. The National Assembly is elected in fixed, electoral districts. Legislators from outlying rural districts are chosen on a plurality basis; legislators of districts located in more populous towns and cities are elected by proportional representation.

The judicial system is based on civil law. It contemplates judicial review of legislative acts in the Supreme Court of Justice. The judiciary is independent. Members of the Supreme Court are appointed by the President and ratified by the National Assembly. The Supreme Court of Justice consists of nine justices. Each justice is appointed for a ten-year term. There are five superior courts and three courts of appeal. Panama also accepts compulsory ICJ jurisdiction, but with reservations.

## ***1.2. Introduction to Panama's Competition Policy***

The introduction of competition policy in Panama was part of a process of economic modernisation and structural change in the country initiated in 1994 with the election of president Ernesto Perez Balladares. His administration began transforming Panama's corporate state structure from one subject to many controls into one that was private sector led and responsive to market incentives. The explicit aim of the economic liberalisation was to increase overall efficiency in the economy and improve the allocation of resources.

Privatisations of state enterprises and of government assets, together with market liberalisation, spearheaded the country's economic transformation. The government privatised and liberalised large parts of the economy to make it more efficient and competitive. Panama also created regulatory institutions to assist in the implementation of market reforms.

The Government privatised the ports that had been returned by the United States as part of the Panama Canal Treaty, as well as much of the existing housing in the former Canal Zone. The government also entered into public-private partnerships in infrastructure. It privatised 51 per cent of

the shares of the electricity and telecommunications sectors and created a combined regulatory agency to oversee these industries – the “*Ente Regulador de los Servicios Públicos*” (ERSP), later converted into the current “*Autoridad Nacional de los Servicios Públicos*” (Authority of Public Services or ASEP). The Government also revised the 1970 banking law that had enabled Panama to become an international banking centre, and in 1998, created the independent “*Superintendencia de Bancos*” (Superintendency of Banks of Panamá or SBP) as the agency to oversee financial regulation.

To promote general competition, the Government eliminated the agency that managed price controls and passed Law 29 on 1 February 1996. The law created a combined competition and consumer protection agency called the “*Comisión de Libre Competencia y Asuntos del Consumidor*” (Commission of Free Competition and Consumers Affairs, or CLICAC), headed by three Commissioners. This agency served as the predecessor to the current “*Autoridad del Protection del Consumidor y Defensa de la Competencia*” (Authority for the Protection of the Consumer and Defence of Competition, ACODECO, or the Agency), created by a modification to Law 29/1996 in 2006.<sup>6</sup>

In addition, the competitive environment changed in Panama with its increasing integration into the global economy. As many markets around the world, especially in small economies, are highly concentrated (with consolidation leading to the possibility of monopoly power and the potential to abuse this power),<sup>7</sup> foreign entry is often the primary source of potential competition.<sup>8</sup> Panama became a member of the WTO in 1997. As a result of its WTO commitments, Panama reduced various trade barriers. In particular, Panama opened up imports by replacing quantitative import restrictions with tariffs, while reducing most import tariffs to 15 per cent of their CIF value. In addition, Panama began a process of trade integration through the negotiation of free trade agreements with countries within Latin America (e.g. Panama-Central America, Chile-Panama), and outside of the region (e.g. Panama-Singapore, Panama-Taiwan). Collectively, these agreements have made it easier for foreign businesses to invest in Panama and for Panamanian companies to increase in size due to a more global customer base.

Law 29/96 set up a competition system based upon practices in the United States, the European Union and Mexico.<sup>9</sup> Law 29/96 borrowed the concepts of absolute and relative illegal practices from Mexico. From the US model, Law 29/96 imported the idea of private rights and class actions. Law 29/96 did not create a stand-alone competition policy component in CLICAC. Instead, the law created an agency that dealt with competition, consumer protection, and trade practices, specifically safeguards. The three Commissioners would convene as a plenary to make decisions on policy. Agency professional staff was divided between lawyers and economists. CLICAC designated both a

chief lawyer and a chief economist for competition policy. The Agency was autonomous, although technically a part of the Ministry of Commerce and Industry (MICI). Currently, ACODECO is a public, technical body, legally independent from the central Government.

The 2006 modification to Law 29/96 not only reformed the institutional structure of the competition agency, but also modified important procedural and substantive aspects to the competition system, such as penalties, exclusions from the law, a greater focus on efficiency concerns (including dynamic efficiency), the use of collective dominance, the ability to reach some state conduct, and the introduction of leniency. However, CLICAC, based upon its experience in enforcing the law, determined that further changes to the competition system were required. These changes resulted in the approval of the current law on “Consumer Protection and Defence of Competition,” Law No. 45/2007 (hereinafter “the Law” or “Law 45”), approved by the National Assembly on 31 October 2007. As a result of these changes to the Panamanian competition system, competition plays an increasingly important role in Panama’s economy.

The National Constitution currently guarantees competition policy in Article 298, which establishes that the State should guard “free economic competition” (*libre competencia económica*) and “free concurrence” (*libre concurrencia*) in the market, remitting the establishment of modalities and conditions to guarantee these principles to the laws. Free economic competition is defined in Law 45 as the participation of “economic agents”<sup>10</sup> in the same market without any existing illegal restrictions in the production process, purchase, sale, price determination, and other conditions related to that economic activity.<sup>11</sup> Free concurrence is defined in Law 45 as the possibility of new competitors having access to the same market.<sup>12</sup>

Law 45 comports with many of the international best practices from the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).<sup>13</sup> The Law has 206 articles and is divided into seven parts (“titles”) titled: “Monopoly”; “Consumer Protection”; “Authority for the Consumer Protection and Defence of Competition”; “Norms Applicable to all the Previous Parts”; “Administrative Procedure”; “Judicial Procedure”; and “Final Norms”. Article 7 of the Antitrust Law articulates the basic legal standard applying to conduct cases. The standard adopts the form of a prohibition:

Article 7. It is prohibited, in the forms established in this Law, any act, contract or practice that restrict, decrease, damage, impede or, in any other form, infringe the free economic competition and the free concurrence in the production, processing, distribution, supply or commercialisation of goods and services.

Table 1 shows the main differences between the previous and the current laws:

Table 1. Comparison between former and current competition law

Criteria	Law 29/96	Law 45/07
<b>Scope</b>	Competition Law, Consumer Law, Unfair Trade Practices	Competition Law, Consumer Law
<b>Objective</b>	Superior interest of the consumer	Superior interest of the consumer
<b>Efficiency as criteria</b>	Not explicitly considered	Explicitly considered
<b>Agency</b>	CLICAC	ACODECO
<b>Head of Agency</b>	Three commissioners	Administrator
<b>Substantive practice</b>	–	“Hoarding” ( <i>Acaparamiento</i> ) incorporated as relative practice
<b>Procedural changes</b>	–	45 days to gather proof in judicial hearings
<b>Sanctions</b>	From B/. 25,000 to 100,000	From B/. 0 to 1,000,000

Source: ACODECO (Autoridad del Protection del Consumidor y Defensa de la Competencia)

Executive Decree No. 8-A (22 January 2009) (hereinafter, “Decree 8-A”) complements and further develops Title I of the Antitrust Law. Title I addresses competition-specific issues (as opposed to consumer protection). Decree 8-A, in Article 2, defines four key concepts for the application of the Law:

- *Agreement*: Any contract, arrangement or compromise between two or more economic agents;
- *Combination*: Any agreement or conscious parallel practice between two or more agents;
- *Act*: Any unilateral or concerted behaviour of one or several economic agents;
- *Conduct*: Any agreement, combination or act carry out by one or more economic agents.

Also, as detailed below, ACODECO has issued four sets of guidelines. The guidelines cover: horizontal co-operation; vertical restraints; merger control; and competition procedures.

### 1.3. Objectives of Competition Policy

Since its inception, the Law has adequately protected the competitive process rather than the interest of competitors. Objectives such as fairness, the competitive structure of the industry, or the growth and protection of small and mid-size firms are not taken into account. In this regard, Article 1° of the Law clearly states that the sole focus of the Law is efficiency:

Article 1. Object. It is the object of this Law the protection and reassurance of the process of free economic competition and the free concurrence, eradicating monopolistic practices and other restrictions to the efficient functioning of the markets for goods and services in order to preserve the superior interest of the consumer.

The Law maintains the preservation of the “superior interest of the consumer” (“*interés superior del consumidor*”) embedded in the previous law as its primary function. However, with the inclusion of the definition of economic efficiency in Article 5 and the establishment of exceptions to the application of the Antitrust Law in Article 6, economic criteria to evaluate the preservation of the interest of consumers have been expressly incorporated into the legal analysis.<sup>14</sup> Moreover, the substantive criterion of efficiency has explicitly changed. The Law now embraces a dynamic, rather than a static view of efficiency.

The standard of superior interest of the consumer used by Article 1 of the Law leaves somewhat open the question of which measure of welfare should be adopted. However, the guidelines issued by ACODECO indicate that the criterion is the comparison of total surplus before and after the conduct or concentration under analysis – i.e., a total welfare, as opposed to a consumer welfare criterion.<sup>15</sup>

Despite the clear objective of efficiency embedded in the Law, Article 3 establishes that any act, meeting, agreement, arrangement, convention or formula, or any other mechanism or modality promoted by the State with operators, which is executed to safeguard the *public interest*, is exempted from the application of the Law.<sup>16</sup>

## 2. Substantive Issues

In many respects the Law has a similar structure to most other competition laws around the world. It addresses the three major areas of potential anti-competitive conduct: restrictive agreements, abuse of dominance, and mergers.

The main distinction made by the Law is between “absolute monopolistic practices” and “relative monopolistic practices.” In addition,



merger control is included in a separate part of the Law under the title of “economic concentrations.” According to Article 2, the Law applies to any act or practice that has effects in Panama, regardless of the location where such practices have been carried out.

Table 2. Competition Law toolkit

“Traditional” categories		Panama’s Competition Law (Law 45/2007)	Further applicable regulations
Horizontal agreements	<i>Hard-core cartels</i>	Absolute monopolistic practices	‘Decree 8-A’ and ‘Guidelines for the Legal Collaboration between Competitors’
	<i>Other agreements</i>	Relative monopolistic practices	
Vertical agreements	----	Relative monopolistic practices	‘Decree 8-A’ and ‘Guidelines for the Analysis of Vertical Conducts’
Abuse of Dominance / Monopolisation	----	Relative monopolistic practices	----
Mergers	----	Economic concentrations	‘Decree 8-A’ and ‘Guidelines for the Control of Economic Concentrations’

Source: ACODECO.

The tests used for a finding of anti-competitive conduct are relatively similar to those used in other jurisdictions. The powers granted to ACODECO to investigate and prosecute potential anti-competitive conduct are typical of those of other jurisdictions. Moreover, ACODECO has the power of competition advocacy. Advocacy exists for purposes of legislation and regulations. Advocacy powers also allow ACODECO to undertake studies of discrete issues and of economic sectors.

### 2.1. *Horizontal Agreements*

The norms that govern horizontal agreements are contemplated in Articles 5, 6, 12, 13 and 14 of the Law, and complemented by Articles 5, 12 and 13 of the Decree 8-A. In addition, ACODECO has issued “Guidelines for the Legal Collaboration between Competitors” (Resolution No. A-24-09 of 21 April 2009)(Collaboration Guidelines), which set out the principles for the assessment of horizontal conducts and to identify the cases in which these conducts contravene the prohibitions established by the Law. These Collaboration Guidelines are based on the US Department of Justice and Federal Trade Commission Antitrust Guidelines for Collaborations among Competitors and the European Commission Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements. However, the Collaboration Guidelines also reflect ACODECO’s own concerns and experience in its enforcement of the Law. In this sense, the Collaboration

Guidelines took into account the fact that the Panamanian markets are highly concentrated.

Article 13 of the Law refers to “absolute monopolistic practices”. The norms suggest that this rule is similar to the system found in EC Law. Following the European model, the Law explicitly refers to practices whose object or effect is to fix prices, to establish quotas and other restrictions on production, to share the market with competitors, and collusive tendering. This provision is further developed in Article 12 of Decree 8-A, which indicates:

Article 12. Exceptions. For the application of article 13 of the Law, and in accordance with article 6 [of the Law], the conducts of economic agents that have as likely effect the increase, saving or improvement of the production and/or distribution of goods or services, or that foment the technical or economic progress, and that generate benefits for the consumers or the market, will be excepted of the application of the Law, whenever any of the four elements that article 6 of the Law establishes it is fulfilled.

This provision seems to follow the European approach to horizontal restraints.<sup>17</sup> Thus, agreements that fall under Article 13 of the Antitrust Law (even if they have an anti-competitive object) are not necessarily unlawful if they comply with the legal exceptions provided in Article 12 of Decree 8-A in relation with Article 6 of the Law (which establishes common exceptions to the application of the Law). As a consequence, the current law does not employ the *per se* rule, while it did exist under the previous law, Law 29/96.

A number of cases brought by ACODECO involving absolute monopolistic practices involved explicit evidence of cartels. A recent case, in which the decision by the Court of the First Civil Circuit is pending, was *Transporte de Carga Colón*.<sup>18</sup> In that case, ACODECO accused several associations and co-operatives of haulage companies that transported containers between the ports and the Colón Free Zone and between the latter and Panamá City of naked collusion. The companies are alleged to have sent a note to their clients (the shipping companies) detailing new higher tariffs for the transport of containers. The increase in prices was based on the increase in operational costs (particularly diesel fuel). They also created a new “band system” to calculate the tariff, whereby prices moved according to changes in diesel prices. Another pending case is *Lavanderías*.<sup>19</sup> In this case ACODECO has accused several laundry shops of colluding by using a concerted scheme to inform their clients of new prices for the services of laundry and ironing.

**Box 1** provides another example of an absolute monopolistic practice case of explicit collusion (“*Estaciones de Combustible*”).

### Box 1. A case on absolute monopolistic practices

#### **“Estaciones de Combustible”:** Second Circuit Civil Court of Veraguas, Sentence No. 9, 18 January 2010

In “*Estaciones de Combustible*” (Petrol Stations) ACODECO filed a complaint against six competitors accusing them to have formed a cartel (i.e. to engage in absolute monopolistic practices) in the fuel market. The Agency affirmed that the firms agreed to fix their retail prices for different types of petrol and diesel during the period of one year (January – December 2005). According to the agency, the firms uniformly overcharged customers despite having different cost structures. They also exchanged information as a means to sustain the cartel. The defendants denied the charges. Instead the defendants contended that the price of gasoline and petrol was regulated (and hence could not be controlled by the petrol stations), and that the price was simply set by each firm unilaterally. The court held in favour of ACODECO’s position and confirmed that there was a cartel during the period at issue. The decision relied mainly on testimonies that corroborated the exchanges of information and the concerted practice, and reports of economic experts that concluded the overcharge was the same for all petrol stations. The court ruled out the argument of price regulation (which had previously existed but was not then active), explaining that regulation was not mandatory, but merely a price-signal to the firms. Despite condemning the cartel, however, the court reduced the time duration of the absolute practice to four months (August – December 2005). The decision was challenged by both parties. The sentence has not yet been given by the court of appeal.

Under the Law, there is no specific definition of either tacit collusion or conscious parallelism. Legally, Article 14 of Decree 8-A states that substantial market power can be inferred from mere interdependence. However, the case law in the area suggests that tacit collusion may take place by means of what is referred to as arrangements or combinations. These arrangements or combinations require more than mere interdependence. There is a legal element that requires a meeting of the minds of participants of alleged collusion. Tacit collusion creates the inference that this meeting of the minds has occurred. The circumstantial evidence that may be used to prove tacit collusion includes parallel behaviour, information exchange and price dispersion with stable participation.

In total there have been nine tacit collusion cases in Panama. These cases involve wheat flour, medical oxygen, airlines, fuel, car insurance, fire insurance, rice, sugar and raw milk. Two cases remain pending in court, many years after CLICAC initiated them. Two tacit collusion cases decided

under the previous Law 29/96 provide examples of the case law - *wheat flour* and *medical oxygen* (on the latter, see the discussion on bid rigging below). In *wheat flour*, four wheat companies were condemned for absolute monopolistic practices.<sup>20</sup> They were found guilty of informally agreeing on the prices of wheat flour and exchanging information about prices (through the industry association) during the period November 1996 to September 1997. The practice increased the retail price of bread. All agreements between the firms were declared void and each firm was fined US\$100,000.00, the maximum allowed by Law 26/96.<sup>21</sup>

The case law from these two cases suggests that to determine that an absolute practice via tacit collusion exists, the plaintiff must establish: that the economic agents are competitors or potential competitors; and that the conduct restricts competition.<sup>22</sup> Successful prosecution (and both cases resulted in sanctions) requires proof of parallel behaviour and other circumstantial evidence such as:

- A market structure that facilitates collusion (absence of substitutes and high barriers to entry);
- Close collaboration among competitors (*e.g.* joint imports of inputs and offering similar commercial conditions);
- Contact between firms' officers or other key employees;
- Scarce fluctuation of prices;
- Different cost structures; and
- No variation of market shares over time.<sup>23</sup>

Successful prosecution of tacit collusion cases also requires the finding of a causal relationship between the evidence and the collusive practice. Moreover, it requires that firm behaviours can be explained only via tacit collusion.

Efficiency considerations were not contemplated in Law 29/96 for horizontal agreements. Law 29/96 considered all horizontal agreements *per se* illegal. It was simply assumed that, generally, these types of practices reduced total welfare, due to the loss of the surplus of consumers derived from a lower level of production that is not offset by an increase in the surplus of producers. Indeed, that is the case of hard-core cartels, which are generally associated with a welfare loss (total welfare or consumer welfare). As a consequence of the *per se* approach, the analysis focused on whether the object or the effect of the agreement was to prevent or restrict the competition between competitors. If the agreement prevented or restricted competition, there was a legal basis to file a complaint before the courts. The reforms of

2006 changed this by incorporating efficiency considerations in the legislation into what became Article 5 of the Law.

