

**Coat of Arms of the Republic of Panama****REPUBLIC OF PANAMA  
JUDICIAL BRANCH****SUPREME COURT OF JUSTICE - ADMINISTRATIVE LITIGATION COURT**

Panama, third (3) of December, two thousand twenty-one (2021)

**COURT HEARINGS:**

Mr. **CARLOS BARSALLO**, acting on his own behalf and representation, has filed an Administrative Claim for Nullity aiming to declare null and void, as illegal, the phrase contained in article 8 of Executive Decree No. 241-A of July 11, 2018, issued by the Ministry of Economy and Finance, which reads: "in the event of non-compliance, the reporting entity must explain the reasons for non-compliance".

As mentioned in the previous paragraph, the contested phrase is found in the Executive Decree No. 241-A of 2018, issued by the Ministry of Economy and Finance. This decree regulates Law No. 56 of July 11, 2017, which establishes the right of women to access and actively participate in decision-making within public and private entities in the country. The relevant provision in the regulation states the following:

"Article 8. The Financial Oversight Entities will establish in their corporate governance regulations, good practices related to the selection of the members of the boards of directors of the subjects regulated by them, based on criteria of gender equity, as well as professionalism, merit, experience and in accordance with the regulations of each sector.

For these purposes, the monitoring by the Financial Oversight Entities concerning the obligation established in Law 56 of 2017 will be conducted through compliance questionnaires. In the event of non-compliance, the regulated entity must explain the reasons for such non-compliance. This information will be updated annually.

The Financial Oversight Entities will publish these reports or questionnaires regarding the compliance of regulated entities, or their results, on their websites and through other media." (the highlighted text is the contested phrase)

## **I. POSITION OF THE PLAINTIFF. LEGAL NORMS ALLEGEDLY VIOLATED AND BASIS OF THE INFRACTIONS.**

As previously mentioned, the plaintiff's claim in the lawsuit is for the nullification, on grounds of illegality, of the phrase "in the event of non-compliance, the regulated entity must explain the reasons for such non-compliance," found in Article 8 of Executive Decree No. 241-A of July 11, 2018, issued by the Ministry of Economy and Finance.

In this regard, the plaintiff considers that Articles 1, 2, and 3 of Law No. 56 of July 11, 2017, which establishes the right of women to access and actively participate in decision-making within public and private entities in the country, have been infringed.

First, the plaintiff argues that Article 1 of the aforementioned Law No. 56 of 2017 has been violated by omission, as the contested regulatory phrase does not respect or protect the right of women to access and actively participate in decision-making in certain private entities in the country.

Second, the plaintiff claims that Article 2 of the Law No. 56 of 2017, which establishes the minimum percentage of women's participation in state institutions as well as mixed-capital companies, has been infringed. In this regard, the plaintiff contends that requiring regulated entities to explain the reasons for non-compliance (as stated in the contested phrase) would suffice for certain private entities to avoid appointing at least thirty percent (30%) women to all positions on their Board of Directors.

On the other hand, the plaintiff considers that Article 3 of Law No. 56 of 2017, which refers to the stages of implementation of this legal framework, has been violated. The plaintiff argues that by requiring the regulated entity to explain the reasons for non-compliance, the legal provision in question would have no effective or real compliance deadline, as it would be sufficient for the regulated entities to periodically explain to the Regulatory Authority the reasons, they deem sufficient for not complying with the law.

## **II. REPORT ON THE CONDUCT OF THE MINISTER OF ECONOMY AND FINANCE**

The lawsuit was referred to the Ministry of Economy and Finance, which was asked to provide an explanatory report on its actions. This report was submitted via Note No. MEG-2020-46393 dated October 13, 2020, which is found on pages 30 to 31 of the case file and contains the following key points:

**FIRST:** Law 56 of July 11, 2017, "Which establishes the participation of women on state boards of directors," aims to establish the right of women to access and actively participate in decision-making processes within public and private entities in the country, including decentralized institutions of the Central Government, public enterprises, financial intermediaries, and those regulated by them that have a board of directors, administrative council, or similar governing bodies in their organizational structure.

