

**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

**Voluntary peer review of competition law and  
policy: Costa Rica**

**Overview**

Report by the UNCTAD secretariat



United Nations

New York and Geneva, 2008

## **Note**

The United Nations Conference on Trade and Development (UNCTAD) serves as a focal point within the United Nations Secretariat for all matters related to competition policy. UNCTAD seeks to further the understanding of the nature of competition law and policy and its contribution to development and create an enabling environment for an efficient functioning of markets. UNCTAD's work is carried out through intergovernmental deliberations, capacity-building activities, policy advisories, seminars, workshops and conferences.

Symbols of United Nations documents are composed of capital letters and numbers. Mention of such a symbol indicates a reference to a United Nations document.

The designations employed and the presentations of the material do not imply the expression of any opinion whatsoever on the part of the United Nations Secretariat concerning the legal status of any country, territory, city or areas, or of its authorities, or concerning the delimitation of their frontiers or boundaries. Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a reference to the document number. A copy of the publication containing the quotation or reprint should be sent to the UNCTAD secretariat. The overview contained herein is also issued as part of the publication *Competition Law and Policy in Costa Rica: Peer Review*.\*

**UNCTAD/DITC/CLP/2008/1 (Overview)**

---

\* This is a not an official translation of the Spanish original.

## Contents

	<i>Page</i>
Introduction.....	1
I. Historical background and context of competition policy.....	2
A. Context and History .....	2
B. Objective .....	2
II. Substantive aspects: contents of the competition law.....	3
A. Horizontal agreements .....	4
B. Vertical agreements.....	4
C. Concentrations .....	6
III. Institutional aspects: competition policy enforcement structures and practices.....	8
A. COPROCOM structure .....	8
1. Adjudicating body.....	8
2. Investigating body.....	9
3. Budget and resources .....	9
B. Administrative procedures, remedies and appeals .....	10
1. Administrative procedures .....	10
2. Remedies and appeal.....	12
3. Sanctions .....	14
C. Competition law enforcement.....	15
D. Selected competition cases .....	18
IV. Competition policy scope: exceptions and special regulatory regimes .....	21
V. Competition advocacy .....	22
VI. International cooperation and capacity building.....	23
VII. Findings and conclusions.....	24
VIII. Policy options and recommendations .....	25
A. General recommendations .....	25
B. Specific policy options and actions to carry out .....	26
References.....	29

## **Introduction**

UNCTAD's peer review of competition law and policies falls within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (the "United Nations Set of Principles and Rules on Competition"), adopted by the General Assembly in 1980. The set seeks, *inter alia*, to assist developing countries in adopting and enforcing effective competition law and policy that are suited to their development needs and economic situation.

The peer review of competition policy seeks to provide voluntary competition agencies with an independent and constructive assessment of its institution and the substantive content and enforcement of competition law. In addition, UNCTAD's peer review process serves as a needs assessment for capacity-building and technical assistance to interested countries.

## **I. Historical background and context of competition policy**

### **A. Context and history**

The Costa Rican economy made the transition from a State intervention-based economy to a market economy in the 1980s. The country based its development strategy on tourism, technology and export promotion to take advantage of the opportunities offered by globalization and the economic reforms instituted.

The process began with the implementation of three reforms: (a) reducing tariffs; (b) reforming and downsizing the State, and (c) adopting stable and consistent macroeconomic policies. In addition, a competition law and policy was enacted to combat anti-competitive practices and enforce constitutional rights relating to trade and business (art. 46 of the Constitution). The principles are embodied in Act No. 7472 on the promotion of competition and effective consumer protection.

### **B. Objective**

The objective of Act No. 7472 is to protect and promote free and fair competition by preventing and prohibiting monopolies, monopolistic practices and other restrictions on market efficiency. This is a public law, and has universal applications.

## **II. Substantive aspects: contents of the competition law**

Act No. 7472 on the promotion of competition and effective consumer protection (also known as “LPCDEC” after its Spanish abbreviation), enacted on 20 December 1994, covers three main substantive aspects:

- Provisions concerning deregulation of economic activities;
- Provisions concerning the defence of competition; and
- Provisions concerning consumer protection.

In addition, Act No. 7472 contains a provision on unfair competition, the enforcement of which was assigned to the judicial branch.

The Act also provides for two commissions, one to handle consumer issues (National Consumer Commission) and one to oversee deregulation of economic activities (Regulatory Improvement Commission).

With respect to the specific provisions dealing with competition issues, the Commission for Promoting Competition (Comisión para Promover la Competencia, or COPROCOM) was created as an independent – though not administratively independent – institutional body within the Ministry of Economy, Industry and Trade. COPROCOM is responsible for reviewing competition cases either at its own initiative or in response to complaints. It has the authority to rule on competition cases and apply appropriate remedies or sanctions as provided for in the law.