Government contracts and bid rigging have not been a significant part of ACODECO's competition work.<sup>24</sup> There have been several investigations where ACODECO has examined purchases by the state to ensure that participation by multiple actors is possible. Nevertheless, so far there has been only one case in which a bid rigging cartel was condemned by the courts – the aforementioned tacit collusion *medical oxygen* case.<sup>25</sup> In that case, two firms engaged in absolute anti-competitive practices by agreeing in advance on the manner in which they would present their bids a tender process. Both parties co-ordinated their bidding prices in eight different regions of the country so as to avoid competition, and each obtained four contracts. The firms were fined US\$100,000 each. The fine took into account particularly the size of the firms and the nature of the product (“an essential good to protect human health”).<sup>26</sup>

In addition to the oxygen case, ACODECO has received some denunciations for bid rigging from third parties. After considering them, ACODECO decided not to file complaints before the courts. One example is TACA, where ACODECO decided not to open an investigation for an alleged bid rigging in the tender process conducted by the Panamanian Institute of Sports (a state agency). The denunciation accused a single firm, TACA Airlines, of having an unfair advantage in the tender process due to its previous knowledge of the prices of travel agencies relative to its competitors in the tender. ACODECO considered that despite having an informational advantage, the conduct of the airline did not amount to an offence to the competition, since other firms were free to presents bids in the process.

A second, interesting example is *Aeroperlas*.<sup>27</sup> ACODECO initiated an investigation *ex officio* in the market of air travel tickets on a local route after receiving information that the two airlines that operate internal flights in Panama (*Air Panamá Regional S.A.* and *Aeroperlas Regional Panamá S.A.*) offered similar tariffs on that route. Moreover, increases in tariffs were allegedly synchronised. In press reports, the two airlines recognised that they did not compete in prices, but on quality of service, and that the increase in prices was due to the increase in operational costs and inflation. After the investigation, ACODECO found that the aeronautics authority (AAC) fixes the airlines tariffs, and that the tariff process promotes agreements between firms. The AAC employs a negotiated process where it meets the firms and agrees the tariffs with them. The adjustments of prices reflected increases in costs. Once it became aware of the tariff scheme, ACODECO decided not to file a complaint but instead to initiate a campaign of competition advocacy, including conversations with the AAC to study

whether the process of tariff fixing goes against competition principles. Particularly, ACODECO recommended that the negotiated process should be carried out separately with each of the firms.

An important change introduced by Law 45 was the creation of a leniency programme.<sup>28</sup> Leniency is an important tool used to fight cartels.<sup>29</sup> Over 50 jurisdictions worldwide have leniency programmes in place. Based on international best practices, Article 104 of the Law indicates:

Article 104. Sanctions. [...] When a company is the first contributor of elements of proof which make possible that the Authority eventually initiates actions before the courts for presumed accomplishment of absolute monopolistic practices, the Authority may to grant or to diminish the payment of any fine or sanction that, otherwise, had been imposed to the company, only if the economic agent is not the market leader and the instigator of the practice.

Accordingly, the requirements of the Leniency Programme are:

- Not to be a market leader;
- Not to be the instigator of the absolute practices; and
- To provide evidence that helps the Authority to commence an absolute monopolistic practices suit.

The benefits and guarantees for the economic agent are:

- The avoidance of the payment of a fine or sanction;
- The decrease in the payment of the fine or sanction; and
- Guarantee of confidentiality of the identity of the economic agent and the documents the economic agent contributes to the case.

The Agency has created a specific form that must be completed by the applicant in order to obtain the benefits of the leniency programme. The form requests detailed information on the applicant's identification, the participants of the absolute monopolistic practice, detailed description of the practice, the elements of proof that the applicant has, and the actions adopted prior to the presentation of the request.

To make the leniency programme effective in its implementation, ACODECO members have attended a training programme in Brazil.<sup>30</sup> The next steps in implementing the leniency regime shall include visiting various Chambers of Commerce to publicise it among Panamanian businesses and increasing overall public awareness of cartel conduct and the leniency programme.

Nevertheless, the leniency programme has not been used by any economic agent to date. Part of the reason for the lack of use of the leniency programme is due to structural features in Panamanian society. The country's culture does not lend itself to the leniency process. Many of the largest domestic firms are family firms. There are close social and family ties across a number of competitor firms. Many executives of various companies in the same industry may be distantly related through marriage or at least belong to the same social circle and social club. Thus, the social costs for participation in leniency seem to outweigh the economic costs of detection. The maximum fine of US\$1million has yet to be imposed in any cartel case, since no decisions have yet been made by the courts under the new law. This too may relate to the lack of leniency applicants. The penalty for being caught may not create sufficient incentives for firms to consider leniency.

There are no criminal sanctions for price fixing under the Law. However, there are potential criminal penalties for price fixing in public bids or public purchase contracts under the penal code (Article 364). To date, criminal penalties have not been used for price fixing-related offenses, however. Perhaps the uncertainty over potential criminal sanctions also may chill the use of leniency.

There are potential benefits for whistleblowers under the Law. Whistleblowers may receive 25 per cent of the corresponding fines under Article 104 of the Law. The 25 per cent bounty provision has not been used in practice, however. The Law does not contemplate reduced penalties for cartel participants other than to the leniency applicant.

Other horizontal agreements that are not hard-core cartels are considered "relative monopolistic practices." An example of a relative monopolistic practice given in the Law is boycotts (Article 16 No. 6). This is the only example in Article 16 of a horizontal relative practice explicitly mentioned. There has been relatively little development in the competition system relating to relative horizontal monopolistic practices. Efficiency is the sole criterion used to assess such practices. Thus, the Law allows horizontal co-operation agreements if their objective is to improve the efficiency in the market – that is, to: innovate; share technical knowledge; allow economic agents with little economic capacity to engage in collective negotiations; or prevent certain economic agents from leaving the market.

The Collaboration Guidelines provide greater detail regarding the types of permitted collaboration. ACODECO issued the Collaboration Guidelines with the specific aim of giving businesses some direction for evaluating whether their practices violate the Law. The Collaboration Guidelines refer to both absolute and relative practices. They clarify that an agreement is not

considered an absolute practice when its aim and practice is to: improve economic efficiency and does not damage the consumer; increase, save or improve the production and/or distribution of goods and services; or encourage the technical or economic progress that generates benefits for the consumers or the market.

In order to assess whether the agreements are a relative practice, the Collaboration Guidelines provide a number of guiding principles. The Guidelines note that the nature, purpose and effects of the agreement must be weighed in the analysis. Other important factors are: the duration of the agreement; the activities of the firms (particularly in R&D markets); the “reasonable necessity” of collaboration; and the possibility of alternative, less restrictive means for competition. Of special concern under the Collaboration Guidelines are: practices that limit the decision-making of a firm, affect the exercise of control, or affect its economic interests; agreements that may lead to collusion; or agreements for the exchange of information. Overall, ACODECO must balance the potential pro-competitive benefits against the potential harm to consumers. Indeed, in accordance with the Law, to consider a certain relative practice as unlawful, it is necessary to prove market power and that the practice is “unreasonable.”

The Collaboration Guidelines also indicate which agreements are likely to be viewed as pro-competitive – joint ventures, R&D agreements, and agreements for the use of a common facility.

## **2.2. Vertical Agreements**

Articles 15, 16, 17, 18 and 19 of the Law, complemented by Articles 14, 15, 16 and 17 of Decree 8-A, govern vertical agreements. The Panamanian competition system considers vertical agreements to be relative practices. Article 16 of the Law details these types of practices. A vertical arrangement is unlawful if its object or effect is to unreasonably (the Spanish term literally translates to “irrationally”) displace economic agents from the market, unreasonably impede their access to the market, or unreasonably confer exclusive advantages in favour of one or more of the economic agents. Exclusive distribution agreements are among the vertical agreements explicitly mentioned by the Law. The Law also mentions resale price maintenance (Article 16.2), tying (16.3), and predatory pricing (Article 16.8). There is also a general clause stating that the Law prohibits “every act that unreasonably damages or impedes the process of free economic competition and free concurrence in the production, processing, distribution, supply or commercialisation of goods and services” (Article 16 No. 9).



Unlike horizontal agreements, there are no presumptions established in the Law for vertical agreements. The Law indicates the types of cases in which vertical restraints are considered illegal “relative monopolistic practices.” Efficiency is the sole criterion for qualifying the legality of an agreement, determined by weighing the net effect of the conduct on the market.

In addition to the Law, ACODECO has developed the “Guidelines for the Analysis of Vertical Conducts” (Resolution No. A-30-09 of June 30, 2009) (Vertical Guidelines). The purpose of the Vertical Guidelines is to indicate the general approach that the Agency will adopt when analysing vertical restraints and to identify the cases in which vertical conduct contravenes the Law. The Vertical Guidelines are strongly influenced by the European Commission guidelines in their approach to vertical restraints.

The Vertical Guidelines are divided into seven parts, including the introduction as Part I. Part II defines vertical conduct as conduct carried out by economic agents that operate or concur in diverse stages of the production chain. The applicable analytical test is based upon total welfare – i.e. costs and benefits are balanced to safeguard the consumer interest and “generate a net gain for the society.”<sup>31</sup> The Vertical Guidelines also indicate that restrictions to inter-brand competition are deemed more dangerous than restrictions to intra-brand competition. Thus, the benefits to the first are given more weight in the analysis of the effect of a conduct. Following the general exception established in the Law (see below, section 2.5), ACODECO does not analyse vertical practices related to intellectual property rights and industrial design.

Part III of the Vertical Guidelines discusses the notion of a relevant market. It provides the criteria that ACODECO applies to determine the product market, including: demand and supply substitution; the aspects involved in the establishment of a geographical market, including various costs, relative prices and competition of imported goods; and the functional and timing dimensions of the relevant market. Parts IV and V describe the analysis of market power, both collective and individual. In this regard, the Guidelines consider entry barriers and rivalry in the analysis. Part VI describes a number of criteria for “orientation and evaluation of vertical restraints.” There are sections within Part VI dedicated to the double marginalisation problem,<sup>32</sup> the free riding problem,<sup>33</sup> and the negative and positive consequences of vertical restraints.

Finally, Part VII of the Guidelines analyse the most frequent vertical practices – exclusive distribution, single branding (including tying), limited distribution (including exclusive distribution, selective distribution, and

exclusive customer allocation), resale price maintenance, market partitioning, franchising, exclusive supply, market and other practices.

### **2.3. Abuse of Dominant Position or Monopolisation**

Article 16 of the Law details relative monopolistic practices. Relative practices under Article 16 can be either single firm or joint anti-competitive practices. The Law contemplates both exclusionary practices and exploitative practices (when such exploitative practices are exercised jointly; unilateral exploitative practices are not prohibited), indicating that they are prohibited when their object or effect is to unreasonably displace economic agents from the market, unreasonably impede their access to the market, or unreasonably confer exclusive advantages in favour of one or more economic agents. Among the cases explicitly mentioned by the Law are exclusive distribution, resale price maintenance, tying and bundling, refusal to supply, predation and, in general, “every act that unreasonably damages or impedes the process of free economic competition and free concurrence in the production, processing, distribution, supply or commercialisation of goods and services” (Article 16 No. 9). Moreover, Law 45 introduced the concept of “*Acaparamiento*,” which is best translated as “hoarding,” as relative monopolistic practice (Article 16 No. 8).<sup>34</sup> Any other type of commercial conduct that implies an exercise of market power (i.e. co-ordinated exploitative abuse or exclusionary abuse) may fit in the general clause of Article 16 related to relative monopolistic practices.

Article 17 requires the definition of a relevant market as a part of the dominance analysis.<sup>35</sup> According to Article 8 of the Law, the relevant market is determined with respect to a product or service (or a group of products or services) and its substitutes within the geographic area where the products and services are produced or sold. The Law accepts that in some circumstances, functionality and timing are also elements to be included in the definition of the relevant market.<sup>36</sup> Article 18 lists the elements considered in the relevant market determination. The most important are: the possibility of substitution (including both national and foreign products); various costs (including distribution costs, costs of raw materials, costs of substitutes, tariffs, etc.); geographic proximity of other markets and the possibility (including the costs) that consumers may switch to those markets; legal restrictions to gain access to other markets and/or products; and innovation.

In order to establish whether a firm has substantial market power within the relevant market, Article 19 of the Law sets out a number of factors, such as:

- The participation of the agent in that market and its ability to fix prices unilaterally or to restrict the output in the market, being impossible for competitors to countervail that ability;<sup>37</sup>
- The entry barriers to the relevant market;<sup>38</sup>
- The presence and market power of the competitors;<sup>39</sup>
- Access to raw materials; and
- The recent behaviour of the agent.

It is with the modifications of 2006 that collective market power was introduced into the Panamanian competition system. Although at present there are some preliminary (internal) investigations in the telecommunications sector where ACODECO is considering the applicability of that concept, none of those investigations have been formally opened, nor has a demand been presented before the courts.

Monopolisation has been decriminalised under Act 14 of 18 May 2007. Previously, ACODECO could, after it obtained a judicial pronouncement of a monopolistic practice, apply to the criminal prosecutor to initiate an investigation of the monopolistic practice.

There have been only a handful of recent cases of abuse of dominance. One of the latest examples is *Refinería Panamá*.<sup>40</sup> In 2009 ACODECO filed a complaint before the Court of the First Civil Circuit against Refinerías Panamá (“Refpan”), an oil company. ACODECO accused it of engaging in relative monopolistic practices in the gasoline and diesel markets. The legal basis for the demand was the general clause contained in Article 16 No. 9. ACODECO accused Refpan of abusing its dominant position in the despatch of gasoline and diesel by establishing a “quota” system, whereby Refpan unilaterally determined the order of dispatch of the lorries filled with its gasoline and oil. The previous system of dispatch was based upon a “first come first served” basis. The new system was allegedly based on the market participation of the haulage firm. However, with the new quota system Refpan would be benefiting Chevron, the firm vertically integrated with Refpan, and Delta, its main client. This relationship affected at least one competitor. To date there has been no judicial pronouncement in the case.

#### **2.4. Merger Control**

Articles 21 to 29 of the Law regulate merger control under the title of “Economic Concentrations.” In addition, ACODECO has developed the “Guidelines for the Control of Economic Concentrations” (Resolution No.

A-31-09 of 16 July 2009) (Merger Guidelines). The Law defines “economic concentration” as follows:

Article 21. Concept and Prohibition. It is considered economic concentration the merger, acquisition of control or any other act whereby firms, associations, shares, company’s rights, trust, commercial establishment or assets in general are grouped, either between suppliers or potential suppliers, between clients or potential clients, and other economic competitors or potential competitors amongst themselves. [...].

There are two elements to qualify an act as a concentration: (1) the association of two or more agents, and (2) control.<sup>41</sup> Article 18 of Decree 8-A clarifies that the concentration has effect from the moment one of the economic agents can exert control over the other.

Generally, the Law prohibits concentrations that “unreasonably affect” competition (free competition and free concurrence) in the market.<sup>42</sup> There are two exceptions to the prohibition established in Article 21. First, associations formed to develop a single project for a restricted period of time are not considered prohibited economic concentrations. Secondly, economic concentrations involving an agent that has incurred systematic losses and decreased market share, so that its permanence in the market is threatened, are also not prohibited. However, the agent must have sought buyers (apart from its competitors) with no success. This is more than just a failing firm defence – it is a flailing firm defence that, nonetheless, has yet to be used in practice.

Article 27 of the Law establishes three (rebuttable) presumptions that an economic concentration has an effect contrary to the Law:

1. Economic concentrations that confer or may confer, to the purchaser, the acquirer or the economic agent that results from the concentration, the power to unilaterally fix prices or to restrict substantially the supply or provision [of goods] in the relevant market, when there is no possibility that competitors may, effective or potentially, countervail that power;
2. Economic concentrations that have or may have as object to displace existing or potential competitors from the relevant market or to prevent their access to the relevant market; and
3. Economic concentrations that have as object or effect to substantially facilitate the exercise of prohibited monopolistic practices to the participants in the act or attempt [i.e. in the economic concentration].<sup>43</sup>

The Merger Guidelines establish that mergers will be approved only if they do not have a negative *net* effect on competition. That is, under the Merger Guidelines, ACODECO carries out a cost-benefit analysis in which it takes into account all the potential efficiencies for both producers and consumers. As with any other aspect of the Law, efficiency is the sole criterion of analysis. Efficiencies must be verifiable and quantifiable. Moreover, a standard of total welfare underpins the competitive assessment. Therefore, there is no requirement to transfer the efficiency gains to the consumer. ACODECO analyses and evaluates the effect in the market as a whole. In principle, ACODECO does not consider any political interest in the analysis of the merger, apart from the general exceptions contemplated in Article 3 of the Law (see below, section 2.5).

The Merger Guidelines provide the methodology for analysis of mergers. The methodology is based upon economic analysis and begins with the definition of the market affected by the concentration. The analysis contemplates a study of the market before and after the concentration. It includes an evaluation of the effects of the operation considering possible efficiencies or benefits. In order to measure the relative size of the firms and the intensity of competition, the Agency relies on indicators of concentration – specifically the Herfindahl-Hirschman Index (HHI) and the Index of Dominance (ID).<sup>44</sup> The ID is a transplant from the Mexican competition law system.<sup>45</sup> From this analysis of the HHI and ID, the Agency makes some conclusions about the consequences of the economic concentration. If the analysis notes a certain degree of concentration in the market,<sup>46</sup> the next step of the analysis is to examine other aspects of the market, such as: entry barriers; dynamics of competition (to determine whether the resulting organisation would have the capacity to unilaterally impose prices and conditions of competition in the market affected by the operation); and unilateral and co-ordinated effects.

The Law does not provide a system of mandatory notification of mergers.<sup>47</sup> Nonetheless, the Law includes an *optional* procedure of pre-notification filing and review, which has resulted in a handful of mergers each year for ACODECO's review (see Table 2). One reason for an optional filing system is to reduce the total number of notifications that ACODECO needs to review. With a mandatory filing regime and one in which the thresholds are too low, an agency may be overwhelmed by the number of filings. This can swamp an agency with merger notifications, most of which do not present a serious competition problem. The optional filing system allows ACODECO to focus its limited resources on investigations of conduct and on advocacy where there can be a greater return on its investment of resources.