**SECOND:** In exercising the constitutional function set forth in paragraph 14 of Article 163 of our Constitution, Executive Decree No. 241-A of July 11, 2018, was issued to regulate Law 56 of July 11, 2017, and its framework of application.

**THIRD:** The phrase contested as illegal by the plaintiff, "**In the event of non-compliance, the reporting entity must explain the reasons for such non-compliance,**" contained in Article 8 of Executive Decree No. 241-A of July 11, 2018, is not contrary to the spirit of Law 56 of July 11, 2017. 2017-10724 March 17, 2017. B (sic)

In this context, it is important to highlight the final paragraph of Article 3 of Law 56 of July 11, 2017, which states:

'...Paragraph: **The present Law will not affect the current composition of the boards of directors mentioned in the previous article that were previously designated,** nor the rights of their members. **Its application will begin to take effect when new appointments are made following its entry into force, as provided for in this article.**'

As noted in the cited provision, it is possible that public or private entities, including those regulated by the Financial Oversight Entities with boards of directors or similar decision-making bodies, at the time of evaluation, may not comply with the composition requirements of their governing bodies regarding the percentage established by Law 56 of 2017, due to the fact that members have already been appointed. However, compliance is required at the time of the election of new members.

**FOURTH:** The statement in the previous paragraph does not imply discretionary compliance with the law nor does it exempt from their obligations those compelled to it, as the plaintiff asserts. On the contrary, it represents a supervisory mechanism

wherein one of the reporting entities may fall under the exceptions contemplated in Article 3 of Law 56 of 2017, and therefore, its non-compliance would be justified. Consequently, the alleged violation raised by the plaintiff does not reveal any illegality, and there has been no excessive exercise of the regulatory authority contained in paragraph 14 of Article 184 of the Political Constitution of the Republic of Panama. Thus, the challenged administrative act does not infringe upon the principle of legality or violate Law 56 of July 11, 2017.

In this context, the fact that a reporting entity explains its non-compliance does not validate its omission or constitute an exemption from its obligations. Rather, in accordance with the rules of Due Process, it allows the entity to demonstrate that its non-compliance is due to one of the justifiable reasons mentioned above, which is not contrary to the provisions of Law 56 of July 11, 2017." (highlighted by the Ministry of Economy and Finance)

### III. OPINION OF THE ADMINISTRATIVE PROSECUTOR

By means of Hearing No. 1399 dated December 4, 2020, which can be found on pages 32 to 44 of the case file, the representative of the Public Ministry requests that the Court deny the plaintiff's claims and, consequently, declare that the contested phrase contained in Article 8 of Executive Decree No. 241-A of July 11, 2018, issued by the Ministry of Economy and Finance, is not illegal.

In the plaintiff's view, the contested action constitutes an Implementing Regulation, expressly based on Article 184, paragraph 14, of the Political Constitution, and in this sense, it does not aim to exempt or relieve reporting entities from

compliance with the provisions of Law No. 56 of July 11, 2017, and its regulations. On the contrary, it aims private entities to explain the reasons why the appointment and participation of women on their Boards of Directors have not met the minimum percentage established, within the framework of their policies and manuals,

### IV. DECISION OF THE COURT

Once the procedures required for this type of process have been completed, the Chamber proceeds to decide on the merits of the claim raised by the plaintiff.

#### **JURISDICTION:**

It is relevant to point out that this Supreme Court of Justice is competent to hear the Contentious-Administrative Action for Annulment filed by Mr. **CARLOS BARSALLO**, in his own name and representation, based on the provisions of Article

206 (2), of the Political Constitution, in conjunction with Article 97 (1) of the Judicial Code, and Article 42(a) of Law No. 135 of 1943, as amended by Law No. 33 of 1946.