Actionable conduct includes absolute monopolistic practices (horizontal agreements) and relative monopolistic

practices (vertical agreements).<sup>2</sup> This law does not have so-called “per se” or “rule of reason” concepts. In addition, the law provides for special ex-post control of concentrations and mergers, which will be discussed below in section 3.3.

### **A. Horizontal agreements**

In Costa Rica, agreements that can be classified as hard-core cartels (intrinsically harmful cartels) are addressed in article 11 of Act No. 7472. Price-fixing is included, as is information-sharing for the same purpose or effect, quota agreements, market allocation agreements and collusive tendering. Agreements that are deemed “absolute monopolistic practices” are null *pleno jure* (intrinsically illegal) and are therefore illegal regardless of the damage they may cause to competition, efficiency, consumers and the general welfare. To prove that such agreements are illegal, COPROCOM must show that those participating in the agreement are competing economic agents (Act No. 7472, art. 11).

### **B. Vertical agreements**

Article 12 of Act No. 7472 lists types of conduct that are classified as relative monopolies. These include vertical restrictions such as exclusive distribution agreements, exclusivity or sole brand contracts, retail price maintenance or conditions for the sale of goods or services, and tied selling. Predatory pricing is also included as a relative monopolistic practice. The description of such conduct in Act No. 7472 is somewhat vague, in that it refers to sales at below “normal” prices. However, in practice,

---

<sup>2</sup> The classification of types of conduct is very similar to that used in the Mexican competition law, on which the Costa Rican law is based.

when assessing the predatory cases that have arisen, COPROCOM has followed the standard two-stage rule used by most competition agencies in evaluating whether selling below “normal” prices constitutes harm for competition.

Also included as a vertical agreement is an arrangement between several economic agents (which may or may not be competitors), or an invitation to them to apply pressure on a customer or supplier to comply with a given conduct, condition or agreement, impose reprisals or obligate them to act in a particular manner, which may be described as “boycotting”.

Finally, a more general category is included which refers to “...any deliberate act that drives out competitors from the market or bars their entry,” COPROCOM has exercised extreme caution in applying this clause. In Mexico, where a similar clause exists in the old competition law, the Federal Competition Commission has faced several problems when applying it, as it was considered unconstitutional.

In order to declare the above conduct a breach of the law, three conditions must be met, as specified in articles 12, 13, 14 and 15 of Act No. 7472: (a) the party presumed responsible for the act(s) must have substantial power in the relevant market; (b) the party must have carried out some of the above-listed practices; and (c) the act must have the objective or effect of eliminating other agents in the market, substantially blocking their access or establishing exclusive advantages in favour of one or several competing agents.

Costa Rican competition law, therefore, does not expressly use the “rule of reason” for analysing this type of agreement. That is to say, it does not formally require balancing the pro- and anti-



competitive effects of the conduct or agreement in question. In order to sanction an agreement, COPROCOM must prove that it is or may be *exclusionary*, by unlawfully displacing or substantially blocking market entry, or else *discriminatory*, by establishing exclusive advantages in favour of one or several parties. Nonetheless, in its ruling, COPROCOM has not developed specific guidelines or tests for the application of this provision of the law (see section 4.3 below).

It can also be inferred that Costa Rican law does not consider abuse of an exploitative dominant position conduct that does not involve excluding competitors, such as “excessive pricing”. If this specific conduct does occur, however, article 5 of Act No. 7472 establishes the conditions under which prices should be regulated to preserve consumer interests.<sup>3</sup>

### **C. Concentrations**

Act No. 7472 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>4</sup> In accordance with article 28 of the Act, COPROCOM can order full or partial divestiture if it finds they are prejudicial to competition in the relevant market(s). It may also, by interpretation of section (a) of article 30, impose less

---

<sup>3</sup> “In 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...” (Act No. 7472, art. 5).

<sup>4</sup> It should be pointed out that article 30 of Act No. 7472 establishes that an action to initiate a procedure for the purpose of prosecuting violations expires at the end of six months, which should be 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.

drastic measures, including compliance with conditions it may impose for restoring competition in the market.

Act No. 7472 sets out the rules concerning concentrations in a single two-paragraph article. A “concentration” is understood as a merger, acquisition or 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 impeding free and fair competition of equal, similar or substantially 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 analysing these operations.