Overall ACODECO seems satisfied with the voluntary reporting system. All mergers of significant economic impact have been brought on a voluntary basis to ACODECO. Given its current level of resources (see section 3.6), voluntary merger notification has some advantages. The parties benefit from the optional merger filing because it binds the Agency to its decision. Thus, once assessed, the Agency cannot initiate a judicial process in the courts against the merger. Another advantage to the parties is that the Agency must pronounce its decision within 60 days after obtaining all the data necessary to carry out the analysis of the merger; otherwise, the merger is approved. To date, ACODECO has not needed to use all of the 60 day period.

ACODECO obtains necessary information in several ways:

- From the proposed merging parties;
- From competitors;
- Via proprietary market research;
- Via interviews and consumer surveys;
- From associations, Chambers of Commerce, and other organisations related to the businesses, products and/or services involved;
- From general information and national statistics of available from government institutions such as the Comptroller General of the Republic, Ministry of Economy and Finance, Customs Agency, and Ministry of Farm Development;
- Via the web (including international statistics and information of similar cases).

The Agency cannot challenge a concentration that has already been assessed or approved under the pre-merger notification procedure, unless the information presented by the parties is incomplete or untruthful.

Mergers can still be undertaken even if the merger is considered anti-competitive by the Agency. Without court enforcement, ACODECO's decision is not binding, subject to a court ruling. The Agency, then, must file a complaint to the Third Court Superior of Justice (the court of first instance for mergers) to seek to break up the merged entity.

There is not a clear sense of the total merger activity within the country because ACODECO does not track merger activity in Panama. The mergers that ACODECO has analysed so far have been mainly local – i.e. national firms or international companies with commercial presence in Panama. Three mergers are noteworthy. In a 2002 case, CLICAC, ACODECO's

predecessor, rejected a merger in the beer industry. The *Compañía Cervecería Nacional S.A.* (controlled by *Bavaria S.A.*) intended to purchase *Cervecería Barú*, its main competitor in the market. After the merger, *Cervecería Nacional* would control approximately 97 per cent of the local beer market. CLICAC devoted great part of its analysis to the relevant product market (the geographic market was restricted to Panama). CLICAC concluded that different types of drinks are not substitutes amongst themselves, and especially that liquors are not substitutes for beers. CLICAC concluded that the relevant market included only the beer market. This was the main issue contended by the two merging parties, who presented claims for reconsideration to the authority on this aspect after the merger was rejected. The claims were later dismissed by CLICAC administratively. The merger applicants did not appeal the decision to the courts.<sup>48</sup>

In its economic analysis of the proposed beer merger, CLICAC considered a number of factors, such as the effect of fidelity, brand prices of raw materials, effect of transport costs and commercialisation costs, the effect on administrative costs and stocks. The merging parties could not demonstrate efficiency savings in any of these aspects. For instance, the merging parties did not demonstrate the alleged economies of scale and scope that they contended would occur as a consequence of the merger. These economies, it was claimed, would allow the merged entity to better compete with bigger international competitors, particularly after a free trade agreement between the United States and Central America. Conversely, CLICAC considered that economies of scale and scope would constitute a barrier to entry into the market. Overall, CLICAC considered that most of the efficiencies were not a net gain for society and did not improve consumer welfare. CLICAC deemed the efficiencies, if they existed, insufficient to make up for competitive concerns arising from the substantial market power the merged entity would obtain.

ACODECO also conditionally approved two mergers in the banking sector, one in 2006 (*HSBC/Banistmo*) and one in 2007 (*Banco General/Banco Continental*).<sup>49</sup> Neither case was decided in court. In the *HSBC/Banistmo* case, a horizontal merger, ACODECO conditioned its approval upon a requirement that for a two-year period, the merged firm would not apply penalty clauses for cancellations of residential mortgage loans. The competition concern was that the penalty clause limited competition in the market for residential loans. In *Banco General/Banco Continental*, also a horizontal merger, ACODECO evaluated relevant markets in active (e.g. commercial credit) and passive (e.g. savings deposits) banking services. It attached the following conditions to its approval: (1) elimination of penalty clauses for cancelled auto loans; (2) elimination of

penalty clauses for cancelled residential mortgages for a period of two years; (3) the merged bank would need to maintain, at the option on the consumer, two related forms of sale for cars - the sale of cars with a guaranteed mortgage and trust contracts for two years; and (4) elimination of a non-compete clause between the two firms. The competition concern regarding the penalty clauses was that the clauses limited competition in the market for residential loans. Similarly, ACODECO analysed that limits on forms of sale would result in limitations to competition. Finally, ACODECO viewed the idea that the seller and purchaser firms would not compete via a non-compete agreement as anti-competitive because the seller thereby would not re-enter the market.

Under the Law ACODECO has three years within which to challenge a consummated merger that was not notified. The Agency has undertaken three such investigations, in each case deciding not proceed with a challenge. These were: the merger of car distributors *Ricardo Pérez/Toyopan and TESA*, financial services merger *Banco Uno/Citi Bank*, and in the milk market *UHT "La Chiricana"/Refrescos Nacionales*. There has never been a post-merger divestment or a break up of a consummated merger.

There have been a number of mergers that ACODECO analysed but did not result in formal investigations due to the small market share of the merging entities (involving manufacturers and distributors of paintings). There was also a case related to the global transaction involving *Nestlé/Borden*. Although ACODECO opened a formal investigation, it decided to close the case without challenging it in court.

## 2.5. *General Exemptions and Special Norms*

Article 4 in Law 45 establishes exclusions to antitrust enforcement. The current exclusions previously existed as exclusions in Law 29. Article 4 indicates:

Article 4. Exclusions. [The following practices] are not considered monopolistic practices:

1. The labour collective conventions concluded by labour unions with an employer or group of employers to obtain better work conditions;
2. The exercise of intellectual property rights and industrial designs recognised by the law to their holders; those [rights] granted for certain period of time to the holders of copyrights for the exercise of their rights; and those [rights] granted to inventors for the exclusive use of their inventions.



The respective regulatory frameworks for these two types of exclusions are the “Collective Labour Agreements” within the Code of Labour of Panama, General Title II, Chapter 1, General Dispositions; and the Law of Copyright and other Intellectual Property Rights (Law No. 15 of 8 August 1994). Because of these exclusions, there have been no competition law cases related to these types of activities. If the situation implies collective labour agreements, the Ministry of Work and Labour Development deals with it; and if the situation is related to copyrights and other intellectual property (IP) rights, MICI addresses such issues. That is, the Law recognises that holders of an IP right have a monopoly of their particular IP right. MICI (specifically its Directorate of the Intellectual Property) determines whether the application for IPR is valid. The same courts that resolve antitrust cases also resolve IP violations. This blanket exemption from the competition law for the exercise of intellectual property rights is quite broad.

The exclusions under the Law are not directed to specific sectors. Rather, Law 45 excludes such activities because of their object or purpose. The objective of the collective labour agreements excluded under the Law is the improvement of labour conditions. On the other hand, IP rights are inspired by the social welfare and the public interest in protecting the rights of authors in their literary, didactic, scientific or artistic works, regardless of their sort, form of expression, merit, or purpose.

In addition to the exclusions described in Article 4, Law 45 establishes exclusions to mergers in Article 21, applying to firms that are in financial difficulty and associations formed to develop a single project for a restricted period of time (*see* section 2.4 above). Apart from these exclusions in Article 21, the Law does not include any additional exclusions for merger control.

There are no *de minimis* exclusions or sector-specific exemptions or exclusions. Therefore, competition law applies equally to private companies and state-owned companies. The applicability to state-owned companies can be found in Article 2 of the Law:

Article 2. Scope of Application. This Law will be applied to all economic agents, either natural or legal persons, private or state or municipal firms, industrial, commercial or professional institutions, lucrative or charity organisations, or to those who, by any other title, participate in the economic activity.

In some limited circumstances the Government (Executive) has the power to override the competition law. The Executive can temporarily regulate maximum retail or wholesale prices (and ACODECO is forced to abide by this Executive decision). The regime is set out in Articles 199 to 202 of the Law. The Executive decision can be introduced when some

restrictions to the efficient operation of the market are noticed, or in the event some generalised monopolistic conduct (carried out by one or several economic agents with substantial market power) imminently threatens consumers and competition. This Executive decision purports to protect consumer interests (Article 199).

There are, however, a number of requirements for this action by the Executive:

- The Executive can only regulate products whose applied import tariff exceeds 40 per cent *ad valorem* (Article 199). This requirement does not apply to hydrocarbons, products derivatives of crude oil (petroleum products) and necessities;
- The measure must be motivated and well-founded (Article 199);
- The Executive decides upon price regulation after a non-binding consultation with ACODECO (Article 200);
- Along with price regulation, the Executive must adopt the measures that it deems necessary to remove the market imperfection (Article 200).

The Executive measure is supposed to be transitory. It cannot last for more than a six-month period, but can be extended for equal periods if the circumstances that motivated the measure remain in place.

The regulation of prices is implemented by fixing the maximum wholesale sale price of the good (Article 201). However, depending on the market conditions, the retail price may also be fixed. The Law indicates that the price must be the lowest between (i) the international price of the good plus customs tariffs and (ii) the national price of the good. The fixed price must include a “reasonable global profit,” taking into account the characteristics of the product and the national market.<sup>50</sup> These powers under Article 201 are currently in effect in two sectors. A maximum price applies to gasoline and diesel fuel. Via a resolution of the National Office of the Secretary of Energy in consultation with ACODECO, the price is updated every 14 days. Similarly, Article 201 has been used to establish a maximum price for bottled gas in 25 pound containers. In both cases, the price is calculated for the City of Panama and is adjusted for costs of freight based on the distance to other parts of the country.

Finally, Article 3 of Law 45 creates an exception for activities of the State. In principle, the Law does not apply to economic activities that are constitutionally reserved for the State and not subject to a concession regime. Nonetheless, the State must ensure that its decisions and administrative acts comply with the principles of free competition and free

concurrency. State institutions can always request advice from ACODECO. While there is no explicit list of such exempted activities, overall they are few. Article 297 of the Panamanian Constitution reserves certain functions to the State, including the lottery, racetracks, casinos, slot machines, and bingo halls. These exemptions do not imply a complete lack of input by ACODECO, however.

Despite the general application of the principles of competition law to State activities, Article 3 establishes a strong exemption in favour of State acts motivated by *public interest*:

Article 3. Monopolies and official acts. [...] The Antitrust Law does not apply to any act, meeting, agreement, arrangement, or formula, or any other mechanism or modality promoted by the State with economic agents, when such a mechanism or modality is carried out with the aim of safeguarding the public interest. [...].

The Cabinet Council of the Republic of Panama (the President, Vice President and Ministers) must declare the public interest, and may request the opinion of the Advisory Board of ACODECO for this effect. This process allows the government to consider diverse objectives that may or may not be associated, directly or indirectly, with (or may be even contrary to) competition policy. The provisions of Article 3 have yet to be used. As a counterbalance, ACODECO is authorised to advocate for free economic competition and free concurrency.

## **2.6. Related Regimes**

### **2.6.1. Regulated Sectors**

At times, antitrust agencies may have an uneasy relationship with sector regulators. Regulators may see an antitrust agency as a potential threat for funding and prestige. This threat of competing regulators may cause a sector administrator to seek greater control (and more power and funding) over its regulated industry. The regulators might take steps to limit the role of an antitrust agency in that particular sector.

Concurrent powers with sector regulators may make it more difficult for antitrust agencies to create a competitive environment in regulated sectors. Remedies available and approaches to the creation of a competitive market may vary between sector regulators and antitrust agencies. The task may be even more difficult in dynamic markets where the market forces and regulations may evolve in ways that are not predictable, such as in telecommunications.<sup>51</sup>

The problem of inconsistent decisions regarding the same conduct when there is not an appropriate division of labour between sector regulators and antitrust authority may complicate efforts to create a more efficient competition system.<sup>52</sup> The Law attempts to address these concerns by mandating that ACODECO is the sole agency to address competition issues in regulated sectors, such as network industries, the aeronautical and securities sectors, and the banking sector.

Relationships between competition agencies and sector regulators are in part based upon a certain path dependency of past institutional inter-relationships. There was a sense in the early period of the various sector agencies (the late 1990s) that CLICAC was an invader onto their turf. This perception of the role of antitrust in regulated industries by sector regulators has improved over time, as ACODECO has been proactive to create a better institutional working relationship with sector regulators. More informal mechanisms have been facilitating ACODECO's institutional efforts. For example, some staff from ACODECO has migrated to the staff of sector agencies and vice versa, creating additional contact points across the agencies.

#### 2.6.1.1. Network Industries

Institutional reforms carried out in 2006 led to the restructuring of the regulatory agency for regulated sectors, then known as *Ente Regulador de los Servicios Públicos* (ERSP), and its replacement by the “National Authority of Public Services” (ASEP).<sup>53</sup> ASEP has jurisdiction over public services such as electricity, telecommunications, radio and television, water and sewerage.

The reforms also designated CLICAC, ACODECO's predecessor, giving it competence in competition law and policy in these sectors, including the powers to give a “favourable concept”, which is to approve general resolutions in aspects related to the defence of competition. Before the 2006 institutional reforms these sectors were subject to the exclusive jurisdiction of ERSP on monopolistic practice issues, since CLICAC had already competence in matters relating to economic concentration. This framework preceded Law 45 and included many competition-related issues. An example of sector regulation on competition issues was the definition of dominant position in the telecommunications market by ERSP in 1999, discussed in [Box 2](#). As a consequence of the pre-Law 45 legal framework, antitrust law had very little impact in network industries and only in minor areas not dealt with in the sector-specific laws.

### Box 2. Dominant Position in telecoms

***Ente Regulador de los Servicios Públicos* [public utilities agency regulator],  
Resolution JD-1334, 12 April 1999**

The public utilities agency regulator, ERSP (ASEP's predecessor), created conditions to be used in determining whether a concessionaire has a dominant position in telecommunications. The conditions were: (i) the service is offered under temporal exclusivity; or (ii) the concessionaire has a market share in the mobile phone market that exceeds the market share of its competitor by more than 15%; or (iii) the concessionaire offers any of the services detailed in the ERSP resolution if and only if its participation in the concentration coefficient is 25% or more and its participation in the HHI is 20% or more. The regulator makes the classification of dominant position once a year for each service. If the concessionaire is classified as dominant, it remains as such until a further change of the circumstances. In addition, the ERSP was authorised to request additional information beyond the normal information requested from telecommunications concessionaires and to carry out inspections or special audits to establish whether a dominant firm is acting against the public interest, abusing its competitors, or infringing the "fair, free and effective competition."

The resolution was specifically adopted to promote "low tariffs to end users", "to promote and guarantee the development of fair competition" and to avoid any infringements to competition law.

The legal framework of regulated sectors established that ASEP must:<sup>54</sup>

1. Promote competition and efficiency in the operations of public service in order to prevent possible monopolistic conduct, anti-competitive conduct, or discriminatory conduct in the companies that operate these public services. To this end ASEP dictates, by means of resolutions, the regulations that are required to maintain competition beneficial to public services. ASEP can issue regulations in regulated markets. The requirement for doing so is that it must first consult with ACODECO. ASEP will ask for the favourable guidance of ACODECO on the specific points of resolutions or regulations that impact possible monopolistic conduct, anti-competitive conduct or discriminatory conduct in public services;<sup>55</sup>
2. Assist ACODECO in investigations, help ACODECO to acquire background knowledge, and assist them in the verification of the possible monopolistic conduct, anti-competitive conduct, or discriminatory conduct on the part of the companies or organisations that serve the public;

3. Immediately send to ACODECO a detailed denunciation of any fact or conduct of regulated companies of which ASEP has knowledge that can affect competition, so that an ACODECO investigation can begin immediately; and
4. Recommend to ACODECO that requests for the adoption of precautionary measures before the competent courts in cases being investigated be done in a way that can be sustained in accordance with the dispositions of the Judicial Code and the effective legislation and within the competition system's framework.

Some of these functions had previously fallen within the purview of sector regulators. The following was incorporated by the competition reform of 2006 into Article 86 of the Antitrust Law as one of ACODECO's functions:

16. To investigate, assess and verify the commission of monopolistic, anti-competitive practices or discrimination by the companies or organisations that serve the public, in accordance with the present Law, and sector-specific regulations and laws applicable to the specific public service at issue. For this purposes, the Authority may ask for the support and the collaboration of the technical personnel of the National Authority of Public Services.<sup>56</sup>

This creates harmonisation of competition functions between ASEP and ACODECO. As a result of these reforms, inter-institutional collaboration between ASEP and ACODECO is now more frequent and better in terms of its quality. Relations have never been stronger between the two agencies. This new relationship has been confirmed, for example, in Article 9 of the Resolution of Cabinet No. 101 of August 23, 2009. This Resolution requested the Agency to review the conditions of competition in the market of electricity generation with the aim of establishing the existence of possible monopolistic practices, as well as to take corresponding measures according to the Law and its regulations if ACODECO deemed such measures necessary.<sup>57</sup> There have also been three meetings in 2010 between ASEP and ACODECO to strengthen co-ordination. ACODECO has placed significant attention on these meetings to encourage a strong dialogue and to help ASEP address competition concerns.

Telecommunications is a particularly important sector in the Panamanian economy. According to industry analysis, the Panamanian telecom market generated \$761 million in 2008. This amount is forecast to expand to more than \$1.1 billion by 2014.<sup>58</sup> Overall, the mobile telecommunications sector in Panama is highly competitive relative to the rest of Latin America. Perhaps as early as December 2010 there may be

mobile number portability. There is also significant competition in the market for international calls. Fixed line service is less competitive but increasingly less important to the overall telecommunications picture. Hence it is of no surprise that competition policy has played a key role in this sector.

