

**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

**VOLUNTARY PEER REVIEW ON COMPETITION POLICY:  
COSTA RICA**

**Full Text**



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# 1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY

## 1.1. CONTEXT AND HISTORY

As with other countries in the Central America, Costa Rica has made the transition from a state intervention-based economy to a market-oriented economy. The country based its development strategy on export agriculture and export promotion to take effective advantage of opportunities offered by globalization.

The process began with the implementation of three policies: tariffs reduction, downsizing of the state, and the adoption of stable and consistent macroeconomic policies. In addition, a set of provisions was enacted as a competition policy tool to combat anti-competitive practices and enforce constitutional rights relating to trade and business (Article 46 of the Constitution). The principles were crystallized in Law 7472, 7472, “*Law for the Promotion of Competition and Effective Consumer Protection*”.

Costa Rica is a middle-income country, set up as a republic. The economy has grown at a rate of about 5% over the last 20 years. It should be highlighted that the country’s territory remained on the margins of the armed conflicts that characterized the region during the 80s and first few years of the 90s, thus successfully avoiding the more serious economic consequences of those conflicts.

Costa Rica’s economy generates a gross domestic product (GDP) of around \$22.2 billion (2006) and has an estimated population of 4.4 million inhabitants (2006), which is growing at an annual rate of 1.8% (World Bank, 2007). The nominal per capita GDP is estimated at US \$5,102 (2007) (International Monetary Fund, 2007).

As a republic, Costa Rica is headed by a president elected by universal suffrage for a period of four years. The legislative branch is unicameral and is comprised of 57 members. Historically the party system has consisted of two major political forces: a social democratic National Liberation Party (PLN) and a more conservative Social Christian Unity Party (PUSC). In the last few years, however, new political forces have appeared on the scene. At the vertex of the judicial system is the Supreme Court, composed of magistrates elected by Congress for a period of 8 years (*The Economist*, 2007).

Costa Rica’s economy has grown steadily over the last 20 years at average annual rates of 5.1% (1986-1996) and 4.7% (1996-2006). An average annual growth rate of 5.4% is estimated for the 2006-2010 period (World Bank, 2007).

The last two years have been especially favourable for the local economy. According to ECLAC’s estimates, the pace of economic expansion has accelerated, going from 5.9% in 2005 to 7.9% in 2006, reflecting primarily a surge in exports (12.6%) and investment (9.3%); per inhabitant, the GDP has risen 5.7% (ECLAC, 2007).

Costa Rica has historically been characterized by political stability, particularly after 1949, when an episode of internal conflicts came to an end and institutional restructuring took place.

In Costa Rica, competition law has very early roots. Article 16 of the 1917 constitution established the defense of the economic freedom as long as it does not harm third parties.

That same vision carried over to the 1949 constitution, in effect today, which sets out the fundamental rights of citizens to free trade, agriculture and business, and expressly prohibits private monopolies, empowering the State to repress monopolistic practices (Article 46). (Cuevas, Carrasco and Khemani, 2007)

Historically, Costa Rica's public sector has played a very active role in the economy, participating directly in strategic economic sectors. In response to the debt crisis of the 80s, the country shifted its growth strategy to exports, including financial sector and price deregulation (decade of the 80s), followed by a trade opening beginning in the 90s (Rivera and Schatan, 2006).

Indeed, the current competition law itself has its origins in the free trade agreement with Mexico, which contains a competition clause, and negotiations for the Third Structural Adjustment Program (PAE III), which was called for the adoption of a competition law. In this context Costa Rica's competition law is therefore inspired by a similar Mexican law, although it contains considerably more exceptions than Mexico. (Rivera and Schatan, 2006). Law 7472, *Law for the Promotion of Competition and Effective Consumer Protection* (LPCDEC), was enacted in 1994.

The State has historically taken an active role in the economy, participating directly in strategic sectors. In response to the debt crisis of the 80s, it adopted an export-based growth strategy, implementing financial sector and price deregulation in the 80s and a trade opening in the 90s. The LPCDEC, originating as has been mentioned in the free trade agreement talks with Mexico, can be said to have materialized deregulation policy and the economic opening.

The LPCDEC empowers the government to regulate the prices of goods and services only temporarily and solely in exceptional cases, which include the existence of abnormal market conditions or monopolies or oligopolies in the production or sale of goods or services. Regulation must be preceded by a technical study to confirm the existence or permanent nature of the exceptional conditions being invoked.

In so much as Costa Rica's competition law has been part of a wider initiative within the framework of the economic opening and structural reforms of the 80s, it goes beyond what is strictly considered competition policy.

The LPCDEC includes three main substantial aspects which are related but strictly independent, to wit: dispositions on deregulation of economic activities (Chapter 2, Articles 3 to 8), protection of competition (Chapter 3, Articles 9 to 16), and consumer protection (Chapter 5, Articles 28 to 46).

In addition, Article 17 (included in Chapter 3 on protection of competition) involves a fourth aspect, namely, a ban on unfair competition – a provision that is directly enforceable by the judicial branch.

Chapter 1 (Articles 1 and 2) contain general provisions (objectives and definitions). Chapter 4 contains two separate sections, one on the Commission for Regulatory Improvement, the authority with respect to the deregulation chapter, and another on the Commission for Promoting Competition (COPROCOM), as the enforcement body for Chapter 2 on protection of competition (with the exception of Article 17 on unfair competition). Chapter 6 creates the National Consumer Commission as the enforcement body for Chapter 5; and, finally, Chapter 7 gives final provisions in Articles 61 through 72.

Throughout this report, when reference is made to the competition law, what is therefore understood are the competition protection aspects of the LPCDEC, or Articles 9 through 16 of Chapter 3, Section 2 of Chapter 4, Chapters 1 and 7 and corresponding regulatory laws. In like manner, reference will be made to the law for consumer protection, economic deregulation and unfair competition.

Since its enactment, several reforms have been made to the LPCDEC, but not in the sections referring to competition protection. In mid-2007 a bill to that end was submitted seeking to give the Commission for Promoting Competition (COPROCOM) additional resources for fulfilling its objectives, widen the scope of competition improvement policy in both public and private sectors, and add elements for more efficient enforcement of the law.

## 1.2. Objectives

The objective of the LPCDEC is to protect and promote free and fair competition by preventing and prohibiting monopolies, monopolistic practices and other restrictions to market efficiency. Given that this is a public law, its provisions may not be waived by the parties and are applicable to any general, special, or contrary contractual customs, practices, uses or stipulations.

The goal of Costa Rica's competition policy is set forth in the first article of the LPCDEC.

*Law 7472, Law for the Promotion of Competition and Effective Consumer Protection*

*ARTICLE 1. Objective and Ends*

*The objective of this law is to effectively protect the legitimate rights and interests of consumers and promote free and fair competition by preventing and prohibiting monopolies, monopolistic practices and other restrictions to market efficiency, and by eliminating unnecessary regulations of economic activities.*

A wide range of opinions exists on the objectives that should be addressed by competition policy. Schematically, there are two opposing points of view: one in which the primary or sole goal is to protect economic efficiency, and another that appeals to a more pluralistic view of the protection of public interest, encompassing non-economic aspects as well as economic efficiency (including market competition and consumer welfare).

In most jurisdictions, the primary goals of competition policy are to maintain and promote competition in order to promote the efficient use of resources, while at the same time protecting the freedom of economic agents. Nevertheless, under certain circumstances competition policy tends to aim at achieving such goals as pluralism, deconcentration of economic decisions, prevention of abuses of economic power, the

promotion of small enterprises, justice and equity and other socio-political values (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007).

The incidence of these supplementary goals tends to vary in the different jurisdictions and over time, reflecting the changing nature and adaptability of competition policy for addressing everyday social concerns, without losing view of its basic objectives (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007).

Including multiple objectives would increase the risk of conflicts and inconsistencies in competition policy enforcement. The interests of the various stakeholders may limit authorities' independence and lead to political interventions and compromises that erode economic efficiency.

In the United Nations "Set of Principles and Rules", it is agreed that laws should primarily be grounded in the protection of market access, competition, trade and economic development (cf. Section E, paragraph 2).

Also, pursuant to Section A, paragraphs 2 and 3 of the Set, the objectives would be primarily economic (efficient international trade and growth; competition creation, promotion and protection; control of economic concentration; the fostering of innovation; and social welfare, especially that of consumers). The United Nations "Model Law" sets out this approach in its first chapter (UNCTAD/RBP/CONF/10/Rev.2 2000) (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007).

As mentioned earlier, in Costa Rica the objective of the LPCDEC is to protect the rights and interests of consumers and promote free and fair competition by preventing and prohibiting monopolies,

monopolistic practices and other restrictions to market efficiency, and by eliminating unnecessary regulations of economic activities (LPCDEC, Art. 1).

According to the law, the protected legal interest is competition (free competition) and consumer rights and interests. Monopolies, monopolistic practices, unnecessary regulations for economic activities and, in general, limitations to efficient market functioning are considered harmful to those legally protected interests.

Although the letter of the law is not restrictive with respect to the supremacy of economic efficiency and consumer welfare as the sole criteria for its enforcement, these criteria can be interpreted *prima facie* as being implicit and are, in fact, the guiding criteria. Otherwise, the LPCDEC's objective does not appear to be inspired by the public interest viewpoint.

### **1.3. Competition Policy as a Tool for Alleviating Poverty**

Starting with the formulation in September 2000 of the Millennium Development Goals by the United Nations (United Nations, 2000), policies for encouraging development and reducing poverty have taken the spotlight globally, becoming progressively the model for public policies in countries where major portions of the population are living in poverty.

Competition policy as a development strategy has not escaped this trend. Experts in the field are beginning to propose formulas that supplement the traditional objective of competition policy – the efficient distribution of resources in the economy as a whole – with the timely objective of improving living conditions for the poor.

For example, Professor Simon Evenett has noted that “*the conceptual arguments and available empirical evidence abundantly support the theory that promoting competition between firms potentiates rapid economic growth in developing economies*” (Evenett, 2003). More recently, in a paper commissioned by UNCTAD, Evenett addresses the fundamental question: Can competition promotion help countries meet the Millennium Development Goals? (Evenett, 2006).<sup>2</sup>

The recent work of Professor Eleanor Fox, notes that competition law enforcement in developing countries needs to aim at not only promoting efficiency and consumer welfare, but also eliminating limitations to mobility within and access to the impoverished sectors: “*This means not only harnessing market forces to keep prices competitive; it also means building a ladder of mobility from the lowest rung up to enable mobility, incentivize entrepreneurship and stimulate invention.*” (Fox, 2007, p. 110) In particular, a specific means of enforcing competition protection law is recommended, so that: “*The marketplace should give firms, including smaller and younger firms, a fair chance to compete on the merit of their product, free from artificial and unnecessary foreclosing restraints by powerful firms.*” (Fox, 2007, p. 113).

Costa Rica has actively embraced the Millennium Development Goals (MDG) initiative. It was one of the 191 countries to approve the 2000 Millennium Declaration in New York for which the initiative was launched. The task of incorporating the MDG into national planning was then undertaken through a joint effort between the UNDP and the Ministry of Planning. The project aims at making the MDG a transversal theme of the major ministries and institutions in the respective goal areas. (United Nations Development Programme in Costa Rica, 2008).

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<sup>2</sup> The research says it can, based on a survey of the number of positive references between competition and development in reports on Millennium Development Goals produced by various United Nations agencies. One of the research findings, in particular, was that half the references are concerned with the goals of poverty and hunger reduction and improved access to new technologies. Also see (Alvarez, Evenett, & Wilse-Samson, 2007).



In tune with this, the “Jorge Manuel Dengo Obregón” 2006-2010 National Development Plan, submitted in January 2007, contains strategic actions as prioritized by each sectoral minister, and incorporates MDG actions, according to the National Planning and Economic Policy Ministry (MIDEPLAN, 2008).

COPROCOM has commissioned two studies on competition within economic sectors that strongly impact the living conditions of the population’s most vulnerable segments: rice and liquid petroleum gas.

**Box 1: Competition Policies and Poverty Reduction. Costa Rica: Sectoral Competition Study of the Rice Sector**

Following the terms of reference, the study sought to determine the effects of current regulations on competition conditions in the rice sector and their impact on consumer welfare – and in particular, on the lowest income segments – for the 1995-2005 decade. The main findings were as follows:

Distortions were found resulting primarily from a combination of: a) protection from import competition and b) regulation of domestic prices, set to maintain a certain level of local production for the purpose of food security, while assuring consumption in the poorest social sectors.

Nevertheless, regulation was not effective in preserving the planted area, increasing production or yields, or balancing post-Uruguay Round industry costs, its adverse effects having fallen back on the most vulnerable sectors made up of farmers and consumers.

The price received by rice farmers fell behind the Consumer Price Index notoriously, indicating deteriorating income among this largely vulnerable sector. The price to consumers, though lower with respect to the CPI from July 2000, began to recover sharply as of July 2003, indicating deteriorating purchasing power among the public – and especially among those most vulnerable.

The rice industry was able to maintain its margins throughout the decade, to the detriment of farmers and end consumers. It was estimated that income transfers from consumers to the agro-chain (agriculture + industry) reached an accumulated 10-year amount of US \$396.4 million, of which 80% was absorbed by the industry and only 20% by farmers.

The impact of this transfer is socially regressive, since monthly per capita spending on rice is conspicuously more significant in lower income homes (7% to 8% of per capita income in the poorest homes, and only 0.4% to 0.6% of per capita income in the richest homes).

The study concludes that the goals of current regulations are not being entirely met, and that changes were necessary, which could be spurred by COPROCOM in exercise of its competition advocacy powers.

The main recommended actions were: reduction of the 35% husked rice import rights; gradual deregulation of regulated prices and monitoring of price-setting mechanisms; replacement of the minimum price system with direct subsidies to assure access to rice by lower income segments; more transparency in the decision-making of the Corporación Nacional Arrocera (the public/private entity that administers the system).

Source: (Petrecolla, Costa Rica. Agrocadena del Arroz. Estudio Sectorial de Competencia, 2006)

## **Box 2: Competition Policies and Poverty Reduction. Costa Rica: Sectoral Competition Study of the Liquid Petroleum Gas Sector**

Following the terms of reference, the study sought to analyze competition conditions in the liquid petroleum gas (LPG) sector and its impact on consumer welfare – in particular, for the lowest income segments. The main considerations are as follows.

Low-income homes in Costa Rica use freely collected firewood as their primary source of energy, a relatively inefficient and highly polluting resource. Their second choice is bottled liquid gas. Consumption of LPG in low-income homes is approximately double that of middle- or higher-income homes, which mostly use electricity. Spending on LPG has almost 2 ½ times more impact on rural income (1.2%) than on urban income (0.5%), and spending on LPG takes up 10 times more of low incomes than of middle- and high incomes. Although there are cultural aspects involved in the use of firewood, price is also a factor; 9.7% of the homes not using LPG report not doing so because of high prices. In countries like Costa Rica, where LPG is primarily used for cooking and constitutes a significant expense in low-income homes, LPG becomes a socially sensitive product. Facilitating access to LPG use by lower-income segments should be a consideration in competition studies.

Market prices are strictly regulated throughout the value chain. Up to now there has been aggressive competition among agents, not in prices, but through cross-litigation based on the deterioration or deliberate withholding of competitors' cylinders, which has resulted on at least one occasion in the closing of a bottling plant by the sectoral regulator.