This unusual ex-post control of concentrations has led COPROCOM to deal with very few concentrations since it began operations. It has also led it to advocate an amendment to Act No. 7472 that would provide for pre-merger notification as an effective way of preventing harm to competition and reducing costs to businesses through ex-post merger control.

It should be pointed out that a more recent law (the Worker Protection Act, No. 7983) regulating pension funds establishes a requirement for pre-merger notifications to the Superintendency of Pensions, and the seeking of an advisory opinion from COPROCOM on whether the merger might harm competition. The advisory opinion is, however, non-binding on the merging parties.

### **III. Institutional aspects: competition policy enforcement structures and practices**

#### **A. COPROCOM structure**

##### **1. Adjudicating body**

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 where appropriate sanctioning any and all practices that may substantially lessen or eliminate free competition. An administrative proceeding at the commission is mandatory and must be exhausted before an appeal can be lodged with 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 are appointed for four years and may be re-elected as often as desired. Appointments are not affected by changes of administration. Appointees must be highly experienced, prestigious professionals in the fields of economics, law or similar sciences.

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

COPROCOM also has the power to recommend price regulation to the public administration in case of monopolistic or oligopolistic markets, and has used this power to advocate 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 on government or sector regulators.

## **2. Investigating body**

COPROCOM delegates the following to its technical support unit: investigation of administrative procedures, monitoring, investigation of concentrated markets, matters relating to enquiries from business or the public, and the collection and evaluation of evidence relating to allegations of anti-competitive practices.

The technical unit has 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.

The substantive and operative task of the unit covers (a) the prevention of anti-competitive practices by conducting market enquires and advocacy activities and issuing advisory opinions to regulators and government departments, and (b) enforcement of Act No. 7472 on competition policy.

## **3. Budget and resources**

COPROCOM and its technical support unit receive their budget and administrative support from the Ministry of Economy, Industry and Trade. The budgetary resources are part of the national budget and amounted to 181,450,000 colones

(approximately US\$ 365,000) in 2008, mostly for paying the salaries of technical unit staff.

In addition, the ministry provides other support such as offices, vehicles, drivers, messengers, information technology, accounting, supplies and building leasing. This support is not charged to COPROCOM's budget.

## **B. Administrative procedures, remedies and appeals**

### **1. Administrative procedures**

Act No. 7472 and its regulations outline the administrative procedures which COPROCOM and its technical support unit must apply in their investigation and ruling. Where not provided for in the Act, the provisions of the General Public Administration Act apply. These cover several stages, which can be summarized as follows:

- When a complaint is received, the technical unit must qualify its admissibility for COPROCOM, analysing such aspects as the competence of COPROCOM, compliance with minimum requirements and evidence. A preliminary 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) reject the complaint if it is untimely, impertinent or obviously ill-founded; (b) if there is any doubt, require the technical unit to make a preliminary investigation to determine if the law has been violated; or (c) order the initiation of an administrative disciplinary procedure;

- The ordinary administrative procedure corresponds to what is established in *Book Two of the General Public Administration Act*, which is based on the principles of due process, rules of evidence, ex officio examination, impartiality, celerity and publicity;
- When ordering the initiation of an administrative disciplinary procedure, COPROCOM generally names three technical unit officials to its executive board, which are in charge of the preliminary investigation. The decision must also clearly indicate the events for which the procedure is being exercised, the article of law that has 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 executive board may request that any and all evidence be submitted so as to determine whether the facts under review are relevant. The request for information can be submitted by COPROCOM or at the request of the parties;
- The ordinary procedure is carried out by means of a private oral hearing before the executive board in which all evidence and relevant information submitted by the parties are admitted and heard (experts, witnesses, documents, etc.). Judicial and expert examinations may be made before the hearing;
- Unless the executive board wishes to introduce new facts or evidence needed for further investigation, then no more than two hearings may be held;

- Once the procedural process has been completed, the executive board sends the case to COPROCOM for review, with its recommendation;
- The procedure ends with the issuing of a ruling by COPROCOM. In cases involving absolute or relative monopolistic practices or anti-competitive practices, the rulings include sanctions and/or remedies.

The administrative procedure to be followed by COPROCOM is a general procedure that applies to any administrative case; that is to say, it is not adapted to the investigation of competition cases. In addition, COPROCOM does not have the legal powers to conduct an adequate investigation of anti-competitive conduct. The law 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. There are no penalties for failure to provide information during an enquiry, but COPROCOM may fine the parties for submitting false information.

## **2. Remedies and appeal**

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

24 hours in the remaining cases; both periods start as of the last notification of the action. When an appeal is pertains to the disallowal of evidence in the hearing, it may be filed immediately, in which case the evidence and reasons for the appeal must be given before the appeal can proceed.