Resolution No. 3134 of the Telecom Sector (discussed above in Box 2) defines a dominant position for services. This resolution focuses the analysis of a dominant position in situations where there might be substitutability. This focus on substitutability for dominance was suggested by the competition agency. Another example is Resolution AN No. 1630-Telco, of 21 April 2008. Applying competition law concepts, ASEP declared that the “telecommunication networks” and the “civil works that support them” on buildings, commercial properties and other sites, are common infrastructures and essential facilities for the telecommunication service. As such, they must be available to all concessionaires. By the same token, ASEP ordered the concessionaires to refrain from concluding contracts or reaching any other agreements with any person if the purpose is either the acquisition of exclusive rights to render services or the administration of the infrastructure with the ability to restrict access. According to the ASEP, the declaration and the order were necessary to protect the right to access to the telecommunication services and the right of consumers to choose the service provider. With this practice, ASEP is explicitly favouring competition intra-networks over facilities-based competition.<sup>59</sup>

#### 2.6.1.2. Aeronautics, Securities and Banking

The relationship with other sector regulators is not as strong as that with ASEP. The same principle of harmonisation that applies in network industries also applies to the aeronautical and securities sectors since the introduction of Law 45. However, inter-agency relations with the aeronautics regulator and securities regulator remain in nascent stages. For an example in the aeronautics sector, see the *Aeroperlas* case described in section 2.1 above.

The most important sector regulator is the banking agency (the “*Superintendencia de Bancos de Panamá*” or SBP), given the importance of the banking sector to the country. The Panamanian banking sector receives significant foreign investment and there is competition for consumer and commercial products. Nevertheless, SBP has been active in addressing all facets of competition in banking without strong co-ordination with ACODECO. For instance, SBP has undertaken various economic studies of the banking sector, including studies on banking competition and competitiveness in the banking sector. SBP has not undertaken a joint

economic study with ACODECO, even though the latter has investigated various competition issues in the sector and has had cases in this area in the merger context (see Section 3.4). There is also, as of 2008, a specific consumer protection function for SBP in financial services distinct from the general consumer protection function of ACODECO.

### Box 3. Clash of agencies (SBP and ACODECO)

**Eighth Circuit Civil Court of the First Judicial Circuit of Panama's province, Auto [sentence] No. 555, 16 April 2004 / First Superior Court of Justice [Court of Appeal], Appeal brought on grounds of violation of rights and liberties [Amparo], July 13, 2004 / Supreme Court, Appeal against decision of First Superior Court of Justice, October 13, 2004**

On April 16, 2004, the Eighth Circuit Court upheld an information request made by CLICAC (ACODECO's predecessor) to the Superintendency of Banks, the banking regulator. The request was made as part of an administrative investigation into the competitive behaviour of several banks. The circuit court ordered the Superintendency to give CLICAC information on sector-specific norms and regulations, referring to the requirements the banks demand from external auditors that audit the financial statements of their clients. The request also extended to the regulator's opinions, acts of supervision, guidelines and similar documents.

The Superintendency appealed the circuit court's decision, claiming that the decision infringed two constitutional rights that underpin the legal protection of bank secrecy. The Court of Appeal focused its judgement on one of the two, the alleged violation of due process of law (the Court held the second right does not confer an individual right enforceable in a court of law). It held that the information request did not refer to any of the central aspects of due process and was not arbitrary. In particular, the court affirmed that the duty of bank secrecy only extended to the regulator's actions in relation to individual clients of a bank (*i.e.*, the client-bank relationship), an aspect that CLICAC's request did not extend to. Therefore, the court dismissed the appeal.

The Superintendency filed a motion for review of the court's denial of appeal before the Supreme Court. The Superintendency argued that the Court of Appeal misunderstood the scope of the duty of bank secrecy, which was broader than only the client-bank relationship. The plenary session of the Supreme Court agreed with the reasoning of the Court of Appeal that there was no infringement of constitutional rights because the request did not extend to depositors' or individual clients' information. It ordered the regulator to provide the Commission with the information of the requirements the banks demand from external auditors to audit the financial statements of their clients. The Supreme Court also noted that the banking law specifically refers to the possibility of application of Competition law within an administrative process (*i.e.*, an investigation) carried out by the Commission. Therefore, the Supreme Court denied the motion for review and confirmed the decision.



Better integration and co-operation between the two agencies is still in a nascent stage. The increasing co-operation is reflected in the fact that when multinationals invest in Panama, they always meet with SBP to access the economic, trade, and political situation in the country, as well as the state of the judiciary. In addition, the Panamanian National Competitiveness Centre (CNC) has undertaken judicial training on banking regulatory matters. SBP does not include ACODECO in these discussions or in this training because SBP does not consider competition policy to be a distinct issue. An example of the nascent stage of this inter-agency relationship is in the area of bank mergers. ACODECO has the power to evaluate mergers in the banking industry, but these mergers require the concurrent approval of the SBP.<sup>60</sup> In recent years there have been several mergers in the sector. Joint oversight in the sector has produced some minor clashes with SBP, as illustrated in [Box 3](#).

Notwithstanding SBP's apparent resistance to the application of the competition law in its sector, it is seen as an effective regulator. Panama has not experienced a banking crisis since the Noriega crisis of 1987. The global financial crisis of recent years had little impact in Panama, apparently because of a well-designed and conservative set of policies applied by SBP.

### 2.6.2. *Unfair Competition*

Law 45 does not include norms applying to unfair competition. The specialist courts that preside over competition cases, which were created under this law, also preside over unfair competition cases. Article 124 of the Law establishes:

Article 124. Competence. Three courts of circuit of the civil branch are created in the First Judicial District of Panama, that will be denominated Courts Eighth, Ninth and Tenth of the First Judicial District of Panama; as well as a court of circuit in Colón. Additionally, a court of circuit of the civil branch is created in each of the provinces of Coclé, Chiriquí and Los Santos, which will be denominated Court Second of Coclé, Court Fourth of Chiriquí and Court Second of Los Santos, respectively. They have competence in its respective judicial districts. Only these courts will have the exclusive competence on the following issues:

[...]

2. Controversies that arise regarding, and/or as a result of, the application or interpretation of the present Law, in matters of monopoly and consumer protection;

[...]

5. Controversies regarding acts of unfair competition.

[...].

### 2.6.3. Consumer Protection

Since there is a natural linkage and complementarity between consumer protection and competition policy (both address malfunctions in the market), the Law also covers consumer protection. Its Title II has approximately 50 articles (Articles 32-83) dealing in great detail with various substantive and procedural aspects of consumer protection.

The Law declares that several activities are an *essential function* of the State (article 34): to guarantee that goods and services in the market fulfil all the quality, health, security and environmental standards; to provide education, advice and information to the consumer; to guarantee the access to effective means for legal defence; to guarantee the universally accepted rights of consumers; and to verify whether there is an adequate supply of necessities. Importantly, the Law also declares essential the encouragement and ruling of consumer associations. Fulfilling this latter mandate, there is a formal relationship between these consumer associations and ACODECO in Panama – one of the members of the ACODECO's Advisory Board (see below, section 3.1) is a representative of the consultative council of the consumer associations. Also, in addition to the sums allocated to ACODECO to cover the costs of educational campaigns for consumers, the annual budget includes a direct transference of money to consumer associations properly constituted and recognised by the corresponding authorities.<sup>61</sup> The amount to be transferred cannot exceed 10 per cent of the budget for education and publicity.

There are seven consumer associations formally constituted and recognised by the authorities.<sup>62</sup> Some of the most important include IPADECU and UNCUREPA.

The Law declares a broad range of consumers' rights (Article 35) – including a right to be protected from unhealthy and unsafe products; the right of access to a variety of products and services; the right to be treated fairly; and the right to be educated, informed and oriented; and suppliers' obligations (Article 36), including the need to provide sufficient and clear information about all of the characteristics of the product or service; ensure that foreign products have warranty information and warnings in Spanish; give instructions on the use and eventual risks of products; warn consumers about possible problems in promptly obtaining parts or accessories; issue an invoice for all transactions; issue a copy of a purchase agreement when this is written; make repairs, replacements, or reimbursements for defective products; inform consumers about prices and other conditions of sale; and deliver services without discrimination. It also regulates consumer credit transactions.

Aside from these provisions, the Law details issues involving contracts, guarantees and deceptive advertising. It establishes, for instance, that any renouncement of consumer rights included in a contract of adhesion is void by law; that there is an implicit guarantee of the normal functioning of the products; minimum conditions of guarantees; that publicity must be truthful and clearly indicate all the conditions related to the product or service; a presumption of novelty of the product, rebuttable by explicit previous declaration of the seller; and so forth.

ACODECO's National Direction of Consumer Protection, which has been internally divided into seven departments, applies the legal provisions of consumer protection under the Law. From its inception ACODECO has focused more on its consumer protection function than on competition work. Consumer protection has very high visibility in Panama, largely because ACODECO has taken significant steps to make the country aware of consumer protection issues and has expended significant resources into these efforts. For example, ACODECO designated 2009 the year of consumer protection education, with the slogan, "An informed consumer has power" ("*Un consumidor informado tiene poder*"). Also, on March 15 of each year, ACODECO celebrates the International Day of the Consumer. ACODECO's active consumer protection programme can also provide visibility for its competition policy function, which is less understood by consumers. ACODECO has sent staff on weekends to various neighbourhoods to raise awareness of consumer protection issues.

There are benefits to the focus on consumer protection for competition policy. A number of competition investigations have been brought to the attention of ACODECO from consumer protection related work. Moreover, the consumer protection function seems to provide legitimacy and power to the competition function of ACODECO. Conversely, an increased enforcement of competition policy would benefit consumer protection.

The National Direction of Consumer Protection spends much of its time handling informal inquiries from consumers and businesses. In addition, the Law establishes two administrative procedures (administrative conciliation and formal complaints) and one jurisdictional procedure (see more details below, section 3.2).<sup>63</sup> Article 82 entitles both ACODECO and consumer associations to initiate or intervene in both administrative and judicial procedures.

Tables 3 and 4 herein below summarise the main descriptive statistics in consumer protection cases.

Table 3. Statistics on consumer protection denounces (I)

Denunciations in Administrative Reconciliation Process				
Period	Received	Amount in \$	Resolved in favour of the consumer	Amount in \$
May-Dec 2006	411	12,179,558.55	295	6,491,667.74
Jan-Dec 2007	603	18,412,400.74	385	10,975,226.85
Jan-Dec 2008	670	38,624,764.55	287	11,813,584.52
Jan-Dec 2009	745	41,713,131.59	335	16,662,374.27
Jan-May 2010	479	28,344,899.01	212	9,304,239.97

Source: ACODECO, *Reporte Estadístico Quejas Recibidas y Resultados*, Departamento de Conciliación Diciembre 2009 (January 2010).

Table 4. Statistics on consumer protection denounces (II)

Denunciations in Formal Complaints Process ('Quejas')				
Period	Received	Amount in \$	Resolved in favour of the consumer	Amount in \$
May-Dec 2006	827	420,871.59	470	200,603.96
Jan-Dec 2007	1,532	671,980.16	1,157	486,449.81
Jan-Dec 2008	1,238	602,652.17	1,077	492,740.99
Jan-Dec 2009	1,316	632,050.27	1,162	521,148.01
Jan-May 2010	663	319,698.63	694	307,364.06

Source: ACODECO, *Reporte Estadístico Quejas Recibidas y Resultados*, Departamento de Decisión de Quejas Mayo 2010 (June 2010).

Most ACODECO efforts focus on law enforcement of consumer protection issues. The maximum fine for violation of consumer protection norms is US\$25,000. If the violation affects or may affect human health, the maximum fine is US\$50,000, apart from other civil and criminal sanctions that may apply (Article 104).

### 3. Institutional Aspects

#### 3.1. The Authority

As noted in Section 1, the agency responsible for the application and enforcement of the competition under the Law is ACODECO. ACODECO is an independent administrative agency in the exercise of its functions. It is autonomous from other parts of the government to determine its own internal structure. The Agency is subject to the control of the General

Comptroller of the Republic. ACODECO does not have the ability to introduce legislation, but can do so through MICI.

ACODECO is directed and legally represented by an Administrator. This is a change from the previous Law 29/96, which provided for three commissioners with overlapping terms. The creation of a single, centralised decision-making administrator reduced the time necessary to make decisions. The Administrator has a term of seven years, which can be extended once, for an additional seven years. The Executive appoints the Administrator. The National Assembly then ratifies this appointment. As an independent agency, it is the Administrator, on behalf of ACODECO, who appoints staff. The current Administrator is Pedro Meilán.

The Administrator is ACODECO's legal representative and is responsible for implementation of ACODECO's policies. As such, he is in charge of relations with other government departments – especially MICI. He sets the budget; determines salaries and wages; appoints officials; and applies disciplinary measures. He also approves programmes for consumer protection advocacy and publicity and promotes programmes regarding technology, education, and information exchange.

In addition to the Administrator, the Law establishes two national directors – one in charge of competition policy and the other in charge of consumer protection – and several administrative and technical units. The competition portion of ACODECO is led by the National Director of Free Competition (hereinafter the “Director of Competition”). The current Director of Competition is Oscar García Cardoze.

The National Direction of Free Competition has three departments: the Department of Competition Investigation (legal division), the Department of Information of Prices and Verification (DIPREV), and the Department of Analysis and Study of the Markets (economic division), whose Chief of the Department serves as the Agency's chief economist. The current Chief of the Department of Competition Investigation is Clarisa Araúz. The current Chief of the Department of information of prices and verification is Diosa Barahona. The current Chief of the Department of Analysis and Study of the Markets is Manuel De Almeida. The economic division mainly prepares and presents studies on the functioning of markets in order to detect distortions in the economy that affect consumers. It also carries out economic reports for investigations and trials. The legal division gives legal support in all procedures. DIPREV surveys prices, verifies prices on medicines and gathers statistics.

There is also an Advisory Council that assists the Administrator. The Advisory Council is composed of five members from different public sector

institutions and consumer organisations, as well as a General Secretary. The members of the Council are:

1. The Minister of Commerce and Industry or his delegate, who acts as President of the Council;
2. The Minister of Economy and Finance, or his delegate;
3. The Minister of Health;
4. One representative of the Advisory Council of the consumers associations;
5. One representative of the unions or business associations.

The Administrator participates in the meetings of the Council but in an *ex officio* role. He also acts as General Secretary of the Council. The Council mainly makes recommendations: it recommends policies and actions to protect consumers' rights; it suggests the undertaking of technical reports or market studies; and it may propose actions or mechanisms to promote participation of economic agents in the market, among other things.

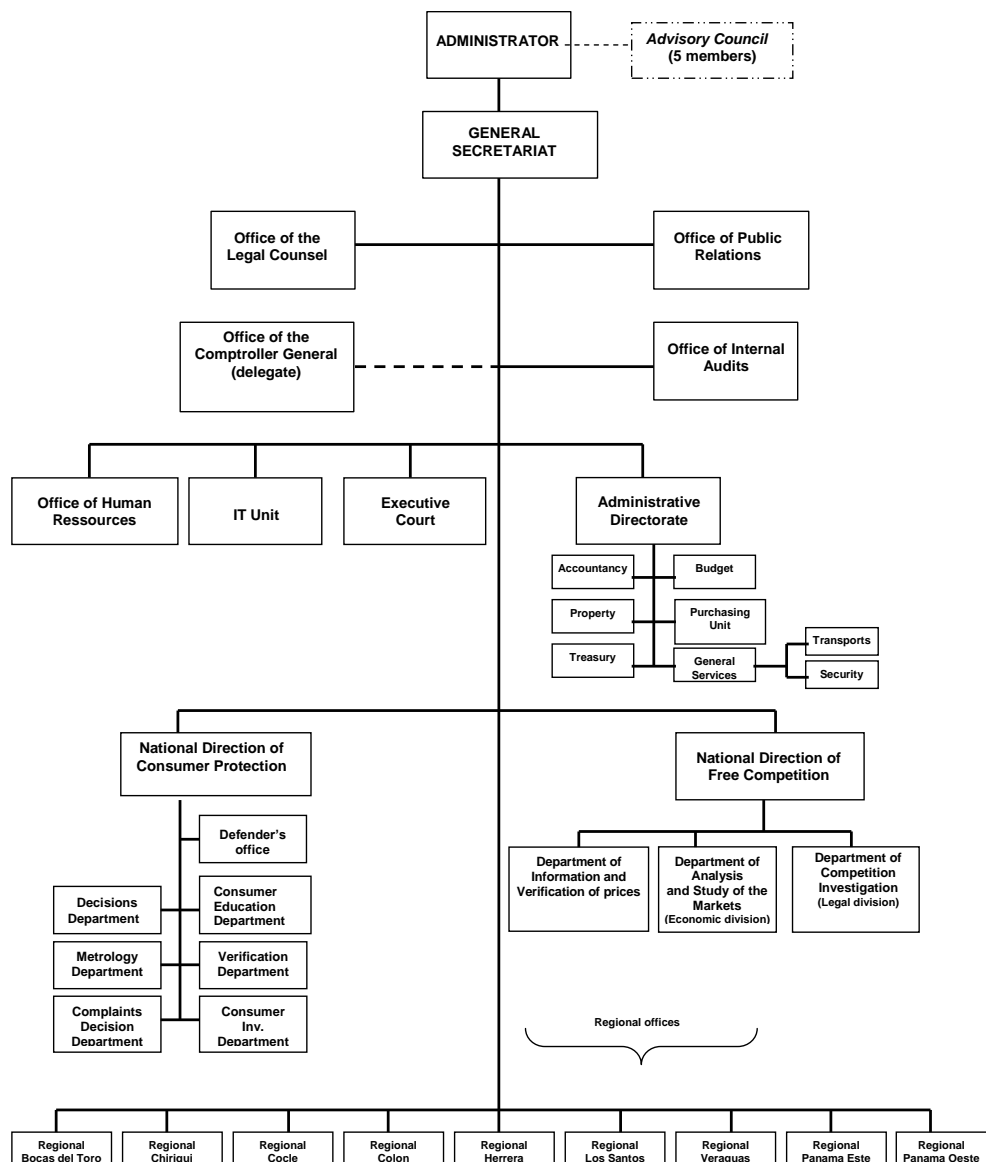
ACODECO has also nine regional offices. Despite the fact that, from a competition law perspective, this is an unusual feature for a small country like Panama, the offices fulfil an important role from the consumer protection viewpoint. In fact, most of their functions are related with ACODECO's duties in this area (mentioned above, in section 2.6.3). Amongst the functions more related to competition law, the regional offices execute the programmes implemented nationally; gather information and means of proof; carry out studies, analysis and investigations of economic agents that have been denounced; and execute judicial orders.

Figure 1 shows ACODECO's organisation chart, specific to competition policy.