Until 2005-2006 the market was undergoing a drastic restructuring with players entering and exiting, and control shifting among established companies. The market then stabilized with a high degree of concentration. The two leading companies, Tropigas de CR and Gas Nacional Z, act in tandem within the framework of Grupo Z Internacional, and only Tomza and Petrogas remain as independent agents. Grupo Z is a leading regional LPG distributor, with 14% of the Mexican market and operations in almost the entire region. There has also been progressive vertical integration of the bottling and cylinder distributing and marketing stages. This has improved service, but raised entry barriers (by shrinking the size of the available independent distribution network). In addition, it would progressively leave independent distributors with only one or two bottling plant suppliers (Petrogas and Gas Tomza).

Horizontal and vertical concentration is not incompatible with strong competition, but it is still a concern, especially if the decision is made to eliminate the current price regulation (maximum prices) which puts a ceiling on end consumer prices. Between 1995 and 2007 the regulated price received by the bottling companies has sextupled. Through its multisectoral regulator, ARESEP, the government has maintained LPG, gas and asphalt prices and subsidized diesel and jet and bunker fuel consumption. Based on this, prices were realigned in December 2006, but the price of end-consumer bottled LPG is still high compared to the rest of the region. The overall mark-up is also relatively high compared to other countries (Argentina, Chile, El Salvador, Guatemala, Honduras and Nicaragua).

The sector's strengths in Costa Rica include: a) the market is expanding, and b) key import / storage facilities are under public management and separated vertically downstream from the sector, a singular feature of the Costa Rican case. On the other hand, its weaknesses

are: a) state import infrastructure (terminals and storage tanks) is too constrained, which is linked to the fiscal expense of an expansion, b) high regulated prices, c) deficient system for the use and responsibility of the cylinder park due to brand segmentation.

The LPG cylinder market in Costa Rica was also found to have a unique regulatory design, since there is coexistence of both a sectoral regulator (MINAE-DBTCC) and a multisectoral regulator (ARESEP). This type of regulatory design requires significant coordination capacity from both regulators. Other requirements include: i) a legal framework that defines the exclusive and concurrent powers of each regulator with maximum clarity, ii) a technically consistent division of powers, and iii) a neutral body to settle potential conflicts.

The study does not recommend eliminating current price regulation, but rather feels it necessary to improve the system for the use and responsibility of the cylinder park due to brand segmentation by taking the following actions: a) clearly attributing ownership of the cylinders to the bottling companies; b) establishing cylinder exchange centres, operated by independent economic agents remunerated for the exchange service under regulatory supervision; and c) generating a "common use" cylinder park – that is, that they can be filled by any bottling company – to facilitate the entry of new agents and competition among already established agents, and to also facilitate asymmetrical exchanges generated by the entry and exit of agents from the market. In addition, it also recommended improving coordination between the sectoral and multisectoral regulators and defining concurrent and exclusive powers with respect to the LPG sector.

Source: (Petrecolla, Estudio Sectorial de Competencia: Gas Licuado de Petróleo en Costa Rica, 2007

These two studies explicitly consider the socioeconomic dimension of affected end consumers, a dimension that should be taken into consideration transversally in all

COPROCOM's actions as a way of putting into practice the contribution of competition policies toward alleviating poverty and reaching the Millennium Goals.

## **2. SUBSTANTIVE ASPECTS: CONTENTS OF COMPETITION LAW**

Law 7472 for improving competition and consumer protection (LPCDEC) was enacted on December 20, 1994. Its text materializes the market deregulation policy initiated years earlier and goes beyond what is strictly competition law.

The LPCDEC empowers the government to regulate the prices of goods and services only temporarily and solely in exceptional cases, which include the existence of abnormal market conditions or monopolies or oligopolies in the production or sale of goods or services. Regulation must be preceded by a technical study to confirm the existence or permanent nature of the invoking exceptional conditions (Petrecolla, 2003).

The LPCDEC has three substantial aspects: deregulation of economic activities (Chapter 2, Articles 3 to 8), protection of competition (Chapter 3, Articles 9 to 16), and consumer protection (Chapter 5,

Articles 28 to 46). In addition, Article 17 (included at the end of Chapter 3) involves a fourth aspect: a ban on unfair competition – a provision that is directly enforceable by the judicial branch.<sup>3</sup>

The LPCDEC created the National Consumer Commission for enforcing consumer protection provisions and the Commission for Regulatory Improvement for overseeing economic deregulation.

With respect to specific competition law, the Commission for Promoting Competition (COPROCOM) was created as an independent technical – though not administrative – body within the Ministry of Economy, Industry and Trade.

COPROCOM is in charge of reviewing competition cases either at its own initiative, or in response to complaints, and sanctioning, whenever relevant, any practices restricting or obstructing free competition.

Strictly speaking, then, the LPCDEC contains three related, though independent, bodies of law on economic deregulation, competition protection and consumer protection - to which is added a provision on unfair competition, which is enforceable by the judicial branch.

As a result, when reference is made in this study to the competition law, what is meant are the competition protection aspects of the LPCDEC, or Articles 9 through 16 of Chapter 3, Section 2 of Chapter 4, Chapters 1 and 7 and its regulations. In like manner, reference will be made to the provisions for consumer protection, economic deregulation and unfair competition.

Since its enactment, several reforms have been made to the LPCDEC, but not where it strictly refers to competition. In mid-2007, a bill prepared with the technical assistance of COMPAL/UNCTAD was submitted that seeks to give COPROCOM additional resources for achieving its objectives, widen the scope of public- and private-sector competition policy, and add sections for more efficient law enforcement.

Since competition law in Costa Rica was inspired by Mexican law, it uses similar terminology, establishing absolute monopolistic practices (horizontal agreements) and relative monopolistic practices (vertical agreements) as sanctionable conduct. In addition, the law contemplates special *ex-post* control of concentrations, which will be analyzed further on.

An issue to be addressed further on is if the LPCDEC could be invoked to sanction individual or unilateral monopolistic practices that eliminate or attempt to eliminate competitors. This is often typified in the doctrine as “abuse of a dominant position” or “monopolization” or “attempted monopolization”.

As to agreements, various types exist among economic agents, of which only a few are anti-competitive, and their potential to harm competition, efficiency and consumer welfare differ notably depending on the particular features of each.

Agreements between economic agents in general, including anti-competitive ones, can be horizontal or vertical. Horizontal agreements are those that involve directly or potentially competing economic agents. Vertical agreements, on the other hand, involve economic agents working at different stages of a specific production or distribution process of goods or services.

The most offensive, usually called “hardcore cartels” (intrinsically harmful cartels),<sup>4</sup> are horizontal agreements (between competitors) involving price fixing, market allocation, production quota setting and collusive tendering.

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<sup>3</sup> Chapter 1 (Articles 1 and 2) provides objectives and definitions. Chapter 4 provides 2 sections, one on the Commission for Regulatory Improvement (the enforcement body for the chapter on deregulation), and a second on the Commission for Promoting Competition (COPROCOM) as the enforcement body for Chapter 2 on competition protection (excepting Article 17 on unfair competition). Chapter 6 refers to the National Consumer Commission as the enforcement body for Chapter 5. The final chapter, Chapter 7, gives final provisions.

<sup>4</sup> The expression was popularized after the OECD’s recommendation in 1998 (OECD, 1998).

Historically, these practices have received the most repressive treatment from competition authorities. For example, in the United States these agreements are criminal offences, and in Canada the idea of making them illegal *per se* was discussed in 1993 (UNCTAD-TD/RBP/CONF.5/7/Rev.3, 2007).

The term “illegal *per se*” means that the act or conduct is inherently illegal, without requiring any type of extrinsic or circumstantial evidence. In the context of competition law this implies that the conduct under review is declared illegal regardless of the damage it may cause to competition, efficiency, or the general welfare or that of consumers. The accused companies cannot argue an absence of damage in their defence; neither is it necessary for authorities to prove the existence of damage in order to sanction the conduct. These practices are presumed offensive.

The U.N.’s “Set of Principles” (Section D, paragraph 3) deems hardcore cartels, as they are now called, illegal in principle, though subject to proof that they restrict market access, competition, international trade and economic development. Articles 1 and 2 of Chapter 3 of the Model Law establish the illegality of these agreements but accept the possibility of authorizing them if beneficial effects can be shown, introducing the so-called “rule of reason” criterion for evaluating them.

The rule of reason is a doctrine developed by the U.S. Supreme Court in its interpretation of the Sherman Act, according to which only those agreements and contracts that unreasonably restrict trade are deemed illegal. The principle of “reasonability” ponders the anti-competitive and pro-competitive effects of the objected restriction.

This approach is currently the most generally accepted. For example, the European Economic Community competition rules and Latin American countries with competition laws such as Argentina, Brazil and Mexico, apply “the rule of reason” approach to competition cases.

## **2.1. Absolute Monopolistic Practices (Horizontal Agreements)**

In Costa Rica, agreements that can be classified as hardcore cartels (intrinsically harmful cartels) are addressed in Article 11 of the LPCDEC. Price fixing is included, as is information-sharing for the same purpose or effect, quota agreements, market allocation agreements and collusive tendering.

In Costa Rican terminology such “absolute monopolistic practices” are deemed “null *pleno jure*” (illegal *per se*, or intrinsically illegal), and therefore illegal regardless of the harm they may cause to competition, efficiency, consumers and the general welfare. The accused companies cannot therefore argue an absence of damage in their defence; neither is it necessary for authorities to prove the existence of damage in order to sanction the conduct.

### **Law 7472, “Law for the Promotion of Competition and Effective Consumer Protection”**

#### *ARTICLE 11. Absolute Monopolistic Practices*

*Absolute monopolistic practices are those acts, contracts, agreements, arrangements or combinations of competing economic agents among themselves, for any of the following purposes:*

- a. Fix, raise, agree upon or manipulate the purchase or sale prices at which goods and services are supplied or demanded in markets, or share information for the same aim or effect.*
- b. Establish an obligation to produce, process, distribute or market only a restricted or limited quantity of goods or to render a restricted or limited number, volume or frequency of services.*
- c. Divide, distribute, assign or impose present or future market portions or segments of goods or services by means of specific or specifiable clientele, suppliers and times or spaces.*
- d. Establish, agree upon or coordinate tenders or abstention in bidding, competitions, public auctions or sales.*

*To enforce this article, the Commission for Promoting Competition, on its own initiative or at a party’s behest, shall exercise market control and review of products with few suppliers.*

*The acts referred to in this article shall be deemed null pleno jure and shall sanction the economic agents incurring in said acts pursuant to this law.*

To sanction this conduct it must be shown that the participants are competing economic agents engaged in a sanctionable collusive act according to the classification in Article 11 of the LPDDEC.

These are specifically acts that are illegal *per se*, as can be inferred by the jurisprudence established by COPROCOM in 1995 in the ice factory case.

*“Horizontal price fixing is defined in Article 11, section (a) of the Law for the Promotion of Competition and Effective Consumer Protection as a punishable absolute monopolistic practice. The provision in question is intended to prevent competing economic agents from agreeing on a single price and thus eliminating the price competition that would exist without an agreement of this type under conditions of free competition. The legislators are concerned that participants in the agreement would in this way obtain monopolistic earnings in obvious prejudice to efficient productive resource distribution and the consumers of the goods or services contemplated in the agreement. Seen differently, the intention is to eliminate the eventual harmful effects of a monopolistic market even in markets with several or many suppliers, when the competitors are acting with a general will.*

*The concept of substantial power in the relevant market is not something to be considered before establishing an absolute monopolistic practice, as the attorneys for the investigated companies would have us think, such as in the case of evaluating possible relative monopolistic practices. The reason for this lies in the directly harmful effects absolute monopolistic practices produce in the markets; with relative practices these effects are subject to the economic agent engaging in them having a truly privileged market position. This was the understanding of the legislators when they subordinated the establishment and sanction of relative monopolistic practices to evidence of substantial power in the relevant market, something not contemplated in the case of absolute monopolistic practices such as the one under evaluation.” (COPROCOM, Regular Meeting # 9-95 Decision: Article Five. Date: 28-11-95 Time: 17:10 Petitioner: Commission for Promoting Competition (ex officio investigation). Respondent: Fábrica de Hielo Cinco Esquinas and others).*

## **2.2. Relative Monopolistic Practices**

Article 12 of the LPCDEC lists relative monopolistic practices corresponding with what is commonly known as vertical restrictions to competition such as exclusive distribution agreements, exclusivity or sole brand contracts, retail price maintenance and/or conditions for the sale of goods or services, and tied selling.

### **Law 7472, “Law for the Promotion of Competition and Effective Consumer Protection”**

#### ***ARTICLE 12. Relative Monopolistic Practices***

*Subject to confirmation of the cases provided for in Articles 13, 14 and 15 of this law, relative monopolistic practices are considered those acts, contracts, agreements, arrangements or combinations whose aim or effect is or may be the illegal elimination of other agents in the market, substantial blocking of their access or the establishment of exclusive advantages in favour of one or several persons, in the following cases:*

- a. Fixing, imposing or establishing the exclusive distribution of goods or services due to the subject or geographical situation or for specific periods of time, including the division, distribution or assignment of customers or suppliers, among non-competing economic agents.*
- b. Price maintenance or other conditions a distributor or supplier must comply with for selling or distributing goods or rendering services.*
- c. A sale or transaction conditioned to buying, acquiring, selling or furnishing another good or additional service, normally different or distinct, or to reciprocity.*
- d. A sale or transaction subject to the condition of not using, acquiring, selling or furnishing available goods or services normally offered to third parties.*

*e. An agreement between several economic agents or an invitation to them to exert pressure against a customer or supplier to dissuade them from a given conduct, impose reprisals or obligate them to act in a specific manner.*

*f. The production or marketing of goods and services at below normal prices.*

*g. "In general, any deliberate act that drives competitors from the market or bars their entry."*

Note: COPROCOM has mentioned for earlier versions of this report that this article includes as a vertical agreement any arrangement between several economic agents, which may or may not be competitors, or an invitation to them to exert pressure against a customer or supplier in order to dissuade them from a given conduct, impose reprisals or obligate them to act in a specific manner, which may be qualified as vertical boycotting.

In competition protection literature and practice, the concept of vertical restrictions on competition refers to practices engaged in by manufacturers or suppliers for the retail sale of their products. These practices generally require agreements between economic agents located at different stages of the value chain, and are thus usually called vertical agreements (UNCTAD-TD/RBP/CONF.5/7/Rev.3, 2007).

Considering that Article 12 lists a series of vertical restrictions to competition and these mostly materialize as vertical agreements between two or more economic agents, the relative monopolistic practices described in the LPCDEC can be understood as vertical agreements or agreements between non-competitors, as COPROCOM has mentioned for earlier versions of this report.

COPROCOM has also mentioned that Article 12 of the LPCDEC lists as a relative monopolistic practice unilateral or individual predatory pricing, which normally does not involve agreements or contracts with other economic agents. However, it has pointed out that the LPCDEC's definition of predatory pricing is somewhat confusing, as it refers to sales at below normal prices leading one to think of usual market prices or rates. Therefore, COPROCOM has based its interpretation in the various cases it has analyzed on that of international organizations recommending studying those cases where the price is below the average variable cost.

The question arises, then, as mentioned earlier, whether any other type of individual or unilateral conduct aimed at eliminating competitors in the market can be sanctioned under the LPCDEC.

In other words, can the exclusionary abuse of a dominant position or monopolization perpetrated by a sole economic agent fall under the premises of Article 12 and constitute an infringement of the LPCDEC?

