

Competition Law and Policy in Costa Rica

A Peer Review



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IN COSTA RICA**

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-- 2014 --



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 and support the identification and dissemination of best practices in competition law and policy. Twelve 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 review 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.

The OECD and the IDB therefore 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 at the LACF (Brazil, Chile, Peru and Argentina) and the peer review of Mexico, which was conducted at the OECD's Competition Committee. The Forum reviewed El Salvador in 2008, Colombia in 2009, Panama in 2010 and Honduras in 2011. A follow-up of the nine peer reviews was conducted in 2012 as part of the 10th Anniversary of the LACF, and Costa Rica, in 2014, has now become the 10th country to have its competition regime peer reviewed. 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 Costa Rica for volunteering to be peer reviewed at the twelfth LACF meeting held in Uruguay on 16-17 September 2014. We would like to thank Paolo Benedetti, the author of the report, and the lead examiners (Vinicius Marques de Carvalho, Brazil; Vanessa Facuse, Chile and Alejandra Palacios Prieto, Mexico), Luciana Macedo and her team at Uruguay's Commission for the Promotion and Defence of Competition 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

Costa Rica adopted its comprehensive competition law, the Law 7472 for the Promotion of Competition and Effective Consumer Protection, in 1994, as a direct result of the Free Trade Agreement Costa Rica signed with Mexico and a structural adjustment programme the country negotiated with the International Monetary Fund at the time. Law 7472 complements article 46 of the 1949 Constitution, still in effect today, which sets out fundamental rights of Costa Rica's citizens to enjoy free trade, agriculture and business, and expressly prohibits private monopolies, empowering the State to repress monopolistic practices.

Competition law is enforced by the Costa Rican competition authority, the Comisión para Promover la Competencia (COPROCOM), which came into being in January 1996. COPROCOM is an agency with formal technical autonomy within the Ministry of Economy, Industry and Commerce (MEIC). Costa Rica's Competition Law remained broadly unchanged from its approval in 1994 and until late 2012. During those eighteen years, the only relevant change to the status quo was relieving COPROCOM of its regulatory improvement obligations. Although the 2012 reform did not substantially change the rules governing competition policy in Costa Rica, it introduced some improvements that had long been demanded by the agency and competition experts, such as vesting COPROCOM with bolder investigative powers - notably, the faculty to conduct dawn raids; granting undertakings with the possibility to require the early termination of an investigation; and the establishment of a merger notification regime with rules governing its process.

In this report it is noted that the main strengths of the Costa Rican competition regime lie in the analytic soundness of Law 7472, which provides a solid foundation for applying competition policy in law enforcement and in other policy areas. In line with best international practices, efficiency-based analysis is the primary criterion for applying competition law and other commonly encountered competition policy concerns. Horizontal agreements (cartels or "absolute monopolistic practices" under Law 7472) are prohibited *per se* and agreements to undertake them are legally void. With respect to unilateral conducts and vertical agreements ("relative monopolistic practices" under the Law 7472), the Law stipulates that such conducts are illegal only if they demonstrably harm competition in the case at issue, if the responsible party has substantial market power in the relevant market and it fails to provide a defence on efficiency grounds. Moreover, thanks to the 2012 amendments to the

Law 7472, Costa Rica went from having an ex post merger control regime to an ex ante system that not only allowed it to identify possible anticompetitive transactions but also, subject to some limitations, to carry out the necessary measures to prevent them from materialising.

Another strength of the competition regime in Costa Rica is COPROCOM's firm commitment to the enforcement of competition law. Despite its limited resources, the Commission –including commissioners and technical support personnel– has repeatedly proved its willingness to apply the Law vis-à-vis powerful economic agents. This can be seen in cases where COPROCOM has ruled against cartel cases and unilateral conducts, and also through an intense use of its power to issue opinions that advocate changes to regulations that might have anticompetitive effects. Also, in a context where the level of support for competition policy in the wider public or business communities was never very high, COPROCOM has demonstrated a will to act independently. As a result, the Commission is a highly respected institution, primarily by other domestic economic regulators –who tend to follow its recommendations– and by the Courts, who in most cases have ruled in favour of the Agency's decisions.

The third strength of the Costa Rican competition regime was made evident with the 2012 amendments to Law 7472. Indeed, amending the law demonstrated that Costa Rica's politicians are open for policy changes in order to align the country's competition framework with best international practices.

Despite these strong points, this report points out that the Costa Rican competition regime needs to be enhanced and strengthened. In this regard, the report notes that one of the main weaknesses of the competition regime is related to the large number of markets and sectors that are exempted from competition law enforcement. Moreover, it is argued that the exemptions currently in place not only are too numerous, but also involve markets where the introduction of competition could result in a more efficient functioning of the economy and, consequently, in substantial efficiency gains for consumers.

A second weakness of the Costa Rican competition regime results from its institutional design. First, placing COPROCOM within the structure of the MEIC may not be the best option as the ministry is responsible for designing and implementing industrial policy in Costa Rica. As it has been shown in both by theory and practice, competition and industrial policy often seek different and even contradictory objectives. Second, the simple fact that COPROCOM is part of MEIC implies a degree of budgetary and administrative dependency that

may conspire against the independency of the Agency. The same concerns the appointment of the commissioners on the proposal of the Minister of Economy; the minister's role in the appointment and removal of the executive director of the Technical Support Unit (TSU) of COPROCOM, and the fact that TSU officials are formally employees of the Ministry. Third, COPROCOM's resources (both human and financial) are insufficient. Finally, the fact that commissioners work part-time has occasionally led to inconsistent decisions, unjustified delays in decision-making and tensions in the relationships between commissioners and TSU's officers.

Another problem, identified in this report, is related to COPROCOM's investigation and sanctioning procedures. In this regard, it is noted that, in contrast to merger control cases, Law 7472 and the implementing regulation do not define or specify with any detail the procedure that must be followed by COPROCOM in order to investigate and solve relevant issues involving monopolistic practices or unlawful mergers. In other words, the procedure that COPROCOM must follow to solve these issues was not designed for the application of competition law –in fact, it is essentially the same procedure used to investigate and sanction any other administrative demeanour–.

Although the 2012 amendment gave COPROCOM the authority to conduct dawn raids, the Agency still lacks some of the necessary means for effectively fighting cartels. In this sense, it is worth mentioning that Law 7472 does not include any sanction for economic agents who contribute to or help in carrying out illegal practices. Besides, except for “particularly severe” cases, the established penalties have been insufficient and do not appear to have any deterrent effect for economic agents. Criminal sanctions for individuals are, moreover, not foreseen; neither is any type of sanctions for those economic agents or individuals that impede the implementation of a dawn raid. Finally, the Law does not provide for a leniency programme that would encourage economic agents involved in a cartel to come forward and co-operate with the Commission. This fact substantially limits COPROCOM's ability to detect and fight hard core cartels.

With regards to unilateral conducts and vertical agreements, this report shows that, as is the case for horizontal agreements, the envisaged penalties are relatively minor. In addition, Law 7472 is not specific enough on how the “rule of reason” applies to the analysis of this type of practices and, so far, the Agency has not issued any guidelines, criteria or legal framework related to this. Besides, COPROCOM's decisions have rarely been sufficiently explicit in providing reasons why the specific conduct represents a danger to competition.

Costa Rica's merger regime continues to allow merger notification to be filed after its execution (making merger harder to un-do). In addition, although the definition of merger in the Law (which is associated to the acquisition of control) allows the Commission to target more effectively potentially problematic transactions, it nonetheless requires case-specific interpretation. This may create uncertainty and makes the process less transparent.

As for COPROCOM's advocacy powers and efforts, the Agency has been particularly active in issuing opinions to sector regulators and other governmental institutions to prevent or modify regulations that could result in anticompetitive effects. Despite these efforts, in some cases the Agency's opinions and recommendations have not been taken into account. Furthermore, COPROCOM rarely issues opinions with regards to markets exempted from competition law, nor indeed to proactively recommend and support the introduction of pro-competitive changes in markets where competition is in-existent or plays a limited role.

Finally, this report also questions the marginal role granted to competition in the review of mergers between market players in the financial sector. It also notes that, although the rules governing competition in the telecommunications sector are quite similar to those provided in Law 7472, the institutional arrangements in place in the telecommunications sector could undermine its effective implementation. Moreover, the enforcement record by the sector regulator so far has been poor.

In the light of the strengths and weaknesses discussed above, the report provides the following recommendations (for full discussion of the recommendations, please turn to page 61):

Recommendations calling for legislation:

- Expand the scope of the national competition law to include all economic agents and sectors.
- Grant COPROCOM more autonomy and independence.
- Significantly increase the Agency's budget.
- Replace the current part-time system for commissioners with one with fewer commissioners working full-time for COPROCOM.

- Replace the current general procedures for conducting investigations and imposing sanctions with other procedures designed with the specific purpose of responding to the complexities and specifications of competition matters.
- Establish new, more severe sanction schemes, including fines that efficiently deter illegal conduct and generate incentives to market agents to co-operate with the authority.
- Among other things, tougher sanctions should involve: a) substantially increasing the amount of fines provided in Article 27 for non-severe cases or, alternatively, defining only a maximum amount of fine; b) including sanctions for those economic agents and individuals that help or contribute in the execution of anticompetitive conducts, that impede the implementation of a dawn raid by hindering, destroying or altering relevant information, as well as for those that deliberately refuse to hand in requested information from the Commission or do so incompletely; c) and imposing criminal sanctions upon those individuals that actively incur in absolute monopolistic practices.
- Provide COPROCOM with powers to grant leniency to whistleblowers that come forward with information about cartels.
- Ban the possibility of notifying mergers after the execution of the transaction.
- Replace the current definition of mergers (which is associated with acquisition of control) with one that requires less case specific interpretation, and adopt an expeditious procedure to deal with non-problematic transactions.
- Strengthen COPROCOM's advocacy powers to include the promotion of procompetitive legal frameworks by making its opinions legally binding or by obliging the recipients of a COMPROCOM opinion to duly motivate their decision when departing from it.
- Transfer to COPROCOM the power to authorise merger transactions between market players in the financial sector.
- Transfer to COPROCOM the power to enforce the competition provisions in the General Telecommunications Law.

Other recommendations

In addition to the suggested legal changes above, we particularly recommend that COPROCOM should:

- Publish guidelines that describe the methodologies and criteria used by COPROCOM in its decisions for cases involving unilateral conducts and vertical agreements (i.e. relative monopolistic practices) and strengthen the economic analysis of the decisions concerning these types of practices.
- Publish guidelines that explain the obligations, requirements and procedures to notify merger transactions.
- Publish guidelines explaining the methodology and criteria used by COPROCOM to impose fines.
- Develop the corresponding capacities to enforce the power to conduct dawn raids.
- Avoid unnecessarily time-consuming investigations –particularly where economic agents are willing to end the anticompetitive conduct under investigation and remedy its effects- by enforcing the powers for settling cases incorporated in 2012 to the Law.
- Broaden the scope of opinions issued by COPROCOM to include sectors exempted from the Law 7472 and use them as a mechanism to promote procompetitive reforms.
- Conduct market studies aimed at identifying the main obstacles to competition as well as the adequate remedies to deal with them, in particular in those sectors where competition is absent or plays a limited role.
- Strengthen the dissemination and communication of competition policy.

1. Context and Foundations

1.1 *Context*¹

Political scientists have long admired Costa Rica as a case of successful presidential democracy². After a civil conflict in 1948, a Constituent Assembly drafted and approved the 1949 Constitution which, in addition to proscribing the existence of a standing army, established the Supreme Tribunal of Elections and made it responsible for organising elections and counting votes. Since that time, the entire adult population has had the right to vote in elections every four years, deemed free and fair, in which all political forces are able to compete for office. In the last 60 years, disagreements between the legislative and executive powers have never led to a presidential assault on the political system, allowing Costa Rica to have a consolidated democracy.

The Costa Rican political regime is characterised by a clear separation of powers with mutual checks and balances, structured around the constitution of 1949 and its subsequent reforms. The system establishes the three branches of government (executive, legislative and judiciary) adding a fourth, the electoral branch (the Supreme Tribunal of Elections). From a comparative perspective, the Costa Rican executive is relatively weak. Its decree powers are limited, hence rarely used. Control of the legislative agenda is shared with the Legislative Assembly, passing to the president only during extraordinary sessions. While the Assembly is the first branch of government, growing polarisation and party fragmentation have weakened its decisiveness and complicated relations with the executive. This has increased the importance of the judiciary, which is charged with settling jurisdictional disputes between the other powers and interpreting the constitutionality of the law.

An additional component of the separation of powers in the Costa Rican state is the existence of horizontal control mechanisms through which the activities of the executive power and its administrative entities can be monitored and regulated. Chief among these is the Comptroller General's office, which has a broad and strong mandate to supervise the use of public funds not only on legal basis, but also with respect to efficiency and outcomes.

The judiciary is made up of four chambers (Salas I, II, III and IV, the last of which is the Constitutional Court), along with justice courts, judges, attorneys and many other professionals. The administration of justice takes place through a differentiated organisation and rational proceedings. The

judiciary is independent and free from unconstitutional intervention by other institutions. The economic independence of the judiciary system is guaranteed by a constitutional provision assigning it 6% of the central state's expected revenues.

A key judicial milestone was the establishment of a fourth constitutional chamber within the Supreme Court in 1989. The court's jurisdiction includes the protection of individual rights, the interpretation of the constitution and the settlement of disputes between branches of government. The exercise and protection of constitutionally guaranteed individual rights was enhanced when access to the court was broadened and made practically costless. Access was also facilitated by making it simpler to mount challenges to laws and statutes, effectively changing the institutional setting that had been in place since 1949. The court has become a decisive intermediary of political disputes, particularly as executive-legislative relations have become more quarrelsome and even gridlocked. It has also invaded the realm of administrative decision-making through its enforcement of individual rights and has become an important veto player in the legislative process.

In 2004, the country was struck by a number of corruption scandals involving political elites, including payback schemes involving multinational corporations that implicated three former presidents³. This tarnished the reputation of traditional parties including the National Liberation Party (Partido Liberación Nacional, PLN) and the Social Christian Unity Party (Partido Unidad Social Cristiana, PUSC) and brought about the collapse of the longstanding two-party system. It also generated a widespread disenchantment with politics and politicians that has translated into lower rates of electoral participation and party identification. The higher levels of party fragmentation since this time have required the formation of legislative coalitions, but they have been unstable.

In April 2014, Luis Solís, of the center-left Citizen Action Party (PAC), won the second round of the presidential election convincingly (with 78% of the vote), breaking with the habitual dominating two-party system. Mr Solís ran his platform on promises to build infrastructure, improve universal health care and pension programmes, and promote environmental stewardship. In his campaign, Mr Solís also expressed a strong desire to revamp the tax system to include a more progressive tax policy. Even though the other candidate, Johnny Araya of the National Liberation Party, had pulled out of the campaign following opinion polls suggesting a large lead by Mr Solís, his name remained on the ballot and

received 22% of the vote. Mr Solis's win came despite 43% of the electorate abstaining from voting in the elections, a record figure. One other important fact to observe is that, despite winning the presidency, the PAC only obtained 13 out of 57 seats in Congress.