**ACTIVE AND PASSIVE LEGITIMATION:**

In this case, the plaintiff is a natural person who appears in defense of the public interest, challenging the phrase "in the event of non-compliance, the reporting entity must explain the reasons for non-compliance," contained in Article 8 of Executive Decree No. 241-A of July 11, 2018, issued by the Ministry of Economy and Finance, which legitimizes him to file the present action.

On the other hand, the Ministry of Economy and Finance is a state entity that, in the exercise of its powers, issued the contested act, which legitimizes it as the passive party in the present Contentious-Administrative Annulment Process.

**ANALYSIS OF THE LEGAL DISPUTE AND DECISION OF THE COURT:**

As stated in previous paragraphs, the plaintiff's disagreement lies in a phrase of the regulation of Law No. 56 of 2017 issued by the Ministry of Economy and Finance, which establishes the participation of women on state Boards of Directors.

To better understand the issue under examination, it is useful to transcribe the content of the contested act, the central part of which states as follows:

**"Article 8.** The Financial Oversight Entities will establish in their corporate governance regulations, good practices related to the selection of members of the boards of directors of the reporting entities, based on criteria of gender equity, professionalism, merit, experience, and in accordance with the regulations of each sector.

To this end, monitoring by the Financial Oversight Entities regarding the obligation established in Law 56 of 2017 will be conducted through compliance questionnaires. **In the event of non-compliance, the reporting entity must explain the reasons for non-compliance.** This information will be updated annually.

The Financial Oversight Entities will publish such reports or questionnaires regarding the compliance of the reporting entities, or their results, on their websites and through other media." (The highlighted portion is the contested phrase.)

The plaintiff argues that the contested administrative act by the Ministry of Economy and Finance offers certain reporting entities an option not to comply with the requirements of Law No. 56 of 2017, as it allows them to provide an explanation for why they do not comply with the appointment of women to their Boards of Directors.

After reviewing the background related to the issuance of the contested administrative act, as well as the evidence in the case file, the Court proceeds to issue its considerations in response to the Contentious-Administrative Action for Annulment filed by Mr. **CARLOS BARSALLO**, in his own name and representation.

It should be emphasized that the plaintiff claims the violation of Articles 1, 2, and 3 of Law No. 56 of July 11, 2017, which establishes the right of women to access and actively participate in decision-making bodies of public and private entities in the country.

In this regard, this Court will examine these provisions jointly since the mentioned legal provisions generally state the same content (referring to the obligation of Central Government institutions, decentralized agencies, public companies, financial intermediaries, and those regulated by them to appoint at least thirty percent (30%) women to their Boards of Directors; as well as the gradual application of the law in three (3) stages: the first stage (one year after its enactment) with ten percent (10%) participation of women in Boards of Directors; the second stage (two years after the law's enactment) with twenty percent (20%) participation of women; and the third stage (three years after its enactment) with thirty percent (30%) participation of women in Boards of Directors), and since the grounds for infringement raised by the plaintiff are the same for Articles 1, 2, and 3 of Law No. 56 of 2017.

The Court notes that the plaintiff essentially argues that the regulatory phrase allows reporting entities to periodically explain their reasons for not appointing at least thirty percent (30%) women to all positions on their Boards of Directors, which would effectively undermine the gradual percentage obligations referred to in Article 3 of Law No. 56 of 2017, leaving no real or effective compliance date.

In this context, the Court observes that Executive Decree No. 241-A dated July 11, 2018, issued by the Ministry of Economy and Finance, is the result of the regulatory authority in our country, expressly derived from Article 184, paragraph 14, of the Constitution, which establishes that it is the responsibility of the President of the

Republic and the relevant Minister to develop laws to facilitate their implementation, "without deviating in any case from their text or spirit."