*Prima facie*, the text of Article 12 appears not to require the existence of an agreement between economic agents as a necessary condition for constituting a relative monopolistic practice. Moreover, as COPROCOM has stated, the article includes predatory pricing, which does not require the concurrence of more than one economic agent and is eminently individual and unilateral.

In principle, a unilateral practice such as tied selling by a single company in a dominant position for exclusionary purposes or effects could come under sections *c* or *d*.

Likewise, a refusal to sell or allow access by a sole dominant company for exclusionary purposes or effects could come under section *g* ("...any deliberate act that drives competitors from the market or bars their entry"). COPROCOM mentioned that Costa Rican authorities have exercised extreme caution in enforcing this clause, since in Mexico it was considered unconstitutional and the Federal Competition Commission has faced several problems enforcing it.

It should be pointed out that the possibility of vertical restrictions on competition imposed by an individual company with a dominant position could constitute an infringement of competition law as

has been made particularly clear in the United Kingdom's competition authority's instructions and in studies by experts (Dobson & Waterson, 1996) (Office of Fair Trading, 1999) (Office of Fair Trading, 2004).<sup>5</sup>

Three elements must be demonstrated for sanctioning relative monopolistic practices, according to COPROCOM and Articles 12, 13, 14 and 15 of the LPCDEC:

- 1) The alleged responsible party has substantial power in the relevant market;
- 2) It has engaged in one of the aforementioned conducts; and
- 3) The purpose or effect of this is or may be the illegal elimination of other agents from the market, a substantial blockage of their access, or the establishment of exclusive advantages in favour of one or several persons.

### **Law 7472, "Law for the Promotion of Competition and Effective Consumer Protection"**

Elements that Must be Considered for Sanctioning Relative Monopolistic Practices

#### ARTICLE 13. Verification

For the practices mentioned in the previous article to be deemed infringements of this law, it must be verified that:

- a. The alleged responsible party has substantial power in the relevant market, and
- b. The practices are carried out with the goods or services related or corresponding to the relevant market in question.

#### ARTICLE 14. Relevant Market

The following criteria should be applied to determine the relevant market:

- 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 said substitution.
- b. The distribution costs of the good itself, its relevant inputs, its supplements and substitutes from other areas in the national territory and abroad; to this end shipping, insurance, tariffs and non-tariff restrictions will be considered, as well as limitations imposed by the economic agents or their organizations 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. Substantial Market Power

For an economic agent to be deemed as having substantial power in the relevant market, the following must be taken into account:

- a. Its market share and 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 entry barriers and elements that could ascertainably alter both these barriers and supply by 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 for this law.

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<sup>5</sup> "...a vertical restriction can also occur as a result of a company's unilateral conduct and a similar analysis will apply in those situations in the context of Article 82 (of the Treaty of Rome) and Chapter 2 (of the national law) prohibitions." (Office of Fair Trading, 2004). Article 82 of the Treaty of Rome and Chapter 2 of the current British law refer to abuses of dominant position by individual firms.



COPROCOM has commented for earlier versions of this report that, pursuant to Articles 13 through 15, Costa Rican law does not contemplate using the “rule of reason” to analyze this type of conduct, so an analysis of the conduct’s pro- and anti-competitive effects is not required.

Emphasis is placed on the fact that for a practice to be sanctioned it must be proved exclusionary, by illegally eliminating an agent from the market or substantially barring an agent’s entry to the market, or else discriminatory, by establishing exclusive advantages in favour of one or several persons.

The jurisprudence established by COPROCOM in 1996, however, noted that the rule of reason had to be applied to substantiate the claim of relative monopolistic practices, as shown by the following:

*“As established by this Commission in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996),<sup>6</sup> to evaluate relative monopolistic practices the concept known in American doctrine as the rule of reason must be applied. That is, an economic analysis is needed for the specific case to determine its anti-competitive effects.*

*Thus an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. Suffice it to say, that if as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists.*

*For this reason, relative monopolistic practices are not illegal per se and must be judged on the merits of each case. That is, analysis of these types of practices is based on a juris tantum presumption of legality, or, in other words, all acts or contracts are presumed legitimate unless proven otherwise. (Giner Perreño, Cesar. Distribución y Libre Competencia, Editorial Montecorvo, S.A. Madrid, 1994)”. (Regular Meeting # 15-97. Decision: Article Five. Date: 5/6/97. Time: 17:15. Enquiry made by Mr. Jorge Alfaro, Rector of the Universidad Nacional, with respect to a cooperation agreement between Universidad Nacional and the company Embotelladora Centroamericana S.A.).*

*“It is this Commission’s opinion that these types of practices are generally prohibited; a case-by-case study must be made to determine the effects required by law under the rule of reason.” Regular Meeting # 19-2004. Decision: Article Six, point E. Date: 5/25/04. Time: 17:30. Case: D-007-01. Petitioner: PepsiCo Inc., Pepsi-Cola Interamericana de Guatemala S.A. and Pepsi-Cola Manufacturing Company of Uruguay S.R.L. Respondent: The Coca-Cola Company and Embotelladora Panamco Tica S.A. Matter: Relative monopolistic practices, classified in Article 12 of Law 7472.<sup>7</sup>*

Of note is that the rule of reason criterion has been developed through jurisprudence in both its jurisdiction of origin (U.S.A.) and its extension in other developed and developing country

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<sup>6</sup> The relevant paragraphs of this decision read as follows: “14. *Horizontal price collusion, classified in Article 11, section (a) of Law 7472, is considered in the doctrine of competition law as the most serious of all monopolistic practices. It should therefore be declared unlawful and illegal per se, regardless of the circumstances for said collusion...17...Under this case it is not necessary to assess whether or not the participating agents have substantial power in the relevant market. This applies inasmuch as Law 7472 provides this requirement solely for qualifying conducts such as relative monopolistic practices or concentrations classified in Articles 12 and 16 of the law.*” Regular Meeting # 39-96. Decision: Article Five. Date: 11/19/96. Time: 17:00. Petitioner: Tarimas Chorotega S.A. Respondent: MADERERA SAN GABRIEL S.A., CONSORCIO DE PRODUCTORES FORESTALES S.A. (COPROFORESA), REFORESTACIÓN INDUSTRIAL LOS NACIENTES S.A., PRODUCTOS REFORESTADOS S.A., MADERAS EL LABRADOR S.A., DIÁME87TROS MENORES S.A.

<sup>7</sup> This jurisprudence has been established in 20 COPROCOM decisions, the list of which, together with relevant paragraphs, is given in the Annex to this document.

jurisdictions, and is usually not explained in detail in the text of competition law. Thus Costa Rica's competition protection regime follows international practices in the matter, as can be seen in the decisions in the following table.

One consideration to especially keep in mind is that application of the rule of reason does not necessarily imply the burden of proof is on the competition authority. Generally the respondents are the ones who offer proof of the harmless or beneficial nature of their conducts. It is up to the authority to appraise their arguments.

This is the kind of hearing COPROCOM would have held to determine if the practice under investigation had the purpose or effect of "*illegal elimination of other agents in the market, substantial blockage of their access or establishment of exclusive advantages in favour of one or several persons,*" as enjoined by Article 12 of the LPCDEC.

Finally, of note is the fact that if competitors are not eliminated by a conduct, Costa Rican law does not consider it an abuse of dominant position unless it directly harms consumer welfare through practices such as "excessive pricing."

Should this specific conduct occur, Article 5 of the LPCDEC sets out the conditions under which prices must be regulated to protect consumer interests.<sup>8</sup>

### **2.3. Strengths and Weaknesses of the Competition Law in the Treatment of Relative and Absolute Monopolies**

As mentioned above, the LPCDEC reserves enforcement of the illegal *per se* rule for an exhaustive list of four types of horizontal agreements, namely, price fixing/manipulation (Art. 11, point *a*), supply quota agreements (Art. 11, point *b*), market allocation agreements (Art. 11, point *c*), and collusive tendering (Art. 11, point *d*).

There is a consensus today that these conducts have no other motivation or rationale than to simply limit competition, they are extremely harmful, and as such are considered hardcore cartels.

The International Competition Network (ICN), an organization formed by competition authorities from various jurisdictions and of which Costa Rica is a member, reports that authorities concur on the harmful effects of these cartels and give them top priority on their agendas (International Competition Network, 2005, p. 9).

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<sup>8</sup> "...For the specific case of monopolistic and oligopolistic conditions for goods and services, the Public Administration will regulate price setting as long as these conditions are maintained..." (Article 5 of the LPCDEC).

**Table 1: decisions arrived at using rule of reason**

Case	Matter
1) Regular Meeting # 15-97. Decision: Article Five. Date: 5/6/97. Time: 17:15. Enquirer: Mr. Jorge Alfaro, Rector of the Universidad Nacional.	Cooperation agreement between Universidad Nacional and the company Embotelladora Centroamericana S.A.
2) Regular Meeting # 15-97. Decision: Article Seven. Date: 5/6/97. Time: 17:15. Enquirer: Mr. Martin Robles Robles, General Manager of Deportivo Saprissa S.A.	Contract granting exclusive permission to Kativo de Costa Rica S.A. to install advertising billboards in the Ricardo Saprissa Stadium.
3) Regular Meeting # 19-97. Decision: Article Seven. Date: 6/17/97. Time: 17:10. Regular Meeting # 22-97. Decision: Article Seven. Date: 7/29/97. Time: 17:15. Enquirer: Asociación Costarricense de Agencias de Publicidad requests further explanations for an enquiry resolved by this Commission in its third decision in Regular Meeting #26.	Publishing a "recommended retail price"
4) Regular Meeting # 22-97. Decision: Article Eight. Date: 7/29/97. Time: 17:15. Enquirer: Comercializadora Centroamericana S.A. (COCESA).	Publishing or offering promotions.
5) Regular Meeting # 22-97. Decision: Article Eight. Date: 7/29/97. Time: 17:15. Enquirer: Cámara Nacional de Detallistas	Promotion underway by DEMASA for its product, "Tronaditas," where the retail price is affixed to the package.
6) Regular Meeting # 09-98. Decision: Article Ten. Date: 3/10/98. Time: 17:00. Petitioner: Agencia de Viajes Panamericana, S.A. Respondent: United Airlines Galileo Network System	Excessive charges for uninstalling the Galileo system if an alternative system is available
7) Regular Meeting # 13-98. Decision: Article Six. Date: 4/21/98. Time: 17:00. Petitioner: Omar Hernández Zamora, representative of Panificadora Oros, Gilberto Pochet Cabezas, representative of Panificadora Pochet and Victor H. Quirós León, representative of Panificadora Damaris. Respondent: Panificadora Bimbo.	Predatory pricing.
8) Regular Meeting # 37-98. Decision: Article Six. Date: 12/1/98. Time: 17:00. Enquirer: Firestone de Costa Rica S.A.	Delivery of suggested distributor price lists.
9) Regular Meeting # 33-98. Decision: Article Five. Date: 11/10/98. Time: 17:10. Enquirer: Mr. Uri Weinstok	
10) Regular Meeting # 16-99. Decision: Article Eight. Date: 5/25/99. Time: 17:00. Enquirer: Mr. Rafael E. León Thompson.	Sale of products at prices below purchase prices
11) Regular Meeting # 24-2000. Decision: Article Eleven. Date: 7/11/00. Time: 17:30. Case: No. C-006-2000. Enquirer: Mr. Federico Rucavado Luque.	Joint strategic plan with a pharmaceutical group in the pharmaceutical sector.
12) Regular Meeting # 37-2000. Decision: Article Fourteen. Date: 10/10/00. Time: 17:30. Petitioner: COMUNICACIONES TELEMUNDO S. A. Respondent: Cámara Nacional de Televisión, Teleamérica S.A, Representaciones Televisivas S.A, Televisora de Costa Rica S.A. and personally against Juan Carlos Gamboa Góngora, Mario González Frías, Olga Lucia Cozza Soto, Pedro Odio Salazar and Fernando Contreras López.	Sale of broadcast rights for the 1999-2000 popular festivals.
13) Regular Meeting # 39-2000. Decision: Article Eight. Date: 10/24/00. Time: 17:30. Enquirer: Mr Eduardo Apuy Chen.	If the consent required by the condominium association meeting of a shopping centre to change the specific destination of a locale constitutes a restrictive practice for competition.
14) Extraordinary Meeting #07-2001. Decision: Article Twelve. Date: 2/13/01. Time: 17:30. Case: C-023-00. Enquirer: Mr. Miguel Bermúdez.	If it is unfair competition for a company to offer a service at half the price being offered on the market by other companies.
15) Regular Meeting # 09-2001. Decision: Article Eleven. Date: 2/27/01. Time: 17:30. Case: 005-00. Petitioner: Mrs. Ana Teresa Vázquez. Respondent: Republic Tobacco Company S.A. and Tabacalera Costarricense S.A..	Sale price agreements and agreements to cut the retail merchant mark-up, as well as alleged retail price setting for cigarette packs
16) Regular Meeting #22-201. Decision: Article Eight, point H. Date: 6/26/01. Time: 17:30. Official investigation, CPC. Respondents: Asociación Nacional de Industriales del Sector Arrocerero and against some of its members.	Agreement not to buy rice from domestic producers, and for pressuring them to bar market access for other economic agents.
17) Regular Meeting # 35-2002. Decision: Article Seven, point G. Date: 11/19/02. Time: 17:30. Case: D-006-01. Petitioner: Ventas Técnicas G y C, S.A. Respondent: Químicas Unidas Ltda..	Possible elimination of their company as an economic agent in the market.
18) Regular Meeting # 19-2004. Decision: Article Six, point E. Date: 5/25/04. Time: 17:30. Case: D-007-01. Petitioner: PepsiCo Inc., Pepsi-Cola Interamericana de Guatemala S.A. and Pepsi-Cola Manufacturing Company of Uruguay S.R.L. Respondent: The Coca-Cola Company and Embotelladora Panamco Tica S.A.	Exclusionary manoeuvrings (retail price setting and exclusivity agreements with distributors, among other things)

Source: Annex 1, based on COPROCOM jurisprudence.

It also specifies that the three aspects conforming these conducts involve: a) an agreement, usually in the form of a secret conspiracy; b) competitors, usually direct competitors operating at the same stage on the value chain; and c) the objective of limiting competition (International Competition Network, 2005, p. 10).

As opposed to the widespread consensus on what makes up a hardcore cartel and the four main types of agreements involved, the ICN reports a lack of consensus as to which analytical standards to apply to those agreements (International Competition Network, 2005, p. 14).

There are two basic approaches, a formal one and an economic one. The formal approach is to apply the illegal *per se* rule, which would be a “zero tolerance” treatment. With this rule the competition authority does not have to prove the harmful economic effects of the agreements (which are assumed) and no pro-efficiency arguments are accepted in their defence. The conducts are considered pernicious regardless of their effects or even their effective consecution (some laws apply limited sanctions to these practices in their degree of attempt).<sup>9</sup>

The strengths of this approach include its relatively inexpensive enforcement (since no detailed market study is required), a strong deterrent effect and the certitude it provides as to the illegality of the conducts in the exhaustive list. Its weakness is that it could lead to the diverting of limited resources into investigating and sanctioning agreements with little significant impact on the markets. This approach to these four kinds of agreements is generally used by authorities in the United States and the European Community.