The Law details the functions of the Agency. Article 86 enumerates 19 functions, including the determination and execution of general policies; the investigation and sanction of anti-competitive conduct; competition advocacy; the issuance of guidelines; the supervision of consumer organisations; etc.

Better legal business planning by firms requires a certain level of guidance and transparency from an antitrust agency. In their relationships with antitrust agencies, business entities and their counsel want to understand the enforcement priorities of the Agency and other issues, such as the determining factors that explain why agencies decide to undertake or not undertake enforcement decisions.

Figure 1. ACODECO's organisation chart



Source: ACODECO's website. [www.acodeco.gob.pa](http://www.acodeco.gob.pa)

Transparency includes making public enforcement standards and procedures, as well as the broader issue of the decision-making framework of the Agency on various substantive antitrust issues. Transparency also includes agencies releasing studies in which agency staff use confidential information to undertake meta-analysis of how certain kinds of claims and situations play out in case analysis before the Agency, even if it does not result in a decision.

ACODECO has encouraged transparency of its activities. It has a very thorough website ([www.acodeco.gob.pa](http://www.acodeco.gob.pa)) with links to the law, guidelines, decrees, studies, and publications. It also includes publications of statistics kept for economic monitoring.

### **3.2. Procedures and Remedies**

#### **3.2.1. Administrative Procedure**

Law 45, Law 38 of 2000 on administrative procedures, and the Judicial Code create the norms for the publication of decisions, issuance of guidelines, and availability of independent examination or appeal. There are three administrative procedures established in the Law – the procedure for the establishment of an economic concentration (Article 110); the administrative conciliation procedure in case a consumer files a complaint (Articles 111 to 114); and the procedure for the decision of formal complaints filed by consumers (Articles 115 to 123). Only the first one directly refers to competition.

In practice, administrative procedures for competition cases go through the following steps:

- The complaint received or the action initiated by the Agency is registered in a book by the Secretariat of the National Direction of Free Competition. The Secretariat assigns the complaint a consecutive number (entry number) that is also the number of the file.
- The Director of Competition designates case officers (both a lawyer and economist, although sometimes two lawyers and two economists) and sends instructions to the Chiefs of the Departments of Competition Investigation (chief lawyer) and Analysis and Study of the Markets (chief economist) (hereinafter collectively the Chiefs of Departments) for the purpose of taking the proceedings forward.
- The case officers initiate the preliminary analysis. They access public information in order to contextualise and inform the



preliminary investigation. The case officers write a preliminary report, which may be revised by the Chiefs of Departments. The Chiefs of Departments then send the report to the Director of Competition for approval.

- The Director of Competition must resolve any disparities between the legal and economic analysis in the preliminary report. The preliminary report is then finalised. At that time, the Director of Competition must decide whether or not to begin a formal investigation.
- If the Director of Competition decides to close the investigation at this stage, the file is closed. If there is a complainant in the case, ACODECO sends a note to the complainant informing it of the decision, signed by the Director of Competition.
- If the Director decides to initiate a formal investigation, the case officer prepares the resolution that commences the investigation. The resolution is sent to the Chiefs of Departments for potential revision. Then it is sent to the Director of Competition, who obtains the necessary signatures for the resolution. Finally, the resolution is returned to the case officer to be placed in the file.
- The case officers agree on the strategy for conducting the investigation and discuss it with the Chiefs of Departments.
- The Chiefs of Departments and the case officers meet with the Director of Competition to consider the need to request judicial authorisation to conduct a dawn raid (“*diligencia de prueba*”). The Director of Competition gives instructions to the Chiefs of Departments on this matter.
- The Chiefs of Departments and/or the Director of Competition instruct the case officers on the need to request authorisation for the dawn raid. The case officer prepares the judicial request, which is again reviewed by the Chiefs of Departments. The Chief of the Department of Competition Investigation (or whoever the Director of Competition designates signs the request), is responsible for presenting the request to the court. The legal officer is the person who is designated to appear in court.
- If the Court does not authorise the dawn raid, the case officers and the Director of Competition consider whether it is possible to correct the aspects of the request that caused the judge to deny it. If it is not possible to revise the request, ACODECO evaluates whether to continue the investigation.<sup>64</sup> If the Director of

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Competition decides not to continue an investigation, ACODECO closes the case file.

- If the court grants the request for authorisation, the case officers, the Chiefs of Departments, and the Director of Competition organise the dawn raid. If other civil servants are required, the Director of Competition will make the necessary requests. After the Director of Competition approves all the aspects of the raid, he holds an organisational meeting for the participants, which the Director chairs. The case officers clarify the legal and economic aspects of the due diligence to be undertaken in the dawn raid and co-ordinate the various logistical matters, such as transportation, the support of the police, the use of information technology, and any another relevant tools. In almost all cases the case team from ACODECO that participates in the dawn raid is accompanied by police. However, the police usually do not have an active role in the raid. They were active on only one occasion, in which the business was not co-operative and resisted supplying the requested information.
- ACODECO carries out the inspection of documents on the firm's premises. If the firm does not co-operate, ACODECO, with the support of the police, enforces the search warrant granted by the court. After the raid (or if the firm co-operates), the dawn raid investigation team gathers all the information mentioned in the court order. The investigation team writes a detailed deed of inventory that it finds as part of the raid and takes as evidence. The civil servant in charge of the raid signs the deed, as do the witnesses (if there are any), and the parties (if they wish to do so). The person in charge of the raid gives a copy of the deed to the affected parties, if so requested.
- The group co-ordinator gives the file of the raid to the legal case officer. A summary of the findings of the due diligence is sent to the Chiefs of Departments, but not kept in the file (it is only kept for internal use).
- The secretary of the Department of Competition Investigation maintains the case file, which can only be accessed by the parties under investigation. The secretary also creates a registry for use of the file by third parties. Article 102 of Law 45 establishes that all the business information that ACODECO receives will not be divulged without expressed authorisation of the parties that have supplied the information, unless they be requested to do so by the *Ministerio Público* (the institution which encompasses the General Prosecutor of the Nation) or by a court.

- The case officers write a preliminary version of the final report of the case after they gather and analyse all of the proof in the investigation. The case officers send this version of the report to the Chiefs of Departments for their comments and later to the Director of Competition for comments and suggested revisions.
- The Director of Competition approves the final report and presents it to the Administrator. The Administrator makes the final decision as to whether or not to file a complaint before the court of first instance. If the Administrator makes the decision not to file the complaint, ACODECO closes the case. Since 2007 ACODECO has conducted a total of nine dawn raids: two in 2007, three in 2008, one in 2009 and three through the first half of 2010.
- The order to file the complaint is sent to the legal case officer. The legal case officer writes up the complaint in co-ordination with the other members of the investigation team. The preliminary version of the complaint is sent to the Chiefs of Departments for their comments. Once reviewed, the draft is sent to the Director of Competition for approval, and then to the Administrator.
- Finally, ACODECO files the complaint before the court of first instance. This marks the end of the administrative process and the beginning of the judicial process. Approximately one third of dawn raids have resulted in court cases.

Private parties can file complaints independently or request to be included as a party in a process initiated by the Authority. However, there have only been a few private complaints so far. One reason for the limited use of private rights may be in the advantages that the Agency has relative to private parties regarding acquisition of evidence. ACODECO can obtain evidence during the investigation stage (which is administrative in nature) that private parties cannot (see above), and hence be better prepared for the judicial process.

If a third party files a complaint with ACODECO, the Agency may decide not to take any action. In this case, the Director of Competition sets forth his reasons for taking no action in a resolution, which can be appealed to the Administrator. The decision of the Administrator, in turn, can be appealed to the Third Chamber of the Supreme Court for an annulment.

The Panamanian Constitution of 2004 has made class actions easier under Article 290. Private class action suits are possible under Article 129 of Law 45. Class actions are available only for final consumers who have been damaged. They are not available for indirect purchasers.<sup>65</sup> The State is not a consumer under the Law because it is not an economic agent.<sup>66</sup>

On ten occasions litigants have attempted to form a class for a class action, but only one class action has been certified in Panama. It came about as a result of a CLICAC investigation of cellular and long distance service provided by telecom provider Cable & Wireless.<sup>67</sup> The court sanctioned Cable & Wireless US\$10,000 and forced the company to compensate its customers who had been affected by excessive pricing charged by Cable & Wireless and its competitor BellSouth. Essentially, this was a competition case recast as a consumer protection case in order to better take advantage of available class action rules.

### 3.2.2. *The role of courts*

All cases that ACODECO decides, whether about absolute or relative monopolistic practices or mergers, must be resolved in the courts. Nevertheless, once the courts have determined that there has been a monopolistic absolute or relative practice, ACODECO is responsible for remedies. See more details on remedies in section 3.2.3 below, and details on judicial review on section 4 below.

In cases in which the plaintiff is a private party requesting civil damages (such as in collusion), the court may decide compensation. Also, a criminal court may apply criminal penalties if the action of the firm falls within one of the conducts described in the penal code. However, civil and criminal actions are independent.

In merger control, there is no involvement of the courts in the (voluntary) notification proceedings in case of economic concentrations, although they can rule on any challenges. As seen, these are only dealt with by ACODECO. A third party may challenge a merger via court.

### 3.2.3. *Remedies*

Number 15 of Article 96 of the Law provides that after the Director of Competition submits a technical report to the Administrator, the Administrator must approve or reject the suspension, correction or provisional suppression of acts that affect competition.

Article 29 of the Law indicates the corrective measures that the Agency may adopt after a merger investigation (either submitted via voluntary pre-merger notification or a merger not submitted to such notification) in case the operation is determined to be illegal. These corrective measures are: to (*ex ante*) impose conditions to the transaction; to (*ex post*) order partial or total divestiture of the new entity; and to require end of the control or the suppression of the acts, when appropriate. The transaction can be denied

completely *ex ante*. See the discussion in section 2.4 above for more details in this regard. In conduct cases behavioural remedies may be extensive, but ACODECO believes that under the Law it cannot impose structural remedies, which they believe are meant specifically for mergers. Numeral 14 of Article 96 suggests that structural remedies may be possible in conduct cases, but this has never been done in practice.

Article 105 of the Law indicates that the Agency can mandate the provisional suspension of any act or practice that it considers a violation of the Law.<sup>68</sup> The Agency has five working days (following the notification of the resolution that orders the suspension) to file a complaint against the economic agent that violated the act or practice. If the complaint is not filed within five days, the suspension of the act is automatically relieved. After filing the complaint, the Agency must again request that the court suspend the act or prohibited practice. The order of suspension decreed by the Agency can later be revoked or modified by the civil judge, at the request of any affected party. There has been only one case decided under article 105 to date (a case involving a brewery that negotiated exclusive agreements to exclude its competitor).

Finally, Article 104 refers to the sanctions and fines in the following terms:

Article 104. Sanctions. The infractions to the Law will be sanctioned in the following way:

1. For absolute monopolistic practices, with a fine of up to a million balboas (B/.1,000,000.00)<sup>69</sup>.
2. For relative monopolistic practices, a fine of up to two hundred fifty thousand balboas (B/.250,000.00).
3. For commercial practices that affect consumer protection, the sanction ranges from reprimands to fines of twenty-five thousand balboas (B/.25,000.00).
4. For infractions for which specific sanction does not exist, with a fine of up to ten thousand balboas (B/.10,000.00).
5. Violation on the part of producers of norms of consumer protection, which affects or may affect the human health, with fines of up to fifty thousand balboas (B/.50.000.00), notwithstanding the corresponding civil or criminal responsibilities.[...].

The level of fines has been significantly increased relative to the previous level of fines under Article 112 of Law 29. Under Law 29, fines were a maximum of US\$100,000 for absolute abuses and US\$5,000 to US\$50,000 for relative abuses. Law 45 does not contemplate adjustment of penalties for inflation. Panama has had a low and stable inflation generally, which makes recalculating the fines less pressing.

When compared to other regulatory agencies, such as ASEP, fines for conduct in contravention of Law 45 are low. However, cases take much longer to be concluded by sector regulators and are administrative rather than judicial in nature. It remains an untested question whether fines for behaviour that violates both sector regulation and competition law are cumulative.

Under the Law, there is no minimum fine for anti-competitive conduct. The lack of a minimum fine allows for discretion on the part of ACODECO to take action against small, localised cartels. For example, in the market for local artisanal bread in Aguadulces, a fine of more than a few thousand dollars would have eliminated all competition for what was a naked price-fixing cartel on the part of the local bakers. Competition advocacy efforts have been carried out ending price-fixing behaviour.

ACODECO promulgates an administrative resolution where it imposes financial penalties on the affected parties. Economic agents found to be in violation of the law have ten working days from the date of the final decision (where the parties are notified of the penalties against them) with which to pay their fine without being subject to additional measures to enforce collection. In terms of the impact of substantive antitrust enforcement, 100 per cent of the penalties imposed by ACODECO for both absolute and relative practices have been paid by firms found to be in violation of the law.

If an economic agent does not pay its fine, management of the case file passes for collection to the so-called “Execution Court” of ACODECO. The Court Executor can arrive at an adjustment for payments from collections by means of seizing assets or bank accounts. In 2009 the Court Executor collected US\$487,044.00 in fines from a total number of 1,197 case files. The chief of the Execution Court is the Judge Executor.

The competition law system allows for both settlements and informal agreements (Article 86 No. 15).<sup>70</sup> The settlement can be agreed between the parties at any stage during the judicial procedure. They must be agreed by the *Procuraduría General de la Nación* and the Cabinet Council, and approved by the respective judge. The use of settlements, in principle, speeds up the resolution of competition cases, as indicated by the Panamanian experience. The business community supports the use of

settlements. So far, there has been one settlement in 2009 and two settlements in 2010 (car insurance, fire insurance). However, there are five pending settlements that will eventually imply judicial agreements with 25 firms in five proceedings. Besides the settlements, the law also authorises the Administrator to accept commitments from the investigated parties through the use of informal agreements (outside the judicial process). This faculty, however, has never been used.

The Law contemplates the possibility of treble damages in Article 30:

Article 30. Sentences. In all cases of infraction to the prohibitions contained in this Title, the courts of justice created by this Law, by means of civil action interposed by the offended, may impose in his favour or in favour of the affected by the condemnation to the agent economic, the equivalent to three times the amount of the damages caused as a result of the illicit act, besides the costs that have been caused.

However, the competent court may limit the amount of the condemnation to the amount of the damages, or to reduce it to twice the amount of such damages, in both cases also imposing the costs, when it is verified that the economic agent has acted without bad faith or intention to cause damage.

The Article does not grant to the Agency the power to seek treble damages on behalf of the victim(s) of anti-competitive conduct. The Agency can only seek a judicial declaration of the existence of a monopolistic practice. Although judges may impose treble damages, such damages in a competition case have only been imposed once so far.

Overall, the emerging sense globally is that treble damages have a deterrent effect on anti-competitive conduct.<sup>71</sup> Regarding the deterrent effect of fines in case of horizontal collusion, CLICAC, in Technical Note No. 29, indicated that the examples of the US, Panama and Venezuela confirms that the use of treble damages only has deterrent capability if the probability of being detected is equal or exceeds 1/3. Intuition suggests that, as in the US, the real probability is, from a Becker optimal deterrence framework standpoint,<sup>72</sup> below the required value. According to the Agency, the available sanctions in Panama are insufficient to deter cartels because they do not surpass the benefits that the economic agents obtained from the absolute monopolistic practices. For multinational firms, even the much higher level of fines under the current Law may not be enough of a deterrent. For many local Panamanian firms, on the other hand, the potential sanctions are not insubstantial.

### 3.3. Enforcement Statistics: Conduct Cases

As of 1 May, 2010, there were a total of nine open competition cases in the Eighth and Ninth judicial circuits. Three of the cases were initiated under Law 29, in 2001 and 2002. The remainder of the open cases are more recent; Law 45 applies in each of these more recent cases. A summary of the enforcement activity in conduct cases is shown in [Table 5](#).

Table 5. **Enforcement statistics of cases**  
 (“cases” includes both formal investigations and judicial cases)

	Horizontal Agreements <sup>73</sup>	Vertical Agreements <sup>74</sup>	Abuses of Dominance <sup>75</sup>	
<b>2009</b>	No. of cases	7	5	1
	Sanctions or orders requested.	1	0	1
	Sanctions or orders imposed	0	0	0
	Total sanctions imposed	0	0	0
<b>2008</b>	No. of cases	11	4	1
	Sanctions or orders requested.	2		1
	Sanctions or orders imposed	2		
	Total sanctions imposed	(\$100,000 each) \$200,000		
<b>2007</b>	No. of cases	5	5	1
	Sanctions or orders requested.	3		
	Sanctions or orders imposed			
	Total sanctions imposed			
<b>2006</b>	No. of cases	2	1	3
	Sanctions or orders requested.			
	Sanctions or orders imposed	4		
	Total sanctions imposed	(\$100,000 each) \$400,000		
<b>2005</b>	No. of cases		<i>No information available</i>	
	Sanctions or orders requested.	2		
	Sanctions or orders imposed	6		
	Total sanctions imposed	(\$100,000 each) \$600,000		

Source: ACODECO.

As Table 5 illustrates, in the past five years ACODECO initiated seven absolute cases in 2009, eleven cases in 2008, five cases in 2007, and two cases in each of 2006 and 2005. In the area of vertical agreements, ACODECO initiated five cases in 2009, four cases in 2008, five cases in 2007, and one case in 2006. In the area of abuse of dominance cases, there was one case in 2009, one case in 2008, one case in 2007, and three cases in 2006.



In terms of the amount of time and resources devoted to particular types of cases, the easier cases to administer are those that involve absolute practices. Relative practices tend to take longer, because they are more complex. Merger cases are more highly variable, as some mergers are relatively simple that only require a preliminary evaluation. More complex mergers can require many more hours (within the limit of 60 days in case of a voluntary ex ante notification; see section 2.4).

### 3.4. *Enforcement Statistics: Mergers*

There have been relatively few merger investigations in the past few years. There were six merger cases in 2009, two cases in 2008, two cases in 2007, and three in 2006.

Table 6. **Enforcement statistics in merger control**

Year	Number of Merger Notifications
2009	6
2008	2
2007	2
2006	3
2005	[Info. not available]

Source: ACODECO.