As recognized by the jurisprudence of the Third Court, the exercise of the authority to issue regulatory norms is based on "the autonomy enjoyed by autonomous public entities and can only be exercised within the specific framework of the services and benefits they provide."<sup>1</sup>

In light of this, the Ministry of Economy and Finance has the power to regulate, issue norms, and organize in order to exercise control, supervision, and safeguarding the powers conferred upon it by law. Accordingly, this Court does not find from the text of the challenged administrative act, or the limited evidence presented in the case, either by the defendant authority or the plaintiff, that there was an overreach in the exercise of regulatory power. On the contrary, the Ministry of Economy and Finance acted within its legal authority. The contested phrase, as drafted, does not exempt the reporting entity from complying with the provisions of the law it regulates, particularly regarding the right of women to access and actively participate in decision-making within public and private entities in the country.

In this regard, it should be emphasized, as explicitly stated in Law No. 56 of 2017, that there are public and private entities in the country which, at the time this legislation was enacted, already had completed appointments in their respective boards of directors or administrative bodies. Therefore, they could not make new appointments until the terms of the already-serving members expire. This is a situation contemplated in the final paragraph of Article 3 of Law No. 56 of 2017, which expressly states the following:

**"Article 3.** This Law will be enforced in different stages, as follows:

1. The first stage will be applied one year after its sanction and will require that the State boards of directors mentioned in the previous article have at least 10% participation of women on their boards.
2. The second stage will be applied two years after its enactment and will require that the boards of directors mentioned in the previous article have at least 20% participation of women on their boards.

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<sup>1</sup> **Resolution of March 21, 2002**, issued within the Contentious-Administrative Nullity Claim filed by **JOSE BENJAMIN QUINTERO**, through legal representative, to declare null and void, due to illegality, Resolution No. 34-2000 D.G. of May 24, 2000, issued by the National Institute of Sports

3. The third stage will be applied three years after its enactment and will require that the boards of directors mentioned in the previous article have at least 30% participation of women on their boards.

**Paragraph: This Law will not affect the current composition of the boards of directors mentioned in the previous article that have been previously designated, nor the rights of their members. Its application will begin in those where new appointments are made after its entry into force, in accordance with the provisions of this article." (Emphasis added by the Third Court)**

In this sense, the regulatory phrase aims that the reporting entities (represented by private sector entities, based on Article 1 of Law No. 56 of 2017) provide or explain their reasons for not meeting the requirement of appointing at least thirty percent (30%) of women to their boards of directors—appointments which could even fall under the temporal application of the legal norms cited in the previous paragraph—such as in the case of appointments to boards made prior to the legal effectiveness of Law No. 56 of 2017.

At this point, it is necessary to note that the **principle of presumption of legality** of administrative acts governs our legal system. This means that not only are such acts presumed to comply with the law, but also that anyone alleging their illegality must fully prove it. As the Colombian scholar **Jaime Orlando Santofimio Gamboa** aptly states, "the presumption of legality is not absolute and admits proof to the contrary. It is by nature revisable."<sup>2</sup>

In view of the above and in consideration of the procedural evidence in the case file, the Court concludes that the challenged act is in accordance with the law, and since the plaintiff has not proven the alleged violations of the impugned act, it is necessary to declare its legality.

For the reasons stated above, the Third Court of the Supreme Court of Justice, administering justice in the name of the Republic and by the authority of the law, **DECLARES THAT THE PHRASE** "in the event of non-compliance, the reporting entity must explain the reasons for the non-compliance," contained in Article 8 of Executive

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<sup>2</sup> SANTOFIMIO GAMBOA, JAIME ORLANDO. *Treatise on Administrative Law, Volume II, Fourth Edition*, Externado University of Colombia, Bogotá, 2007, page 55



Decree No. 241-A dated July 11, 2018, issued by the Ministry of Economy and Finance, **IS NOT ILLEGAL.**

For **COMMUNICATION,**

(Signed)

**CARLOS ALBERTO VÁSQUEZ REYES**  
**MAGISTRATE**

(Signed)

**CECILIO CEDALISE RIQUELME**  
**MAGISTRATE**

(Signed)