The economic approach involves applying the rule of reason, resulting in a more tolerant treatment, with the understanding that circumstances may exist whereby these agreements have favorable economic effects that offset the adverse effects. With this rule, depending on the legal framework, either the adverse effects of the agreement must be established as a requisite for sanctioning it, or the pro-efficiency arguments put forth by the respondents in their defence must be admitted and assessed. In either case, this implies carrying out a relatively sophisticated market study demanding time and information.

The strength of this approach is that it avoids sanctioning agreements among competitors that are potentially beneficial for efficiency, and allows authorities to focus their efforts on more significant cases. Its weakness lies in the fact that the competition authority must develop and apply more sophisticated investigation and analysis tools and invest more time in investigating and collecting information.

Finally, the ICN reports that competition authorities now have a better understanding of the pro-competitive goals of most vertical agreements and the general trend is to treat them more permissively (equivalent to evaluating them with the rule of reason). It points out, in particular, that no consensus exists on including vertical collective conducts in the group of hardcore cartels (International Competition Network, 2005, p. 14).

Concerning these points, the UNCTAD/COMPAL study on competition policy in Costa Rica warns of applying Article 11’s illegal *per se* standard, stating that “*in practice this has led COPROCOM to initiate actions against economic agents with little market participation for agreements with little market impact due to the small amount of money involved or short duration, which has generated generating questions as to the cost-benefit of COPROCOM’s intervention in these cases*” (Odio Rohmoser & Oliveira, 2005, p. 29). It also notes the existence of literature<sup>10</sup> arguing the benefits to developing countries of adopting the rule of reason standard for evaluating cartels (Odio Rohmoser & Oliveira, 2005, p. 54).

Nonetheless, the authors recommend not innovating on the country’s current standard, namely, the *per se* rule, for the four specific types of horizontal agreements listed in Article 11, and the rule of

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<sup>9</sup> For example, Argentina law was amended in 1999 to prohibit anti-competitive practices, not only because of their effects, but also their “purposes”, following the text of European law.

<sup>10</sup> Specific mention is made of Lewis Evans and Patrick Hughes, *Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature*, New Zealand Treasury Working Paper 03/31, December 2003.

reason for the remaining conducts (basically vertical agreements and unilateral conducts) given in Article 12.<sup>11</sup>

The reason for this is that the current criteria is fairly in line with that being used in several of the major jurisdictions with a long history of competition policy, and with the general trend, which is to maintain zero tolerance for the four specific types of agreements listed exhaustively in Article 11 of the LPCDEC known as hardcore cartels.

As to the benefit of expanding the list in Article 11 to include a concerted refusal to hire and a concerted refusal to provide access to an essential facility, proposed by the aforementioned authors (Odio Rohmoser & Oliveira, 2005, p. 56), which is equivalent to expanding the coverage of the *per se* rule, the suggestion is to carry out specific studies, since there is still no international consensus on the matter.

After more than a decade of enforcing the LPCDEC, there is fairly widespread, simplified concept that the law admits vertical agreements but bans horizontal ones. Taking this into consideration, instead of expanding the list in Article 11 or eliminating the illegal *per se* criterion, guidelines should be drawn up to inform economic agents which horizontal and vertical agreements are admissible, and under what circumstances – mentioning, among others, such agreements as those for technological cooperation, specialization and rationalization, exclusive rights or licenses, exports, etc,

## 2.4. Concentrations

In past decades, after compulsory notification of economic concentrations was introduced in the U.S. with the Hart-Scott-Rodino law of 1976, a substantive debate has ensued on whether or not to use a mechanism of this type for the preventive control of concentrations.

The United Nations Set of Principles and Rules (UNCTAD/RBP/CONF/10/Rev.2 2000) and its spin-off, the Model Law on Competition (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007), point out the advantage of having a system for notifying of economic concentrations.

In particular, the latter document gives the two main arguments against setting up a control of concentrations, to wit: a) in countries with small markets, allowing concentrations among domestic firms would help them build up enough scale to compete globally, and b) the formation of large domestic firms (“national champions”) would be encouraged which, despite abuse of the domestic market, would be globally competitive (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007, p. 51).

The first argument notes that if a small economy is open to international trade and foreign investment, economic concentrations among local players do not necessarily reduce or limit competition and could be allowed. The second argument emphasizes that what generally happens to national champions is that they abuse their power in domestic markets, without being globally competitive. It also highlights the importance of a concentration control mechanism to prevent the effects at home of mergers or acquisitions made abroad (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007, p. 51.).

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<sup>11</sup> “...what is true is that the culture of competition built up over these last ten years has spread the system of horizontal practices, which are illegal ‘*per se*’, and vertical practices, to which the ‘rule of reason’ is applied. This system could lead to the censuring of horizontal practices whose effects are not harmful or which may even have pro-competition effects (as could occur in the case of an agreement among competitors to buy raw materials from a supplier in order to get larger discounts.) Amending this system when a culture of competition has not yet been consolidated in the country, however, is not advisable as this would lead to a sacrifice of the breakthroughs achieved up to now. These considerations should be left for a future amendment to the law.” (Odio Rohmoser, E. & Oliveira, 2005, pp. 55-56)

Progressively a consensus has been building among experts in favour of preventative control of concentrations, and at this point some 60 competition authorities (out of a total of about 100) apply some type of merger and acquisition review mechanism.

Conversely, there is no single mode for enforcing concentration control. In some jurisdictions notification of the deal is compulsory and must be given in advance, meaning the deal cannot be closed or the concentration put into effect without first being duly authorized (the U.S., the European Community and most of its member states, Mexico, South Africa, and Brazil, for example). Other jurisdictions have a notification system whereby the parties can close the deal without this authorization, assuming the risk of a potential blockage once an investigation into the reported deal has been concluded (the case of the current system in the United Kingdom). This system is usually termed voluntary, or *ex post*.

The first notification system is more effective as a preventative measure in that it eliminates the difficulties entailed in breaking up an already effectuated deal. The second enables the private sector to close deals more quickly when authorization is assured. This second system could be supplemented (as in the case of the United Kingdom) with the possibility of ordering the parties to maintain the businesses separated until the investigation is concluded, when *prima facie* a reported deal seems to be of some concern.

Costa Rican law does not provide for *ex ante* concentration control, as pre-merger notification is not required. Nevertheless, COPROCOM has the power to investigate concentrations that have already been formed.<sup>12</sup> In accordance with Article 28 of the law it can order full or partial divestiture if it finds they are prejudicial to the market. It could also, by interpretation of section (a) of this article, impose less drastic measures, as it is empowered to correct a concentration. This is similar to the system in effect in the U.S. until the Hart-Scott-Rodino sanctions were enacted.

The LPCDEC sets out the rules concerning concentrations in a single two-paragraph article. A concentration is understood as a merger, acquisition of control or any other act carried out by competitors, suppliers, customers or other economic agents by virtue of which companies, associations, shares, capital stock, trusts or assets in general are concentrated. Any act having the purpose or effect of reducing, harming or preventing free and fair competition of equal, similar or substantially closely-related goods or services is prohibited by law. The law stipulates that the criteria for measuring substantial relevant market power with respect to vertical agreements must be followed for analyzing these operations.<sup>13</sup>

As a result, COPROCOM has had to deal with very few concentrations in the years since it began operations. The situation has also led it to advocate for amendments to the law that would provide for pre-concentration notification – the latest of which, backed by consulting studies commissioned by UNCTAD/COMPAL (Odio Rohmoser & Oliveira, 2005) (Odio Rohmoser, 2005), proposes a compulsory pre-notification system similar to what is now used in the major jurisdictions with experience in the matter.

This report recommends that it insist on getting Congress to pass an amendment to the LPCDEC, or a supplementary law, to set up preventive economic concentration control in Costa Rica.

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<sup>12</sup> It should be pointed out that Article 30 of the LPCDEC provides that an action to initiate a procedure for the purpose of prosecuting violations expires at the end of six months, counted as of the moment the infringement occurred or as of effective knowledge of the same by the offended party. However, for continuous acts the period starts as of its last occurrence.

<sup>13</sup> A later law, Worker Protection Law No. 7983 regulating the pension fund market, provides for prior notification of mergers or acquisitions among pension fund operators to the sectoral regulator (the Superintendence of Pensions, or SUPEN), but also requires the regulator to solicit COPROCOM's opinion on whether the merger might be detrimental to market competition. This provision governs solely pension fund operators.

The understanding is that the system currently being proposed falls generally within the eight governing principles established at the inaugural conference of the International Competition Network, of which COPROCOM is a member (International Competition Network, 2002). Nevertheless, in light of those general principles, adopted in a timely manner by the different jurisdictions, the current reform bill could be improved.

## **2.5. Unfair Competition**

Unfair competition comprises conducts such as the distribution of false or misleading information capable of harming the commercial interests of third party agents or consumers; false or misleading product comparisons in advertising campaigns; the fraudulent use of brands, trade names, packaging or labelling; and the receipt, use or dissemination of unauthorized confidential information.

These practices mostly involve private disputes between two or more economic agents and do not affect competition as such. They are therefore not usually addressed by competition law and are dealt with directly in judicial court, while direct damages to consumers are addressed by consumer protection laws.

Note that neither the United Nations Set of Principles and Rules nor the Model Law on Competition contain any reference to unfair competition (UNCTAD-TD/RBP/CONF.5/7/Rev.3 2007), (UNCTAD/RBP/CONF/10/Rev.2 2000).

The general recommendation is that if these practices are addressed by competition law, provisions should be made to exclude them from the realm of competition authorities and have them heard directly by the courts.

Behind this recommendation is the fact that this authority's resources should not be diverted into handling private disputes having no effect on competition itself, which is the legally protected interest. This tends to be synthesized by saying the competition authority should “defend competition and not the competitors.”

As mentioned, the LPCDEC bans acts of unfair competition (Article 17) but relegates their treatment to the courts, while still allowing consequences affecting consumer interests to be handled by the consumer protection authority. Based on this, it could be said that this aspect of the LPCDEC is in line with international practices.

## **2.6. Consumer Protection**

The origins of competition law and consumer protection law are diametrically opposed.

The cornerstone of competition law is the Sherman Act in the United States (1890), a response to the actions of the so-called railroad and oil trusts that were squeezing the profit margins of farmers and small businesses by fixing the prices of raw materials and end products. In Germany, too, antitrust laws were adopted in response to the overall increase of verified prices during the post-war hyperinflation period, and excessive pricing during the first post-war period also gave rise to legislation in the United Kingdom (Motta, 2004, 3-6).

In turn, competition provisions in the Treaty of Rome (1951), the founding treaty for the European Economic Community, were mainly motivated by a desire to prevent discrimination by nationality of access by non-German firms to essential raw materials (carbon and steel) controlled by German firms. The guiding principle for these provisions, of course, has always been the creation of a single market (Motta, 2004, 3-6).

On the other hand, consumer protection law as such is much more recent, having only begun to develop in strength as a field of law with the consumer movements of the 1970s, although various several consumer protection provisions had already existed earlier in contract law.

The unification of consumer rights in consumer protection laws is a recent development where model laws generated by different international organizations have played an important role (UNCTAD being an outstanding example).

With growing widespread acceptance of the principle of economic efficiency as an assessment criterion for punishable conducts under competition law (whose origin goes back to the so-called Chicago School) and the universalizing of market economies, consumer welfare has begun to be considered a priority when enforcing competition laws, and this has brought about a convergence in the goals of both types of laws and authorities.

Both instruments are now considered an essential part of a market economy, so that in those countries where there has been a recent restructuring, as in the case of Costa Rica, competition and consumer protection laws have been established at the same time (similar to what has happened in Eastern European countries).<sup>14</sup>

In general, consumer protection law in Costa Rica is in line with United Nations recommendations, which cover:

- a) consumer protection from health and safety risks;
- b) the promotion and protection of consumer economic interests;
- c) access to adequate information for making well-grounded decisions in accordance with their desires and needs;
- d) consumer education, including education on the economic, social and environmental repercussions of their choices;
- e) the possibility of effective compensation;
- f) the freedom to form consumer groups or other consumer organizations and the opportunity for these organizations to voice their opinions when decisions are made affecting them; and
- g) the promotion of environmentally sustainable consumption (United Nations, 1999)

### **3. INSTITUTIONAL ASPECTS: COMPETITION POLICY ENFORCEMENT STRUCTURES AND PRACTICES**

Section E.1 of the Set of Principles and Rules requires states to adopt, improve and effectively enforce appropriate laws and establish the relevant legal and administrative procedures.

The tendency has been either the creation of a new, specialized body for enforcing competition law or the expansion of a pre-existing body's powers and institutional nesting. In some cases, such as in Pakistan, Colombia and Peru, a single authority has been created for competition, consumer protection, intellectual property, unfair competition and similar laws applicable to companies (UNCTAD-TD/RBP/CONF.5/7/Rev.3, 2007).

Costa Rica has opted to create a single specialized professional body. For the purpose of implementing competition law and free competition, the LPCDEC has created the Commission for Promoting Competition (COPROCOM) with exclusive authority in this matter.

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<sup>14</sup> There is a precedent in the Consumer Protection Act, enacted in 1975, but the law was never enforced (Petrecolla, 2003).



### 3.1. COPROCOM Structure

Two main instances are involved in substantiating an investigation into competition matters and free competition: one for instructing in investigations, and one for adjudicating cases.

COPROCOM as such is the one that adjudicates each case, while instruction in investigation has been delegated to the Technical Support Unit. COPROCOM is the sole instance in the administrative seat, and its decisions can only be reviewed in the court system.

#### **Law 7472, Law for the Promotion of Competition and Effective Consumer Protection**

*ARTICLE 21. Creation of the Commission for Promoting Competition.*

*The Commission for Promoting Competition is created as the maximum deconcentration organ and shall be assigned to the Ministry of Economy, Industry and Trade. It shall be responsible for hearing, at its own initiative or in response to complaints, and sanctioning where appropriate any and all practices restricting or obstructing free competition and unnecessarily hampering market fluidity.*

*An administrative proceeding at this Commission is compulsory and must be exhausted before appeal can be lodged before a court (...).*

#### 3.1.1. Adjudicating Body

The Model Law on Competition proposed by UNCTAD was formulated on the assumption that it is probably most efficient to have a competition authority as autonomous as possible of the government, with strong sanctioning and investigating capacities, whose decisions may be reviewed in a higher judicial instance. The tendency has been in this this direction, and is considered extremely important, as it allows the authority to avoid political influences (UNCTAD-TD/RBP/CONF.5/7/Rev.3., 2007).

According to Article 21 of the LPCDEC, the Commission for Promoting Competition (COPROCOM) has exclusive authority over free and fair competition matters and is in charge of reviewing, at its own initiative or in response to complaints, and sanctioning where appropriate any and all practices restricting or obstructing free competition. An administrative proceeding at this Commission is mandatory and must be exhausted before appeal can be lodged before a court.

The commission consists of five regular members and five alternates, nominated by the Ministry of Economy, Industry and Trade and approved by the President. All members keep their positions for four years and may be re-elected as often as desired. The members elect from among themselves a chairperson for a two-year term.

Appointments do not follow the political cycle, and appointees must be highly experienced, prestigious professionals in the fields of economics, law or similar sciences.

Commissioners do not work full time in this position. They meet in regular weekly sessions and are paid for their attendance. They rule on cases and must account for their actions before other relevant stakeholders in public deliberations and jurisdictional bodies.

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.

COPROCOM is also charged with recommending (non-binding) price regulation to the public administration in case of monopolistic or oligopolistic markets; COPROCOM has however, used this power to advocate for price deregulation in markets such as the rice market.