Costa Rica is not only a case of consolidated democracy. An upper middle-income country of 4.8 million inhabitants, the country is also an example of development success. Indeed, development has transformed the Costa Rican economy from an exporter of coffee and bananas - which accounted for three-fourths of exports in 1960 - to an economy exporting a wide variety of non-traditional agricultural products, light manufactured products, and even sophisticated computer goods. Costa Rica's GDP per capita increased four-fold between 1950 (USD 847) and 2000 (USD 3,315, in 1990 US dollars) (Lehoucq, 2006:2) in a region where GDP per capita barely doubled during this period. Costa Rica's GDP per capita (at purchasing power parity, PPP) in 2013 was USD 12,900 USD. This figure compares relatively well with other countries in the region such as Nicaragua (USD 4,500), Honduras (USD 4,800), Guatemala (USD 5,300) and El Salvador (USD 7,500). The only country in Central America with a higher GDP per capita higher than Costa Rica is Panamá (USD 16,500).⁴ By comparison, Mexico (an OECD member country) had a per capita GDP of USD 16 950 in 2013, according to OECD estimates.⁵

The Costa Rican economy has been posting positive growth rates for most of the past 25 years. Indeed, the economy grew at an annual average rate of 5% throughout the 1990s and has generally outpaced the average growth rate for the region in the current millennium. GDP growth reached a peak of 8.8% in 2006 and maintained a healthy pace in 2007. As a consequence of the global financial crisis in 2008 the country's economy registered a decline of 1.3% of GDP in 2009. In response, the government increased its spending in social and labour-intensive infrastructure, helping the economy recover and to grow by 5.0% in 2010, and by 4.4% in 2011. The Costa Rican economy registered a year-on-year GDP increase of 3.4% in 2013, compared to 5.1% in 2012⁶. Current forecasts project average GDP growth of around 4.2% over the next few years, driven by private consumption and domestic investment (World Bank, 2014)⁷.

Costa Rica, nevertheless, has not been exempt from periods of economic instability. Internal inconsistencies and adverse economic conditions during the end of the 1970s pushed the state-centred model adopted by the country in the early 1950s into a process of structural reforms during the early 1980s⁸. Significant liberalisation took place during this period mainly within the trading

sector, in the form of significant tariff and duty reductions. Privatisation was restricted to unprofitable state enterprises, while state monopolies in banking, insurance, electricity and telecommunications were left untouched. Only gradually did liberalisation advance in these areas, starting with the banking sector in the 1990s.

Trade liberalisation was accompanied by strong market-opening strategies aimed at attracting foreign investment and promoting exports. This allowed Costa Rica to diversify its production base, first through non-traditional agricultural exports and later through high-tech industries clustered in free-trade zones. The liberalisation process was later intensified through the ratification of the Central American Free Trade Agreement (CAFTA), following the country's first referendum in 2007. This agreement included a set of laws that called for competition within the telecommunication and insurance sectors, meaning that the state gave up its monopolies although its firms have remained competitive against the private sector.

The telecommunications state monopoly was first opened in 2009 with competition in Internet and other related services. The first public auction for cellular frequencies was held at the end of 2010, with two private companies (Claro and Telefónica) entering the market. Within a few months of launching their networks, these new companies had secured around 500,000 customers between them. Difficulties related to the extension of permits and licensing, particularly on a local level, continue to present some barriers to effective competition.

Competition within the insurance sector started in 2010 with medical and other policies, and was extended in 2011 to include vehicle and liability insurance. The 2012 market share of private insurers totalled slightly more than 13%, excluding compulsory insurance programs, meaning that the market share of private insurers as a whole reached 9.8%, an increase of 9.2 percentage points from 2010. Opening of the electricity sector is still awaiting passage of a new regulatory law in the Legislative Assembly, clearly demonstrating the relative lethargy faced by these transformations.

The financial sector has been open to competition for several years, though the competitive playing field is not entirely level, as only state-owned banks enjoy an implicit state deposit guarantee and are administered under a special development regime. The state retains exclusive rights to alcohol distillation; the importation, refinement and distribution of petroleum and its derivatives; and in most cases the operation of railroads, ports and airports. Although airport

concessions have begun to be offered to private parties, the regulatory framework has been subject to several changes and contracts have been plagued by difficulties.

Costa Rica's banking system is solid and administered according to international standards that include prudential supervision and capital adequacy requirements. All intermediaries must be registered and unregulated players are currently rare, though they were a problem in the past. There are strict disclosure rules and information on market participants is available to the public. Capital adequacy ratios have normally ranged from 10% to 14%, above the minimum Basel standards (8%), even reaching 15.1% in 2012. Loans grew aggressively during the period of high economic growth, starting in 2002, without jeopardising loan quality or the solvency of the financial system.

The global financial crisis slowed growth, but it did not have widespread negative repercussions on the financial system. While the economic slowdown did affect the payment capacity of borrowers, causing a slight uptick in arrears since 2009 that continued through 2012 (when nonperforming loans reached 1.8% of the total loan portfolio), the effect was still below the international nonperforming loan benchmark of 3%. The financial sector regulator (SUGEF) was credited with competently anticipating and successfully managing the effects of the crisis. Three state banks dominate the market with almost 45% of all assets and 47% of all liabilities. Following in importance are 11 private banks, including foreign-owned entities, which represent about 29% of the system's assets. The rest of the sector is made up of financial companies, financial co-operatives and two special banks.

Despite advances in prudential regulation, the financial system suffers from high credit spreads, or the difference in yield between public and private bonds of the same maturity, a sign of inefficiency. The financial depth of the system (measured as the ratio of loans to GDP: 53% in 2011) is relatively high for regional standards and has grown considerably in recent years (from 43% in 2005). However, it is still low in comparison to more developed markets. The system suffers from a patchwork of legislation governing intermediaries. Not only do state banks enjoy an implicit state guarantee unavailable to private competitors, but special entities such as the Banco Popular have unique tax and reserve-requirement exemptions. A comprehensive reform bill has been circulating for several years, but its prospects of advancing in the legislature are uncertain.

As a result of the active trade-liberalisation policy that was a part of Costa Rica's development strategy based on global integration and export orientation, at present the country has a trade-to-GDP ratio of 80.6%. Average weighted tariffs are 2.4% (2009-2011). This implies a strong dependence on international transactions. In its Index of Economic Freedom 2013, the Heritage Foundation reports that the trade-weighted average tariff rate is quite low and that there are relatively few non-tariff barriers. However, the country did recently expose itself to WTO sanctions by exceeding its cap on agricultural subsidies on rice for three years in a row (2007 – 2010). The country reformed its export promotion mechanisms in 2009 to make them compliant with WTO norms. Costa Rica joined the General Agreement on Tariffs and Trade (GATT) in 1990 and ratified the WTO treaty in 1994. It has been an active participant in the multilateral trade system, including the Doha round trade negotiations, while at the same time actively pursuing bilateral and preferential free trade agreements.

The freedom to enter contracts using any currency is legally protected, and there are no restraints on making and withdrawing investments. Foreigners enjoy the same rights and obligations that are extended to nationals. In fact, the economy has flourished in recent years on the basis of foreign domestic investment. According to the Economic Commission for Latin America and the Caribbean (ECLAC), inflows of foreign direct investment into Central America increased 36% in 2011, with Costa Rica ranking second within the sub-region behind Panama.

However, starting a business in Costa Rica, while not impossible, remains difficult. The World Bank's *Doing Business Report 2013* shows it takes up to 60 days to start a new business, a period equal to that of 2008 and still higher than the Latin American average. The country is ranked 128th out of 185 in the global index in this regard, and 110th in the overall global index concerning the ease of doing business. The informal sector is considered to be small as compared to other Central and Latin American countries, though 32% of the workforce was employed in this sector in 2011, including the self-employed, microenterprises, and non-remunerated or domestic workers.

Costa Rica's central bank maintains a high level of professionalisation and has pursued consistent anti-inflationary and foreign exchange policies. Most recently, the central bank has focused its policy on inflation, which in 2012 reached an annual rate of 4.5%. Costa Rica had not experienced inflation levels below 6% for two consecutive years since 1978. This represents a turnaround from the high inflation levels of 2008 (13.4%), which were partly the product of

high international food and energy prices. In October 2006, the bank also abandoned a longstanding crawling peg exchange regime in favour of a crawling band system, in which the colón (the local currency) is allowed to float between predefined (and adjustable) upper and lower limits. The move, while consistent with inflation targeting, has made the exchange rate more volatile. Large influxes of foreign investment have led to a significant appreciation of the currency with respect to the U.S. dollar, including a rise of more than 13% between 2010 and 2011. While this may have contributed to keeping prices low, it has reduced the competitiveness of tradable sectors and tourism, while increasing imports; in sum, this has boosted the trade deficit significantly.

Costa Rica is also well known for its socio-economic achievements. Its life expectancy is substantially higher than in most Latin American countries, while infant and child mortality rates are significantly lower. Also, Costa Rica has one of the lowest poverty and income inequality rates in the region. It seems however that poverty reduction has reached a plateau, and while the position of the country in terms of human development remains relatively high, overall progress since the early 2000s has been moderate in international comparisons. The country's score on the UNDP's Human Development Index rose only slightly from 0.768 in 2010 to 0.773 in 2012, coming in 62nd on the HDI 2012 and seventh among Latin American countries, just behind Cuba, Panama and Mexico.

The incidences of poverty and extreme poverty have respectively remained around 20% and 6% since 1994, except for 2007 and 2008. Inequality also rose during 2011. The Gini coefficient increased from 0.508 in 2010 to 0.515 in 2011, a marked deterioration. The average income increased in 2011 in part due to the role of non-contributory pensions and conditional cash transfers. However, social inequality has tended to expand, as the income of the richest decile rose from 16 times that of the poorest decile in 2008 to 19.2 times in 2009. This trend continued during 2012, as the richest decile increased its per capita income by 11.6%, while the income of the poorest rose only by 2.5%. Poverty levels are similar in urban and rural areas, suggesting an absence of regional exclusion, but inequality is still higher in rural regions.

1.2 Foundations of Competition Policy

The origins of competition law in Costa Rica can be traced to the two constitutions of 1917 and 1949. Article 16 of the 1917 Constitution established the defence of economic freedom as long as it did not harm third parties. Meanwhile, article 46 of the 1949 Constitution, still in effect today, sets out the

fundamental rights of citizens to enjoy free trade, agriculture and business, and expressly prohibits private monopolies, empowering the State to repress monopolistic practices.

For a long time however, the constitutional provisions were more of a statement of political aspiration than a basis for government policy. Indeed, during the 1970s, in an environment of import protection and strong state supervision, much of the Costa Rican economy was under price or entry control, or in the hands of state-owned monopolies. The goal of policymakers was to eliminate the “evils” of private monopoly, and this was accomplished by price control and state ownership.

By the mid-1980s, it became clear that the old economic policies could no longer support growth. Although less aggressively than other countries in the region, the government proceeded to change its economic direction and adopted an export-based growth strategy that was initially complemented by financial sector and price deregulation and, starting in the early 1990s, by trade opening.

Within this framework, and as a direct result of the Free Trade Agreement Costa Rica signed with Mexico and a structural adjustment programme the country negotiated with the International Monetary Fund at the time⁹, the Law 7472 for the Promotion of Competition and Effective Consumer Protection (hereinafter referred to as “Law 7472” or “Law”) was approved by Congress in the last days of 1994 and came into force on January 19, 1995.

Probably because it was part of a larger reform effort, the scope of Law 7472 goes beyond what is usually strictly considered as competition policy. In fact, the law includes provisions governing economic deregulation and consumer protection. Moreover, it also includes a set of provisions concerning unfair competition.

As will be discussed further in this report, Law 7472 established the creation of the Costa Rican competition authority, the Commission to Promote Competition (hereafter “COPROCOM”, “Commission” or “Agency”) with powers to apply the new regulations regarding competition and regulatory improvement matters.

The Law also decreed the creation of the National Consumer Commission (NCC), a quasi-independent cabinet agency that aims to provide effective protection of the rights and legitimate interests of consumers (Article 1). This protection is manifested in the investigation and punishment for obligation

breaches of the merchant set out in Article 34 of the Law. NCC is empowered to sanction acts that may harm the consumer, and it can also take precautionary measures, such as the freezing or seizure of property, suspension of services, or the temporary cessation of the events that violate the provisions of Law 7472. According to Delgadillo (2013), NCC has neither jurisdiction over the annulment of unfair terms in contracts (Article 42, Law 7472), nor for the compensation of damages¹⁰. These cases are dealt with only by the judicial branch of government through the courts. Moreover, the Law limits the NCC functions to actions and complaints initiated by an individual, without giving the power to operate proactively for cases where there is more than one affected consumer or where collective interests of consumers are in jeopardy. In this sense, NCC is a reactive office that deals mostly with individual cases.

It should be noted that, probably because the competition and consumer protection frameworks were designed and adopted at the same time, the provisions in both regulations are fairly consistent and, hence, their enforcement has not led to contradictory decisions or conflicts between COPROCOM and NCC.

Regarding the unfair competition provisions, Law 7472 stipulated that economic agents¹¹ affected by conducts foreseen in article 17 of the Law¹², could only contest such conduct through judicial proceedings, consequently excluding COPROCOM from dealing with such cases.

A noteworthy element of Law 7472 is that it grants the government the power to regulate prices, establish marketing margins or impose other means to control any goods or services manufactured or supplied in the country. Nevertheless, Article 5 stipulates that, for goods manufactured or supplied under monopolistic or oligopolistic conditions, regulation must be subject to COPROCOM's prior opinion on the convenience of such measures. Article 6 of the Law, meanwhile, foresees the elimination of all non-tariff restrictions and any and all quantitative and qualitative restrictions to product imports. However, this article also determines that the government may, exceptionally, establish import and export licenses. In such cases, Law 7472 provides that the government has to conduct technical studies to support its measures and gather COPROCOM's opinion, which can only be departed from by means of a reasoned decision.

Competition Law 7472 remained broadly unchanged from its approval in 1994 and until late 2012. During those eighteen years, the only relevant change to the *status quo* worth mentioning was the Fiscal Contingency Law (Law 8343

of 2002), which created the Regulatory Improvement Commission with powers to co-ordinate and lead all initiatives and efforts related to regulatory improvement, consequently relieving COPROCOM of its regulatory improvement obligations.

The 2012 reform, introduced by Law 9072, did not substantially change the rules governing competition policy in Costa Rica. The main thrust of the amendment, which was mainly a result of an intensive advocacy effort by COPROCOM, was to provide the Agency with additional investigative powers, such as the faculty to conduct dawn raids; the possibility for economic agents to require the early termination of an investigation for anticompetitive practices; and the establishment of a merger notification regime with rules governing its process.

2. Content and scope of the competition law

2.1 Objectives and scope of the Competition Law

Competition policy objectives are set out explicitly in Article 1 of Law 7472: “to protect and promote the competitive process and free market participation by preventing and prohibiting monopolies, monopolistic practices and *other restraints on the efficient functioning of markets*” (emphasis added). Efficiency, thus, is the primary criterion for applying the competition law. Other commonly encountered competition policy concerns are subsumed in the efficiency-based analysis. For example, in the Law there are no doctrines or interpretations about fairness or fair competition, nor about protecting the interests of small enterprises or limiting industrial concentration. Moreover, although the Law is part of a programme to develop a more market-oriented economy, it takes no explicit note of the goal of promoting economic growth.

While the objectives of the Law are in line with competition policies and laws in many OECD countries as well as with the evolution of competition policy and theory elsewhere, the same does not apply to the scope of the Law, which contains several exemptions. According to Article 9, the competition provisions are applicable, by its terms, to “all economic agents” with the exception of concessionaires of public services by means of a law¹³, those executing acts authorised in special laws, and state monopolies. Additionally, Article 72 establishes that the law “shall not be applicable to the municipalities in their internal regime, as well as in their relations with third parties”.

The exemptions leave many markets and sectors outside the scope of competition law and, hence, of COPROCOM's jurisdiction. Note that most public services in Costa Rica are provided by companies holding a state concession. This is the case, for ground and maritime transport, electricity generation, transport and distribution, supply of hydrocarbon derivatives, rail cargo transport and the entire water utility chain (distribution of drinking water, sewage water, liquid industrial waste and rainwater recollection and evacuation in urban areas), among others. In these markets and sectors, not only does competition law not apply but competition among market players is also scarce or non-existent. Furthermore, in most sectors, participation of private investment is restricted or, in some cases, not permitted at all¹⁴. Finally, regulation of public utilities (e.g. tariffs, quality and other service conditions) is in the hands of the Public Services Regulatory Authority (ARESEP), an independent multi-sector regulatory agency created by Law 7593 of 1996.

Another area outside the scope of competition law is the imports, refinery and distribution of wholesale petroleum and its derivatives, including fuels, asphalt and gasoline¹⁵. In these markets, the state company, Costa Rican Petroleum Refinery (RECOPE), has had a legal monopoly since 1993, and the ARESEP is in charge of setting prices for all hydrocarbons that RECOPE commercialises as well as safeguarding compliance with other service conditions defined by the executive branch.