**EFREN C TELLO C.**  
**MAGISTRATE**

(Signed)

**KATIA ROSAS**  
**SECRETARY**

TRANSLATION

(Seal of the Supreme Court of Justice, dated December 15, 2021, at 8:46 in the morning, by the Administration General Attorney Office – Signed)

(Seal that reads: In order to notify interested parties of the above resolution, Edict No. 3647 has been posted in a visible place in the Secretary's Office at 4 p.m. today, December 13, 2021 – Signed)

**REPORTING JUDGE: CARLOS A. VÁSQUEZ R.**

Entry No. 64864-2020

**ADMINISTRATIVE LITIGATION CLAIM FOR NULLITY, FILED BY MR. CARLOS BARSALLO ACTING ON HIS OWN BEHALF AND REPRESENTATION, AIMING THE NULLIFICATION OF THE PHRASE: "IN THE EVENT OF NON-COMPLIANCE, THE REPORTING ENTITY MUST EXPLAIN THE REASONS FOR NON-COMPLIANCE", WITHIN ARTICLE 8 OF EXECUTIVE DECREE NO. 241-A OF JULY 11, 2018, ISSUED BY THE MINISTRY OF ECONOMY AND FINANCE.**

### **DISSENTING OPINION OF THE JUDGE**

**CECILIO CEDALISE RIQUELME**

With all due respect, I must convey my disagreement with the decision reached by the other Magistrates of this Court. I do not concur with the ruling that the phrase "(...) in the event of non-compliance, the reporting entity must explain the reasons for non-compliance," as contained in Article 8 of Executive Decree No. 241-A of July 11, 2018, issued by the Ministry of Economy and Finance, does not constitute an illegal provision.

In administrative law, it is crucial to acknowledge that while the Public Administration possesses the authority to regulate provisions enacted by the Legislative Body, such regulatory authority must not be excessive or exceed the boundaries established by the law being regulated through an Executive Decree.

In this regard, it is important to consider that Law 56 of July 11, 2017, which mandates the participation of women in State Boards of Directors, provides, in its Article 2, the following regarding the composition of supervisory bodies:

*"Article 2. In institutions within the Central Government, decentralized entities, public companies, financial intermediaries, and those overseen by such entities, which have boards of directors, administrative boards, or similar bodies in their organizational structure, at least 30% of all appointments to such positions shall be women.*

*For institutions where appointments are periodic, the State shall ensure that the minimum participation of women is maintained across different periods, in accordance with the provisions of this Law.*

*Mixed capital companies, in which the State holds a stake, must make every effort to meet the minimum participation threshold established by this Law, and the State shall make the necessary appointments to ensure compliance.*

***Paragraph:*** *Boards of directors whose positions are filled by State authorities, and where the ability to designate nominal members in their entirety or in a quota greater than 61% is legally restricted, will be exempt from this requirement.*

*In the case of boards of directors where members are appointed by name and not by authority, the necessary appointments shall be made to comply with the provisions of this Law."*

When comparing article 2 of Law 56 of July 11, 2017, -which is a higher-ranking regulation, with a lower-ranking regulation that is the subject of this claim of illegality, namely Article 8 of Executive Decree No. 241-A of July 11, 2018 which regulates the provisions of Law 56/2017, the following is established:

*"Article 8. The Financial Oversight Entities shall establish, within their corporate governance regulations, good practices related to the selection of board members of the entities they regulate, based on criteria of gender equity, as well as professionalism, merit, and experience, in accordance with the regulations of each sector.*

*For such purposes, the Financial Oversight Entities shall monitor compliance with the obligations established under Law 56 of 2017 through compliance questionnaires. **In the event of non-compliance, the reporting entity must explain the reasons for such non-compliance.** This information will be updated annually."*

(Cf. f. 14 of the court file)

(The emphasis is ours)