COPROCOM is also empowered to issue opinions on matters of free and fair competition with respect to laws, regulations, agreements and other administrative acts. These opinions have no legal effect and are non-binding.

In the area of public services, with respect to competition protection, in order to exercise its competition advocacy powers COPROCOM must interact with the different sectoral regulators in the government administration, such as the divisions concerned with energy and fuels in the Ministry of Energy and the Environment, and the multisectoral regulator ARESEP (regulatory authority for public services and utilities), created by Law 7593 of October 6, 1996.

In the area of economic deregulation and price regulation, COPROCOM is a member of the Commission for Regulatory Improvement, which hears and decides on the economic deregulation aspects of the LPCDEC. The Commission for Regulatory Improvement, presided over by the Minister of the Economy, Industry and Trade, has representatives from various ministries, the private business sector and the unions.<sup>15</sup>

In the area of intellectual property rights, COPROCOM must interface with the Industrial Property Registry on compulsory licensing matters based on anti-competitive conducts, in concordance with the international treaties of which Costa Rica is signatory (mainly the WTO-TRIPS).

In the area of consumer rights protection, the commission must interface with the National Consumer Commission if any infringement of the consumer protection rights provided in the LPCDEC simultaneously harms competition.

### **3.1.2. Investigative Body**

COPROCOM delegates to the Technical Support Unit instruction in administrative procedures, monitoring and investigation of concentrated markets, and any investigation needed to determine if sufficient admissible evidence exists to justify sanctioning economic agents for committing anti-competitive practices prohibited by the competition law.

The Technical Support Unit is currently composed of 15 full-time members. It is an interdisciplinary team with 12 professionals in the fields of law, economics and business administration, and 3 administrative and support staff. There has been a high turnover of professionals, thus limiting a build-up of knowledge and experience.

The substantive and operative task of the TSU involves, on the one hand, the administrative procedures followed for economic agents who have presumably engaged in illegal conducts, and on the other, market enquiries and the prevention of anti-competitive practices, in addition to seeking out and following up on cooperation activities concerning competition.

Note that the stock of TSU procedures at May 2007 is at around 100 (see Table 2, p. 33 and Table 4, p. 34), giving an average of around 8 procedures per professional and 33 per administrative assistant.

This indicates the shortage of human resources for handling complex investigations, which are highly demanding of investigation and preparation time. This shortage, moreover, leads to an excessive backlog in the processing of procedures.

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<sup>15</sup> In the law's original institutional design, COPROCOM had authority over economic deregulation as well as competition matters. The abovementioned fiscal contingency law, Law 8343, amended this to allow COPROCOM to concentrate on the purely competition protection aspects of the LPCDEC.

### **3.1.3. Budget and Resources**

COPROCOM and its Technical Support Unit (TSU) receive their budget and administrative support from the Ministry of Economy, Industry and Trade (MEIC). Available budgetary resources from the national budget amounted to ¢181,450,000 (colones) – approximately US \$365,000 – in 2008, mostly for paying the salaries of Technical Support Unit staff.

In addition, the MEIC provides other administrative support such as cleaning services, drivers, messengers, information technology, accounting, supplies, building leasing, and others, none of which is charged to COPROCOM's budget.

The budget may be considered insufficient, especially if it is applied strictly to salaries when funds are needed for training and updating professionals, acquiring bibliography, outsourcing some parts of investigations (market and consumer surveys, etc.), and spreading a culture of competition, among other things.

### **3.1.4. Assessment**

The current institutional design does not give COPROCOM a high degree of autonomy from government administration, since i) it is assigned to the Ministry of Economy, Industry and Trade (MEIC), even though it operates as the "highest deconcentration body"; ii) the commissioners are appointed by the President at the MEIC's recommendation and the requirements for their removal are fairly undemanding; iii) it does not have a separate budget from that of the general government administration; and iv) the commissioners do not work exclusively or permanently for the commission but limit themselves to meeting for deciding on matters brought by the TSU. Note that in the proposed amendment to competition aspects of the LCPDEC the TSU's pivotal role is recognized by designating it the "advisory and executive body" of COPROCOM.

Moreover, even in the current design the competition authority does not have enough human and budgetary resources to guarantee that competition policies will substantially impact the economic system.

## **3.2. Administrative Procedures, Remedies and Appeals**

### **3.2.1. Administrative Procedures**

According to the LPCDEC, Articles 30, 34, 35, 38 and 39 of the Regulations for Law 7472 and additionally, where unanticipated in this law, the General Administration Law, the administrative procedure followed for analyzing and assessing cases consists of several stages, which may be summarized as follows.

When a complaint is received, the Technical Support Unit must qualify its admissibility for COPROCOM, analyzing such aspects as competence of COPROCOM, observance of minimum requirements and existing probative elements. This report must be reviewed by COPROCOM in the session immediately following the date of its submission.

With respect to this report, COPROCOM may either: a) categorically reject the complaint if it is untimely, impertinent or obviously ill-founded, b) if there is any doubt, require the Technical Support Unit to make a preliminary investigation to determine if, in effect, a law has been violated, or c) order a sanctioning administrative procedure to be instituted.

The ordinary administrative procedure corresponds to what is established in Book Two of the General Public Administration Law, which is based on the principles of due process, rules of evidence, ex officio examination, impartiality, celerity and publicity.

When ordering a sanctioning administrative procedure to be instituted, COPROCOM generally names as the procedure's executive board (a review board), three Technical Support Unit officials, responsible for the preliminary investigation.

The decision must also clearly indicate the events for which the procedure is being exercised, the article of law that may have been infringed, possible sanctions resulting from this act, any appeals and the time period the parties have for filing them. The decision to institute a procedure must be duly notified to the parties.

In the preliminary investigation the procedure's executive board (review board) may order any and all evidence to be submitted so as to determine the reality of the facts under review; the request for information can be at its own initiative or at the request of the party.

The ordinary procedure is carried out by means of a private oral hearing before the procedure's executive board in which all evidence and relevant allegations submitted by the parties are admitted and heard (experts, witnesses, documents, etc.). Judicial and expert examinations may be made before the hearing.

Upon conclusion of the hearing, the procedure is ready for a final decision to be handed down, unless the procedure's executive board wishes to introduce new facts or more evidence is needed which was not available for the first hearing. No more than two hearings may be held.

Once the procedural process has been completed, the procedure's executive board sends the case together with its recommendation to COPROCOM for review and a final ruling.

The administrative procedure ends with the issuing of a ruling by COPROCOM, which may include the relevant sanctions in cases where absolute or relative monopolistic practices or concentrations have been indisputably demonstrated.

Since the administrative procedure followed by COPROCOM is a general one applicable to any administrative case, COPROCOM does not have the investigative powers needed for adequate investigation of anti-competitive conduct. The law merely allows it to request information from parties being investigated, which may send only the information they wish to send, without COPROCOM knowing whether or not the parties are withholding any evidence.

On the other hand, COPROCOM may impose precautionary measures if it deems they are necessary for putting the ruling into effect. Up to now they have only been imposed in a recent case where infrastructure leasing for television cable signal transport was denied.

### **3.2.2. Remedies and Appeals**

In the administrative procedure followed by COPROCOM, ordinary appeals are only admissible against the initiating action, disallow of an oral hearing or any evidence, and the final ruling. Ordinary appeals are appeals for reversal or review and remedies of appeal, which are filed before the executive board or the COPROCOM, as the case may be.

Ordinary appeals may be filed within a period of three days when pertaining to the ruling by COPROCOM, and within twenty-four hours in the remaining cases; both periods start as of the last notification of the action. When the appeal is pertaining to the disallowal of evidence in the hearing, it may be filed immediately, in which case the evidence and reasons for the appeal may be given then or within the aforementioned periods.

In the wake of a recent Constitutional Chamber verdict, administrative remedies can be considered exhausted once the parties are permitted to file an appeal for reversal against the final decision. Once administrative remedies are exhausted, final decisions may be challenged directly for illegality before

a contentious-administrative court. Most of the final decisions handed down by COPROCOM where fines have been levied against economic agents have been challenged in the courts.

One case that merits special attention for being the first to be resolved in court is that of several real estate brokers who were sanctioned when they were found to be colluding in rate fixing. The Court of Appeal (First Chamber of the Supreme Court of Justice) confirmed COPROCOM's sanction as well as Decision No. 73-2006 issued in the second instance by Section 3 of the Contentious-Administrative Court. The Appeal Courts thus confirmed the fine imposed and the order given to the Chamber of Real Estate Brokers to modify their code of ethics, eliminating elements concerning fee fixing.

In addition, economic agents can resort to the Fourth Constitutional Chamber of the Supreme Court of Justice, lodging remedies of appeal or charges of unconstitutionality if they feel their constitutional rights have been violated. At present most of the proceedings concerning the LPCDEC have consisted of constitutional issues involving several of its articles, particularly those empowering the State to require and review confidential documents of economic agents. These actions have been resolved by the Constitutional Chamber in favour of COPROCOM.

Of note also are actions for conflicts involving agents or sectors wholly or partially excluded from the scope of application of the LPCDEC that have been resolved by the same Chamber. For example, minimum fee-setting by professional associations (2001) and rate-fixing by shipping firms within the framework of the United Nations Maritime Conferences have been endorsed by the Constitutional Chamber.

### **3.2.3. Sanctions**

It is general knowledge that sanctions are only effective when they are able to discourage illegal conducts, and this depends as much on the strength of the sanction as on the probabilities of detection or discovery of the illegal conduct.

In competition law this is equivalent to confiscating all earnings obtained through the illegal practice. It is generally impossible, however, to calculate this amount with sufficient exactitude, so the various jurisdictions have resorted to a variety of criteria for setting the amount of sanctions, which in the case of hardcore cartels may include personal sanctions against directly implicated individuals.

In the case of Costa Rica, in addition to injunctions, settlements or elimination of the conduct, COPROCOM can order any economic agent violating competition law to pay a fine equivalent to 680 times the minimum wage in the case of absolute monopolistic practices, and 410 times the minimum wage for relative monopolistic practices and anti-competitive concentrations.

In particularly severe cases, the Commission can impose a fine equivalent to ten percent (10%) of the annual sales for the previous fiscal year, or up to ten percent (10%) of the value of the party's assets. The higher of the two fines should be imposed. The vague wording of this paragraph in the Law has limited its enforcement. In several cases, an inability to calibrate this percentage of sales together with the requirement for imposing the higher of the two fines has led to confiscatory fines, so that in the end the maximum wage-based fine has been imposed.

Furthermore, COPROCOM may impose sanctions for the supplying of false information or late submission of information, and can sanction individuals participating directly in monopolistic practices or prohibited concentrations in representation or on behalf and to the account of enterprises or de facto entities.

The UNCTAD/COMPAL study had already mentioned the weak deterrent power of the sanctions set out in the LPCDEC, indicating that the amounts are not deterrents for large companies and fines should be increased, either by increasing the maximum amounts (first paragraph of Article 28) or by

amending and applying the article's second paragraph on severe violations (Odio Rohmoser & Oliveira, 2005, p. 35).

This report shares that opinion and recommendation. However, other mechanisms could be implemented which have been successfully used in other jurisdictions, initiatives that seek to inform the public of the actions of companies engaging in illegal conduct, thus affecting their reputation.

With respect to this and hardcore cartels, the International Competition Network, of which COPROCOM is a member, notes that an important example of this kind of sanction is a requirement to publish guilty verdicts, in order for the potential damage to the company's reputation to have a deterrent effect. In addition, companies guilty of colluding on bidding could be excluded from future bidding, and implicated individuals could be disqualified from exercising certain duties for a period of time (International Competition Network, 2005, p. 4).

### **3.2.4. Competition Law Enforcement**

COPROCOM has gone through three stages of institutional development (Comisión para Promover la Competencia – COPROCOM, 2007). In the first stage, covering its first five years of operation (1995-2000), its efforts were focused on creating the institution itself and educating the public and private sectors on competition. During this period some 250 procedures were processed, several markets were deregulated and the first sanctions for violations of anti-monopoly provisions were applied, though with low fines, since they were part of the effort to educate the private sector.

Then, in the 2000-2003 period, COPROCOM prioritized two lines of action: promoting a culture of competition and protecting competition. This translated, on the one hand, into greater emphasis on monitoring the work of Congress in market competition matters, use of the communication media, preparation and dissemination of informative materials, and the giving of talks, seminars and workshops. On the other hand, efforts were focused on detecting and repressing anti-competitive horizontal practices (cartels), imposing stronger sanctions in major economic sectors such as rice, beans, container transport, leather buyers, and others (Comisión para Promover la Competencia / COPROCOM, 2007).

Finally, in the third stage, to date, fines have become somewhat more severe and exemplary, and the authority has supplemented its actions with an institutional strengthening program that includes activities with other institutions directly involved in enforcing competition policy, such as the judicial branch, the multisectoral public service regulator (ARESEP) and sectoral regulators.

Additionally, activities are underway with civil society stakeholders (universities, business chambers, and others), and cooperation with other government bodies, competition authorities in other jurisdictions and international organizations has gained momentum, while sectoral competition studies are being made in sensitive markets. (Comisión para Promover la Competencia/COPROCOM, 2007).

From its creation in 1995 to May 2007, 801 different kinds of procedures have been processed by COPROCOM, including complaints, investigations on COPROCOM's initiative, enquiries, authorisations, opinions, price fixing, concentrations and injunctive reliefs. Efforts have been concentrated on processing complaints (29%) and *ex officio* investigations (16%), although enquiries have been in the forefront for both COPROCOM and the TSU (26% and 16%, respectively). There have only been 6 procedures concerning concentrations, since the law does not provide a mechanism for giving notice of concentrations.

After 2003, when COPROCOM began to concern itself solely with the competition aspects of the LPCDEC – the Commission for Regulatory Improvement having been created to take charge of deregulation – COPROCOM and the TSU had more enquiries (24% and 29%, respectively) and fewer complaints and *ex officio* investigations (14% and 13%, respectively).

Between 1995 and the end of 2006, a total of 707 procedures out of a 1995-2006 stock of 770 were completed, or some 92%, showing no bottleneck had been formed (compare Tables 2 and 4).

Table 2 below shows the efforts of COPROCOM from its creation in 1995 to May 2007, when 801 different kinds of procedures have been processed, including complaints, investigations on COPROCOM's initiative, enquiries, authorisations, opinions, price fixing, concentrations and injunctive reliefs.

**Table 2: Enforcement of the LPCDEC by COPROCOM, 1995-2007**

Year	Complaints	Ex Offici o Invest.	Enquiries	Authorizations	Opinions	Price Fixing	TSU Enquiries	Concentrations	Injunc. Reliefs	TOTAL
1995	14	2	0	0	0	0	0	0		16
1996	33	6	6	0	0	0	0	0		45
1997	61	4	1	0	0	0	0	0		66
1998	19	20	13	0	0	0	0	0		52
1999	16	20	26	0	0	0	0	0		62
2000	13	14	32	0	0	0	0	0		59
2001	19	11	36	3	12	1	1	1		84
2002	10	5	8	2	13	0	20	0		58
2003	17	15	15	2	11	1	20	1		82
2004	15	16	15	4	13	0	17	1		81
2005	6	9	19	2	18	0	20	2		76
2006	9	7	23	4	9	0	35	1	1	89
2007*	3	2	16	1	2	0	16	0	1	41
<b>TOTAL</b>	<b>235</b>	<b>131</b>	<b>210</b>	<b>18</b>	<b>78</b>	<b>2</b>	<b>129</b>	<b>6</b>	<b>2</b>	<b>801</b>
	<b>29%</b>	<b>16%</b>	<b>26%</b>	<b>2%</b>	<b>10%</b>	<b>0%</b>	<b>16%</b>	<b>1%</b>	<b>0%</b>	<b>100%</b>

2007\*: Information to May 2007

Source: COPROCOM - TSU

In almost 12 years (from 1995 to May 2007) the efforts of both the COPROCOM and the TSU have been concentrated on processing complaints (29%) and *ex officio* investigations (16%), although different types of enquiries have also been in the forefront (26% for COPROCOM and 16% for the TSU).