The production and manufacture of alcoholic beverages commercialised in Costa Rica is also a legal monopoly and, therefore, exempt from competition law. This monopoly was created by an 1885 law that aimed at fostering the sugarcane industry and protecting society from health problems derived from alcohol. As a result, private companies can only manufacture spirits through a state concession provided by the National Liquor Factory (FANAL), and with raw material provided exclusively by the latter. In addition to being the sole manufacturer of raw materials for spirits and derived products in Costa Rica, FANAL also commercialises the finished product. Notwithstanding the above, commercialisation of liquor is open to competition and COPROCOM may intervene in case of competition law infringements – as in fact it has done in the past.

Finally, sector-specific laws and judicial decisions apply to a number of different markets, substantially limiting the scope of Costa Rica's competition law. This includes sugar and rice markets. The sugar market is regulated by Law 7818 of 1998, which grants the Agriculture League of Sugarcane Industry (LAICA), a non-governmental corporation formed by representatives of various

market players that participate in different levels of the production and commercialisation chain –in some cases even competitors-, the authorisation to regulate activities related to the purchase, import, export, storage and commercialisation of sugar produced in Costa Rica. In this sense, LAICA has, among others, the authority to fix the sugar output or resale prices at different stages of commercialisation, at the national level. In the rice market, something similar happens with the National Rice Corporation (CONARROZ), a public and non-governmental entity incorporated in 2002 as a result of Law 8285¹⁶.

In the professional services market, meanwhile, the exemption from competition law does not have its origin in legislation but rather in a 1999 ruling of the Constitutional Court, which established that professional services are activities different to the production of goods and services covered by Law 7472; and, therefore, professional associations are authorised to fix its affiliates' fees¹⁷. In 2001, moreover, the Attorney General's Office issued a harmonising ruling in that same sense to confirm that this judgment is legally binding for the competition authority.

2.2 *Conduct*

Under Article 11 and 12 of the Law 7472, anticompetitive practices are classified as either “absolute” or “relative”. In line with best international practices, absolute monopolistic practices, which refer to horizontal agreements among competitors (i.e. cartels), are prohibited *per se* and agreements to undertake them are legally void (i.e. not legally enforceable). Such practices cannot be defended by claiming that they are efficient, as the law presumes their inefficiency conclusively. Meanwhile, relative monopolistic practices, which refer to different types of unilateral conducts and vertical agreements with potential anticompetitive effects, may not be found illegal unless the respondent is found to have “substantial power” in a defined relevant market and fails to substantiate an efficiency defence.

2.2.1 *Horizontal restrictive arrangements*

2.2.1.1 *Substantive rules*

Under Article 11 of the Law 7472, the absolute monopolistic practices that are subject to *per se* prohibition include five categories of hard-core cartels usually found in most competition laws: price fixing, output restriction, market division, bid rigging and collusive boycotts. Article 11 also specifies as unlawful certain particular kinds of conduct within those categories. For

example, the price fixing clause prohibits information exchanges with the purpose or effect of fixing or manipulating price; the output restriction clause prohibits commitments related to the volume or frequency with which goods and services are produced; the market division clause covers potential as well as existing markets; and the bid rigging clause covers agreements respecting both participation in auctions and establishment of the prices to be bid.

Article 28 of the Law 7472 stipulates that in case of an absolute monopolistic practice, COPROCOM may order the suspension, correction or elimination of such conduct, as well as any other actions required to counteract the anticompetitive effect caused by it, regardless of any applicable penalties. Likewise, and taking into account the payment capacities of the involved economic agents, COPROCOM may impose a fine equal to 680 times the minimum monthly wage (approximately USD 324,700)¹⁸. For recurring perpetrators, or whenever the conduct is considered as “particularly severe” - a concept that is not properly defined in Law 7472 or in any other legal instrument - COPROCOM may fine each of the involved economic agents with up to 10% of the value of the annual sales the perpetrator obtained in the regular course of business, for the fiscal year immediately preceding the competition agency’s final resolution¹⁹.

That said, even after the amendment to Law 7472 in 2012, COPROCOM still does not have some of the powers and tools required to effectively fight such conducts.

- As noted by Sittenfeld (2007), the law only allows penalisation for colluding market players²⁰. In other words, the law fails to provide penalties for undertakings assisting in the anticompetitive conduct. This has meant that, although COPROCOM has sometimes found commercial and business chambers or associations to be key components in the anticompetitive arrangements prohibited by the Law, the same law prohibits the Agency from imposing any penalties on these actors.
- The penalties for absolute monopolistic practices are strikingly low and in all likelihood have very little deterrent effect, with the exception of the penalties envisioned for “particularly severe” cases. Put differently, for many market players it is highly likely that the benefits of conducting hard-core violations is substantially higher than the costs that it would incur should it be caught. It is also important to keep in mind that, unlike competition legislation in other jurisdictions,

the law fails to provide criminal sanctions for individuals involved in this type of conduct.

- The Law authorises the Commission to request relevant information for its investigations, but it does not foresee any penalties for cases in which the undertakings refuse to provide the requested information, or provide it incomplete. In fact, the law only imposes penalties for the delivery of false information or delayed delivery of information²¹. Also, in both cases the possible penalties are very low and hence provide little incentive to comply: up to 65 minimum monthly wages (approximately USD 31,500) and 50 minimum monthly wages (approximately USD 24,250), respectively.

The low penalties and weak deterrence are somewhat counterbalanced by the fact that, with the amendment of the Law in 2012, the Agency now has the authority to conduct dawn raids and inspections in offices and commercial and industrial facilities of the market players. In these dawn raids, which require the prior authorisation of a judge, the Agency's personnel may review and copy all accounting books, agreements, mails, emails and any other document and electronic data related to the manufacturing, promotion, marketing, and sale strategies of the visited economic agents. Likewise, the Agency may submit to questioning any employee, representative, officer and shareholder that is present at the time of the dawn raid.

However, the Law does not provide for penalties of any kind to economic agents who hinder, destroy or disrupt relevant information with the purpose of deviating, hindering or stopping the investigation of a possible breach of the Law or any other subject matter of the dawn raid.²² This provision differs from other jurisdictions where the relevant agencies have the authority to perform dawn raids. Also, and probably as a result of COPROCOM's lack of resources (both human and financial), the Agency does not have the minimal infrastructure required to guarantee such dawn raids to be thorough enough, or to take place at all.

Finally, another matter that substantially limits COPROCOM's capacity to efficiently identify and fight agreements among competitors to increase prices or limit output is that, as of mid-2014, Law 7472 does not contain a leniency programme allowing for the voluntary co-operation or whistle-blowing by market players.²³

In this regard, it is worth noting that, although the implementation of a leniency programme would be beneficial to competition policy in Costa Rica, doing so would not necessarily produce positive results of the same magnitude than in other jurisdictions where leniency programmes have been implemented. For that to happen, additional adjustments to Costa Rica's competition legislation would have to be introduced to alleviate the problems referred to in the previous paragraphs. In other words, in order for a leniency programme in Costa Rica to be successful, perpetrators should know that the risk of getting caught and the costs for doing so are higher than any potential benefit.

2.2.1.2 Enforcement

Taking into account the fact that COPROCOM has serious resource restrictions (more on this in section 3.1), it can be said that the Agency has been reasonably active in fighting illegal agreements among competitors to set prices and restrict output. Since its creation in 1995, COPROCOM's investigations of absolute monopolistic practices ending in penalties add up to a total of 14 (see Table 1)²⁴. In the last five years, moreover, COPROCOM has opened 15 investigations involving this type of anticompetitive practices (an average of 3 per year) and issued decisions on 9 occasions (an average of 1.8 per year).

A word of caution is in order, though. On the one hand, the majority of cases investigated that involved collusive practices were relatively easy to identify. Either they involved third party complaints, or COPROCOM became aware of such conduct through national press publications. On the other hand, although all punished conducts were hard-core cartel cases, only one was considered as "particularly severe" by COPROCOM. This was the only case where severe fines were imposed. In the remaining cases, the fines imposed by COPROCOM were below the maximum amount allowed by Law 7472 even for non-particularly severe cases.

Table 1. COPROCOM's investigated and sanctioned cartels (1995-2014)

Final decision's date of issue	File Number	Economic agents involved in the conduct and sanctioned	Category of horizontal agreement	Total amount of fines imposed**
1995	08-95	5 ice producers	Price fixing	¢201,750 (around USD 1,200)
1999	15-98	11 members of the National Bean Chamber	Price Fixing	¢35,582,820 (around USD 130,000)
1999	11-99	23 radio announcers	Price fixing	¢167,580 (around USD 610)
2000	34-99	11 container carriers	Price fixing	¢44,261,280 (around USD 147,000)
2000	36-99	3 tanneries*	Price fixing	¢14,917,332 (around USD 50,000)
2001	31-99	5 members of the National Rice Chamber*	Output restriction	¢30,280,820 (around USD 94,000)
2002	28-00	28 real estate brokers	Price fixing	¢4,251,110 (around USD 13,000)
2002	IO-06-01	22 pork breeders*	Price fixing	¢32,632,793 (around USD 94,000)
2002	IO-03-01	2 palm processors*	Price fixing and output restriction	¢114,349,125 (around USD 332,000)
2008	IO-11-04	5 members of the National Horticulturist Corporation's Board	Price fixing	¢82,003 (around USD 164)
2008	IO-04-05	64 custom agents	Price fixing	The sanctions imposed did not involve fines.
2009	IO-16-04	7 pension funds	Price fixing	¢2,475,392,315 (around USD 4,381,000)
2009	D-05-06	5 public parking operators	Price fixing	¢15,894,873 (around USD 28,000)
2012	D-04-08	3 telecom operators*	Bid rigging	COPROCOM is not allowed to release this figure or any information on the case

* Cases in which sanctions were also imposed on individuals.

** To calculate fines in American dollars, the exchange rate for January of the year in which COPROCOM issued the final ruling of the case was used.

Source: Prepared on the basis of the information provided by COPROCOM.

Box 1. Significant Cartel cases

Pension funds

COPROCOM found that eight local pension operators used the 2004 investment and pension fund crisis to engage in a price fixing cartel (i.e. agreeing to set similar or identical productivity and contribution commissions upon their affiliates). COPROCOM started investigations upon the request of SUGEF, one of the regulators of the financial system. Pension operators argued that the sudden increase of commissions within a reduced timeframe was the effect of a concentrated market (oligopolistic) and the ability of competitors to mimic each other's strategies. COPROCOM analysed incumbents' arguments to find that companies' behaviour was not similar to what is observed in oligopolistic markets: (i) there was no kinked-demand effect, since all companies reacted the same way instead of waiting for affiliates to relocate as a result of a price increase; and (ii) there was no price leadership, since the pension market in Costa Rica lacks a dominant firm where competitors necessarily follow the leader's pricing structure. In 2009 COPROCOM imposed, upon six companies, a fine of 10% of their asset value; and a 10% fine of gross revenues for one of the remaining companies investigated. So far this has been the largest amount of fines imposed by COPROCOM (around USD 4,381,000).

Pork breeders

Due to a supply surge of pork meat in the Costa Rican market during the first months of 2001, the Costa Rican Association of Pork Breeders decided to use freezing chambers to stock the surplus of pork in order to control the price fluctuations and avoid price falls. COPROCOM found that the supply restriction of pork meat in the market constituted an absolute monopolistic practice. Hence, in 2002 COPROCOM sanctioned the market players and the individuals that participated in the agreements. Fines in the amount of USD 16,250 per firm and of USD 100 upon one individual were imposed.

Palm Fruit

Palm fruit prices were set by the Ministry of the Economy until deregulation in 1998. As a result of deregulation, palm fruit producers and manufacturers, through the National Palm Fruit Association, started negotiations related to new commercialisation agreements. In 1999, the palm industry suffered a crisis derived from the international oil price decrease, which resulted in new market conditions.

Two main local competitors commercialised palm fruit and its derivatives in Costa Rica: Palmatica S.A., with three processing plants and production sites; and Coopeagropal R.L., with only one processing plant. Both competitors attended meetings within the Association in order to discuss and react to market conditions. During such meetings, Palmatica and Coopeagropal's representatives discussed: (i) sale and purchase prices; (ii) palm fruit oil offer restrictions; and (iii) on Palmatica's part, an exchange of information regarding purchase conditions from its providers. COPROCOM concluded that both competitors incurred in violations to Article 11 of the law and accordingly imposed fines which add up to around USD 332,000 upon the undertakings in question and its officers.

Beans

In 1998, the natural phenomenon “El Niño” caused a shortage of beans, which induced an increase in prices. In order to deal with price fluctuations and market instability, the National Association of Beans Processors, its affiliates and other market players allegedly agreed: (i) to fix prices, (ii) exchange information regarding producers’ purchase prices, and (iii) allocate markets. COPROCOM found the following violations and imposed sanctions as follows: first, competitors fixed prices of their 900 gr. beans bags and imposed fines upon the involved undertakings and individuals in amounts that went from USD 4,949 to 8,323. Second, competitors exchanged information regarding price increases with the object of controlling the market and imposed fines that went from USD 2,699 to 11,473. This particular violation is relevant because the use of indirect evidence used to prove it was confirmed on appeal before courts of justice. Third, no evidence of market allocation was found. It is important to note that, as in the cases discussed above, COPROCOM did not consider the Association as a competitor and thus no fine was imposed on it.

2.2.2 *Unilateral conduct and vertical agreements*

2.2.2.1 *Substantive rules*

Under Law 7472, all varieties of unilateral conduct and vertical agreements with potential anticompetitive effects are treated as “relative monopolistic practices”. In line with best international practices, these conducts must be analysed under the rule of reason or effects-based analysis; that is, they are considered illegal only if they demonstrably harm competition. In the language of Article 12, the practices undertaken must “improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of certain persons.” Equally important, according to the Law a relative monopolistic practice is unlawful only if the responsible party has substantial market power in the relevant market and fails to substantiate a defence on efficiency grounds.

Box 2. Definition of relevant market and market power in law 7472

Article 14 of the Law 7472 establishes that for determining the relevant market the following criteria should be applied: a) the possibilities of substituting the good or service in question with another of domestic or foreign origin, considering the technological possibilities, degree to which consumers have substitutes and the time required for making such substitution; b) the distribution costs of the good itself, its relevant inputs, its supplements and substitutes from other areas in the national territory or abroad; to this end shipping, insurance, tariffs and no-tariff restrictions will be considered, as well as limitations imposed by the economic agents or their organisations and the time required to supply the market from other sites; c) the costs and possibilities for consumers to resort to other markets; d) the national and international legal restrictions limiting consumer access to alternative supply sources or supplier access to alternative customers.

Article 15, meanwhile, establishes that for an economic agent to be deemed to have substantial market power in the relevant market, the following elements shall be considered: a) its market share (no formal thresholds are defined) and its possibility of unilaterally fixing prices or substantially restricting supply in a relevant market, without other economic agents being able to counteract that power at present or in the future; b) the existence of barriers to entry and elements that could alter both these barriers and supply to other competitors; c) the existence and power of competitors; d) the access possibilities of the economic agent and its competitors to sources of raw materials; e) its recent conduct; f) other similar criteria established in the regulations of the Law.

Most of the conducts identified in the Law as relative monopolistic practices are usually found in established competition laws around the world: vertical market allocation by reason of area and/or time; vertical price restrictions; tied sales; exclusive dealing; exclusionary group boycotts; predation; refusals to deal; price discrimination, sales or purchasing conditions; and raising rivals' costs.

In the 2012 reform to the Law, however, the Legislature added to the list of relative monopolistic practices a group of conducts that, although falling under the “rule of reason” provision, are farther from the competition law mainstream and are clearly more associated with the prosecution of what in other jurisdictions is considered exploitative abuse of dominance²⁵. These practices, which inclusion in Article 12 was strongly lobbied by suppliers to supermarkets, are:

- Conditioning, imposing or any other act aimed at demanding from an economic agent the change, modification or substitution of its trademark as a requirement for trading its goods or services, or at imposing the production of identical or similar goods or services under a trademark different from that used by the economic agent.