### 3.5. *Investigative Powers*

Article 98 of the Law grants the Director of Competition the ability to obtain from public or private institutions and natural or legal persons, documents, testimony and other information, through any type of evidence, within the ambit of its competences. It can also request the relevant court to adopt precautionary measures, secure proof and to approve the use of dawn raids, within the ambit of administrative investigations.

Likewise, Article 99 establishes that the Director of Competition has the authority to summon alleged perpetrators, witnesses, complainant firms, experts and others within the ambit of his powers in administrative investigations. The Director of Competition may also carry out competition audits of market participants in order to prevent the recurrence of monopolistic practices and to verify compliance with a settlement. These powers permit ACODECO to carry out comprehensive market investigations or sector studies. These studies are analogous to, for example, those of the United Kingdom's Competition Commission.

### 3.6. *Human and Budgetary Resources*

The initial endowment of human resources of CLICAC in 1997 has affected the Agency's subsequent development. Some of the people who joined CLICAC in 1997 were new hires to the Agency. These were professionals with university degrees who were paid competitive government wages. Some professionals arrived from other regulatory agencies and others came from universities. Others joined CLICAC from the Office of Price Regulation which had been eliminated with the enactment of Law 29/96. Many of these people had substantial experience in their field but lacked professional qualifications.

A third group arrived with consumer protection experience. Since the creation of CLICAC, staffing in the competition policy area has focused on university trained lawyers and economists.

ACODECO heavily focuses its budgetary resources towards its consumer protection function. Therefore, ACODECO resources devoted to competition policy are relatively small in a comparative context, as the tables below illustrate.

ACODECO has some degree of discretion on how much of its financial resources to assign to each of its competition and consumer protection functions, such as money for training. However, this discretion does not extend to the ability to add personnel to the competition side. Any broader set of additional funding for the competition function is a product of additional budgetary expenditures from the National Assembly. An increase or shift in budgetary resources requires the cooperation of the Ministry of Economy and Finance for successful passage of the increase in the National Assembly.

Table 7. **ACODECO Budget relative to the total Panamanian central government budget**

Year	ACODECO Modified Budget (in millions of Balboas)	Central Government Budget (in millions of Balboas)	Proportion of Total Government Expenditures
2005	3.916186	3,643.2	0.11%
2006	5.410900	4,445.9	0.12%
2007	5.213830	4,691.6	0.11%
2008	6.418430	5,731.9	0.11%
2009	7.161406	7,092.3	0.10%

Source: ACODECO.

Table 8. **Total ACODECO employees relative to the total Panamanian central government number of employees**

Year	ACODECO Employees	Central Government Employees	Proportion of Total Government Employees
2005	234	103,694	0.23%
2006	237	107,378	0.22%
2007	338	111,394	0.30%
2008	419	115,120	0.36%
2009 <sup>a</sup>	464	115,197	0.40%

Source: ACODECO.

Table 9. **ACODECO competition policy employees relative to the total**

Year	Directorate of Competition Employees (a)	Central Government Employees	Proportion of Total Government Employees
2005	N/A	103,694	N/A
2006	45	107,378	0.04%
2007	43	111,394	0.04%
2008	44	115,120	0.04%
2009 <sup>a</sup>	47	115,197	0.04%

(a) In 2005 there was no Competition Directorate. The Directorate was created by ACODECO structure. The numbers for the Competition Directorate include personnel of the three departments of the Competition Directorate. This total is misleading as most of the personnel belongs to DIPREV (Department of Information and Verification of Prices: price surveys), and does not have direct linkage to competition matters.

Source: ACODECO.

Table 7 illustrates that ACODECO's total budget has been rather constant in terms of total government expenditures, with a fluctuation between .10 per cent and .12 per cent of total government expenditures. Table 8 shows that the number of employees overall, and the percentage growth of ACODECO employees, has been significant from 2005-2009. In 2005 there were 234 ACODECO employees (.23 per cent of central government employees). The total number of employees grew marginally to 237 in 2006 (.22 per cent of government employees), the year National Assembly passed Law 45. However, after passage of Law 45, growth has been significant to 338 employees in 2007 (.30 per cent of central government employees), 419 employees (.36 per cent of central government employees) in 2008 and 464 employees (.40 per cent of central government

employees) in 2009. However, as [Table 9](#) illustrates, ACODECO's gains in the total number of employees (and particularly in terms of professionals) have not affected the Competition Directorate. The Competition Directorate had 45 employees in 2006, 43 employees in 2007, 44 employees in 2008, and 47 employees in 2009. Throughout the period, the percentage of employees as to the total number of central government employees remained constant at .04 per cent. Despite the more than doubling of the size of ACODECO, there were no additional resources expended upon the Competition Directorate that focus on the competition mission. Of the 47 employees in the competition policy group, six lawyers work in the Department of Competition Investigation and six economists work in the Department of Analysis and Study of the Markets. This Department also has two financial analysts. The rest are the personnel of DIPREV (Department of Information and Verification of Prices).

The competition staff performs its work well, given its significant resource constraints. The Agency is well regarded by the practitioner community, academics and the press for good case selection, professionalism and technical competence.

Gustavo Paredes, as the then head of CLICAC, wrote in 2005 for a mission to the OECD Latin American Competition Forum:

Without a doubt, [funding] is the most important challenge facing our organisation. The competition authority is largely financed by transfers of funds from the central government budget, and it is highly difficult to obtain financing at a level at which the administrative outlays might match the size of the economy and the possible instances of illegal conduct that should be investigated.<sup>76</sup>

In sum, the situation regarding funding for competition work has not improved much since 2005 in number of employees. However, there have been investments in equipment and training.

While there was some international financial support in the early years of the Agency, this support has not been constant. The lack of overall funding has limited the Agency's ability to undertake certain investigations because of the lack of human resources. It also has impacted its ability to undertake as much competition advocacy work as the Agency would like to do.

ACODECO, in comparison to other competition agencies in Latin America, has had significant continuity in terms of agency leadership and staff, which has helped to create an institutional memory. The current Administrator has been with the Agency since 2006 and one of his predecessors was with the Agency for eight years. The Director of

Competition has been with the Agency since 1997. The Chief Economist has also been with the Agency for the same amount of time as the Director.

ACODECO is blessed with a dynamic leadership. The current Administrator is well known to the Panamanian public, primarily through his consumer protection work. He seems to be well respected by the business community and by other government agencies. The Director is very knowledgeable about Panama's industrial organisation. He is also well respected by the judiciary and private litigants who focus on competition matters.

The salaries at ACODECO are comparable to peer government agencies in Panama, but ACODECO's competition resources as an agency are less than those of peer Panamanian regulatory agencies. Most hiring is done laterally. ACODECO only hires exceptional university interns upon their graduation.

At the more junior level there is more turnover, particularly amongst lawyers. Lawyers have tended to leave the Agency either for the private sector or for other similarly paying government agencies. Replacements do not come exclusively or even primarily from university interns in ACODECO. Among the current staff of junior lawyers, many joined ACODECO from various prosecutors' offices.

Among the competition economists, many joined ACODECO laterally from other regulatory agencies or from the private sector. The movement amongst economists has been more limited, arguably due to the relatively good salaries offered by ACODECO for economics professionals in comparison to other government posts. Also, there are fewer private sector opportunities for economists.

ACODECO has made efforts to integrate and train new employees to improve their technical knowledge and skills in competition law and economics. The Director pairs new lawyers and economists with more senior members on particular cases to build institutional capabilities. The relationship between economists and lawyers seems to be particularly strong. This may be due in part to the small size of the Agency. However, this is also a reflection of the efforts of ACODECO's leadership to keep the two groups integrated. Office morale seems to be high. There is an annual football game in the office and socialisation, particularly among the junior staff, is common after work. Many of the junior staffers are highly motivated and eager to learn about the latest developments in competition law and economics.

The Agency has been the recipient of some relatively recent antitrust technical assistance and capacity building. Members of ACODECO have

benefited from attendance at the “*Escuela Iberoamericana de Defensa de la Competencia*,” which is run by Spain’s competition agency, the “*Comisión Nacional de Competencia*.” On occasion, ACODECO has asked for and received help from the US Department of Justice and Federal Trade Commission on both general issues and on particular matters.

In terms of the adequacy of financial resources, there are some cases that cannot be undertaken because there are only fourteen professionals in the competition group. In other situations, small cases are not worth initiating formally through the court system because it would result in bankruptcy of the very small firms. Instead, ACODECO has informally asked these smaller firms to stop their local cartels.<sup>77</sup>

#### 4. Judicial Review

Judges with responsibility for adjudicating on competition matters also adjudicate on other areas. The lowest-level court for ACODECO’s purposes is at the municipal level, where the Agency brings consumer protection cases. The next level of the judiciary is the circuit level, where the Agency first brings absolute and relative conduct cases. At the next level is the Third Superior Tribunal, the appeals court for absolute and relative conduct cases. It is also the court of first instance for merger review. Cases before the Third Superior Tribunal may be appealed to the Supreme Court.

There is both an administrative and judicial element to competition law enforcement. At the first stage is administrative enforcement. There is only one way in which courts may review the preliminary administrative decisions of ACODECO – a process initiated by an interested party either in the Third Chamber of the Supreme Court (“Full Administrative Jurisdiction”) or in the Civil Courts of Commerce (review of decisions on precautionary measures).

Law 45 created significant revisions to the system of judicial review. One of the main insights learned from practice under the previous Law 29 was the need to obtain faster decisions on cases involving monopolistic practices, as well as to obtain greater sanctions. Thus, the Law introduced a new disposition limiting the length of hearings on issues of proof in competition cases. These hearings must be completed within forty-five days, with the possibility of an additional thirty days at most.

As a result of this change, cases proceed much more quickly under the revised competition system than under Law 29. Because there is, in general, significant frustration with the judicial system in Panama, these reforms in Law 45 have enhanced ACODECO’s public standing. This result has been viewed favourably by the practitioner community and by academics in the

country. As the vast majority of cases involve absolute practices, the shorter time for evidentiary hearings has not presented problems. The system for faster evidentiary hearings has yet to be tested in areas of more complex relative practices.

The ability of the judges who hear competition cases to understand competition law and economics is highly variable. There are a few judges who seem to know the issues quite well and who are well regarded for their decision-making. Other judges have made less progress in their knowledge of the core issues of competition law and economics. Occasionally, ACODECO (and previously CLICAC) have worked to train judges on basic competition issues. These efforts have met with some success. In other areas of complex economic regulation, such as in banking and finance, there have been formal courses offered for judges as well. Anecdotally, these courses seem to have had some positive impact. However, because of resource constraints, judicial training by ACODECO has not been as frequent or as comprehensive as would be optimal for competition cases.

The Superior Tribunal<sup>78</sup> has had issued a number of decisions since the creation of the Panamanian competition system. Some decisions are from cases involving the Agency and its predecessor, while others are a function of private rights. [Table 10](#) below provides a summary of all decided cases. Of the twelve total cases before the Tribunal, seven have involved absolute conduct, while one case consisted of both absolute and relative conduct claims.

## 5. Competition Advocacy

Through competition advocacy antitrust agencies may intervene either *ex ante* or *ex post* to shape regulation, promote the organisation of a market-oriented economic system and reduce government restraints on competition. Competition advocacy by antitrust agencies creates a counterweight to domestic interest groups. “Antitrust is not a cure for rent seeking, but it can make important contributions to addressing the problem.”<sup>79</sup> Competition advocacy can be focused directly towards government restraints when an antitrust agency makes submissions in administrative rule makings or through the legislative process to safeguard the competitive process. Competition advocacy takes a number of forms, including direct advocacy, constituency development, research, and studies.<sup>80</sup> These policies enable antitrust agencies to advocate against anti-competitive laws and regulations by unmasking their societal costs.<sup>81</sup>

Table 10. Decisions of the Superior Tribunal

Year	Number of Cases	Case Type (In terms of Anti-Competitive Practice)
1997	0	N/A
1998	0	N/A
1999	0	N/A
2000	0	N/A
2001	1 (Unión Nacional de Consumidores y Usuarios de la República de Panamá (UNCUREPA) v. Unión Nacional de Corredores de Aduana de Panamá)	Absolute
2002	0	N/A
2003	2 (1. UNCUREPA v. Asociación Panameña de Crédito; 2. CLICAC and others v. Gold Mills de Panamá and others)	1. Relative; 2. Absolute
2004	2 (1. CLICAC v. Macello, S.A. and others; 2. CLICAC v. Aceti-Oxigeno, S.A. and others)	1. Absolute; 2. Absolute
2005	0	N/A
2006	0	N/A
2007	3 (1. UNCUREPA v. Petrolera Nacional S.A. and others; 2. Raiza Katiana Royo v. Media World Corp; 3. Vima J. Ayala F. v. Cable Onda, S.A.)	1. Absolute; 2. Relative; 3. Relative
2008	2 (1. ACODECO and others v. Aeronautica de Medellin Consolidada, S.A. and others; 2. Servicios y Estacion Delta S.A. v. Petroles Delta, S.A.)	1. Absolute and Relative; 2. Relative
2009	2 (1. ACODECO and others v. Boyd Barcenas, S.A. and others; 2. ACODECO and others v. Boyd Barcenas, S.A. and others)	1. Absolute; 2. Absolute

Source: Third Superior Tribunal.

The Law recognises the ability of ACODECO to undertake competition advocacy. According to Article 86(5) of the Law, ACODECO may provide advice to economic agents, associations, educational institutions, charity organisations, and other civil and public sector organisations on matters of competition.<sup>82</sup> The Agency also may recommend the adoption or modification of any proceeding or requirement in a sector of the national economy, and undertake studies to promote competition. The competition advocacy programme has been significant and has had a positive impact. Since 2006, ACODECO has undertaken eighteen technical studies (see [Appendix I](#)). These studies have included a wide variety of topics, such as: barriers to entry distribution, supermarkets, international trade, professional



services and transport; milk; telecommunications; rice; pay television; and petroleum.

Beyond studies, ACODECO also assists other agencies on pro-competitive regulation. When a state agency has doubts regarding its compliance with competition rules, ACODECO sends a consultative note with technical and legal information advising on how to avoid anti-competitive regulation. The state agency may then adopt or modify any proceeding or requirement based on ACODECO's input.

As part of its competition advocacy programme, ACODECO regularly attends consultative committees of ministries as an observer. If ACODECO determines that the competition law is being violated, it advises the participants on ways to avoid the infraction and how to stop any ongoing restrictive practices. For instance, the Ministry of Farming Development (MIDA) meets once a month with producers. ACODECO is invited to participate as an observer in these meetings.

Another example of competition advocacy was ACODECO's involvement in the decision of the State to confirm the participation of a new harbour operator to manage containers in the port in the Pacific part of the Panama Canal. The Agency suggested the inclusion of a "condition of participation" in the official prequalification document for the tender process. The document indicated:

Within the framework of this Act witnessed by notary public, the State will be able to disqualify the proposals that could imply the hiring of monopolies, prohibited economic concentrations or any other act that can restrict, diminish, damage, prevent or harm the free competition and the free economic concurrence, creating distortions in the market, therefore it will not predescribe the accidental proposals of natural or legal people, partnerships or associations that administer or own facilities of ports or Terminals in the area of the Pacific of Panama.

According to this condition of participation, the State was authorised to disqualify the participation of certain economic agents that were already present in the market. While considering the compatibility of the tender law with competition law and competition principles, the Agency concluded that according to constitutional and legal norms, in the tender process, the State must consider only the alternatives that involved the participation of *new* economic agents in the market. With ACODECO's intervention, the State guaranteed that a new operator would be granted the concession to undertake the management service of load in containers in the Pacific of Panama. This new entry increased competition in the market. A different conclusion (i.e., granting the concession to a firm already present in the

Panamanian Pacific coast) would have violated the principles of free competition and free concurrence under the Law. Moreover, that situation would have led to a less efficient outcome.

Recent theoretical work suggests that problems within a production chain can have a significant impact on output reduction if inputs enter the production chain in a complementary fashion.<sup>83</sup> For example, an increase in productivity in the transportation sector will raise the output in capital equipment. This, in turn, will raise output in the transportation sector.<sup>84</sup> Where there is a weak link, this has dynamic effects on economic development. In this regard, critical infrastructure is an area of great need for competition advocacy.

Issues of competition that come up in the trade and investment context can be significant. Trade barriers are relatively small in Panama. In terms of the ability of foreign firms to enter the Panamanian market, the largest problems are ones of transportation infrastructure and trade facilitation (including customs). Reduced bureaucratic red tape also would improve Panama's relative market openness. There does not seem to be enough knowledge of the specific rules of Panama's trade agreements and their competitive effects to be able to take advantage of the opportunities that these agreements provide.

Panama has problems of anti-competitive government regulation in a number of regulated sectors. Nevertheless, barriers in Panama are lower than in most of Central America. There are still a few sectors in which there are foreign ownership restrictions of some sort, but there are few such restrictions. Similarly, there are some sectors in which there are laws that govern labour issues (percentage of employees that must be Panamanian). Panama allows for easy repatriation of corporate profits, making it relatively more competitive than some neighbouring countries.

The largest competitiveness problem with regards to government regulation seems to be an overly complex bureaucracy. Also, freight transportation is relatively expensive in Panama, although public transportation is cheap.

ACODECO and MICI have a good working relationship. MICI seeks ACODECO's help to reduce regulatory barriers such as critical infrastructure. It also asks for advice from ACODECO on competition policy provisions within trade agreements.

Overall, even with these successes, competition advocacy has had limited visibility to the public overall. The lack of exposure of competition issues has limited ACODECO's ability to make a larger pro-competitive economic impact with its advocacy work. Moreover, the lack of a linkage

between ACODECO's advocacy efforts and the creation of pro-competitive regulation has resulted in the lack of awareness of senior political figures in the competition mission of ACODECO. ACODECO lacks a strong political base at the highest levels of government. The lack of a senior champion in the current or previous administration who links ACODECO's efforts to country competitiveness and economic development limits ACODECO's ability to garner greater funding for competition enforcement. The lack of a champion also limits the ability of senior government officials to protect ACODECO against special interests who are threatened by the Agency's pro-competitive advocacy work.