There have only been 6 procedures concerning concentrations, since the law does not provide a mechanism for giving notice of concentrations.

After 2003, when COPROCOM began to concern itself solely with the competition aspects of the LPCDEC – the Commission for Regulatory Improvement having been created to take charge of deregulation – COPROCOM and the TSU had more enquiries (24% and 29%, respectively) and fewer complaints and *ex officio* investigations (14% and 13%, respectively) (see Table 3).

**Table 3: Enforcement of the LPCDEC by COPROCOM, 1995-2007**

Year	Complaints	Ex Officio Invest.	Enquiries	Authorizations	Opinions	Price Fixing	TSU Enquiries	Concentrations	Injunc. Reliefs	TOTAL
2003	17	15	15	2	11	1	20	1		82
2004	15	16	15	4	13	0	17	1		81
2005	6	9	19	2	18	0	20	2		76
2006	9	7	23	4	9	0	35	1	1	89
2007*	3	2	16	1	2	0	16	0	1	41
<b>TOTAL</b>	<b>50</b>	<b>49</b>	<b>88</b>	<b>13</b>	<b>53</b>	<b>1</b>	<b>108</b>	<b>5</b>	<b>2</b>	<b>369</b>
	14%	13%	24%	4%	14%	0%	29%	1%	1%	100%

Source: Table 2

**Table 4: COPROCAM Procedures Completed by Year, 1995-2006**

Year	Enquiries	Complaints	Ex Officio Invest.	TSU Enquiries	Authorizations	Opinions	Price Fixing	Concentrations	Total
1995	0	8	1	0	0	0	0	0	9
1996	4	12	1	0	0	0	0	0	17
1997	1	40	4	0	0	0	0	0	45
1998	15	57	21	0	0	0	0	0	93
1999	21	19	17	0	0	0	0	0	57
2000	32	9	15	0	0	0	0	0	56
2001	36	18	7	1	3	7	1	1	74
2002	10	13	5	18	2	12	0	0	60
2003	14	14	14	18	2	10	1	1	74
2004	16	16	7	13	3	12	0	0	67
2005	18	9	12	20	3	13	0	1	76
2006	21	3	9	34	2	10	0	0	79
<b>TOTAL</b>	<b>188</b>	<b>218</b>	<b>113</b>	<b>104</b>	<b>15</b>	<b>64</b>	<b>2</b>	<b>3</b>	<b>707</b>

Source: COPROCOM, based on COPROCOM and TSU archives. Preliminary data. Corresponding to procedures completed per year, including completed procedures carried forward from previous years and those completed the same year in which they were instituted. In 1998 there was an unusual volume of summary proceedings among the complaints, as MEIC's Trade Area transferred various procedures to COPROCOM due to a refusal by companies to submit information.

Table 5 below shows some of the main markets investigated by COPROCOM between 1995 and 2005, which include basic consumer goods for low-income sectors such as milk, chicken, onions, beans, sugar and rice, or key inputs for the economy such as cement and concrete.

**Table 5: COPROCOM, Main Markets Investigated or Under Investigation, 1995-2005**

YEAR	Markets (1)
1995	Ice factories
1996	Chamber of Hotels, tires, cosmetics
1997	Coffee, cable TV
1998	Milk, chicken, onions, beans, tow trucks, parking lots
1999	Insurance, telecommunications, rice, truckers, tanneries, transmission rights
2000	Airlines, real estate brokers, tobacco companies
2001	Palms, pork, palm nuts, sugar, airlines, soft drinks
2002	Credit card issuers, customs agents
2003	Bonded warehouses, construction rods, cement
2004	Radio, bookstores, repair shops, plastics, textiles, paper, onions, beans
2005	Pension fund administrators, premixed concrete, day-old bread, supermarkets, pharmacies, rice, municipal services

Source: COPROCOM and TSU archives. Preliminary data.



(1) Some of the markets investigated or under investigation.

Below is information on the 15 investigations that ended up with sanctions (Table 6), most of which came under Article 11 of the LPCDEC (absolute monopolistic practices considered intrinsically illegal or illegal *per se*).

**Table 6: COPROCOM, Cases Sanctioned with Fines, 1995-2006**

Case No.	Sector, Enterprise or Economic Agent	Type of Practice	
1	02-95	BTICINO DE C. R	Retail price imposition, and imposition of exclusivity Article 12 of the LPCDEC: relative monopolistic practice
2	08-95	ICE FACTORIES	Price fixing Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
3	07-95	GAS COMPANIES: TROPIGAS DE C.R and GAS NACIONAL ZETA	Price fixing Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
4	07-98	AGUAS MINERALES DE C. R.	Refusal to submit information Other
5	28-98	NATIONAL CHAMBER OF PHARMACIES (CAMARA NACIONAL DE FARMACIAS, OR CANAFAR)	Preventing the entry of new competitors NO DATA
6	15-98	NATIONAL CHAMBER OF PRODUCERS OF BEANS AND SIMILAR PRODUCTS (CAMARA NAC. FRIJOLES Y AFINES)	Information sharing for bulk purchase of beans and price fixing for sale of 900 g bags of black beans Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
7	11-99	ANNOUNCERS	Price fixing Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
8	34-99	CONTAINER TRUCKERS	Price fixing agreement Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
9	36-99	TANNERIES	Price fixing Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
10	28-00	REAL ESTATE BROKERS	Price fixing agreement Article 11, section <i>a</i> of the LPCDEC: absolute monopolistic practice
11	IO-006-01	PIG FARMERS	Pork supply restriction NO DATA
12	31-99	RICE SECTOR ECONOMIC AGENTS OF THE NATIONAL ASSOCIATION OF INDUSTRIALISTS	Violation of Articles 11, section <i>b</i> and 12, section <i>e</i> , of Law 7472 Article 11, section <i>b</i> : absolute monopolistic practice; and Article 12 of the LPCDEC: relative monopolistic practice
13	IO- 003-01	PALM NUT	Price fixing for refined oil and collusion on refined oil sale volume Article 11, sections <i>a</i> and <i>b</i> of the LPCDEC: absolute monopolistic practice
14	D-07-01	COCA COLA INTERAMERICAN CORPORATION AND EMBOTELLADORA PANAMCO TICA S.A.	Price imposition and exclusivity contracts Article 12 of the LPCDEC: relative monopolistic practice
15	IO-009-01	CORPORACIÓN DE SUPERMERCADOS UNIDOS	Violation of Article 12, sections <i>b</i> and <i>e</i> , of the Law Article 12 of the LPCDEC: relative monopolistic practice

Source: COPROCOM and Technical Support Unit archives.

Table 7 shows that between 1995 and 2006, 151 economic agents were fined for a total of approximately ¢670.3 million (colones), giving an average fine of some ¢4.4 million (colones).

**Table 7: COPROCOM, Fines Levied on Economic Agents, 1995-2006**

Year	Number of Economic Agents Sanctioned	Fines Levied in Colones	Equivalence in Number of Minimum Wages	Average Fine per Sanctioned Agent in Colones
1995	3	11,180,741	250	3,726,914
1996	0	0	0	
1997	5	156,410	5	31,282
1998	1	626,400	12	626,400
1999	16	35,369,920	633	2,210,620
2000	17	56,179,012	839	3,304,648
2001	31	6,692,260	1947	215,879
2002	63	151,233,523	1965	2,400,532
2003	10	122,587,048	1254	12,258,705
2004	2	72,758,120	870	36,379,060
2005	1	205,911,840	1640	205,911,840
2006	2	7,607,422	57	3,803,711
<b>TOTAL</b>	<b>151</b>	<b>670,302,696</b>	<b>9,472</b>	<b>4,439,091</b>

Source: COPROCOM and Technical Support Unit archives.

### 3.2.5. Selected Competition Cases

COPROCOM enforcement has focused mainly on applying the *per se* rule to agreements among competitors (Article 11). When COPROCOM started out, price fixing was easily detected via information available to the public (publications of fixed price lists in national newspapers and similar places), as economic agents were unaware of the illegal nature of these practices. Fines were small and symbolic (Brusick, Alvarez and Pierre Horna, 2004).

The sectors involved in these practices included ice factories (Regular Meeting #9-95, Decision: Article Five. Date: 11/28/95), bean processors (Regular Meeting #33-98, Decision: Article Six. Date: 11/10/98), announcers (Regular Meeting #20-99, Decision: Article Four, section *a*. Date: 6/22/99), and container truckers (Regular Meeting #33-2000, Decision: Article Six. Date: 9/12/00).

The bean processor case was especially important in that it was the first to be sanctioned for information-sharing among competing agents and, specifically, for meeting to discuss prices. The investigation revealed that although not all the agents that attended the meeting shared information, all of them took advantage of the data disclosed, with a single market price for beans resulting.

In 2002 two palm oil producers and manufacturers were fined (Regular Meeting #33-2002, Decision: Article Five, point F. Date: 11/5/02) for sharing information on palm nut price schedules and for agreeing to limit refined oil sale prices and volumes. The amount in fines reached the equivalent of 1,484 times the minimum wage, including fines levied on various individuals, representing corporations, who participated in the cartel agreements. This was after price fixing had been shown by verifying meetings to that end (Odio Rohrmoser, 2005) (Petrecolla, "Informe sobre las necesidades y prioridades en el area de Políticas de la Competencia," 2003).

In 2003, various airline companies were *ex officio* investigated for fixing lower ticket sales commissions for travel agencies (Regular Meeting #37-03. Decision: Article Five. Date: 12/2/03), but enforcement of the *per se* rule proved difficult as there was no direct evidence of the assumed price fixing. The fines ranged from 140 to 280 times the minimum wage. The ruling was appealed by the companies, which supplied additional information on the market's knowledge of the leader's proposed cut, leading COPROCOM to reconsider its ruling and acquit the defendants.

In the area of relative practices, of note is one of the first investigations made by COPROCOM (in 1995) with respect to a case involving an electrical components supplier with a major share of the market that sought to exclude a competitor through resale price fixing and tied selling, among other conditions. A total fine of 100 minimum wages was imposed and the firm was ordered to cease these practices (Regular Meeting #9-95. Decision: Article Four. Date: 11/28/95).

In 2004 another investigation on relative practices, initiated in 2001 in response to a complaint of retail price fixing, exclusivity contracts with distributors, and other exclusory practices in the soft drink and fruit juice market, was concluded (Regular Meeting #19-2004. Decision: Article Six, point E. Date: 5/25/04). In this case the investigation of Coca Cola's bottling company in Costa Rica for price and sales volume imposition, imposition of conditions for using the bottling company's refrigerators, exclusivity contracts, tied selling and price discrimination led to sanctions for imposing resale prices and setting up exclusivity contracts, mainly in elementary and high schools. The company was ordered to eliminate the exclusivity condition for using the bottling company's refrigerators for those commercial establishments with only the one refrigerator and no space for other equipment. Sanctions totalled 820 minimum wages (Sittenfeld, 2007).

Another particularly relevant case is an investigation that led to the sanctioning of the country's largest and most important supermarket chain. After a procedure lasting several years (2002-2005), the chain was fined 1,640 minimum wages for engaging in four types of illegal conducts: (a) imposition of conditions on suppliers to provide price and discount information to third parties, (b) imposition of a requirement that suppliers provide studies reflecting competitors' price changes, (c) imposition of larger discounts for the chain from suppliers in the face of other competitors' lower prices, and (d) the invitation to suppliers to impose reprisals against competitors in order to keep prices low. (Regular Meeting #37-2005. Decision: Article Seven: Date: 11/15/05).

Finally, mention should be made of two recently sanctioned cases (2007/2008) involving two enterprises providing electricity in two different regions of the country. In one of the cases the firm had decided not to renew the pylon infrastructure lease for the only company providing cable TV service in the region, and was fined approximately ¢21 million (colones) (Regular Meeting #01-2008. Decision: Article Six. Date: 1/8/08). In the second case, the company had decided not to lease the pylon infrastructure for wide-band cable Internet signal transport, and was fined approximately ¢64 million (colones) (Regular Meeting #32-2007. Decision: Article Five. Date: 12/11/07). In both cases the companies were planning to provide the services themselves in their respective areas.

These last two cases are especially important, since they concern companies with public utility (in this case, electricity) concessions, which are exempted from the scope of Law No. 7472. Nonetheless, COPROCOM felt that infrastructure leasing was a different service from that of the concession and therefore the LPCDEC was applicable.

Note that these are the only two cases to have been prosecuted under section (g) of the law, which refers in general terms to any deliberate act to exclude competition. Although COPROCOM had been cautious about enforcing this section, it felt such enforcement was proper in these cases, given that the conduct was intentional and had no other justification than to eliminate competition, and no other benefit than for the electric companies.

#### **4. COMPETITION POLICY SCOPE: EXCEPTIONS AND SPECIAL REGULATORY REGIMES**

Competition law best practices dictate that the law should be of general application - that is, that it should apply to all sectors and all economic agents engaged in producing goods and services for trade purposes. All kinds of companies, then, both public and private, would come under the law. The recommendation stems from the independent nature of economic activity (Khemani, 2002).

Although in most economies competition law covers public as well as private enterprises, multiple exceptions are allowed in both developed and developing countries, the most common being in the following sectors or activities: union activities, agriculture, transportation, financial services, energy, telecommunications, postal services and mass communication media (for a detailed review see Khemani, 2002, pp. 14-25).

In Costa Rica the following are exempted from enforcement of the LPCDEC: a) providers of public services by virtue of a concession, under the conditions provided by law and the concession contract; b) state monopolies created by law, expressly authorized to operate in areas such as insurance, alcohol distillation and marketing for domestic consumption, and distribution of fuel, telephone services, telecommunications, electricity and water; and c) municipal or local governments, both internally and in their relations with third parties. (Articles 9 and 72 of the law and Article 29 of the regulations).

In addition, the Constitutional Chamber has ruled that the fixing of minimum fees by professional associations is also excluded from the LPCDEC as long as it is explicitly allowed by other laws (Gamboa, 2003).

Moreover, the law's definition of 'economic agent' exempts business and similar type chambers and associations from enforcement of competition law, if they do not participate in economic activities as buyers or sellers of goods or services. This is an important limitation, as investigations have shown that anti-competition agreements tend to form within the confines of these kinds of associations.

It should be added that Costa Rica is in the process of breaking up its insurance and telecommunications monopolies. Draft bills are underway in Congress and should give COPROCOM the power to investigate anti-competition practices in the insurance market, including insurance associations. Investigations into cellular phone services will be undertaken by the regulatory body and only non-binding consultation and advisory opinions from COPROCOM is envisaged.

## **5. COMPETITION ADVOCACY**

Competition advocacy refers to the actions of competition authorities to promote a competitive environment for economic activities by means of voluntary compliance mechanisms. These primarily involve communication with other government agencies and public awareness-raising as to the benefits of competition (cf. International Competition Network, 2002).