- Conditioning the celebration of contracts to accepting supplementary benefits that by their nature or following usual business practices are not related to the object of those contracts.
- Imposing, under the threat of breaking up business relations, payment or other business conditions not recognised by business customs.

As for absolute monopolistic practices, COPROCOM may order the suspension, correction or elimination of conducts connected to relative monopolistic practices, as well as any necessary actions to counteract their anticompetitive effects, regardless of the applicable fine. In that regard, it is important to point out that economic sanctions listed in Article 28 of Law 7472 for relative monopolistic practices are lower than those considered for absolute monopolistic practices. Article 28 foresees that, considering the economic agent's ability to pay, COPROCOM can impose a fine of up to 410 times the minimum monthly wage (approximately USD 200,000). In cases of repeat offense or when the COPROCOM considers the conduct to be "particularly severe" (although the concept is not defined in the law), it may impose, upon any economic agent concerned, a single fine of up to 10% of the value of its annual sales obtained during the previous fiscal year.

As in most competition legislations, Law 7472 does not explain how the rule of reason should be applied to establish the anticompetitive effects of the practices listed under article 12. Put differently, the Law does not define what should be understood by "*improperly displace* other agents from the market" (emphasis added) or, "*substantially limit* their access" (emphasis added), nor does it describe how the Agency should analyse and weigh evidence offered by the parties to demonstrate the pro-competitive effects or efficiency improvements in the market derived from the practice in question. The problem, however, is that, after almost twenty years of existence, COPROCOM has not issued guidelines, opinions or rules in this sense. Moreover, in its decisions COPROCOM rarely explains with sufficient detail the reasons why penalised practices are considered to have led to competitive harm. It should be no surprise, therefore, that a common critique among those who were interviewed for the present analysis is that, once COPROCOM establishes the existence of a conduct listed in Article 12 and finds that the agents in question have substantial market power, it applies a sort of *per se* prohibition. In other words, COPROCOM is often criticised because it downplays the effects analysis of investigated practices, which increases the risk of type I errors, or false positives, when assessing relative monopolistic practices.

It is also important to note that, like for absolute monopolistic practices, unless COPROCOM considers the conduct as “particularly severe”, the Law imposes relatively low fines for relative monopolistic practices. As mentioned before, market players may find that the benefits from engaging in practices aimed at excluding competitors from the market or inhibiting their entry are substantially higher than the costs of getting caught and penalised. Therefore, it could be argued that the deterrent effect of fines for this type of practices is limited.

2.2.2.2 *Enforcement*

Since its creation in 1995, COPROCOM’s investigations of relative monopolistic practices ending in penalties add up to a total of 11 (see Table 2). Like it was argued for cartels, taking into consideration COPROCOM’s lack of resources, this figure is far from negligible²⁶. Moreover, between 2009 and 2013, COPROCOM started 32 investigations involving unilateral conduct and vertical restraints violations (an average of 6.4 per year) and issued 31 decisions on this matter (an average of 6.2 per year).

Although fines contemplated in the Law for relative monopolistic practices are milder than those contemplated for absolute monopolistic practices, it is noteworthy that the average amount of the economic sanctions imposed on non-particularly severe relative monopolistic practices was significantly higher than those imposed on the equivalent absolute monopolistic ones.

Table 2. COPROCOM's investigated and sanctioned relative monopolistic practices (1995-2014)

Year of the final resolution	File Number	Economic agents involved in the conduct and sanctioned	Conduct sanctioned	Total amount of fines imposed**
1995	02-95	BTICINO de C.R.	Vertical price restrictions	¢3,128,241 (around USD 18,700)
1999	28-98	National Chamber of Pharmacies (CANAFAR)	Exclusionary Boycott	¢178,560 (around USD 650)
2001	31-99	10 members of the National Rice Chamber*	Exclusionary Boycott	¢92,035,140 (around USD 287,600)
2004	D-07-01	Embotelladora PANAMCO TICA S.A. (Coca Cola)	Vertical price restrictions	¢34,028,360 (around USD 80,600)
2005	IO-09-01	Corporación de Supermercados Unidos	Discrimination in purchasing conditions and exclusionary boycott	¢205,911,840 (around USD 465,600)
2007	IO-02-03	Abonos Agro S.A.	Tied sales	¢63,980,090 (around USD 122,800)
2008	D-06-06	COOPEALFARO RUIZ R.L.	Refusal to deal	¢21,320,910 (around USD 42,600)
2009	D-01-07	COOPELESCA R.L.	Refusal to deal	¢63,980,090 (around USD 113,200)
2011	D-04-08	Empresa de Servicios Públicos de Heredia	Refusal to deal	¢90,341,642 (around USD 177,100)
2013	D-04-03	Economic agent in the financial market***	Exclusive dealing	¢12,036,368,377 (around USD 23,700,000)
2013	D-07-09	22 car and auto parts dealers	Exclusionary Boycott	¢515,658,295 (around USD 1,011,000)

* Cases in which sanctions were also imposed on individuals.

** To calculate the fines in US dollars, the average exchange rate of January of the year of the final resolution was considered.

*** Following a recent court ruling, COPROCOM is not allowed to reveal any information on this case.

Source: Prepared on the basis of the information published by COPROCOM.

Box 3. Significant unilateral conduct cases

Car spare parts

In 2008 the National Institute of Insurance (INS) launched a web page to trade car spare parts through a private bidding program where car importers, car distributors and car spare part suppliers could interact. Its objective was to obtain the best supply conditions from car spare part suppliers. However, the largest car distributors and importers, through the Car Manufacture Association (AIVEMA), reacted to this initiative by conditioning their participation in the scheme on the imposition of restrictive and exclusionary conditions on the functioning of the bidding process. These conditions included: (i) fixing test periods so that AIVEMA's affiliates could pre-try the system without any obligation; (ii) AIVEMA's affiliates would exclusively sell to the INS all car spare parts for new cars (i.e. cars of less than 5 years); (iii) AIVEMA's affiliates would grant a 15% discount to the INS before the final price; (iv) AIVEMA imposed a certain date for the program to start working; and (v) all of AIVEMA's affiliates would have to be registered as authorised suppliers. This conduct was reported to COPROCOM by other spare part competitors not affiliated to AIVEMA, who argued that the conditions, requirements and conducts displayed by AIVEMA's affiliates directly affected the process of competition and car spare part competitors. COPROCOM found evidence of a boycott, since minutes of meetings within AIVEMA showed that its affiliates agreed not to support INS's program, given that it promoted the purchase of spare parts not recommended by manufacturers. In 2013, COPROCOM found that AIVEMA's affiliates were in a joint dominant position and that they used such power to put pressure on the INS to accept the Association's conditions, hence forcing competitors not affiliated to AIVEMA out of the car spare part market. COPROCOM fined AIVEMA's officials, affiliates and individuals that directly participated in the conduct with amounts that went from USD 5,158 to 211,494 per undertaking.

Cable TV

Coopealfaro Ruiz, R.L., is a local co-operative created to supply electricity in rural areas. It has a state concession and an authorisation to operate and provide services related to electricity generation, distribution and commercialisation in the area of Zaracero, thus controlling a vast infrastructure network (electricity towers and posts) in that area. Cable Zar S.A. is a local cable TV supplier authorised to exclusively offer such services in the Zaracero area. Cable Zar leased Coopealfaro's infrastructure (about 400 towers and posts) to provide its cable TV services. Competition issues arose when Coopealfaro decided to terminate the lease agreement, without objective justification, denying Cable Zar an essential input to provide its services. COPROCOM found that Coopealfaro enjoyed a dominant position in the cable tower and post network market, since: (i) the tower and post network was a natural monopoly; (ii) it had the possibility to choose from a wide range of customers that necessarily required its network to provide their services (i.e. telephone, Internet, cable TV); (iii) entry barriers were high due to regulatory restrictions; (iv) convergence in the telecoms sector allowed Coopealfaro to weigh its possibilities and expand its business to other markets, which in fact was evidenced; and (v) the network was impossible to replicate. In view of the above facts, in

2008 COPROCOM ordered precautionary measures to stop Coopealfaro from denying access to its infrastructure. Additionally, COPROCOM concluded that Coopealfaro's infrastructure was an essential facility and refusing access to its tower and post network would force Cable Zar out of the market, with important consequences for consumers. No procompetitive justifications were found, which resulted in a fine of approx. USD 42,990 (i.e. only 45% of the maximum allowed fine for non-severe cases).

Supermarkets

Corporación de Supermercados Unidos (CSU) is the largest supermarket chain in Costa Rica with over 100 stores. Its stores adopt different formats, according to the services they provide, which can be classified by: (i) low price stores (less variety); (ii) excellent customer in-store service (higher prices and regular product variety); or (iii) ample variety stores (high prices and excellent customer service). CSU's competitor, Diboyco S.A. – a Costa Rican market player, filed a competition complaint before COPROCOM arguing that CSU used its buyer power in the downstream market for low price stores to put pressure on its providers in the upstream market. The alleged conducts consisted of the following: (i) imposing purchase conditions upon potential suppliers so that suppliers wishing to sell to CSU had to provide the latter with their pricing strategies; (ii) imposing payment conditions, which included payment deadlines, price changes and special or additional discounts, different to those offered to CSU's competitors; and (iii) CSU invited other upstream suppliers to "manage the market" and incur in boycott behaviour so that CSU's prices were lower than those offered to its competitors. In 2005, COPROCOM found that CSU had substantial buyer power, since it could manipulate its suppliers in the upstream market and impose conditions upon them. COPROCOM also concluded that CSU illegally restrained its suppliers and foreclosed its competitors from obtaining better prices. COPROCOM imposed fines on CSU of approx. USD 465,600.

2.2.3 *Mergers*

2.2.3.1 *Substantive rules*

Before the 2012 amendment to Law 7472, Costa Rica not only lacked an *ex ante* merger control regime, but also the few rules governing mergers were clearly insufficient to prevent or effectively cope with anticompetitive transactions. In fact, in just a couple of paragraphs, Article 16 of the Law barely provided a merger definition; prohibited those mergers whose objective or effect is to reduce, distort or hinder competition; and established that during the investigation of prohibited mergers, the criteria for determining market power and defining relevant market had to be the ones used for the investigation of relative monopolistic practices. Meanwhile, Article 28 empowered the Commission to penalise unlawful mergers by ordering partial or total divestiture, as well as the imposition of a fine of up to 410 times the minimum monthly wage (around USD 200,000). As with sanctions for absolute and relative

monopolistic practices, the Law established that in “particularly severe” cases, the Commission could impose a fine equivalent to 10% of the value of the offenders’ annual sales for the previous fiscal year, or up to 10% of their assets.

Within this framework, in its first 18 years of experience COPROCOM not only investigated very few merger cases, but also, as noted by Sittenfeld (2007), in those few cases in which the Commission found anticompetitive effects, it encountered serious problems in blocking or undoing the transaction. One of the biggest problems, of course, was the fact that mergers had already been executed by the time the investigation started.

The 2012 amendment introduced a significant improvement to rules governing merger control in Costa Rica²⁷. First, Article 16 now provides a more robust definition of what is considered a merger: “the merger, acquisition and sale of a business establishment, or any other act or contract that merge companies, associations, shares, capital stock, trusts, management or other assets in general executed between competitors, clients, providers or other economic agents that have been independent among them and that result in the acquisition of economic control by one of them or the formation of a new economic agent under the joint control by two or more competitors”. In addition, without including any type of presumptive rules (e.g. market share thresholds, per se treatment, etc.), the amendment also established that mergers are transactions by means of which a person, public or private, acquires control over two or more economic agents, actually or potentially independent among them, or that participate in different levels of the supply chain of goods and services. Second, the existing definition of an anticompetitive merger was expanded. The new text of Article 16 states that COPROCOM shall approve those mergers that do not have the object or effect of: a) acquiring or increasing significantly substantial market power, thus leading to a limitation or elimination of competition; b) facilitating tacit or explicit co-ordination among competitors or producing adverse results for consumers; c) lessening, harming or impeding competition or free market participation with respect to equal, similar or substantially related goods or services. Moreover, if a merger has any of the aforementioned objects or effects, in order to approve it, COPROCOM shall assess whether: i) the merger is necessary for attaining economies of scale or developing efficiencies, which benefits are greater than its anticompetitive effects; ii) the merger is necessary to avoid the exit from the market of the productive assets of one of the economic agents involved in the merger; and iii) the anticompetitive effects can be offset by the remedies imposed by COPROCOM.

The amended Article 16 of the Law allows COPROCOM to impose the following remedies: a) the assignment, transfer, licensing or sale of one or more of the assets, rights, shares, distribution systems or services of a merging party to a third party authorised by the Commission; b) limiting or restricting the provision or selling of specific services or goods, or the marking off of the geographic area in which these can be provided or the type of customers to which they can be offered; c) the obligation to supply specific products or provide specific services under non-discriminatory terms and conditions to certain customers; d) the introduction, elimination or modification of the clauses included in the contracts with its customers or suppliers; and e) any other structural or behavioural remedy necessary for preventing, reducing or offsetting the merger's anti-competitive effects.

However, the most significant change introduced by the 2012 reform was probably the new rules for notifying mergers. Article 16bis establishes that, from April 2013, the parties to a merger falling within certain thresholds have the legal obligation to notify the merger to the Commission before it takes place or within five business days of its execution. According to the new rules, the thresholds for mergers that fall within the notification obligation are as follows:

- The total value of the productive assets of all the undertakings involved in the transaction, including their headquarters, exceeds 30,000 minimum monthly wages (approximately USD 14,550,000). This also applies to successive transactions executed within a period of two years that, in total, exceeds the aforementioned amount; or
- The total revenues generated by all economic agents involved within the national territory exceed 30,000 minimum monthly wages (approximately USD 14,550,000).

Failure to comply with the notification obligation is punishable with fines of up to 410 times the minimum monthly wage (approximately USD 200,000) in addition to any other sanction deriving from other violations of the Law, and independent of other measures that the Commission may order to eliminate or offset any anticompetitive effect of the merger.

Article 16ter establishes that COPROCOM has 30 calendar days to issue a resolution, extendable for up to 60 additional days in especially complex cases. Once the merger review is concluded, the Commission may: a) authorise the merger; b) subject the authorisation to meeting specific commitments proposed

by merging parties – in which case they shall be executed under the terms specified by COPROCOM in the resolution -; c) inform the applicant that the merger's foreseeable negative effects cannot be offset with the remedies proposed, which can lead notifying parties to propose new remedies within the following ten days. In the latter case, once COPROCOM receives the new proposal, it has to determine whether it: (i) accepts the proposal and approves the merger, subject to meeting the proposed remedies; (ii) approves the proposal, subject to remedies distinct to those proposed by merging parties; or (iii) blocks the transaction.

Although it is still too early to assess the impact of these amendments to the merger control regime – as noted above, implementation started in April 2013 – there is little doubt that they represent a substantial improvement to Costa Rica's merger regime.

Despite the improvements, the new merger regime still has problems. One of these problems originates in the fact that the current rules allow a merger to be notified up to five business days after its execution. Since international experience clearly indicates that undoing a consummated merger is a notoriously difficult task, it would have been better if the new rules established the obligation on merging parties to notify the transaction before its closure. Alternatively, the law could have required COPROCOM's prior approval before the closure of any notified merger. Another less drastic alternative could have been empowering the Commission to issue stop orders for those transactions where it had reasonable doubts about the likely effects of the transaction on competition. In this case, merging parties would not be authorised to close the transaction until the authority had cleared it.

Moreover, it could be argued that associating the definition of merger with the acquisition of control was not necessarily the best option available. In this regard, it is important to note that, although this definition allows the Commission to target more effectively potentially problematic transactions, it requires more case specific interpretation and therefore, it can create uncertainty and make the process less transparent.