Part of the problem of convincing the public of the importance of competition is the lack of university-level training on competition issues for the broader population involved in business. There are no university courses at the undergraduate level, either in industrial organisation or in competition law. Some classes in both law and economics at the Panamanian universities contain modules on competition issues. Typically current or former ACODECO staff teaches these classes, as do the relatively few law specialists in competition.

Opportunities for students to learn about the Panamanian competition system through internships in the competition policy part of ACODECO are limited. ACODECO has concerns about direct involvement by interns in competition matters because of issues regarding potential disclosure of confidential information. Interns have worked only in the monitoring group that is not related to competition policy but that is housed within the competition policy branch of ACODECO. Most interns do not leverage their internships into full-time opportunities in competition policy. As noted in Section 3.6 above, in the legal division new hires tend to be ones with prosecutorial experience. There is less hiring in the economics division than the legal division of the Agency's competition group.

ACODECO is moderately active in its public advocacy function in terms of speeches on competition policy. Relative to its efforts in consumer protection (The Administrator of ACODECO hosts a daily television show on consumer protection issues), competition advocacy is less visible to the public. ACODECO has a significant web presence providing important information to the public. It has begun to roll out efforts to educate business associations on the leniency programme and cartel enforcement. The members of the press most knowledgeable about business issues are informed regularly about competition policy developments.

## 6. International Aspects

The Law explicitly contemplates several international issues in its application.

### 6.1. *Market Definition*

Article 18 of the Law and Decree 8-A that regulates the Law establish the elements to take into account in the definition of the relevant market. They explicitly indicate that the various costs that must be taken into account to define the relevant market include costs incurred in foreign jurisdictions. Both the Law and the Decree also indicate that foreign products or services may be substitutes for local products or services. Panama is a small economy that is open to trade. Where there are not trade barriers, competition may be fierce in the Panamanian market.

Transparency in the market is a factor taken into account in the determination of potential and actual barriers to entry. ACODECO analyses existing foreign regulations. Unclear conditions regarding market participation, legislation, and/or institutions may affect the entrance of new competitors to the market. ACODECO evaluates this mix of factors to determine supply substitutability of the product or service within the definition of the relevant market.

Imports of similar goods and services are also taken into account. Import tariffs and any other CIF cost are considered to determine if the imported good is a real substitute for the national good. This analysis is used for the determination of the relevant market in both monopolistic practices and mergers.

### 6.2. *International Commerce*

The Agency does not play any role in the regulation of international trade under the Law. Before the creation of ACODECO, Law 29/96 vested CLICAC with the duty to protect local producers against unfair trade practices. CLICAC or any affected party could request a court of law to adopt antidumping measures or subsidies or recommend to the Cabinet the adoption of safeguards. Under the current legal scheme, these trade functions have been transferred to MICI. ACODECO implements the provisions in the trade agreements where there are competition policy chapters.

### **6.3. *Discrimination***

Neither the Law nor ACODECO discriminate between national and foreign companies. The State generally does not engage in discriminatory practices. All firms must obey the Law and pay the same taxes, regardless of their nationality.

Nevertheless, in many cases various Panamanian laws provide certain advantages and/or fiscal incentives of another nature to foreign companies in order to stimulate investment in the country. For example, there are incentives in the free zones of processing, free zones of petroleum, and the free zone of Colón. Moreover, the government has granted incentives for call centres, assembly plants, and multinational firms that do business in specific zones of the country.

If any country applies a commercial measure against Panama that violates international treaties (for example, the WTO Agreements), Panama may undertake retaliatory measures against companies of that country that do business in Panama. For example, the Panamanian government may prohibit participation of these companies in tender processes in Panama.

### **6.4. *International Participation and Co-operation Agreements***

ACODECO is active in a number of international forums. For instance, it has been involved in the OECD-IDB Latin American Competition Forum, the OECD Global Forum on Competition and the ICN. Panama hosted the sixth Latin American Competition Forum meeting in 2008. Because of funding issues, not as many members of ACODECO attend the OECD and ICN as the Agency would like to send. ACODECO has not been involved with activities in private sector competition policy forums such as the Fordham Competition Law Institute (both its annual fall conference and various training programmes), ABA Antitrust Section or the IBA Antitrust Section.

Additionally, to date ACODECO has signed six co-operation agreements with competition agencies: El Salvador, Costa Rica, Nicaragua, Puerto Rico, Colombia and Peru. These agreements focus on co-operation in investigations and information exchanges, although all but the Puerto Rican agreement also include language regarding technical assistance. In addition, there is an ongoing regional project with the Central American antitrust agencies, financed by the Inter-American Development Bank, which aims to provide training, consultancy, sector-specific studies, and enhancement of other types of co-operation among the agencies.

Co-operation with the signatories of these agreements has been gradual. It has developed primarily through consultations between the agencies, which communicate mainly through email. On occasion, videoconferences have been set up to help clarify issues that text alone cannot resolve. Confidentiality is guaranteed in all cases. ACODECO only provides information as part of inter-agency co-operation if ACODECO considers the information to be non-confidential.

The bilateral co-operation agreements facilitate the extra-territorial application of the Law. However, as seen, a co-operation agreement is not required to apply the Law when the conduct has effects on Panamanian territory (Article 2 of the Law), even if that conduct has been carried out abroad. There have been no cases that apply the extra-territorial provision of the Law. Specific to cartels, ACODECO has yet to prosecute an economic agent based outside of its jurisdiction for a cartel offense. However, it has conducted investigations of multinationals involved in international cartels.

A potential future problem may arise in the market of purchase and sale of electricity. Panama will interconnect its electric system with Central America and Colombia. Once this regime is in place, there may be situations in which purchases and sales of energy made in Central America or Colombia have an impact on local competition. There will be at least a problem of market definition – should this be defined locally or broader? In the latter case, should ACODECO apply national competitions laws or a regional norm? Indeed, the same situation may arise in Central American countries and Colombia. There have been calls for regulatory harmonisation in the region in this area and generally within competition policy. These issues have yet to be resolved.

## 7. Conclusions and Recommendations

1. In general, ACODECO has managed to perform quite well given scarce resources and limited government support. Practitioners and the business community hold ACODECO's competition team in high regard, as do the members of the judiciary who focus on competition issues.
2. Competition policy has little visibility in the country, however, either within other parts of government or among the general population. Efforts to explain what competition is and why it matters have had limited success. As a result, Panama lacks a robust competition culture. However, ACODECO is well positioned to improve the competition culture within the country given its significant successes in the area of consumer protection activities and through the media attention this

attracts. The public understands consumer protection more readily than competition policy. Undoubtedly, a successful competition policy requires a better-informed population. ACODECO can leverage its success in consumer protection to raise the profile of competition policy

3. The lack of competition culture at the level of the general population also exists among many technocrats, as well as within the broad business community. For example, there are no specific courses in industrial organisation and competition law at the Panamanian universities, although some classes on business and business law incorporate discussion of Law 45. This deficiency has limited overall knowledge of the subject within Panama and specialisation among practitioners. It also limits the development of the successive generations of agency staff and leadership. Finally, this lack of awareness suggests that many in the business community do not consider competition issues as part of their risk/reward analysis of doing business.
4. Panama's open economy alongside its highly concentrated markets has prompted a general perception within Panama that cartels do not exist and that there are no serious competition problems. In other areas, regulators and the legislature do not quite understand the cost of anti-competitive government regulation. The Agency needs to spend more time on advocacy work and should initiate some high impact cases in the non-tradable sectors where anti-competitive practices have a much bigger public impact. ACODECO also needs to take the same excellent marketing efforts that have made consumer protection so successful and apply them to competition advocacy. Although ACODECO's competition advocacy technical studies are good, they lack the necessary public visibility to promote a competition culture. In this sense, the technical studies have not had sufficient impact in the media and at the highest levels of government in terms of both raising the profile of competition policy and making it a policy priority. To move competition policy further up the political agenda, ACODECO needs to make the case for competition as a tool for enhancing country competitiveness and economic development.
5. In this sense, competition advocacy must be targeted to various constituency groups in government and the private sector. Other measures worth considering for raising political awareness of competition policy could include establishing training programmes for members of the National Assembly and the media, as well as an internship programme for university journalism students.

6. Given the Agency's limited resources, case selection has been relatively effective. ACODECO eschews bringing large numbers of cases of marginal value in favour of a few cases that are strong both on the facts and on the law. Given the competition problems in Panama, however, particularly in the area of cartels, ACODECO brings too few cases. This is in large part a function of inadequate resources. The cartels cases brought have focused on a number of high profile sectors, such as basic foodstuffs. These cartel cases provide an opportunity for ACODECO to demonstrate the importance of competition to the general public.
7. The Law, which is the product of recent modification, does not warrant any significant amendment at this point given that competition case law and practice are still developing. A number of issues stand out for potential long term modification, however. The first is the issue of group boycotts. Notably, whether or not group boycotts should be recast as a clear absolute monopolistic practice (i.e. an object restriction) as opposed to a relative practice (i.e. an effects-based restriction).
8. Another issue is whether to alter the merger notification system from a voluntary system to a mandatory one. Such a change would only make sense if there was a sufficiently high notification threshold. Based on the perceived current level of merger frequency in the country, however, there does not seem to be a need to create a mandatory merger notification system. Other Latin American countries, most notably Chile, have voluntary merger notification systems. The consensus view from the interviews conducted for this report was that a mandatory merger notification system is not necessary given the administrative costs that such a system would create. The introduction of a mandatory notification system for mergers should be reassessed once ACODECO's competition enforcement resources are increased, to ensure an effective ex ante review of structural changes in local markets.
9. A third area of potential change would be to raise the level of civil penalties for violations of the law, particularly for absolute practices. Thus far, courts have not applied the maximum penalties established in the Law. However, amending the Law to raise the level of fines (particularly for absolute practices) in the short term is probably premature. Unfortunately, the effective deterrent level of fines is still unclear. There is no experience with maximum fines because all fines have been based on infractions under Law 29/96 rather than Law 45/07. It seems clear, however, that the fines actually levied to date for engaging in cartel conduct have been too low to act as a deterrent. In other areas of law where there are high levels of fines, companies that have been fined have lobbied members of the National Assembly and others in government about what they viewed as "excessive" fines.



ACODECO's ability to better deter cartel activities will be in part a political process to generate support from other parts of government for high fines for absolute practices.

10. The fourth issue relates to tacit collusion. Unlike in Europe and the United States, parallel behaviour can be considered anti-competitive in Panama (Decree 8-A, Article 14: the concept of "substantial collective power" includes interdependence – i.e. non-co-operative oligopoly). This may need to be revised to align Panama with current industrial organisation theory as well as the practice and case law in a number of other countries.
11. The final area of possible long term change in the Law is in the area of intellectual property. The intellectual property exemption is too broad. This has not yet had any significant effect yet in terms of policy or case law, but as the competition system becomes more advanced this issue will become more important.
12. ACODECO has made some important gains in the area of regional integration on competition matters, both formally and informally. As Panama becomes more integrated regionally, the need for such integration at the level of competition policy will only grow. ACODECO might consider sponsoring a regional competition day for the purpose of promoting such integration. Additionally, subject to resource availability, co-operation with other agencies on regional studies in regulated industries, such as energy and telecommunications, may allow for deeper integration of the various competition agencies across the region.
13. ACODECO must continue to improve its working relationship with sector regulators. ACODECO's impressive collaboration with MICI serves as a template for further co-operation with other sector regulators.
14. One way to gain a higher profile within the government is to undertake enforcement actions that create support for ACODECO in other parts of government. In this regard, prosecution of bid rigging in government procurement, where cartel activity often occurs, would be productive. ACODECO could justify its yearly competition budget with one or a few highly publicised enforcement actions in which it uncovers significant financial harm to the government. This would contribute to ACODECO's standing as a source of cost savings for the government.
15. Public procurement is a large part of any government's budget. Anecdotal evidence suggests that there is significant cartel activity within Panama. It is quite possible that the same inclination for Panamanian firms to participate in cartels also leads these firms to

participate in bid rigging schemes against the government. In addition to focusing on uncovering bid rigging in these sectors, ACODECO could also work on the creation of rules for government contracts that makes collusion less likely, such as auction design and tender rules. Another activity in this area would be to strengthen advocacy in the private sector to educate firms about bid rigging. In this way, the working relationships that ACODECO would create with various parts of the government would create constituency groups within government that would support ACODECO's broader competition mission. The government procurement agency undertakes some bid rigging work. A closer working relationship between ACODECO and the procurement agency could create certain synergies. For example, there are certain types of work or issues that might not be apparent to the procurement agency that are more apparent to a competition agency regarding collusion. Raising awareness of competition concerns and providing training to the procurement officers would be one method to create such synergies. Many countries have bid rigging programmes and the OECD has produced guidelines on fighting bid rigging in public procurement, along with checklists for procurement officials.<sup>85</sup>

16. Leniency programmes have yet to be effectively implemented. The effective use of leniency accompanied by high fines for the non-leniency applicants can fundamentally alter a country's business culture. One successful leniency case can promote leniency applications by firms in other industries. Brazil, South Africa and Korea are examples where leniency has changed firm culture. However, the mere existence of a leniency programme will not be sufficient; it must be accompanied by effective enforcement. In the absence of a significant risk of detection and the imposition of large fines, companies have no incentive to apply for leniency. In this sense there are too few cases initiated by ACODECO to conclude that the rate of detection is sufficiently high to encourage leniency applications. Anecdotal evidence from interviews suggests that cartelisation is endemic in Panama. If this is the case, ACODECO must strengthen its anti-cartel efforts in order to increase the probability of detection. Further, ACODECO must seek the imposition of higher fines in the cases that it successfully prosecutes. Higher fines will be more likely as cases are adjudicated under Law 45/07 as opposed to Law 29/96.
17. In many competition regimes in Latin America, the judicial process is a serious impediment to the effectiveness of the competition regime. In these countries there are long delays associated with the litigation of competition cases. In Panama, however, the 45-day limit for evidentiary hearings has significantly reduced problems of this sort in the judicial

process. Nevertheless, to support and strengthen judicial decision-making additional training in economic analysis could be advisable. Experiences with similar training programmes in Latin America and the rest of the world has been positive. The training could be undertaken by third parties such as Panama's CNC (National Competitiveness Centre), which has organised similar training for the judiciary on banking regulation. Similarly, such training could be part of regional efforts on judicial training on competition economics. A Centre for law and economics could be established at one or more of Panama's universities.

18. The ability to settle cases facilitates re-allocation of a competition agency's resources in line with other priorities. A settlement procedure exists in Panama, but to date it has been seldom used (though its use is increasing). It is unclear whether this procedure has been under-utilised because it is ineffective or because the rules for its use are not sufficiently clear. The increased use of negotiated agreements could improve both the effectiveness and the efficiency of the competition system.
19. The Agency does not undertake regular long-term operational planning. Such planning would assist in the identification of priorities and resource allocation. The publication of a strategic plan would also provide guidance on enforcement priorities to the overall population, business community, other parts of the government and other stakeholders. ACODECO provides a review of its yearly achievements. This could be included alongside the annual report on the agency's activities.
20. Most importantly, ACODECO requires more financial resources for its competition functions. Staffing is similar in size to other countries. ACODECO has not seen its competition budget expanded in recent years, in line with the considerable growth in the consumer protection budget during the same period. To address what seems to be significant cartel activity in a number of sectors and in government procurement ACODECO needs more funding for additional lawyers and economists. The National Assembly should increase ACODECO's budget so that additional personnel may be hired for the competition function of the agency.

## Notes

1. Government statistics.
2. International Monetary Fund, World Economic Outlook Database, October 2009.
3. Panama Economic Insight.
4. Government statistics.
5. World Economic Forum, Global Competitiveness Report 2009-2010.
6. Law-Decree No. 9 modified Law 29/1996 on 20 February 2006.
7. Joseph S. Bain, *Relation of Profit Rates to Industry Concentration: American Manufacturing, 1936-1940*, 65 *Q.J. Econ.* 293 (1951); George J. Stigler, *A Theory of Oligopoly*, 72 *J. Pol. Econ.* 44 (1964).
8. Todd Mitton, *Institutions and Concentration*, 86 *J. Dev. Econ.* 367, 368 (2008).
9. Marco A. Fernández, *Condiciones generales de competencia en Panama*, CEPAL (2005) at 12.
10. This is the term of art within Latin American antitrust for what is effectively a legal entity that is subject to the jurisdiction of antitrust law.
11. Article 9 of Law 45.
12. Article 10 of Law 45.
13. Organisation for Economic Co-operation and Development (OECD), *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Doc. C(98)35/Final (25 Mar. 1998); OECD, *Recommendation of the Council on Merger Review*, OECD Doc. C(2005)34 (23 Mar. 2005); OECD Competition Committee, *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (2 Oct. 2005); First Annual Conference of the International Competition Network (ICN), Notification & Procedures Subgroup, Naples, Italy, Sept. 28–29, 2002, *Guiding Principles for Merger Notification and Review Procedures*; Fifth Annual Conference of the ICN, Cape Town, S. Afr., 3-5 May 2006, *Recommended Practices for Merger Notification and Review Procedures*.

14. Neither the definition of efficiency nor the exemption based on efficiency considerations existed under the previous Law 29/96, although efficiency was used in relative monopolistic practices and in merger analysis.
15. See *Article 5 of Decree No. 8-A*; “Guidelines for the Legal Collaboration between Competitors” (Resolution No. A-24-09 of 21 April 2009); and “Guidelines for the Analysis of Vertical Conduct” (Resolution No. A-30-09 of 30 June 2009).
16. See *infra*, section 2.5.
17. For a general reference, see *Richard Whish, Competition Law* (2009), especially chapter 4.
18. ACODECO facilitated the complaint filed before the court on 29 October 2009.
19. ACODECO facilitated the complaint filed before the court.
20. *CLICAC v. Gold Mills de Panamá S.A. y otros*, 8th civil court of the first circuit, Sentence No. 64 of 30 September 2003; 3rd Superior Tribunal of Justice, Sentence of 28 June 2004; Supreme Court, *Sala Primera*, Sentence of 1 December 2006.
21. The fines were imposed by CLICAC Resolutions Nos. PC-060-06, PC-061-06, PC-062-06 and PC-063-06, of 26 January 2006.
22. For more detailed analysis see Juan D. Gutiérrez R., *Tacit Collusion in Latin America: A Comparative Strategy in Eleanor M. Fox & D. Daniel Sokol, Latin American Competition Law and Policy* (2009). See more generally the 2006 Global Forum on Competition roundtable discussion of “Prosecuting cartels without direct evidence of agreement”, available at [http://www.oecd.org/document/50/0,3343,en\\_40382599\\_40393105\\_4044\\_1074\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/50/0,3343,en_40382599_40393105_4044_1074_1_1_1_1,00.html).
23. See Gutiérrez *supra* note 22 at 240-41.
24. On the importance of bid rigging, see OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009).
25. Sentence No. 59 of 29 September 2004, 9th Civil Court of the First Circuit. The sentence confirms the findings of the CLICAC, in Resolution No. PC-004-01. On appeal, the Third Superior Tribunal of the First Circuit confirmed the sentence of the court on 28 March 2008.
26. ACODECO, Resolution Nos. DLC-06C-015-08 and DLC-06C-016-08, of 27 May 2008; the latter confirmed on appeal by Resolution A-042-08 of 1 August 2008.
27. ACODECO, preliminary report of 20 May 2009.