The actions can be classified into two main groups. One group is aimed at persuading other government entities not to adopt unnecessary anti-competitive measures and to work together with sectoral regulators in setting limits to economic regulation. The goal of the other group is to familiarize other government bodies, the judicial system, economic agents and the general public with the benefits of competition and the competition authority's role in fostering and protecting welfare by, for example, preparing instructions, manuals or guidelines, holding seminars, and publishing press bulletins and annual reports. Both types of actions contribute to building what is called a "culture of competition" (International Competition Network, 2002).

For effective competition advocacy in government actions, the competition authority must be able to speak out in a timely manner, and therefore a system is needed to make sure it is informed of draft bills with the potential to limit competition. Here the authority will have greater impact if it participates in designing regulations.

According to an International Competition Network survey, there are very few jurisdictions where the competition authority's opinion is binding. One explanation for this is a reluctance to grant veto power to a non-elective body, unlike Congress or the government. Instead, some jurisdictions felt it was important to have a formal consulting system whereby government bodies must explicitly list

their reasons for rejecting the competition authority's opinion (International Competition Network, 2002, p. viii).

A major challenge for competition authorities is competition advocacy in regulated sectors, for which very specialized knowledge is required. A frequently successful mechanism is the exchange of professionals between sectoral regulators and competition authorities, giving each body an understanding of the other's viewpoint.

It should be emphasized that compulsory compliance or binding actions (orders, sanctions, authorizations, etc.) and voluntary compliance or non-binding actions (competition advocacy) redound upon each other to build a reputation that increases the effectiveness of each type of action (International Competition Network, 2002, p. xi).

As competition law has been part of a gradual process of general restructuring for a more open market economy, competition advocacy has been an important part of COPROCOM activities. Of particular use is the power to issue opinions (whether at its own initiative or in response to requests) on free competition issues with regard to laws, regulations, agreements, circulars and other administrative actions; it should be kept in mind, however, that these opinions or recommendations are non-binding.

COPROCOM has issued opinions and recommendations on how to promote and guide existing regulations in diverse economic sectors such as LP gas, insurance, telecommunications, and producers in markets such as rice, palm nut, poultry, beans, and others.

As public services are exempt from competition policies, advocacy here has been minimal. On the other hand, advocacy has been stronger in other regulated sectors of the economy, combining punitive measures and pro-competition recommendations.

For example, in the case of rice, 26 economic agents were sanctioned for collusive activities. In addition, a sectoral competition study of the agrochain has recommended modifying import duties. (Petrecolla, Agrocadena del Arroz – Estudio Sectorial de Competencia, 2006).

Moreover, COPROCOM has worked hard at promoting a culture of competition since its inception. Its promotion and prevention efforts have focused on education and dissemination for building a culture of competition; a task that has had the technical and financial support of international cooperation.

Of particular note are the training efforts made for groups and institutions directly related to competition law enforcement, especially those charged with reviewing the actions of COPROCOM (the Constitutional Chamber and Contentious-Administrative Court, among others), the private sector (enterprises, chambers and other bodies) and academic groups (universities, students and researchers), among others.

Another way to reach greater coverage in disseminating competition issues has been to prepare and distribute informative materials. In particular is the periodic publication of a specialized electronic newsletter, with more than 100 editions, and the dissemination and distribution of COPROCOM jurisprudence.

In brief, COPROCOM has steadily opposed policy initiatives for setting prices, margins or production/import quotas or for imposing regulatory entry barriers for economic agents in a wide range of economic sectors, including regulated ones. At the same time it has spoken out for price deregulation and the lowering of import tariffs.

As several TSU members have noted, their actions have not been very effective, although the authority does not keep a formal record of the positive or negative outcomes of its recommendations.

Considering the time and resources involved in responding to enquiries from different parts of the government and in issuing *ex officio* COPROCOM opinions, the outcomes should be monitored in order to obtain an objective measure of their effectiveness and come up with ways of improving it.

## **6. INTERNATIONAL COOPERATION AND CAPACITY-BUILDING**

The need for international cooperation on competition policy has been more and more evident over the last two decades, beginning with the UNCTAD initiative leading to the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (in the 80s) and followed by the OECD initiative for detecting and sanctioning hard-core cartels (end of the 90s). More recently, one more step in the same direction was the creation of the International Competition Network by competition authorities from various jurisdictions (UNCTAD/RBP/CONF/10/Rev.2 2000).

Costa Rica is developing both a multilateral and bilateral international cooperation agenda. Cooperation with more advanced economies and international organizations such as the United Nations Conference on Trade and Development (UNCTAD), Economic Commission for Latin America and the Caribbean (ECLAC), International Competition Network (ICN), World Bank/FIDES, Agencia Española de Cooperación Internacional, Canadian International Development Agency, International Development Research Centre (IDRC)/Canadian government, and competition authorities from Canada, Mexico, Chile and Switzerland has supplied technical resources and materials for capacity strengthening (Comisión para Promover la Competencia / COPROCOM, 2007).

Costa Rica has also made competition policy commitments within the Free Trade Agreement with Canada, where a mutual obligation is established to notify when an investigation is started that may involve the other country's interests. To date the treaty has been used mainly as a source of technical assistance for COPROCOM and no notification procedures have yet been initiated. At present a Competition Chapter is under negotiation within the trade axis of the Partnership Agreement between Central America and the European Union.

Cooperation has also evolved through agreements of understanding with other competition agencies to establish joint technical assistance activities, information exchange and other joint measures, similar to the ones with the Chilean National Economic Attorney's Office, the El Salvador Superintendence of Competition, and the one underway with the Competition Authority of Panama.

Regionally, the Central American Competition Group was formed in 2006 to execute a regional Central American strategy, set forth in the Guatemala Protocol, of adopting common provisions for eliminating monopolistic practices and promoting free competition in the region. The taskforce's first assignment was to create institutional mechanisms for improving coordination and technical cooperation among competition policy offices and institutions in the Central American region.

Additionally, Costa Rica is one of the beneficiaries of the COMPAL program, through which the Swiss government and UNCTAD supply technical assistance for competition policies and consumer protection (UNCTAD / COMPAL PROGRAMME, 2006).

Through COMPAL diagnostic studies of the law and its reform (Petrecolla, 2003) (Odio Rohrmoser, 2005), leaflets on competition and regulation (Coloma, 2006), manuals and guidelines for investigating anti-competition practices, have been realized; also, training for officials and university professors, and detachments to the Swiss competition authority have been extended.

## 7. FINDINGS AND CONCLUSIONS

Competition law was introduced in Costa Rica in 1995 as part of the institutional scaffolding needed for a gradual opening, deregulating and restructuring of the economy, geared to driving growth and development.

Much of COPROCOM's activity, therefore, has been aimed at revising the various legal provisions by which successive administrations have pushed ahead in this process, and at building a culture of competition in both public and private sectors.

At the same time, it has furthered the training of its professionals in the Technical Support Unit, especially through exchanges with competition authorities of other jurisdictions and experts from international organizations.

In this context, COPROCOM has carried out relatively few investigations into anti-competitive conducts, though it has focused on important economic sectors in terms of public welfare, and has tried, under the legal limits, to impose exemplary sanctions when appropriate.

The particular originating circumstances of competition law are at the core of the current institutional regime's observed weaknesses, to wit: major exceptions to the law's coverage, no preventive control system for mergers and acquisitions, missing key investigation tools, the weak deterrent power of fines, little institutional independence from government administration, and no formal regional authority cooperation mechanism.

More than 10 years of enforcement have led to a build-up of valuable experience for both COPROCOM and the Technical Support Unit, and the regulatory bodies, other public administration sectors, the judicial branch and civil society stakeholders.

At the same time, the market opening and deregulation experiences of this and neighbouring countries has led to a widespread belief that the goals of development and poverty reduction are only possible in a market economy to the extent that public institutions ensure and protect competition, access to basic goods and services, and consumer rights.

Accordingly, the competition law and COPROCOM's actions should be reviewed with a view to improving their performance under current economic and market conditions, in order to meet the challenges of progressively regionalized and globalized markets and comply with the Millennium Development Goals. Poverty reduction must be at the core of all public policy, including competition policy.

The relationship between competition policy, development, innovation, competitiveness and poverty reduction in developing countries heads the agendas of competition authorities in developing countries and the different international organizations providing them with technical assistance.<sup>16</sup>

In the case of Costa Rica, bringing competition policy into line with development and poverty reduction goals does not require legislative or methodological changes. Rather, it requires improving competition in the key economic sectors concerned, on the one hand, with innovation and development (energy, infrastructure, communications, industrial inputs, security, business services, etc.), and on the other hand, with basic consumer goods and services for the lower-income population (food, medicines and health, education, etc.).

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<sup>16</sup> See for example (Cuevas, Carrasco and Khemani, 2007).

## **8. POLICY OPTIONS AND RECOMMENDATIONS**

### **8.1. General Recommendations**

The LPCDEC has been amended on several occasions, but not in areas dealing strictly with competition protection.

Currently under review is a 2006-2007 bill, prepared by COPROCOM with COMPAL/UNCTAD technical assistance (Odio Rohrmoser, 2005).

Which proposes to:

- i) expand the scope of the law to include all economic agents, without exception;
- ii) give COPROCOM a more robust institutional framework (making it more independent), increasing its financial and human resources and enforcement power;
- iii) clarify the methodology for classifying and analysing absolute and relative monopolies;
- iv) incorporate a pre-merger control mechanism for concentrations; and
- v) increase the deterrent power of sanctions.

The proposed amendment is in line with competition protection best practices and focuses on remedying some key missing elements in Costa Rica's competition law.

It is recommended that COPROCOM mobilise support in Congress to enact these legal reforms.

In addition, it is proposed that COPROCOM pursue regional cooperation for dealing with competition cases of a regional nature that may be harmful to competition in more than one country.

### **8.2. Specific Policy Options and Actions to Carry Out**

- 1) In line with the global trend, eliminate all competition law exceptions, in terms of both business (such as public service concessions) and type of person undertaking the activity (legal monopolies, municipal governments, cooperatives, not-for-profit organizations, labour and business associations, professional associations, etc.).
- 2) Inasmuch as there is some international controversy over whether to apply the *per se* criteria in dealing with intrinsically harmful cartels and sanction them with criminal measures, encourage studies and opinion-sharing on the issue with other competition authorities and experts.
- 3) Prepare a manual for investigating the relative monopolistic practices of Article 12, bringing together domestic and international experiences in the matter (the COPROCOM 2006 document on abuse of a dominant position is one precedent).
- 4) Expand the preventive and repressive scope of the law by means of the following:
  - a) Set up a mechanism for notifying and providing preventive control of concentrations.
  - b) Until the above is in place, it is recommended that COPROCOM develop a strategy to inform and persuade the private sector to voluntarily submit to pre-merger control of concentrations, with the aim of providing greater legal certainty for mergers and acquisitions.
  - c) To this end, COPROCOM should prepare a voluntary notification and concentration analysis manual explaining the technical criteria to be used in these cases and the advantages of the mechanism for the private sector.
  - d) Grant COPROCOM the power to reach settlements with the agents under investigation.



- e) If raising the amount of fines is not viable, consider sanctions involving economic agents' reputations, such as obligating them to notify customers, suppliers, shareholders and the general public, nationally and internationally, of their sanctioned actions.
  - f) Strengthen the dissemination and communication of competition policies among government administration, judicial branch and civil society.
- 5) Give COPROCOM and its Technical Support Unit more investigation tools, particularly the following powers:
- a) Visit and inspect domiciles and collect documents without consent (search and seizure).
  - b) Give lenient treatment to economic agents who confess their participation in a horizontal agreement and supply evidence.
  - c) Share confidential information with other competition authorities, particularly within the region, encouraging to this end the signing of cooperation agreements, with the technical support of international organizations and competition authorities in more developed countries.
  - d) Issue binding opinions on competition issues, at their own initiative or at the behest of other bodies.
  - e) Set up sanctions for cases where agents do not comply with requested precautionary measures or commitments, or do not notify of a concentration.
- 6) Give COPROCOM and its Technical Support Unit more institutional independence from government administration and lobbying by economic agents, considering the following:
- a) Designate commissioners by means of a competitive examination and past records.
  - b) Establish mandatory exclusive or full-time dedication of commissioners.
  - c) Grant budgetary and staff hiring independence for both COPROCOM and the Technical Support Unit.
  - d) Clearly establish causes for dismissal of commissioners and Technical Support Unit staff.
  - e) Clearly establish the circumstances under which commissioners may excuse themselves from deciding on an issue, and increase the severity of sanctions if they do not excuse themselves when appropriate.
  - f) Improve and standardize investigative and administrative procedures – for example, getting appropriate ISO certification for COPROCOM's internal procedures.
- 7) Concentrate efforts on key sectors for the economy due to their impact on:
- a) employment and development conditions (industrial raw materials, energy, and other similar markets), or
  - b) working-class living conditions and poverty (basic foods, medicines and health services, and education).
- 8) Strengthen competition advocacy in all sectors of the economy, including those exempted from the LPCDEC. For this COPROCOM should execute an action plan identifying the sectors and problems to be analyzed over the next few years, in the form of a three-year agenda for sectoral competition studies and pro-competition recommendations.
- 9) Within the framework of the regional cooperation agenda, and taking into consideration that many economic agents operate throughout Central America, encourage and participate in regional sectoral studies in key sectors of the regional economy.

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## **ANNEX 1: DECISIONS ARRIVED AT USING RULE OF REASON**

### **1. Regular Meeting # 15-97. Decision: Article Five. Date: 5/6/97. Time: 17:15.**

Enquiry: On enquiry made by Mr. Jorge Alfaro, Rector of the Universidad Nacional, with respect to the cooperation agreement between Universidad Nacional and Embotelladora Centroamericana S.A.

”Before issuing an opinion, be advised that to determine the legality or illegality of the contract a relevant market study must exist, among other conditions. Additionally, if the contract is found to be potentially anti-competitive, an ordinary administrative procedure must be initiated and due process must be given to the interested parties.

Regardless of the foregoing, several necessary elements can be pointed out to the consulting party that may serve as a guideline for determining if an exclusivity contract is legal or otherwise.

As established by this Commission in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996), to evaluate relative monopolistic practices the concept known in American doctrine as the rule of reason should be applied. That is to say, an economic analysis is needed for the specific case to determine its anti-competitive effects.

Thus an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. Suffice it to say, that if as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists.

For this reason, relative monopolistic practices are not illegal *per se* and must be judged on the merits of each case. That is, analysis of these types of practices is based on a *juris tantum* presumption of legality, or, in other words, all acts or contracts are presumed legitimate unless proven otherwise. (Giner Perreño, Cesar. *Distribución y Libre Competencia*, Editorial Montecorvo, S.A. Madrid, 1994).”

### **2. Regular Meeting # 15-97. Decision: Article Seven. Date: 5/6/97. Time: 17:15**

Enquiry: made by Mr. Martin Robles Robles, General Manager of Deportivo Saprissa S.A.

“As established by this Commission in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996), to evaluate relative monopolistic practices the concept known in American doctrine as the rule of reason should be applied. That is to say, an economic analysis is needed for the specific case to determine its anti-competitive effects.”

### **3. Regular Meeting # 19-97. Decision: Article Seven. Date: 6/17/97. Time: 17:10**

Enquiry: Asociación Costarricense de Agencias de Publicidad requests further explanation of the reasoning in an enquiry resolved by this Commission in its third decision of Regular Meeting No. 26, held on July 16, 1996, concerning the practice of publishing a “recommended retail price.”