Equally important, relying exclusively on the acquisition of control concept to define a merger transaction, as is the case in Law 7472, could leave outside the scope of merger review minority shareholders that, although they do not confer decisive influence over a previously independent firm, could have adverse effects on competition. As noted by the OECD (2013), it is well understood today that, under certain conditions, minority shareholdings may

have anti-competitive effects²⁸. Accounting for this is the fact that the holder of the minority interest may have the ability to influence the target to compete less aggressively, or it may decide to behave less competitively not to affect its financial interest in the target company. Even with a purely passive financial interest the holder may have a unilateral incentive to compete less aggressively as it benefits through its minority interest if the target faces less competition. Moreover, in some cases the minority shareholders could make the target less attractive for alternative investors, thus substantially reducing the possibility that the target could become a more powerful competitor.

Although the COPROCOM is pleased with the changes introduced by the reform to the Law in 2012 and is confident that the new regime will allow the agency to prevent anti-competitive transactions, the Commission is concerned that, since those adjustments were implemented, the number of notified mergers has been less than expected. In this regard, it is likely that the merger guidelines recently issued by COPROCOM will help to minimise violations to the notification rules. Although these guidelines refer mostly to the economic aspects involved in merger review, they advance a more clear definition than the one provided in the Law of what acquisition of control means in the context of a merger transaction. This substantially reduces a source of uncertainty regarding the new rules governing merger control that could account for the conduct observed by COPROCOM²⁹.

In order to effectively prevent possible violations to the notification rules, however, COPROCOM will also have to make an effort to disseminate more actively the content and scope of these rules among the business community and competition law practitioners. Moreover, COPROCOM will have to devote some resources to systematically monitor markets and, when a notification violation is detected, impose the sanctions contemplated in the Law. Put differently, parties to a merger not only need to know the existence and scope of the merger notification rules but also they need to perceive that failure to comply with them will most likely be detected and that the costs for doing so are substantial.

2.2.3.2 Enforcement

Between 1995 and 2013, merger provisions within the Law 7472 resulted in a small number of mergers investigated by COPROCOM. Indeed, between 1995 and 2008 COPROCOM opened 11 investigations involving anticompetitive mergers and issued only 5 decisions on this matter. Among

those cases, two are worth mentioning. The first one was initiated in February 1996 and involved the merger, in 1995, between Kimberly Clark and Scott Paper, both multinational US companies with business in Costa Rica. During the investigation, COPROCOM established that the transaction resulted in the elimination of competition in four markets related with paper tissue in Costa Rica: toilet paper, napkins, paper towels and paper handkerchiefs. The Commission requested the companies to present, in the following 30 business days, a plan of action to reverse the negative effects of the transaction in the four identified relevant markets. Although incumbents offered a plan to divest some of the brands to third parties, which was accepted by COPROCOM, there is no record showing the compliance of such plan in the Commission's docket, as stated by Sittenfeld (2007).

The second relevant merger case started in 2007 as a result of the acquisition of several companies belonging to Grupo Atlas by Electrodomésticos Mabecca, S.A.³⁰. In its investigation, COPROCOM established that by means of the transaction, Mabecca would increase its market share to 90% in the kitchen ovens market and 72% in the refrigerators market. Since barriers to entry in both markets were found to be significant, the Agency ruled that the transaction resulted in a substantial lessening of competition in both markets and, hence, that the merger represented an infringement to the Law. Moreover, since COPROCOM determined that Mabecca's conduct was particularly severe, a USD 2,317,561 fine (equivalent to 10% of Mabecca's annual sales) was imposed on the company. Finally, with the aim of avoiding further harm to competition, COPROCOM imposed on Mabecca the following measures: (i) refrain from representing or distributing potential competitors' kitchen ovens or refrigerators; (ii) report any merger intention or transaction that could possibly cause vertical or horizontal anticompetitive effects; (iii) avoid any vertical and horizontal restrictions to competition; and (iv) regularly report market information for the two products.

Since the implementation in April 2013, of the 2012 amendment to the merger control provisions, and until July 2014 when this draft was completed, only sixteen mergers were notified to COPROCOM, out of which twelve were approved with no conditions and, by the time this report was crafted, four were under review.

Among COPROCOM's decisions under the new merger regime, probably the most prominent one involved the acquisition Punto Rojo S.A. by Colgate-Palmolive (Central America) Inc. The former is a local manufacturer and dealer

of personal hygiene products, clothing and home products; whereas the second is an American multinational manufacturer and distributor of personal hygiene products and other home cleaning products. For this transaction, COPROCOM established that the merger would have impact on the following relevant product markets in Costa Rica: (i) soap: antibacterial, cosmetic and baby (bars and liquid soap), (ii) shower gel (iii) dishwashing soap (cream and liquid), and (iv) fabric softeners. COPROCOM's analysis revealed that, in the dishwashing soap market, the share of both merging parties was small and therefore the transaction posed no competition concerns. There were other markets, meanwhile, where, although Colgate had a high market share (i.e. fabric softener 80%-90%, shower gel 50%-60%), Punto Rojo's participation in the market was unimportant. In these markets the Agency concluded that the transaction posed no threat to competition, since the merger would not affect significantly Colgate's already high market power. In the antibacterial soap market, finally, Punto Rojo had a significant share of the market and Colgate was a close competitor. In this market, the Agency concluded that, although Punto Rojo and Colgate's joint market participation would increase substantially and there were high barriers to entry (such as the presence of well-established brands), actual and potential competitors had the means and incentives to increase their presence. In the light of these conclusions, the transaction was finally cleared, without any remedial action.

3. Institutional Issues: enforcement of competition policy

3.1 *Competition policy institutions*

Law 7472 endows COPROCOM with the exclusive authority to enforce competition law in Costa Rica. Article 21 states that the Agency, both at its own initiative and in response to complaints, is in charge of reviewing and sanctioning, where appropriate, any and all practices restricting competition and free market participation.

The Agency initiated activities in January 1996. Under Article 21 of the Law, it is a body of "maximum deconcentration" within the Executive branch, within the Ministry of Economy, Industry and Commerce (MEIC). This means that, although the Agency is formally independent from the government on competition law enforcement matters, for budgetary and administrative purposes it depends on MEIC.

COPROCOM's board is composed of five regular and five substitute members, nominated by the Minister of Economy, Industry and Commerce and

approved by the President. Their terms are staggered, and they are appointed for four-year terms, with the possibility of one re-election. COPROCOM's president is elected by its members from among themselves for a two-year term. Article 22 of the Law establishes the following qualifications for becoming a commissioner: (i) a person with recognised reputation, (ii) with "vast experience" in competition matters, (iii) recognised independence of judgment. Additionally, it stipulates that four members of the Commission must necessarily be: one lawyer, one economist and two professionals with a university degree in subjects related to the Agency's activities. Finally, the same article stipulates that substitute commissioners temporarily replace regular commissioners in cases of absence, legal impediment or "excuse". During Commission sessions, and unless they are replacing a regular commissioner, substitute commissioners are allowed to participate but not to vote.

Commissioners do not work full-time, and they meet in regular weekly sessions for which they are paid for their attendance – around USD 50 per session³¹. A *quorum* of four commissioners is required for a COPROCOM meeting, and the concurrent vote of at least three members is needed for a decision.

While commissioners have been given responsibility for adjudicating cases, COPROCOM's Technical Support Unit (TSU) has been granted the responsibility of investigating them. In addition, the TSU is responsible for conducting market enquiries, and a great deal of the Agency's advocacy work, which include drafting responses to consultations made by third parties as well as the Agency's opinions, and the conduct of outreach activities.

Although the responsibilities of the TSU are significant, the unit is composed of only 15 full time members, 12 of them being professionals in the field of law, economics and business administration. The remaining 3 members are administrative staff. The executive director in charge of the unit is directly appointed by the Minister of Economy, Industry and Commerce. All the TSU staff are civil servants assigned to the MEIC. As a result, neither COPROCOM's president nor the commissioners participate in the recruitment or promotion of TSU's officers. Moreover, TSU's executive director can be removed of his position at any moment by the Minister of Economy.

In addition to its limited staff, COPROCOM also has limited financial resources. Even though the Agency's budget was increased around 18% between 2009 and 2013, from USD 590,000 to USD 695,000, almost all of it (95%) was used to pay the wages of the TSU members. Furthermore, as shown

in the following charts, this budget is conspicuously lower than those of other economic regulators in Costa Rica³² and those of other comparable competition agencies in the region (see Table 4).

Table 3. Economic regulatory authorities' budget for 2012

Regulatory Institution	Budget in 2012
Commission for Competition Promotion (Comisión para la Promoción de la Competencia)	¢ 424,952,691 / USD 633,436
Pensions Regulatory Authority (Superintendencia de pensiones)	¢ 4,800,100,000 / USD 9,356,920
Telecoms Regulatory Authority (Superintendencia de telecomunicaciones)	¢ 23,950,900,000 / USD 46,687,914
General Regulatory Authority of Financial Entities (Superintendencia general de entidades financieras)	¢ 10,649,900,000 / USD 20,760,038
General Regulatory Authority of Insurance (Superintendencia general de seguros)	¢ 3,624,000,000 / USD 7,064,327
General Regulatory Authority of Stocks (Superintendencia general de valores)	¢ 5,443,300,000 / USD 10,610,721

Table 4. Comparable competition agencies' budget in Latin America

Competition Agency	2012 Budget	Number of employees	Share of budget allocated to wages
COPROCOM	USD 633,436	15	95%
Superintendencia de Competencia, El Salvador	USD 1,908,950	20	75%
Comisión para la Defensa y Promoción de la Competencia, Honduras	USD 900,000	13	59%
Instituto Nacional de Promoción de la Competencia, Nicaragua	USD 374,000	8	78%
Comisión de Promoción y Defensa de la Competencia, Uruguay	USD 270,000	5	60%

Source: Prepared on the basis of the information available in "Base de Datos Agencias América Latina" (2013), available at: <http://www.crcal.org/guias-y-estudios/otros-documentos>

Although the Costa Rican competition authority has certain institutional features which favour its independence – not least the fact that its independence is stipulated in the Law - there is still substantial room for improvement. First, MEIC is the ministry in charge of designing and running industrial policy in Costa Rica. Since competition and industrial policy often seek different and even contradictory objectives, it could be argued that placing COPROCOM within the structure of this ministry is probably not the best solution available³³.

Second, the simple fact that COPROCOM is part of MEIC implies a degree of budgetary and administrative dependency that at some point might conspire against the independence of the Agency. The same could be said about the appointment of the commissioners following the proposal of the Minister of the Economy; the minister's role in the appointment and removal of TSU's executive director; and the fact that TSU officials are in fact employees of the Ministry.

Third, while it is remarkable what the Agency has been able to accomplish with relatively limited human and financial resources; the fact that its resource allocation is so limited also reveals the marginal place that competition matters occupy on the Costa Rican public policy agenda. It could be argued that unless COPROCOM is provided with substantial additional resources, as well as sufficient autonomy to make use of them, it is hard to conceive how Costa Rica could have a sound and effective competition policy appropriate to the country's needs.

Finally, while the decision to let commissioners work part-time may reduce costs, it also leads to a number of problems. Firstly, since the payment to attend COPROCOM's sessions is negligible, the commissioners need to have a second employment which often places them in a situation of conflict of interests. As a result of this, it frequently occurs that the commissioners have to excuse themselves from participating in the decision making process. Hence, it is quite usual that a group of commissioners that issued a ruling in one case is completely different from another group of commissioners responsible for other cases. This tends to reduce the consistency in COPROCOM's decisions. Secondly, the part-time participation of commissioners' means that they may not always have an in-depth knowledge of the cases they are assessing. Consequently, efficiency is reduced as discussions about a single case may extend to several sessions and reaching a resolution may take longer than it should. Finally, the part-time scheme has sometimes generated important information asymmetries between the commissioners and the TSU members, which resulted in tensions between them.

3.2 *Administrative procedures*

Law 7472 does not define or specify with any detail the procedure that must be followed by COPROCOM in order to investigate and solve relevant issues involving monopolistic practices or unlawful mergers, in contrast to merger control cases. The implementing regulation does include some general definitions, but it generally remits to procedures envisaged in the General Law for the Public Administration. In other words, the procedures that COPROCOM must follow to solve these issues are similar to those that any government agency must follow in the investigation and resolution of any issues which might result in some type of penalisation.

Briefly, according to the procedural rules currently in place, when the Agency receives a complaint, the TSU must prepare a preliminary report for the commissioners to qualify its admissibility. The report must contain, among others, a detailed analysis of the legitimation of the claimant and defendant, the observance of the minimum requirements to file a complaint, as well as any existing evidentiary elements.

With respect to the report prepared by TSU, commissioners may either: a) categorically reject the complaint; b) request that TSU carries out further preliminary investigations; or c) order an ordinary administrative procedure to be instituted. As noted by Petrecolla (2008), in case of the latter, commissioners are required to clearly spell out in their decision, among other things, the events for which the procedure is being instituted, the article of the law that may have been infringed and possible sanctions resulting from this act³⁴. The decision must be duly notified to the agents involved in the investigation.

In the course of the investigation, TSU officials are responsible for the investigation and, therefore, may order any and all evidence to be submitted as well as to determine the veracity of the facts under review. Once the relevant information has been requested and received, the investigating body is obliged to summon the parties for a private oral hearing. The latter has two purposes: (i) granting the parties involved in the investigation access to the Commission's docket; and (ii) providing the appropriate moment for them to submit *de jure* and *de facto* pleas as well all relevant evidence.

Upon conclusion of the hearing, unless the procedures' executive board deems it necessary to introduce new facts or more evidence is needed – in which case a new hearing may be held - the board submits the case and its

recommendation to the commissioners for their review and decision. The administrative procedure ends with the issuing of a ruling by COPROCOM, which may include sanctions if the infringement of the law has been indisputably demonstrated.

According to article 27 of the Law, upon request of the involved market players, COPROCOM has the power to settle at any stage of the investigation before the hearing. It may do so, as long as there is sufficient commitment from the faulty undertaking to ensure that it will terminate the alleged practice or suppress anticompetitive effects thereof through the execution of conditions imposed by the Commission. In order to terminate the administrative procedure, COPROCOM is obliged to take damages into account, the economic agent's behaviour in past conducts and the possibility to restore competitive conditions in the market. In such cases, the Commission may demand undertakings to establish guarantees that it deems appropriate, and that a summary of such agreement is published and directly notified to the parties involved.³⁵

Finally, COPROCOM's decisions may be appealed within a period of only three working days³⁶. In this case, COPROCOM may change its decision. Note, however, that this has seldom occurred in practice.

Although the procedure was not designed for the application of competition law –in fact, it is essentially the same procedure used to investigate and sanction any other administrative demeanour– it has reasonably allowed COPROCOM to investigate and penalise undertakings involved in illegal practices. From the market players' point of view, moreover, the procedure grants the minimum guarantees of due process and, therefore, ensures that the regulator will reasonably use its discretionary powers. The main contribution to this is the separation between the investigating party and the decision-making party; the existence of an instance which allows the filing of pleas; the possibility of offering evidence; the ability to rebut the counterpart's evidence and arguments; and the option of appealing COPROCOM's decisions before the Commission itself or the judiciary.

However, it would be valuable for the system if the current general procedures were to be replaced by others designed with the specific purpose of responding to the complexities and specifications of competition matters, as it occurs in countries with a more established legal tradition of enforcing competition law.

3.3 *Judicial Review*

Until 2006, undertakings could not appeal a decision made by the Commission before a judicial court if it had not previously been appealed before COPROCOM. However, since 2006, as a result of a ruling issued by the Constitutional Chamber, once COPROCOM has issued a decision for a case, the parties involved can either appeal before the Commission or challenge it on illegality grounds before a contentious administrative court. In addition, if undertakings consider their constitutional rights to be violated, they can resort to the Fourth Constitutional Chamber of the Supreme Court of Justice. Note that in Costa Rica there is no court specialised in economic matters, including competition.

In that regard, it is important to point out that even though the majority of decisions made by COPROCOM involving fines have been challenged in the courts, a vast majority of them have been upheld by the latter³⁷. Equally important, although judges rarely study in depth the substance of the cases, they have never overruled COPROCOM's decisions on such grounds.