As can be observed, the plaintiff does not dispute whether the Ministry of Economy and Finance had the authority or not to regulate Law 56/2017 through Executive Decree No. 241-A dated July 11, 2018. On the contrary, the legal issue submitted to

the Third Court of the Supreme Court of Justice is focused on determining whether the Executive Decree, in developing Law 56/2017, **exceeded or overstepped its regulatory authority by imposing** that the reporting entity must explain the reasons for non-compliance – **a requirement that is not expressly provided for in the higher-ranking law.**

Therefore, upon comparing the content of Law 56/2017 with the provisions of Article 8 of Executive Decree No. 241-A dated July 11, 2018, which regulates the law, it is our view that the claim of illegality stems from the fact that the regulation exceeds the legislative authority granted to the Executive Branch to develop the subject matter at hand.

In other words, nowhere in Law 56/2017 does it expressly establish the Financial Oversight Entities to excuse themselves from complying with the requirement to appoint women to their Boards of Directors. The Law does not grant an exception for the Oversight Entities to explain the reasons why they have not been able to appoint women to said positions.

The above is extremely delicate, since Article 8 of Executive Decree No. 241-A of July 11, 2018, introduces new criteria that were not developed by the legislator when Law 56/2017 was enacted.

In our opinion, it is not clear that the regulation (Executive Decree No. 241-A of July 11, 2018), which is a provision of lower hierarchy, has been specifically subjected or subordinated to the provisions of a higher hierarchical norm such as Law 56/2017.

Another reason we consider that the illegality of the challenged phrase should also be declared (article 8 of Executive Decree No. 241-A of July 11, 2018) is because it states the following:

"(...) For such purposes, the monitoring by the Financial Oversight Entities of the obligation established in Law 56 of 2017, will be done through compliance questionnaires. In the event of non-compliance, the regulated subject must explain the reasons for non-compliance. This information will be updated annually."

(The emphasis is ours)

**The correct wording of the provision should have been as follows:**

"(...) For such purposes, the monitoring by the Financial Oversight Entities concerning the obligation established in Law 56 of 2017, will be done through compliance questionnaires. In the event of non-compliance, **the Financial Oversight Entities** must explain the reasons for non-compliance. This information will be updated annually."

(The emphasis is ours)

As observed, a **significant drafting error** was made when formulating the regulation at issue, as the term **reporting entity** was used when the appropriate term should have been "**financial oversight entities**". It is impossible to think that the reporting entities themselves are the ones who will say why female individuals (women) have not been appointed to the boards of directors of the Financial Oversight Entities.

In fact, Article 1 (7) of Executive Decree No. 241-A of July 11, 2018, defines **reporting entities** as follows:

"Those entities of the **private sector** that are **regulated and supervised by the financial oversight entities** in accordance with the current regulations."

(The emphasis is ours)

Meanwhile, Financial Oversight Entities are defined in the Article 1 (6) of Executive Decree No. 241-A of July 11, 2018, as follows:

"Financial Oversight Entities: These are the Superintendency of Banks, the Superintendency of the Securities Market and the Superintendency of Insurance and Reinsurance and the Panamanian Autonomous Cooperative Institute."

Consequently, it is inconceivable that the provision that regulates Law 56/2017, that is, the second paragraph of article 8 of Executive Decree No. 241-A of July 11, 2018, which is the subject of the claim, would place the responsibility on the very entities subjects to inspection, oversight and regulation; to explain why female individuals (women) have not been appointed to the Boards of Directors of the Financial Oversight Entities that will oversee them.

For the reasons previously stated, we believe the ILLEGALITY of the contested phrase "**In the event of non-compliance, the regulated subject must explain the reasons for non-compliance**" should have been DECLARED.

As these conclusions have not been shared by the majority of the Magistrates of the Court of Appeal, I am compelled, with all due respect, to DISSENT.

Respectfully,

**(Signed)**

**CECILIO CEDALISE RIQUELME  
MAGISTRATE**

**KATIA ROSAS**

**Secretary of the Third Court**