“As was clearly stated in the aforementioned articles of Law 7472 and jurisprudence, price imposition for a supplier or retailer constitutes a relative monopolistic practice, subject to sanctioning pursuant to Article 25 of this law upon prior confirmation of substantial market power on the part of the economic agent imposing the price. The sanction may consist of elimination of the practice and payment of a fine of up to four hundred and ten times the amount of the lowest minimum monthly wage.

It must be pointed out that in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996) this Commission has ruled that the concept known in American doctrine as the ‘rule of reason’ must be applied in assessment of relative monopolistic practices. That is to say, an economic analysis is needed for the specific case to determine its anti-competitive effects. Moreover, an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. Suffice it to say, that if as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists. That is, relative monopolistic practices are not illegal *per se* and must be judged on the merits of each case.”

**4. Regular Meeting # 22-97. Decision: Article Seven. Date: 7/29/97. Time: 17:20.**

Enquiry: Request for clarification and further explanation of the Commission's reasoning in Article Three of the Minutes for Regular Meeting No. 26-96 concerning the practice of publishing a "recommended retail price," submitted by the Asociación Costarricense de Agencias de Publicidad.

"It is understood from the aforementioned articles of Law 7472 that price imposition for a supplier or retailer constitutes a relative monopolistic practice, subject to sanctioning pursuant to Article 25 of this law upon prior confirmation of substantial market power on the part of the economic agent imposing the price. The sanction may consist of elimination of the practice and payment of a fine of up to four hundred and ten times the amount of the lowest minimum monthly wage.

Moreover, in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996) this Commission has ruled that the concept known in American doctrine as the 'rule of reason' must be applied in assessment of relative monopolistic practices. That is to say, an economic analysis is needed for the specific case to determine its anti-competitive effects. Moreover, an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. Suffice it to say, that if as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists. That is, relative monopolistic practices are not illegal *per se* and must be judged on the merits of each case.

In the enquiry in question, the practice of publishing promotions is considered by this body as permissible in that the economic agent does not have substantial market power, or if it did, the practice does not or cannot have the purpose or effect of illegally eliminating an economic agent from the market; these aspects must be analyzed according to the aforementioned rule of reason."

**5. Regular Meeting # 22-97. Decision: Article Eight. Date: 7/29/97. Time: 17:20**

Enquiry: made by the company Comercializadora Centroamericana S.A. (COCESA), on the practice of publishing or making promotions.

"It is understood from the aforementioned articles of Law 7472 that price imposition for a supplier or retailer constitutes a relative monopolistic practice, subject to sanctioning pursuant to Article 25 of this law upon prior confirmation of substantial market power on the part of the economic agent imposing the price. The sanction may consist of elimination of the practice and payment of a fine of up to four hundred and ten times the amount of the lowest minimum monthly wage.

Moreover, in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996) this Commission has ruled that the concept known in American doctrine as the 'rule of reason' must be applied in assessment of relative monopolistic practices. That is to say, an economic analysis is needed for the specific case to determine its anti-competitive effects. Moreover, an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. Suffice it to say, that if as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists. That is, relative monopolistic practices are not illegal *per se* and must be judged on the merits of each case.

In the enquiry in question, the practice of publishing or making promotions is considered by this body as permissible in that the economic agent does not have substantial market power, or if it did, the practice does not or cannot have the purpose or effect of illegally eliminating an economic agent from the market; these aspects must be analyzed according to the aforementioned rule of reason."

**6. Regular Meeting # 22-97. Decision: Article Eight. Date: 7/29/97. Time: 17:20**

Enquiry: enquiry submitted by the Cámara Nacional de Detallistas concerning a promotion underway by DEMASA for its product, "Tronaditas," where the retail price is printed on a sticker affixed to the package.

"Additionally, in earlier jurisprudence (Article 5 of Regular Meeting No. 39 of the Commission for Promoting Competition held on November 19, 1996) this Commission has ruled that the concept known in American doctrine as the 'rule of reason' must be applied in assessment of relative monopolistic practices. That is to say, an economic analysis is needed for the specific case to determine its anti-competitive effects. Moreover, an

assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. Suffice it to say, that if as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists. That is, relative monopolistic practices are not illegal *per se* and must be judged on the merits of each case.”

**7. Regular Meeting # 09-98. Decision: Article Ten. Date: 3/10/98. Time: 17:00.**

Petitioner: Agencia de Viajes Panamericana, S.A. Respondent: United Airlines Galileo Network System

“Nevertheless, this body deems that, as established by Article 12 of the *Law for the Promotion of Competition and Effective Consumer Protection*, this type of practice must be analyzed according to the rule of reason, and that the legality of a relative practice will depend on the economic impact it has on the relevant market. In this particular case this Commission feels there is insufficient evidence to presume economic harm as any of the effects indicated in Article 12 of Law 7472 may cause, be it illegal elimination of other economic agents from the market, blocked access, or the establishment of exclusive advantages in favour of one or several persons. Thus this argument is not admissible.”

**8. Regular Meeting # 13-98. Decision: Article Six. Date: 4/21/98. Time: 17:00**

Petitioner: Omar Hernández Zamora, representative of Panificadora Oros, Gilberto Pochet Cabezas, representative of Panificadora Pochet and Víctor H. Quirós León, representative of Panificadora Damaris. Respondent: Panificadora Bimbo. Practice: Predatory pricing.

“Firstly, according to the description of the conduct by the petitioning party, it can be said that a relative monopolistic practice as provided in Article 12, section (f) of Law 7472 does exist – that is, the production or marketing of goods and services at below normal prices. This banned practice, known in doctrine as ‘predatory pricing,’ must be analyzed according to the rule of reason to determine its pro-competitive and anti-competitive effects.”

**9. Regular Meeting # 33-98. Decision: Article Five. Date: 11/10/98. Time: 17:00**

Enquirer: Mr. Uri Weinstok, concerning changes in the mark-up included in the suggested prices.

“It should be pointed out that in earlier jurisprudence (Article 5 of Regular Meeting No. 39 held on November 19, 1996) the Commission for Promoting Competition has ruled that the concept known in American doctrine as the ‘rule of reason’ must be applied in assessment of relative monopolistic practices. Application of this rule requires an economic analysis of the specific case to determine its anti-competitive effects; an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. If as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists.”

**10. Regular Meeting # 37-98. Decision: Article Six. Date: 12/1/98. Time: 17:10.**

Inquiry made by Firestone de Costa Rica S.A. concerning delivery of a suggested price list to distributors.

“In the first place, the case provided for by the rule must be shown; in this case, there must be proof of price imposition or other conditions a distributor or supplier must comply with for selling or distributing goods or rendering services. Secondly, pursuant to Articles 13, 14 and 15 of the LPCDEC, it must be shown that the economic agent has substantial power in the relevant market. Finally, the anti-competitive effects of the practice must be shown; that is to say, that said practice has or may have the purpose or effect of illegally eliminating another agent from the market or substantially blocking market entry, or establishing exclusive advantages in favour of one or several persons. Thus, unlike absolute practices, relative practices are not illegal *per se* but must be analyzed based on a *juris tantum* presumption of legality,<sup>17</sup> that is to say, that they are legal until proven otherwise. A practice, then, may incur in one of the seven cases provided for in Article 12 but also have pro-competitive effects and therefore not be sanctionable. That is, the Commission must assess the pro-

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<sup>17</sup> López Velarde, Rogelio. *La Ley Federal de Competencia Económica y Algunas Consideraciones desde la Perspectiva del Derecho Internacional*. Revista Jurídica. Anuario del Departamento de Derecho. Universidad Iberoamericana. No. 2, 1995. p. 296 A

and anti-competitive effects of the practice to determine if it should be sanctioned; this is considered the 'rule of reason', of fairly universal application, especially in competition regimes derived from American doctrine."

"Of permissible nature are all those price communications existing internally between producers and retailers or between distributors and retailers, whereby there is no imposition but simply an intention to guide the retailer with respect to the price at which their product may eventually be sold. Thus, if an investigation is needed to resolve a practice of this nature, it would be taken into account as circumstantial evidence under the rule of reason when comparing pro- and anti-competitive effects. Know all men by these presents."

**11. Regular Meeting # 16-99. Decision: Article Eight. Date: 5/25/99. Time: 17:00.**

Enquirer: Mr. Rafael E. León Thompson. Matter: Sale of products at below-purchase prices.

"Predatory pricing is a practice whereby a company intentionally reduces its prices to below its production costs, for a period of time, for the purpose of driving its competitors out of the market, and later raises its prices to recover its losses."

"This type of conduct by economic agents is considered a relative monopolistic practice and as such needs to be investigated under the 'rule of reason' to analyze its anti-competitive effects on the market."

**12. Regular Meeting # 24-2000. Decision: Article Eleven. Date: 7/11/00. Time: 17:30.**

Enquirer: Mr. Federico Rucavado Luque. Matter: Joint strategic plan with a pharmaceutical group in the pharmaceutical sector.

"Additionally, in earlier jurisprudence (Article 5 of Regular Meeting No. 39 held on November 19, 1996) the Commission for Promoting Competition has ruled that the concept known in American doctrine as the 'rule of reason' must be applied in assessment of relative monopolistic practices. Application of this rule requires an economic analysis of the specific case to determine its anti-competitive effects; an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. If as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a monopolistic practice exists."

**13. Regular Meeting # 37-2000. Decision: Article Fourteen. Date: 10/10/00. Time: 17: 30.**

Petitioner: Comunicaciones Telemundo S. A. Respondent: Cámara Nacional de Televisión, Teleamérica S.A, Representaciones Televisivas S.A, Televisora de Costa Rica S.A. and personally against Juan Carlos Gamboa Góngora, Mario González Frías, Olga Lucía Cozza Soto, Pedro Odio Salazar and Fernando Contreras López. Matter: Sale of broadcast rights for the 1999-2000 popular festivals.

"The rule of reason is used to analyze relative monopolistic practices. Unlike absolute monopolistic practices, the law does not determine *ex-ante* the anti-competitive nature of relative practices; on the contrary, it is recognized that they may have beneficial effects on competition. Because of this the anti-competitive nature of the practice must be shown, based on an assessment of the characteristics of the situation in question, so that identification can be made of the set of circumstances that are effectively restricting competition."

"m) Costa Rican law does not mention that absolute monopolistic practices must be analyzed under the *per se* rule, but that these are derivations that have been made based on previous court resolutions. That said practices should be analyzed under the rule of reason and the social welfare premise, which in this case translates into the fact that the events within the Zapote bull ring may be seen by most Costa Ricans."

**14. Regular Meeting # 39-2000. Decision: Article Eight. Date: 10/24/00. Time: 17: 30.**

Enquirer: Mr. Eduardo Apuy Chen. Matter: If the consent required by the condominium association meeting of a shopping centre to change the specific destination of a locale constitutes a restrictive practice for competition.

"For their part, relative practices are analyzed under the doctrine called the 'rule of reason.' That is to say, to determine the illegality of these practices an assessment must be made of all the special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. If as a result of this economic analysis the anti-competitive effects are found to be greater vis-à-vis the pro-competitive effects, a relative monopolistic practice exists. In other words, unlike absolute practices, they are not illegal *per se*."



**15. Extraordinary Meeting #07-2001. Decision: Article Twelve. Date: 2/13/01. Time: 17: 30.**

Case: C-023-00. Inquirer: Mr. Miguel Bermúdez. Matter: If it is unfair competition for a company to offer a service at half the price being offered on the market by other companies.

“As in the case of predatory pricing, for a company incurring in this practice to be sanctioned it must be shown that it has substantial power in the relevant market and that the practice has the purpose or effect of illegal elimination of other agents from the market, substantial blockage of their access or the establishment of exclusive advantages in favour of one or several persons. It should be added that such practices are analyzed under the ‘rule of reason’, meaning that their anti-competitive and pro-competitive effects are analyzed to determine whether or not they constitute an infringement of the law.”

**16. Regular Meeting # 09-2001. Decision: Article Eleven. Date: 2/27/01. Time: 17: 30.**

Petitioner: Mrs. Ana Teresa Vázquez. Respondent: Republic Tobacco Company S.A. and Tabacalera Costarricense S.A.. Matter: Alleged violations of Articles 11, section (a), and 12, section (b), of the *Law for the Promotion of Competition and Effective Consumer Protection*, alleged sale price agreements and agreements to cut the retail merchant mark-up, as well as alleged retail price imposition for cigarette packs.

“Many relative practices, aside from restricting competition, may also have pro-competitive and pro-efficiency effects, and it would therefore be wrong to impose a universal ban. The doctrine known as the ‘rule of reason’, then, is used to determine whether or not the conduct is illegal. This means that an analysis must be made of anti-competitive *vis-à-vis* pro-competitive effects deriving from the practices to determine whether or not they are sanctionable. It must also be determined whether the accused economic agent has substantial power in the relevant market.”

“Relative practices are clearly based on a *juris tantum* presumption of legality which presupposes that the party potentially harmed by the restriction must prove the existence of factors such as substantial power in the relevant market on the part of the alleged transgressor.”

**17. Regular Meeting #22-201. Decision: Article Eight, point H. Date: 6/26/01. Time: 17: 30.**

Case: 031-99. Official investigation, CPC. Respondents: Asociación Nacional de Industriales del Sector Arrocero and some of its members. Matter: Alleged violations of Articles 11, section (b), and 12, sections (e) and (g), of the *Law for the Promotion of Competition and Effective Consumer Protection*, for allegedly agreeing not to buy rice from domestic producers and pressuring them to block other economic agents’ market access.

“This is because relative monopolistic practices are analyzed under a *juris tantum* presumption of legality. That is to say, an economic analysis is needed for the specific case to determine whether the practice had the purpose or effect of harming free and fair competition. Thus an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. All the foregoing aspects are important because the practices are not illegal *per se*, but rather their illegality is assessed according to what is known in doctrine as the ‘rule of reason,’ which takes into account all these aspects.”

**18. Regular Meeting # 35-2002. Decision: Article Seven, point G. Date: 11/19/02. Time: 17:30.**

Case: D-006-01. Petitioner: Ventas Técnicas G y C, S. A. Respondent: Químicas Unidas Ltda. Matter: For alleged relative monopolistic practices hindering free and fair competition, and the potential elimination of the company as an economic agent in the market.

“This is because relative monopolistic practices are analyzed under a *juris tantum* presumption of legality. That is to say, an economic analysis is needed for the specific case to determine whether the practice had the purpose or effect of harming free and fair competition. Thus an assessment must be made of all the facts, evidence and special circumstances of the case, the intentions of the parties and the benefits or harm caused to free competition. All the foregoing aspects are important because the practices are not illegal *per se*, but rather their illegality is assessed according to what is known in doctrine as the ‘rule of reason,’ which takes into account all these aspects.”

**19. Regular Meeting # 19-2004. Decision: Article Six, point E. Date: 5/25/04. Time: 17: 30.**

Case: D-007-01. Petitioner: PepsiCo Inc., Pepsi-Cola Interamericana de Guatemala S.A. and Pepsi-Cola Manufacturing Company of Uruguay S.R.L. Respondent: The Coca-Cola Company and Embotelladora Panamco Tica S.A. Matter: Relative monopolistic practices, classified in Article 12 of Law 7472.

“It is this Commission’s opinion that these types of practices are generally prohibited; a case-by-case study must be made to determine the effects required by law under the rule of reason.”