3.4 *Special competition regimes*

Barring the exceptions discussed in section 3.1 of this report, Law 7472 invests in COPROCOM the responsibility to investigate, and, where appropriate, penalise, all practices restricting or obstructing free competition. However, since 2008, the rules governing competition in the financial and telecommunications sector are different to those in place in other parts of the economy.

3.4.1 *Competition regime in the financial sector*

Article 56 of the 2008 Regulatory Law of the Insurance Market – which, following the provisions of the Free Trade Agreement Costa Rica signed with the United States, opened the insurance market to private investment and competition –, established that the financial sector's regulatory authorities are the ones responsible for authorising mergers between market players under their supervision³⁸. Moreover, it established that, once a merger authorisation request is received by any of these regulators, they must consult with COPROCOM on the effects that this might have on competition, and COPROCOM may issue an opinion within the following fifteen days. In those cases where regulators decide to deviate from the competition agency's opinion, even though such opinions are not binding upon them, regulators have to justify their decisions.

With regard to the investigations and penalisation procedures of anticompetitive practices (both absolute and relative) carried out by market players under the supervision of the financial regulators, it was established that COPROCOM would continue to be responsible for those procedures as in all other markets under its scope. In these cases, however, COPROCOM has to request the corresponding regulator's non-binding opinion on the matter to be issued within the following fifteen days. Moreover, it was stated that in cases where the relevant regulator explicitly advises the need to avoid a sanctioning action because of the risk it poses to the financial system's stability, COPROCOM has to justify why its resolution deviates from the regulator's opinion.

Finally, article 56 established that regulators must complain before COPROCOM for any practices contrary to those classified in Law 7472, in which case the regulators may participate in the corresponding procedure as interested party.

Even though the changes discussed do not imply a substantial modification in the investigation and sanctioning of anticompetitive practices in the financial sector –the amendment did not change the exclusive competence of COPROCOM over such matters– the same cannot be said regarding merger control. Indeed, under the new regulation, there is no clause stipulating that the authorities in this sector must ensure that the mergers requiring their approval do not harm competition. It can be argued, therefore that the provisions in article 56 of the Regulatory Law in the Insurance Market of 2008 were equivalent to empowering the financial sector regulators to approve mergers with possible anticompetitive effects within the markets under their supervision.

That said, since the Law entered into force, none of the regulators of the financial sector has ever adopted a decision related to mergers that deviated from COPROCOM's opinions. However, all cases dealt with involved transactions where the regulators did not perceive an objection and where COPROCOM did not foresee competition issues. Because of this, it is not clear what would happen if the regulators' view was not in line with COPROCOM's opinion. In particular, it is uncertain how much weight competition considerations would have in the regulator's final decision. Unfortunately, the rules governing this decision leave little room for optimistic forecasts.

3.4.2 *Competition Regime in the Telecommunications Sector.*

As noted earlier in this report, until 2008 the telecommunications sector in Costa Rica was a state monopoly under the responsibility of the Costa Rican Institute of Electricity (ICE). The sector, thus, was exempted from the competition provisions set forth in Law 7472. As a result of the ratification of the Free Trade Agreement with the United States in October 2007, in June 2008 the Costa Rican Congress approved the General Telecommunications Law (Law 8642)³⁹. The Law at stake did not only open the sector to private participation but also very explicitly defined the competition rules that would govern the sector.

Article 52 of Law 8642, states that the operation of networks and telecommunications services in the country will be subject to a sectorial competition regime ruled by that law, and that the criteria established in Law 7472 will be auxiliary. In this sense, the Law delegates the Telecommunications Regulatory Authority (SUTEL)⁴⁰ the following responsibilities regarding competition matters: a) promote competition principles in the telecommunications market; b) determine the existence of effective competition in the telecommunications market; c) guarantee access of operators and providers to the telecommunications market and to essential facilities under reasonable and non-discriminatory conditions; and d) prevent the abuse of market power and monopolistic practices. Moreover, Article 52 establishes that SUTEL will have the exclusive jurisdiction to know, correct and sanction monopolistic practices committed by operators or providers that have the object or effect of limiting, diminishing or eliminating competition in the telecommunications market.

The General Telecommunications Law, like Law 7472, classifies anticompetitive practices as either absolute or relative. Absolute monopolistic practices are prohibited *per se* and agreements to undertake them are legally void. They include four categories of hard-core cartels: price fixing, output restriction, market allocation and bid rigging⁴¹. In line with Law 7472, relative monopolistic practices are considered illegal only if they foreclose or exclude other market players, substantially limit their access, or establish barriers to entry or exclusive advantages in favour of certain persons. Moreover, a relative monopolistic practice is unlawful under Law 8642 only if the responsible party has substantial market power in the relevant market and fails to prove an efficiency defence.

Relative monopolistic practices contained in Law 8642 include: price discrimination; imposing sales or purchase conditions; refusals to deal; cross subsidies; vertical market division by reason of geography or time; vertical price restrictions; tied sales; exclusive dealing; exclusionary group boycotts; predation; and “any other act with the sole object of excluding operators or providers from the market or impeding their entry”⁴².

It is important to point out that Law 8642 considers absolute and relative monopolistic practices as “serious” offenses that can be penalised with fines of between 0.5% and 1% of the market player’s gross income obtained during the previous fiscal period. For those cases in which SUTEL considers the existence of a “particularly severe” infringement to the law, the Regulatory Authority (Superintendence) may impose a fine that goes from 1% to 10% of the annual sales obtained by the offender (articles 67 and 68 of Law 8642). Furthermore, SUTEL is entitled, by Article 58, to order the suspension, correction or elimination of the unlawful conduct.

Regarding merger control in the sector, article 56 of Law 8642 defines mergers as: the merger, acquisition, alliance or any other consolidation between two or more independent network operators, telecommunication service providers, associations, capital stock, trust funds or other assets in general. Although Law 8642 does not associate the definition of merger with the acquisition of control, in October 2008 the ARESEP issued secondary regulation where it stipulates that only mergers involving changes in control shall be notified before SUTEL for prior approval⁴³. In addition, the Law stipulates that the regulator has a 30 business day period to issue its decision⁴⁴. On especially complex cases, SUTEL may extend this deadline, for one single occasion, for up to 15 extra working days.

According to article 56 of Law 8642, SUTEL shall not authorise mergers that: result in the acquisition of market power or that could potentially increase the possibility of exercising market power; could ease express or tacit co-ordination between operators and/or providers; or could cause adverse effects on consumers’ welfare. However, SUTEL may evaluate if the merger is necessary to achieve economies of scale, develop certain efficiencies or avoid the exit of a competitor from the market.

Article 57 stipulates that for those merger that pose harmful effects on competition, SUTEL might impose certain conditions or corrective measures upon merging parties, which consist of the following: a) the assignment, transfer or sale of one or more of its assets, rights and shares through the

procedure of a public tender; b) separation or divestiture; c) the restriction or limitation to offer telecommunication services within certain geographical areas; d) restrict or limit the acquisition of new state concessions or authorisations; and e) the insertion, elimination or modification of any agreement clauses executed between the operators or service providers that stipulate anything related to the operation of the network or the provision of telecommunication services. Additionally, in case of non-authorized mergers, article 58 of Law 8642 allows SUTEL to impose sanctions consisting of a fine between 1% and 10% of the annual sales of the offender as well as partial or total divestiture of the merged companies.

Finally, notwithstanding SUTEL's exclusive power to investigate, correct and penalise monopolistic practices in the telecommunications sector, Articles 55 and 56 of Law 8642, respectively, foresee that: (i) when dealing with anticompetitive practices, SUTEL shall request COPROCOM's non-binding technical opinion in two instances, first, prior to starting procedures and, second, before taking a final decision, which shall be issued within 15 days; (ii) when dealing with mergers, SUTEL shall request COPROCOM's non-binding technical opinion only before taking a final decision, which shall also be issued within 15 days. If SUTEL departs from COPROCOM's opinion, the former must duly motivate its decision and approve it by a qualified majority.

It thus appears that, despite some differences, the regulations governing competition in the telecommunications sector are pretty similar to those contemplated in Law 7472 and, hence, share most of the strengths and weaknesses discussed throughout this report⁴⁵.

The telecommunications competition regime, however, has certain features that could be questioned in addition to those already discussed in previous sections for Law 7472. The most salient of these features relates to the decision of empowering SUTEL, and not COPROCOM, with the responsibility of enforcing competition law in the telecommunications sector. In this regard, it could be argued that, since SUTEL is responsible for the implementation of the *ex ante* regulation, empowering it to enforce *ex post* regulation could result in a less rigorous enforcement of the latter, particularly in those cases where both types of regulation conflict. This scheme, moreover, might bring about inconsistency between SUTEL and COPROCOM's decisions, with the possible consequence of weakening the legitimacy of competition policy in general. Finally, it could also be argued that delegating the application of both *ex ante*

and *ex post* regulation to a single regulatory authority increases the possibilities of regulatory capture. After all, it is easier to capture one agency than two⁴⁶.

Since its creation in 2008, SUTEL's enforcement record in competition matters has been modest. Probably as a result of the fact that its priority has been the building up of the Agency itself as well as defining the basic regulatory rules for the sector, the Agency has not yet defined the procedures that will regulate the investigations and decisions regarding anticompetitive conducts and mergers in the sector. Moreover, almost 6 years after SUTEL's incorporation, and despite having sufficient economic resources, the Agency has very few staff assigned to deal with competition matters. Last, but not least, most of the rather few investigations opened for anticompetitive practices are still pending⁴⁷.

The limitations of SUTEL became evident in 2012, when the agency was notified with the acquisition of Cablevision by ICE, a company that provided cable TV services. At the time, even though COPROCOM informed SUTEL that, from a competition perspective, the merger posed no problems – since ICE did not participate in the restricted cable TV market - and although it had no impact on concentration levels on radio spectrum, SUTEL decided to impose certain conditions on granting the merger authorisation, including the return by ICE to the government of 350 MHz of radio spectrum under its control. The regulator based its decision on the fact that ICE not only held a big share of the radio spectrum for telecommunications in Costa Rica but also was not using a substantial part of it. Although the decision was overruled by SUTEL after ICE's appeal, it became clear that, as far as competition is concerned, the telecommunications regulator still has some way ahead to become a credible and respected authority.

4. Competition Advocacy

Competition advocacy, for purposes of this discussion, has two dimensions. The first reflects the competition agency's role as consultant to the government and to the sector-regulatory agencies regarding legislation and regulation that implicate competition policy. The second is as proponent for increased public understanding and acceptance of competition principles.

The Law explicitly vests COPROCOM with the authority to engage in certain forms of competition advocacy. Article 1 of Law 7472 establishes that its general objective is to promote competition and access to free market. Article 27 further empowers COPROCOM to determine the co-ordination

mechanisms to penalise and prevent anticompetitive practices; to publish studies, opinions and decisions – always respecting undertakings' confidential information; and to issue practical guidance in competition matters. Additionally, subsection f) grants COPROCOM the faculty to issue, on its own initiative, non-binding opinions addressing questions of competition policy with respect to laws, regulations, agreements, and other governmental acts.

As pointed out by Sittenfeld (2007), since its incorporation in 1995, COPROCOM has made extensive use of the powers vested upon it to explain the benefits of competition and competition law enforcement as well as to broaden its base of support. Among the activities that the Agency has performed, the substantial number of courses, workshops and seminars imparted by it are particularly noteworthy. A great variety of actors have participated in these activities, from consumer associations and business chamber representatives to officers from other public institutions and government branches, such as the Judiciary, the Attorney General's Office, Congress, the Ombudsman's Office, sectorial regulators and the National Consumers Commission. Furthermore, the Commission has organised activities especially designed to familiarise journalists with competition matters. In many occasions these activities were carried out with the sponsorship of international organisations, such as the United Nations Conference on Trade and Development (UNCTAD), and with the support of foreign competition authorities, such as the US Federal Trade Commission, the Mexican Federal Competition Commission, the EU Competition Commission and the Spanish Competition Tribunal.

Since 1998 COPROCOM has published every two months a Competition Newsletter with the objective of spreading the basic competition principles, as well as publishing relevant cases concluded by the Agency. The newsletter is published on the Commission's website, together with a wide range of Commission-related materials (including, among other things, relevant legislation and COPROCOM's annual reports). The Agency also has a search engine on its Internet home page for decisions and opinions that allows relatively easy access to such material issued by the Agency since its creation.

Even though COPROCOM's efforts have been useful in broadening the perspective on competition policy in Costa Rica, and in raising awareness among market players, when it comes to advocacy, COPROCOM's most important contribution has been the issuing of opinions⁴⁸. During the Commission's early years its powers to issue competition opinions was never

exercised; however, from 2001 onwards such faculty has been used more frequently. At present, more than 50% of its resources are destined to the preparation and structuring of such opinions. In the last five years COPROCOM has issued such 87 opinions, which results in average of 17.4 per year.

Regulatory authorities in the financial and telecommunications sectors are prone to acknowledge COPROCOM's expertise and, therefore, tend to follow its recommendations. Indeed, with the only exception of the merger case involving the ICE (see above), in the remaining 31 occasions where the Agency's opinion was requested, the sector regulators' decision did not depart from COPROCOM's.

Meanwhile, the record of opinions and recommendations issued by COPROCOM to Congress and other governmental institutions is mixed. Indeed, in some cases they helped avoid the adoption of anticompetitive regulations. A good example of these cases occurred in 2011, when beans producers and suppliers pushed within Congress a bill that contemplated the creation of a National Bean Office with a structure and task similar to those of the Agricultural Industrial League of Sugar or the National Rice Corporation. Put succinctly, the bill contemplated granting producers and suppliers the power to determine production volumes, imports and exports, as well as commercialisation prices. Once COPROCOM was informed about this bill, it issued an opinion explaining to Congress its potential adverse effects on competition and consumer welfare. The bill was withdrawn.

Another successful case for COPROCOM was the Agency's discovery that the Ministry of Ecology and Energy (MINAE) had suspended an authorisation request to build a petrol service station in the area of Cruz de Guanacaste in the last months of 1998. MINAE's main argument for its decision was that demand in the area would be fully satisfied, since one petrol station already operated and the construction of a second one was being planned. In the ministry's view, authorising a third petrol station would only encourage "ruinous" competition between the stations⁴⁹. In light of the above, COPROCOM issued an opinion in 1999 stating that the National Fuel System Regulation established an entry barrier for potential competitors and encouraged the creation of local monopolies in the commercialisation of fuel. Shortly after receiving COPROCOM's opinion, MINAE modified the Regulations, eliminating some of the provisions that were questioned by the Agency.

However, there have also been several cases where COPROCOM's opinions have not been considered and its recommendations have been ignored.

For example, in 2013 COPROCOM found that the Ministry of Health, through some laboratories and medicine distributors, decided to limit parallel medication imports. The limitation consisted of prohibiting patented medicine imports and commercialisation by third parties without the patent holder's consent. According to MINAE, these measures were justifiable on grounds of guaranteeing good quality products, as well as preventing the commercialisation of fake or adulterated medications. The Agency issued an opinion in which it stated that these provisions did not only violate the regulatory framework of the sector –since the applicable regulations explicitly allow for parallel import of medicines, on condition of having sanitary registry in the country– but also represented an entry barrier for new competitors, which limited competition in the market. In its opinion, therefore, the Commission advocated for parallel imports to be allowed. However, until this date the Ministry of Health has not addressed COPROCOM's recommendations and medicine parallel imports are still prohibited.

COPROCOM's opinion on the Technical Cement Regulation is another example that shows that the government has not always considered the Commission's opinion. In this case, the opinion had its origin in a consultation brought forward by a member of Congress in 2009, regarding the competition effects of the Regulation on the cement market. After analysing the case, in April 2010 COPROCOM issued an opinion in which it argued that the chemical requirements for hydraulic cement were excessive, encouraged barriers to entry for potential competitors and foreclosed some market participants. In this sense, COPROCOM noted that even though the Costa Rican Institute of Cement and Concrete (the business association which brings together the most important cement and concrete producers in the country) argued that the requirements had been established because of ecological, health protection and quality control reasons, the fulfilment of such requirements was not foreseen in any other part of the world. Although COPROCOM encouraged the Office of Technical Regulation to revise the regulatory provisions, to this date no modification has been set.