28. On the importance of leniency, see OECD, *Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002).
29. ICN, *Drafting and implementing an effective leniency policy in Anti-cartel Enforcement Manual* (2009); OECD, *Leniency as the Most Effective Tool in Combating Cartels*, Latin American Competition Forum, 9-10 September 2009, Santiago, Chile.
30. Brazil has significant experience with leniency programmes. The Brazilian leniency programme was launched in 2000, and the first leniency applicant came in 2003. Up to 2009, approximately 15 agreements had been signed and others are currently being negotiated. See *Brazilian Antitrust Division, Fighting Cartels: Brazil's Leniency Program* (3a ed., 2009). See also, OECD, *Competition Law and Policy in Brazil: A Peer Review* (2010).
31. Vertical Guidelines, at para. 20. The official text in Spanish indicates: *La ACODECO analizará las conductas verticales con base en los aspectos jurídicos y económicos presentes en cada caso y motivará sus decisiones desde ambas perspectivas. Al estudiar las conductas de tipo vertical, la ACODECO balanceará las ventajas pro-competitivas y los beneficios que la conducta reporta, versus las desventajas anticompetitivas o restricciones a la competencia que la misma cause. Al decidir actuar sobre la presunta legalidad o ilegalidad de las conductas investigadas, la ACODECO buscará proteger e impulsar la política de competencia, de manera que los recursos se asignen de manera eficiente y se salvaguarde el interés superior del consumidor, de tal manera que se genere una ganancia neta para la sociedad.*
32. The double marginalisation problem is where an upstream and downstream monopolist each extract monopoly rents. A common way to solve this problem is through resale price maintenance.
33. The free-rider problem exists when one agent (firm) benefits from the actions of another without paying for it (see *Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization*, 4th ed, 2005, p. 782). It is likely that a distributor may free ride on the promotional efforts of another distributor, particularly at the wholesale or retail levels.
34. There is only one article in the Panamanian Criminal Code (P.C.C.) that references antitrust matters. Article 238 of the P.C.C. establishes that it is a criminal offense to hoard materials or necessities, with the intent to reduce the offerings in the market or to alter the prices of public or private goods or services, damaging consumers or users. This article relates to Article 16 No. 8 of Law 45.
35. See also Article 14 of Decree 8-A, which bases the determination of collective market power on the “economic link” between agents (including parallel behaviour).

36. See also Article 15 of Decree 8-A.
37. As such, this element resembles the standard definition of dominance in European Law: “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.” (Judgment of the European Court of Justice, Case 27/76, *United Brands v. Commission*, [1978] E.C.R. 207, at para. 65 and Judgment of the European Court of Justice, *Hoffmann La Roche v. Commission*, 85/76, [1979] E.C.R.-461, at para. 38). The definition has since then been repeatedly used by the Commission and the courts in most article 102 judgments. Article 15(4) of Panama’s Decree 8-A uses the SSNIP test to establish substantial market power: an agent has substantial power when it has the ability to affect the market conditions and, particularly, to impose and maintain a significant and non-transitory increment in prices over their actual levels (The relevant part of the official text in Spanish says: *Para el efecto, se entenderá que el o los agentes económicos analizados tienen poder sustancial en el mercado pertinente cuando están en capacidad de afectar las condiciones de mercado y, en especial, de imponer o mantener un incremento significativo y no transitorio de precios por encima de niveles existentes*).
38. See also Article 16 of Decree 8-A, which sets out the criteria for establishing the presence of entry barriers.
39. This translation is literal. It is a reference to the market structure. The level of concentration is implicit in the market power of the competitors. See also fn 35. Article 15(4) of Panama’s Decree 8-A uses the SSNIP test to establish substantial market power: an agent has substantial power when it has the ability to affect the market conditions and, particularly, to impose and maintain a significant and non-transitory increment in prices over their actual levels.
40. ACODECO facilitated the demand filed in the court on 25 May 2009.
41. See *Merger Guidelines*, para. 20. Paras. 22 ff. define the concept of control.
42. Article 21 of the Law.
43. The official text in Spanish indicates: *Artículo 27. Presunciones. Para los efectos de la verificación que debe conducir la Autoridad, se presumirá que la concentración tiene un objeto o efecto prohibido por esta Ley cuando el acto o la tentativa: // 1. Confiera o pueda conferir, al fusionante, al adquirente o al agente económico resultante de la concentración, el poder de fijar precios unilateralmente o de restringir sustancialmente el abasto o suministro en el mercado pertinente, sin que*

*los agentes competidores puedan, efectiva o potencialmente, contrarrestar dicho poder. // 2. Tenga o pueda tener por objeto desplazar a otros competidores existentes o potenciales, o impedirles el acceso al mercado pertinente. // 3. Tenga por objeto o efecto facilitar sustancialmente, a los participantes de dicho acto o tentativa, el ejercicio de prácticas monopolísticas prohibidas. // Estas presunciones podrán desvirtuarse aportando al efecto prueba en contrario. [Id.]*

44. The Merger Guidelines indicate that the ID index weights more in the analysis (para. 135).
45. The ID is the sum of squared firm contributions to the market HHI.
46. Specifically, if the ID is over 0.25, the assessment of the concentration must continue with the next steps. If the ID increases but its value is less than 0.25 after the concentration, the concentration will not be challenged, unless there are reasons to estimate that it has an anti-competitive objective. If the ID does not increase and its value after the concentration is less than 0.25, the concentration will not be challenged (Merger Guidelines, para. 135).
47. See Article 23 of the Law and Article 18 of the Decree 8-A.
48. Under Law 29/96, CLICAC's decisions on mergers were binding unless appealed to a court.
49. A third conditional merger (*Alta Cordillera SA/Thunderbirds Resort Inc.*, DNLC-OGC-020-10 of 26 July 2010) dealt with casinos. ACODECO reduced the length of the non-compete clause between the buyer and seller.
50. The official Spanish text of article 201 indicates: *Artículo 201. Fijación de Precios. La regulación de precios de los bienes y servicios se realizará mediante la fijación de un precio máximo de venta, utilizando como parámetro el precio internacional más el arancel aplicado o el precio nacional, el que se más bajo de los dos. A este último precio se le agregará un margen de utilidad global razonable, de acuerdo con las características comerciales del producto y el mercado nacional. // En condiciones normales, la fijación del precio se realizará a nivel mayorista, pero podrá fijarse al nivel de minorista si las condiciones del mercado así lo requieren.*
51. ICN, Limits and Constraints Facing Antitrust Authorities Intervening in Regulated Sectors (2004).
52. Damien Geradin & Michael Kerf, Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation 23 (2003).
53. See *Law Decree No. 10*, of 22 February 2006, which replaced ERSP by ASEP; Executive Decree No. 143 of 29 September 2006, that establishes



the definitive text of the Law 26 of 29 January 1996; and Executive Decree No. 279 of 14 November 2006, which regulates the Law 29/1996.

54. See *Executive Decree No. 143 of 29 September 2006*, that set out the text of the Law 26 of 29 January 1996, especially Article 19.
55. See also *Article 14 of Executive Decree No. 279/2006*, which reasserts that ASEP must obtain the favourable opinion of ACODECO before the issuance of general regulations dealing with “markets, monopolistic conducts, anti-competitive conducts or discriminatory conducts”.
56. Article 86 No.16 of the Antitrust Law.
57. The Cabinet instructed several authorities with authority and functions in the electricity market (e.g. the authority for the environment, ANAM; the public utilities agency regulator, ASEP; ACODECO; the National Secretary of Energy, amongst others) to adopt a number of measures for electricity firms to meet economic and social objectives. The Cabinet Council adopted its resolution on the basis of the principles of continuity of supply, efficiency, competition, and access to public subsidies by end-users of scarce resources.
58. Pyramid Research, Inc., Panama: Mobile Opportunities Abound Despite High Penetration (2009).
59. Facilities-based competition involves several social costs. See *Jean-Jaques Laffont and Jean Tirole, Competition in Telecommunications* 22 (2000).
60. Merger Guidelines, para. 14.
61. ACODECO has issued Guidelines on the formal requirements for transference of funds to consumer associations (Resolution No. A-045 of 22 August 2008).
62. These are: *Unión Nacional de Consumidores y Usuarios* (UNCUREPA), founded in 1993 and recognised in 2003; *Instituto Panameño de Derechos de Consumidores y Usuarios* (IPADECU), founded in 1995 and recognised in 2003; *Asociación para la Protección de los Derechos del Consumidor y el Ambiente* (ANAPRODECA), founded in 2000 and recognised in 2003; *Asociación Nacional de Consumidores de Panamá* (ANACOP), founded in 2001 and recognised in 2003; *Unión de Consumidores y Usuarios Chiricanos* (UCONUCHI), founded and recognised in 2003; *Asociación Nacional de Consumidores de Medicamentos Genéricos* (ANACOMEGE), founded and recognised in 2004; and *Instituto de Estudios de Defensa del Consumidor* (INDECON), founded and recognised in 2005.

63. Within the administrative procedure for formal complaints, ACODECO can decide cases up to US\$2,500.00.
64. This possibility remains hypothetical. In practice, all diligences of proof have been authorised.
65. Article 125 of the Antitrust Law in relation to Articles 129 *ff*.
66. Yet, according to Executive Decree No. 188 of 27 November 2009, by which there is a discussion of the regulation of electronic selection procedures in the Electronic System of Public Contracting "Panama Purchases", which in its Article 22 modifies Article 110 of the Executive Decree Not. 366 of 28 December 2006, such that "For all the legal effects, the State will be considered the consumer."
67. Fernández, *supra* note 10, at 16-17.
68. The process of the behavioural remedies is regulated by the Article 27 of the Decree 8-A.
69. Recall that the Balboa is pegged 1:1 to the US dollar.
70. The official text in Spanish indicates: *Artículo 86. Funciones de la Autoridad. La Autoridad tendrá las siguientes funciones: [...] // 15. Cesar, en cualquier etapa de la investigación que se realice en sede administrativa y aun luego de promovido el proceso judicial ante la autoridad competente, la investigación o desistir del proceso judicial, mediante la realización de transacciones, previo cumplimiento de los requisitos legales, siempre que los agentes económicos investigados o demandados acepten medidas en torno a las conductas o a los actos investigados, incluyendo cláusulas penales que garanticen el cumplimiento del acuerdo.*
71. David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 *Amer. Econ. Rev.* 870 (1990). Conner and Lande suggest that treble damages would have a deterrent effect but in reality, US damages are closer to single damages. See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 *Tul. L. Rev.* 513 (2005)
72. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968).
73. Absolute practices.
74. Relative practices.
75. *Id.*
76. See <http://www.oecd.org/dataoecd/41/52/38835528.pdf>.

77. This is true for a recent local bread cartel investigation in Aguadulce.
78. The appeals court for absolute and relative conduct cases and the court of first instance for merger cases.
79. Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of Competition Policy*, 2003 *Colum. Bus. L. Rev.* 359, 368 (2003).
80. Timothy J. Muris, Chairman, FTC, *Creating a Culture of Competition: The Essential Role of Competition Advocacy*, Address Before the International Competition Network Panel on Competition Advocacy and Antitrust Authorities (28 Sept. 2002).
81. D. Daniel Sokol, *Limiting Anti-Competitive Government Interventions that Benefit Special Interests*, 17 *Geo. Mason L. Rev.* 119, 145 (2009).
82. The official text in Spanish indicates: *Artículo 86: Funciones de la Autoridad. La Autoridad tendrá las siguientes funciones y atribuciones: [...] // 5. Realizar abogacía de la libre competencia ante los agentes económicos, asociaciones, instituciones educativas, entidades sin fines de lucro, organizaciones de la sociedad civil y la Administración pública, a través de la cual podrá recomendar, mediante informes técnico-jurídicos, la adopción o modificaciones de cualquier trámite o requisito propio de algún sector de la economía nacional o realizar estudios a fin de promover y fortalecer la competencia en el mercado.*
83. Charles I. Jones, *The Weak Link Theory of Economic Development*, 1 (Berkeley, Working Paper, 2007).
84. *Id.* at 5.
85. OECD Guidelines for Fighting Bid Rigging in Public Procurement (2009). The Guidelines and the Checklist are available here: <http://www.oecd.org/dataoecd/27/19/42851044.pdf>.

## Appendix I

### List of Competition Advocacy Sector Studies Since 2006

<i>Beneficios Económicos de los Tratados de Libre Comercio</i> (Economic Benefits Originating from the Free Trade Agreements)	November 2006
<i>Modelo de simulación de los beneficios que obtendrían los consumidores como resultado del desarrollo y aplicación de los tratados de libre comercio</i> (Simulation model of the benefits obtained by consumers from the development and implementation of free trade agreements)	November 2006
<i>La inversión extranjera directa en cadenas de supermercados su efecto en el comercio minorista ante la apertura comercial</i> (Impact of direct foreign investment in supermarket chains in the retail trade as a result of the opening of trade)	December 2006
<i>Análisis del comportamiento reciente de los precios al consumidor de los porotos en las principales cadenas de supermercados</i> (Analysis of the recent consumer price behaviour in the main supermarket chains)	August 2007
<i>Análisis sobre la evolución de los precios del pan y mercados relacionados</i> (Analysis of the recent evolution of the price of bread and related markets)	August 2007
<i>Aspectos normativos en materia de protección al consumidor en materia de pago de matrícula, mensualidades, compra de libros de texto, uniformes escolares y afines</i> (Normative aspects of consumer protection regarding the payment of tuition, also on a monthly basis, purchase of textbooks, school uniforms and related goods)	November 2007
<i>Situación de precios del arroz</i> (Price status of rice)	November 2007
<i>El manejo de contingentes arancelarios</i> (The handling of tariff contingencies)	December 2007 / March 2008

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<i>Consideraciones sobre los precios de paridad en la industria de los combustibles</i> (Considerations on price parities in the fuel industry)	December 2007
<i>Estructura y Funcionamiento del mercado del gas licuado de petróleo (LPG) en Panamá</i> (Structure and operation of the gas market (LPG))	January 2008
<i>La Defensa de la Competencia y de la Libre Concurrencia en Fiestas Populares de Celebración del Carnaval en la República de Panamá</i> (The defence of competition and free concurrence in carnival activities in the Republic of Panama)	January 2008
<i>Cláusulas Abusivas e Información Asimétrica en los Contratos de Compra y Ventas de Viviendas</i> (Abusive clauses and asymmetric information in contracts related to the purchase and sale of housing)	May 2008
<i>Estructura y funcionamiento del mercado energético</i> (Structure and operation of the energy market)	January 2008
<i>Materiales de empaque</i> (Packing materials)	December 2008
<i>Regulación de precios en Panamá como políticas públicas en situaciones excepcionales</i> (Price regulation in Panama as a public policy under exceptional circumstances)	April 2009
<i>Estimación del impacto en los precios de algunos productos alimenticios ante la reducción de aranceles mediante el decreto de gabinete n° 10 de 2008</i> (Assessment of the price impact of selected food products resulting from the decrease of import duties included in Cabinet Decree #10 of 2008)	June 2009
<i>Televisión pagada</i> (Paid TV)	October 2009
<i>Mercado de carne de ave (pollo y gallinas) en Panamá</i> (Poultry market in Panama)	December 2009

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*Appendix II*

**ACODECO Investigations**

<b>CASES WITH COMPLAINTS BEFORE COURTS</b>			
<b>Sector</b>	<b>Year <sup>1</sup></b>	<b>Absolute monopolistic practice</b>	<b>Relative monopolistic practice</b>
Fire insurance	2007	1	
Car insurance	2007	1	
Sugar	2007	1	
Rice	2008	1	
Petrol stations Santiago	2008	1	
Milk	2008	1	
Fuel dispatch	2008		1
Freight Colón	2009	1	
Laundry	2009	1	

<b>CASES WITH NO COMPLAINTS FILED BEFORE THE COURT</b>			
<b>Sector</b>	<b>Year <sup>1</sup></b>	<b>Absolute monopolistic practice</b>	<b>Relative monopolistic practice</b>
Petrol stations David	2007	1	
Restaurants	2008	1	
Cement plants	2008	1	
PENSA	2008	1	1
Tender processes CSS y ontological hospital	2009	1	
Petrol stations Bocas del Toro	2009	1	
School Buses	2009	1	
Ice	2010	1	
Corn	2010	1	

CASES UNDER CURRENT INVESTIGATION			
Sector or firm	Year <sup>1</sup>	Absolute monopolistic practice	Relative monopolistic practice
Fertiliser	2008	1	
Rice (boycott)	2008		1
Air local transport	2008	1	
Gas companies	2009	1	
Customs services	2009	1	
Health insurance	2009	1	
Chong vs. Nestlé	2009		1
Sand plants	2009	1	
Boycott against newspapers	2010		1
Boycott against Coca-cola	2010		1
Lavamáticos Chorrera	2010	1	
Sistemas del Istmo vs. e-payment	2010		1
Boycott against gas companies	2010		1
Diary plants (milk grade C)	2010	1	
Digicel vs. Cable & Wireless	2010		1
Digicel vs. Movistar	2010		1
Distributors of air Conditioner	2010		1
Crane companies	2010		1





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