Regarding COPROCOM's opinions on price regulation of goods and services provided under monopolistic or oligopolistic conditions - contemplated under Article 5 of the Law -, and on the establishment of import and export licences - contemplated under Article 6 of the Law - the experience has been both limited and mixed. On the one hand, between 1995 and 2002, the government consulted COPROCOM on the convenience to keep regulation over rice prices twice a year⁵⁰. In all cases, although COPROCOM insisted such regulation was not justified on competition grounds and recommended its

elimination, the government decided to depart from the Agency's opinion. On the other hand, in May 2014 the MEIC requested COPROCOM's opinion on the convenience to regulate the prices of fertilizers. In its opinion, the Commission argued that there was not enough information to justify such measure. It seems COPROCOM's opinion was taken into account, since MEIC has not introduced any regulation in this matter⁵¹.

Last, it is worth noting that the vast majority of opinions issued by COPROCOM has only involved markets and sectors within the scope of Law 7472. Put differently, the Commission rarely issues opinions with regards to markets exempted from competition law. Furthermore, COPROCOM has rarely been proactive; for instance through issuing opinions and recommendations to support the introduction of the structural reforms in markets where competition is inexistent or where it plays a marginal role (e.g. telecommunications and insurance sectors before they were opened, or in the majority of public services up to this date). It could be argued, therefore, that although COPROCOM has been fairly active as a consultant to the government and to some sector regulatory agencies concerning legislation and regulations that implicate competition policy, the Agency has remained within the boundaries its comfort zone.

5. Conclusions and recommendations

5.1 *Current Strengths and Weaknesses*

The main strengths of the Costa Rican competition regime lie in the analytic soundness of Law 7472, which provides a solid foundation for applying competition policy in law enforcement and in other policy issues. In line with best international practices, efficiency-based analysis is the primary criterion for applying competition law and other commonly encountered competition policy concerns. Horizontal agreements are prohibited *per se* and agreements to undertake them are legally void. With respect to unilateral conducts and vertical agreements the Law stipulates that such conducts are illegal only if they demonstrably harm competition in the case at issue, if the responsible party has substantial market power in the relevant market and it fails to provide a defence on efficiency grounds. Moreover, thanks to the 2012 amendments to the Law 7472, Costa Rica went from having an *ex post* merger control regime to an *ex ante* system that not only allowed it to identify possible anticompetitive transactions but also to carry out the necessary measures to prevent them from materialising.

Another strength of the competition regime in Costa Rica is COPROCOM's firm commitment to the enforcement of competition law. Despite its limited resources, the Commission –including both commissioners and TSU personnel– has repeatedly proved its willingness to confront and aggressively apply the Law to powerful economic agents. This can be seen in cases where COPROCOM has ruled against cartel cases and unilateral conducts, and also through issuing numerous opinions that advocate changes to regulations that might result in anticompetitive effects. Also, in a context where the level of support for competition policy in the wider public or business communities was never very high, COPROCOM always showed a level of independence that no one puts into question. As a result, the Commission is a highly respected institution, primarily by other economic regulators –who tend to follow its recommendations– and by the Courts, who in most cases have ruled in favour of the Agency's decisions.

The third strength of the Costa Rican competition regime was made evident with the 2012 amendments to Law 7472. The fact that the law was amended demonstrates that politicians in Costa Rica are willing to discuss policy changes in order to align the country's competition framework with best international practices.

However, the Costa Rican competition regime needs to be updated and strengthened. In this regard, one of its main weaknesses is related to the large number of markets that are exempted from competition law enforcement. As noted in this report, the exemptions currently in place not only are too many, but also involve markets where the introduction of competition could result in a more efficient functioning of the economy and, consequently, in substantial gains for consumers.

A second weakness of the Costa Rican competition regime is its institutional design. First, given that MEIC is the ministry responsible for designing and implementing industrial policy in Costa Rica, and competition and industrial policy often seek different and even contradictory objectives, it seems that placing COPROCOM within the structure of this ministry is probably not the best alternative available. Second, the simple fact that COPROCOM is part of MEIC implies a degree of budgetary and administrative dependency that at some point might conspire against the independency of the Agency. The same could be said about the appointment of the commissioners following the proposal of the head of MEIC, the minister's role in the appointment and removal of TSU's executive director, and the fact that TSU

officials are employees of the Ministry. Third, COPROCOM's resources (both human and financial) are clearly insufficient, as discussed in detail earlier. Finally, the fact that commissioners work part-time has sometimes led to inconsistent decisions, unjustified delays in decision-making and tensions in the relationships between commissioners and TSU's officers.

Another problem, identified in this report, is related to COPROCOM's investigation and sanctioning procedures. In this regard, it is noted that, even though, up until now, these procedures have not been an obstacle for the Commission's work and provide minimum due process guarantees, Law 7472 and the implementing regulation does not define or specify with any detail the procedures that must be followed by COPROCOM in order to investigate and solve relevant issues involving monopolistic practices or unlawful mergers. In other words, the procedures that COPROCOM must follow to solve these issues were not designed for the application of competition law –in fact, they are essentially the same than those used to investigate and sanction any other administrative demeanour–.

Regarding cartels, even though the 2012 amendment gave COPROCOM the authority to conduct dawn raids, the Agency still lacks some of the necessary means for effectively fighting this type of unlawful conduct. In this sense, it is worth mentioning that Law 7472 does not include any sanction for economic agents who contribute or help in carrying out illegal practices. Besides, except for “particularly severe” cases, the established penalties have been insufficient and do not deter economic agents from committing such conducts. Criminal sanctions for individuals are, moreover, not foreseen; neither are any types of sanctions for those economic agents or individuals that impede the implementation of a dawn raid. Finally, the Law does not provide for a leniency programme that would encourage voluntary co-operation of the involved economic agents with the Commission. This circumstance substantially limits COPROCOM's ability to detect and fight hard core cartels.

With regards to unilateral conducts, this report shows that, as for horizontal agreements, the envisaged penalties are relatively small. Likewise, it is worth mentioning that Law 7472 is not specific enough on how the rule of reason applies to the analysis of this type of practices and, up to this date, the Agency has not issued any guidelines, criteria or legal framework in that matter. Besides, COPROCOM's decisions have rarely been sufficiently explicit in providing reasons why the specific conduct represents a danger to competition.

Considering mergers, this report maintains that, despite the fact that the 2012 amendment to Law 7472 placed Costa Rica closer to the standard of best international practices, the merger control regime allows merger notifications to be filed after their execution. In addition, although the definition of merger in the Law allows the Commission to target more effectively potentially problematic transactions, it requires case-specific interpretation and, therefore, it can create uncertainty and make the process less transparent. Equally important, it could leave outside the scope of merger review minority shareholders that, although they do not confer decisive influence over a previously independent firm, could have adverse effects on competition through their decisions and actions.

As for COPROCOM's advocacy efforts, this report notes that although the Agency has been particularly active in regards to opinions issued for other government institutions to prevent or modify regulations that could result in anticompetitive effects, in some cases the Agency's opinions and recommendations have not been taken into account by the addressed parties. Furthermore, COPROCOM rarely issued opinions with regards to markets exempted from competition law or to proactively recommend and support the introduction of procompetitive changes in markets where competition was inexistent or marginal.

Finally, this report also questions the marginal role granted to competition in the review of mergers between market players in the financial sector. It also notes that, although the rules governing competition in the telecommunication sector are quite similar to those provided in Law 7472, the institutional arrangements in place in that sector could undermine its effective implementation. Moreover, the enforcement record by the sectorial regulator so far has been poor.

5.2 *Recommendations*

Recommendations calling for legislation

Expand the scope of the competition law to include all economic agents.

The competition law exemptions provided by law lack any economic justification whatsoever. In addition, such exemptions are provided for economic sectors where competition could have a great positive impact on consumer welfare. In line with international trends, thus, it is advisable to eliminate all competition law exemptions, both in terms of business (i.e. such as public service concessions) and type of persons undertaking the activity (i.e. legal monopolies, municipal governments, co-operatives, business associations, professional associations, etc.).

Grant COPROCOM more autonomy and independence.

COPROCOM's current institutional design allows for the Ministry of Economy, Industry and Commerce to improperly exercise influence over the Agency's decisions. Therefore, it is recommendable, as happened with other economic regulators recently created in Costa Rica, for COPROCOM to become an agency independent from the Ministry, self-sufficient in terms of financial and human resources, and with total technical and operative autonomy.

Significantly increase the Agency's budget.

The main weakness of Costa Rica's competition regime has been COPROCOM's lack of sufficient financial and human resources to effectively enforce competition law. Therefore, it is advisable to significantly increase said resources so that they are similar to other economic regulatory agencies in Costa Rica.

Replace the part-time commissioner's scheme, for one with fewer commissioners and full-time dedication.

The current system whereby commissioners work part-time does not only contribute to the appearance of conflicts of interest, but also gives rise to inconsistencies and may delay its decisions while causing problems with and conflicts between commissioners and the TSU. To avoid such problems, COPROCOM could adopt a scheme similar to the telecom regulator, this is, an authority with three commissioners appointed on the basis of a competitive examination. In order to strengthen their independence, their terms should be staggered and possibly for a period of six years without re-election. Alternatively, the agency could adopt a mixed scheme of full-time and part-time commissioners, where the former participate directly in the analysis and decision making process, including voting rights, and with the latter acting only as advisers. In any case, it is of vital importance to set up clear rules to avoid conflicts of interest.

Replace the current general procedures for conducting investigations and imposing sanctions with others designed with the specific purpose of responding to the complexities and specifications of competition matters.

Investigation and sanctioning procedures for monopolistic practices and illegal mergers were not designed to deal with the specificities of competition law matters. In this token, it is advisable to follow best international practices and define *ad hoc* procedures that go in hand with COPROCOM's responsibilities.

Establish new sanction schemes that efficiently deter illegal conduct and generate incentives to co-operate with the authority.

Except for "particularly severe" cases, the established penalties have been insufficient and do not deter economic agents from committing such conducts nor do they generate incentives to co-operate with the authority during its investigations. Therefore, a substantial increase in the amount of fines provided in Article 27 for non-severe cases, is recommended. Alternatively, recommendations include the imposition of only a maximum amount of fine, so that the Commission weighs the elements surrounding the anticompetitive conducts (i.e. aggravating and attenuating) in order to impose the amount of

finest that it deems fit (never exceeding the maximum amount) regardless of whether it is a “particularly severe” case or a non-severe case.

Also, it is advisable to include sanctions for those economic agents and individuals that help or contribute in the execution of anticompetitive conducts, that impede the implementation of a dawn raid by hindering, destroying or altering relevant information, as well as for those that deliberately refuse to hand in requested information from the Commission or do so incompletely. Finally, it is recommended to study the possibility to impose criminal sanctions upon those individuals that actively incur in absolute monopolistic practices.

Provide COPROCOM with powers to grant leniency.

It is advisable for competition law in Costa Rica to include a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member who reports its cartel association to the competition enforcement agency. As seen in other jurisdictions, this type of programmes (known as leniency programmes) are useful and efficient tools that encourage offenders to come forward to ‘confess’ and implicate their co-conspirators, providing first-hand, direct “insider” evidence of illegal conduct that other parties to a cartel want to conceal. Besides, such systems help to uncover collusion tactics that would otherwise go undetected and can destabilise existing cartels. They act as a deterrent effect to those weighing their possibility to enter into cartel arrangements.

Ban the possibility of notifying mergers after the execution of the transaction

Despite improvements to the merger regime included in the 2012 amendments to the Law, the rules currently in place allow merging parties to notify a transaction above defined thresholds after the deal closure. Since undoing a consummated merger is a notoriously difficult task for a competition agency, it is recommended to modify such provision in a way that mergers above the defined thresholds necessarily have to be notified before its closure. Additionally, it is advisable to empower the Commission to issue stop orders for those transactions where it has reasonable doubts about the likely effects on competition. In this case, merging parties would not be authorised to close the transaction until the authority clears it.

Replace the current definition of merger (which is associated with acquisition of control) with one that requires less case specific interpretation and adopt an expeditious procedure to deal with non-problematic transactions.

Although associating the definition of merger with the acquisition of control allows the law to capture more effectively potentially problematic transactions, it requires more case specific interpretation and therefore, the provision as it stands can create uncertainty and make the process less transparent. Equally important, relying exclusively on the ‘acquisition of control’-concept to define a merger transaction, as is the case in Law 7472, could leave minority shareholders outside the scope of merger control. Therefore, it is suggested to dissociate the definition of merger from the acquisition of control. Since such change will very likely increase the number of non-problematic merger notifications, it is recommended to adopt a more expeditious procedure to deal with these types of transactions.

Strengthen COPROCOM’s advocacy powers to promote pro-competitive legal frameworks.

One of COPROCOM’s biggest problems when issuing opinions destined to impede or reverse anticompetitive regulations is that in some cases the institutions do not take them into account. Therefore, it is advisable to empower the Commission with the faculty to issue binding opinions. Alternatively, the Law could oblige addressees of a COMPROCOM opinion to duly motivate their decision when departing from such opinion.

Transfer to COPROCOM the power to authorise merger transactions between market players in the financial sector.

At present, COPROCOM can only issue non-binding opinions that can or cannot be taken into consideration by the corresponding regulatory authority in mergers between market players supervised by the financial regulators. With the objective of preventing anticompetitive mergers, it is advisable to empower COPROCOM with the faculty to supervise such transactions and empower the corresponding regulatory authority to issue non-binding opinions to COPROCOM. Only in cases when it is necessary to avoid systemic risks and overall stability in the markets, should the scheme currently in place apply.

Transfer to COPROCOM the power to enforce the competition provisions in the General Telecommunications Law.

This reports notes that, since SUTEL is responsible for the implementation of the *ex ante* regulation, empowering it to enforce *ex post* regulation could result in a less rigorous enforcement of the latter, particularly in those cases where both types of regulation conflict. This scheme, moreover, might bring about inconsistency between SUTEL and COPROCOM's decisions, with the possible consequence of weakening the legitimacy of competition policy in general. Finally, it could also be argued that delegating the application of both *ex ante* and *ex post* regulation to a single regulatory authority increases the possibilities of regulatory capture. Therefore, provided that COPROCOM budget is significantly increased, it is recommended that the possibility of delegating the agency the power to enforce the competition provisions in the General Telecommunications Law is carefully studied. In this case, and in order to promote that COPROCOM's decisions are adequately informed, SUTEL could be empowered to issue non-binding opinions (similar to those currently in the hands of COPROCOM).

Other recommendations

Publish guidelines that describe the methodologies and criteria used by COPROCOM in its decisions for cases involving unilateral conducts and vertical agreements (i.e. relative monopolistic practices).

Law 7472 does not explain how the rule of reason applies in the analysis of unilateral conducts and vertical agreements. It is advisable for COPROCOM, therefore, to publish guidelines that, together with case law, allow third parties to understand the methodology the agency uses to assess the competitive effects of such conducts.

Strengthen the economic analysis of the decisions concerning unilateral conducts and vertical agreements (i.e. relative monopolistic practices).

In its decisions, COPROCOM rarely explains with sufficient detail the reasons why penalised practices are considered to have led to competitive harm. A common critique among those who interact with COPROCOM, therefore, is that the agency applies a sort of *per se* prohibition to the conducts listed in

Article 12 of the Law. To face such critique, and in order to minimise the risk of incurring in false positives, it is recommended for COPROCOM to make additional efforts to focus its analysis on the economic effects of the investigated practices. To do so effectively, the resources of COPROCOM would need to be boosted, especially with a dedicated economics unit to carry out quantitative analyses to support decisions.

Publish guidelines that explain the obligations, requirements and procedures to notify merger transactions.

In May 2014 the Commission issued guidelines explaining the methodology and economic criteria used by COPROCOM to review mergers within the framework of the new merger control regime. In order to reduce uncertainties about the procedural aspects of this regime, it is advisable that COPROCOM complements the new guidelines with others explaining these aspects, including the notification obligations and formalities.

Publish guidelines explaining the methodology and criteria used by COPROCOM to impose fines.

Although Law 7472 provides some parameters for COPROCOM to define the amount of fines imposed upon economic agents, such parameters are not sufficiently clear to grant further certainty and predictability. It is therefore recommended that, as other competition authorities have done in recent years, COPROCOM publishes guidelines containing the methodology and legal and economic criteria used by the Commission to impose fines.

Develop the corresponding capacities to enforce the power to conduct dawn raids.

The 2012 reform to the Law 7472 empowered COPROCOM to conduct dawn raids during its investigations. International experience shows that this faculty is a very effective tool to obtain evidence, especially when an investigation is still at the covert stage. It is advisable that the Commission develops and assigns resources to develop the necessary infrastructure (human and material) to start using such powers and to do it in an effective manner.

Use powers incorporated in 2012 to the Law 7472 for settling cases.

Until this date, the Agency has not used its powers for settling cases incorporated in 2012 to the Law. Since those powers allow the Commission to end unnecessarily time-consuming investigations –particularly where economic agents are willing to end the anticompetitive conduct under investigation and remedy its effects- it is advisable for COPROCOM to take advantage of them. When the conditions are met, applying the settlement powers will contribute to a more efficient use of the authority’s scarce resources.

Broaden the scope of opinions issued by COPROCOM to include sectors currently exempted from the Law 7472 and use them as a mechanism to promote procompetitive reforms.

COPROCOM has shown limited willingness to issue opinions aimed at impeding or modifying regulations that have anticompetitive effects in sectors exempted from competition law enforcement. Additionally, the authority rarely tried to proactively push forward structural changes in markets where competition is absent or plays a marginal role. Given the impact they have on the overall functioning of the economy and consumers’ welfare, it is therefore advisable for COPROCOM to broaden the scope of its opinions to these sectors and markets.

Conduct market studies.

In order to become an effective competition advocate in the markets mentioned above, COPROCOM will have to acquire deep knowledge on their functioning, and problems. Therefore, it is recommendable for COPROCOM to conduct exhaustive market studies that identify the main obstacles to competition in these sectors as well as the adequate remedies to deal with them.

Strengthen the dissemination and communication of competition policy.

The work COPROCOM has undertaken in disseminating and communicating competition policy since its incorporation in 1995 has allowed it to build a good reputation, especially within other regulatory authorities, and the Judiciary. It is, therefore, advisable to continue this work and extend its scope to a more ample audience. This should help the Commission increase competition culture in Costa Rica not only among government officials but also within the private sector, civil society and public in general.

NOTES

- ¹ This section draws extensively on the excellent country overview in the Bertelsmann Stiftung's Transformation Index (BTI) 2014. Unless otherwise noted, the report in question is the source for the information contained herein. See, Bertelsmann Stiftung, BTI 2014 – Costa Rica Country Report. Gütersloh: Bertelsmann Stiftung, 2014, and references therein.
- ² See Lehoucq, F. (2010) "Political Competition, Policy Making, and the Quality of Public Policies in Costa Rica," Working Paper, Commission on Growth and Development, World Bank; and Lehoucq, F. (2006) "Policymaking, Parties, and Institutions in Democratic Costa Rica", Background Paper, Centro de Estudios para el Desarrollo Institucional (CIDE), Mexico City.
- ³ See, The Economist (2004) "Not Swiss After All", November 25. Available at: <http://www.economist.com/node/3430295>
- ⁴ Costa Rica GDP per capita (PPP) in 2013 was 12,900 USD. This figure compares relatively high with other countries in the region such as Nicaragua (4,500 USD), Honduras (4,800 USD), Guatemala (5,300) and El Salvador (7,500 USD). The only country in Central America with a higher GDP per capita higher than Costa Rica is Panamá (16,500 USD). See, The World Factbook, Central Intelligence Agency. Available at: <https://www.cia.gov/library/publications/the-world-factbook/>
- ⁵ http://stats.oecd.org/Index.aspx?DatasetCode=SNA_TABLE1
- ⁶ Costa Rica's GDP (current USD) in 2013 was 49.62 billion. See, Costa Rica, World Development Indicators, World Bank. Available at: <http://data.worldbank.org/country/costa-rica?display=graph>
- ⁷ World Bank (2014) Costa Rica Overview. Available at: www.worldbank.org/en/country/costarica/overview

- 8 Note that the 1949 Constitution entrusted the state with key tasks such as the fulfillment of social and economic rights while retaining important areas of the economy, such as banking, electricity and telecommunications as state monopolies. The state was also given the administration of health, education and housing issues.
- 9 Both the provisions set forth in the Free Trade Agreement with Mexico (which was signed in 1994 and came into force in January 1995) and the structural adjustment program negotiated with the International Monetary Fund (PAE III, which was approved by Congress in 1995) obliged Costa Rica, among other things, to adopt a competition law framework.
- 10 See, Delgadillo L. (2013) “An Assessment of Consumer Protection and Consumer Empowerment in Costa Rica”, *Journal of Consumer Policy*, Vol. 36 (1), pp 59-86.
- 11 The term economic agent is similar to the concept of undertaking used in EU Competition Law.
- 12 The following conducts, contained in article 17 of the Law, are considered contrary to remediation norms and good business practices: the distribution of false or misleading information capable of harming the commercial interests of third party agents and consumers; false or misleading product comparisons in advertising; the fraudulent use of brands, trade names, packaging or labelling; and the receipt, use or dissemination of unauthorised confidential information.
- 13 Prior to 2012 amendments to Law 7472, all public service providers operating under a state concession were exempted of the provisions set forth in the competition law, regardless of whether the concession had been granted by means of another law. However, there were sectors, such as airlines, where these concessions had not been granted by means of a law. In these sectors, as a result, the exemption was no longer applicable following the 2012 amendments.
- 14 In the electricity sector, for instance, power system operations are largely the responsibility of state-owned enterprises: the Instituto Costarricense de Electricidad (ICE), its subsidiary Compañía Nacional de Fuerza y Luz (CNFL), and some small municipal utilities. A handful of rural co-operatives generate, distribute and market electricity in rural areas not covered by ICE or CNFL. ICE generates the bulk of electricity supply (81%), provides all transmission service in the country, and is responsible for just over a third (39%) of electricity distribution. CNFL, whose main corporate purpose is to

distribute and market electricity in the capital, San José, accounts for 4.5% of electricity generation and distributes 42% of generated electricity in the country. Two municipal companies and four co-operatives cover the rest of power distribution in Costa Rica. These companies also produce 3% of the electricity. Private companies, including small hydroelectric projects, sugarcane refineries and wind plants, produce the remaining electricity in Costa Rica. All of the electricity they produce must be sold to ICE who then transmits to distributors. Changes introduced by Laws 7200 of 1990 and 7508 of 1995 permit limited private-sector participation in electricity generation (30% of the market). At present there is no competition in the local generation market, only competition for the market, through ICE contract tendering. ICE and all other companies participating in the distribution market, moreover, provide their services under monopolistic conditions, since all have exclusive market allocation areas. For further information see: <http://www.reegle.info/policy-and-regulatory-overviews/CR>

¹⁵ The country imported almost 18 million barrels of crude oil in 2010, 95% of which is used for transportation and the remainder for energy plants. Costa Rica is among the few countries in the region with no oil and gas production, although there are indications of offshore deposits.

¹⁶ See, Petrecolli, D. (2006) “Costa Rica, Agro-cadena del Arroz: Estudio Sectorial de Competencia”, FIAS, World Bank. Available in <http://www.coprocom.go.cr/documentos/informes/InformeFinalArroz.pdf>

¹⁷ The Constitutional Court’s ruling followed a constitutional challenge to a decision by COPROCOM sanctioning affiliate members of the Lawyers Bar Association (Colegio de Abogados) for fixing their fees.

¹⁸ The minimum monthly wage is currently set at ₡266,942.69 (approximately USD 477).

¹⁹ Article 29 of the Law 7472 states that in order for the COPROCOM to determine a fine, the agency shall take into consideration the following valuation criteria: the seriousness of the infringement, the threatened or caused damage, the indications of intention, the perpetrators’ market share, the damaged or threatened market, the duration of the conduct or merger, the recidivism of the perpetrator and its payment capacity. To this date, however, the COPROCOM has not issued any criteria or guide regarding the application of such valuation criteria.

²⁰ See Sittenfeld, P. (2007) “Ventajas y limitaciones de la experiencia de Costa Rica en materia de políticas de competencia: un punto de referencia para la

región centroamericana”, Serie Estudios y Perspectiva N°69, Comisión Económica para América Latina, México D.F.

21 This does not mean that the refusal to provide requested information or providing it incomplete went unpunished. As a matter of fact, COPROCOM has used its powers to penalise the delay in the giving of information for sanctioning this behaviour by undertakings.

22 As a reference, for such cases, the recent amendment to the Federal Economic Competition Law in Mexico, in addition to financial penalties, provides criminal penalties of up to three years of imprisonment.

23 It is important to note that COPROCOM has sent Congress a new amendment proposal to Law 7472, which includes leniency programme provisions. The proposal, however, has not yet been discussed in the Legislative Assembly and observers predict that it is unlikely it will be in the near future.

24 During almost the same period of time, the investigations of absolute monopolistic practices ending in penalties carried out by Mexican competition authority add up to a total of 60. Note, however, that the size of the Mexican economy is around 26 times bigger than the size of the Costa Rican economy and the budget of the Mexican Federal Competition Commission has been around 25 times bigger than COPROCOM's.

25 The main reason why many jurisdictions prefer to avoid introducing exploitative abuse provisions in their competition law is because they understand that the effective control of these provisions could exceed the scarce resources of a competition agency and, more importantly, they could discourage the search for efficiencies and improvements and, consequently, end up strengthening a dominant position. See, Grosman, L. and Tserebrisky, T. (2003), “El Abuso Explotativo y la Defensa De La Competencia en Argentina”, Boletín Latinoamericano de Competencia N°16.

26 As a reference, the Mexican Federal Competition Commission investigated and imposed fines upon undertakings for this type of anticompetitive conducts in 42 occasions during a similar period.

27 For further information on the merger control regime in Costa Rica, see Monge, C. and López Volio, M. (2014), “Costa Rica”, in The Antitrust Reviews of the Americas 2014, Global Competition Review. Available at: <http://globalcompetitionreview.com/reviews/54/the-antitrust-review-americas-2014/>

28 See OECD (2013) “Background Note. The Concept of a Merger Transaction”, in Definition of Transaction for the Purpose of Merger Control Review, Competition Policy Roundtables, Paris, France.

29 Since the guidelines present with fair amount of detail the economic issues involved in the review of the competitive effects of mergers as well as the methodology the Agency will use to assess those effects, it is likely that they will also help to improve the soundness of COPROCOM’s analysis of mergers transactions and the quality of its decisions in this matter.

30 Grupo Atlas is a Costa Rican company whereas Electrodomésticos Mabecca, S.A. is the Costa Rican subsidiary of Controladora Mabe, S.A. de C.V., a Mexican Holding with worldwide businesses.

31 Substitute members are paid for their attendance around USD 25 per session.

32 Unlike the Regulatory Authorities mentioned in the table above, COPROCOM counts with additional resources from MEIC’s budget to pay for the lease of its offices and related bills (e.g. electricity, water, private security, etc.). Such payments are not included in COPROCOM’s annual budget.

33 On the relationship between industrial policy and competition, see Aghion, Dewatripont and Harrison (2012), “Industrial Policy and Competition”, NBER Working Paper No. 18048.

34 Petrecollo Diego (2008) “Voluntary Peer Review on Competition Policy: Costa Rica”, United Nations Conference on Trade and Development, United Nations, New York and Geneva.

35 Please note that as of the drafting of this report, there has been only one request from COPROCOM to settle a price fixing case.

36 During the procedure the economic agents may request the overruling of the act that initiated the procedure, the act that denied the oral hearing or the act that deems the evidence presented during the hearing inadmissible. According to the procedure, the authority that issued the act (i.e. the TSU and/or commissioners) are responsible of solving the requests.

37 Please note that only in one case the courts ruled against COPROCOM for procedural matters. Under the courts’ view, COPROCOM failed to motivate its decision when applying different fines upon the parties involved.

- 38 The regulators of the financial system referred to in this provision are: Regulatory Authority of Financial Entities (SUGEF), created in 1995 and whose function is to audit the operations and activities of financial entities; the Regulatory Authority of Stocks (SUGEVAL), created in 1998 and whose function is to regulate the stock market; the Pensions Regulatory Authority (SUPEN), created in 1996 and whose function is to regulate the national pensions system; and the Insurance Regulatory Authority (SUGESE) created in 2008 and which is responsible for the regulation of the insurance industry.
- 39 For a detailed description of the opening of the telecommunications sector in Costa Rica and the role that Free Trade Agreement with the United States played in the process, see Trejos Lalli, E. (2012) “Apertura de las Telecomunicaciones: 5 años de Avances y Desafíos”, in Informe 2012: Hacia la Sociedad de la Información y el Conocimiento, Programa Sociedad de la Información y el Conocimiento, Universidad de Costa Rica, Costa Rica.
- 40 SUTEL was created in 1998 through the Law for the Strengthening and Modernisation of Public Entities in the Telecommunications Sector (Law 8660). It is a body with maximum deconcentration under the ARESEP.
- 41 In line with the provisions of article 11 of the Law 7472, the Law 8642 also specifies as unlawful certain particular kinds of conduct within those categories. The price fixing clause prohibits information exchanges with the purpose or effect of fixing or manipulating price; the output restriction clause prohibits commitments relating to the volume or frequency in which goods and services are manufactured; the market allocation clause covers actual and potential telecommunication services’ markets; and the bid rigging clause covers agreements respecting both participation in auctions and establishment of the prices to be bid.
- 42 With the cross subsidies exception, all the practices included on this list are contemplated in article 12 of Law 7472.
- 43 It is relevant to highlight that neither the Law 8642 nor its regulations contemplate notification thresholds.
- 44 The review period shall start from the moment of the authorisation request filing, or otherwise, from the moment undertakings comply with SUTEL’s information request.
- 45 The most salient differences between the rules governing competition in Law 7472 and Law 8642 are the following: 1) SUTEL has no power to conduct dawn raids; 2) undertakings in the telecommunications sector may not settle

competition investigations, and; 3) SUTEL has no power to impose fines for failure to notify merger transactions.

46 In favor of delegating SUTEL with the power to enforce competition law in the sector, it could be argued that, by the time the new Costa Rican telecommunications legal framework was defined, COPROCOM had no experience whatsoever in the sector and it definitively lacked the resources necessary to assume this responsibility.

47 Until July 2014, SUTEL has started 3 investigations: (i) in 2012, against 3 cable TV providers for price fixing, which was closed in March 2014 without sanctions; (ii) in 2011, for predatory pricing and margin squeeze, which is still pending, and (iii) in 2010, for price discrimination against one cable TV provider, also still pending. Additionally, SUTEL has asked COPROCOM's opinion regarding the viability to start investigations in the Mobile Virtual Network Operators market (2012) and in a couple of refusal to deal cases (2013). In both cases, however, no investigation has formally been started.

48 COPROCOM's opinions include both, those issued on its own initiative as well as those stipulated under Law 7472 –which involve governmental price regulation for monopolistic and oligopolistic markets -. They also include opinions requested by regulators in the financial and telecommunications sectors for cases involving mergers and anticompetitive practices. Finally, they also include consultations by other government institutions and third parties.

49 It is important to note that MINAE's decision was based on the National Fuel System Regulation.

50 As noted in section 2.1 of this report, in 2002 Congress passed Law 8285 which ended government direct regulation over rice prices and delegated it CONARROZ.

51 According to COPROCOM, there have been very few occasions where its opinion under Article 6 cases was requested. In all of them, since the measures in question did not impose further restriction on the import and export of products, the Agency's opinion was favourable. In the last five years, moreover, its opinion on this matter has not been requested.

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