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 imposed 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 have colluded in fixing commission rates. 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 second instance by the Contentious-Administrative Court. The Appeal Courts 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 and collusive agreements.

In addition to the first appeal, economic agents can resort to the Fourth Constitutional Chamber of the Supreme Court of Justice, if they feel their constitutional rights have been violated by rulings that are deemed unconstitutional. Most of the proceedings concerning Act No. 7472 have consisted of constitutional issues, particularly those relating to the power of the State to require and review confidential documents of economic



agents. All cases brought before the Constitutional Chamber have been decided in favour of COPROCOM.

Of note also are actions regarding conflicts concerning agents or sectors wholly or partially excluded from the scope of application of Act No. 7472. For example, minimum fee-fixing by professional associations (2001) and rate-fixing by shipping firms have been endorsed by the Constitutional Chamber. The explanation given for both cases was that the competition law is recent and has included aspects outside the intrinsic limits of defence of competition.

### **3. Sanctions**

In addition to injunctions, settlements or elimination of the conduct or agreement, 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 serious cases, the Commission can impose a fine equivalent to 10 per cent of the annual sales for the previous fiscal year, or up to 10 per cent of the value of the party's assets.

The vague wording of this paragraph of the Act has limited its applicability. An inability to calibrate this percentage of sales and the requirement for imposing the higher of the two fines (assets and sales) would in many cases lead to confiscatory fines for the sanctioned parties.

In addition, with penalties in cases involving absolute monopolies, COPROCOM may also impose measures if deemed necessary for the ruling to be effective. Up to now they have only been imposed in a recent case of denial of infrastructure leasing for cable television.

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.

### **C. Competition law enforcement**

Between 1995 and December 2007, 870 different kinds of procedures were processed by COPROCOM, including complaints, investigations initiated ex officio by COPROCOM, consultations, authorizations, opinions, price-regulating, concentrations and injunctive relief. Efforts have been concentrated on processing complaints (28 per cent) and ex officio investigations (15 per cent), although consultations have been in the forefront (25 per cent). There have been only eight procedures concerning concentrations, since the law does not provide a mechanism for giving notice of concentrations.

The main markets investigated by COPROCOM between 1995 and 2007 are shown in table 1. They cover a large number of basic consumer goods such as milk, chicken, onions, beans, sugar and rice, and key inputs for the economy such as cement and steel for construction.

A total of 18 investigations were undertaken (table 2), most of which came under article 11 of Act No. 7472 (illegal

absolute monopolistic practices), though the trend over the last few years has been towards more investigations into relative monopolistic practices.

Between 1995 and 2008, 684.1 million colones of fines were levied for breaches of the competition law. In 2005 a single agent was fined 205.9 million colones (31 per cent of the total amount of fines). The average fine levied against the 110 agents sanctioned since 2001 was 5.3 million colones.

**Table 1: COPROCOM, principal markets investigated or under investigation, 1995–2007**

<b>Year</b>	<b>Markets</b>
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	Palm, 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
2006	Coffee, vehicle revision, cement, car parts, medicines
2007	Dairy products, LP gas, cable infrastructure, telecommunications and insurance, rice and domestic airlines

*Source:* COPROCOM and technical support unit archives (preliminary data).

**Table 2: COPROCOM, cases sanctioned with fines,  
1995–February 2008**

<b>Sector, enterprise or economic agent</b>	<b>Type of practice</b>
BTICINO DE C.R.	Resale price imposition and imposition of exclusivity (art. 12, sections a and b)
ICE FACTORIES	Price-fixing (art. 11, section a)
GAS COMPANIES: TROPIGAS DE C.R. and GAS NACIONAL ZETA	Price-fixing (Art. 11, section a)
AGUAS MINERALES DE C.R.	Refusal to submit information
NATIONAL CHAMBER OF PHARMACIES (CAMARA NACIONAL DE FARMACIAS, or CANAFAR)	Collusion among economic agents to pressure suppliers into not selling certain products in supermarkets (art. 12, section e)
NATIONAL CHAMBER OF PRODUCERS OF BEANS AND SIMILAR PRODUCTS (CAMARA NAC. FRIJOLES Y AFINES)	Sharing of information for bulk sale of beans and price-fixing for sale of 900 g bags of black beans (art. 11, section a)
ANNOUNCERS	Price-fixing (art. 11, section a)
CONTAINER TRUCKERS	Fixing of price increase percentage (art. 11, section a)
TANNERIES	Price-fixing (art. 11, section a)
REAL ESTATE BROKERS	Fee-fixing (art. 11, section a)
PIG FARMERS	Pork supply restriction (art. 11, section b)
RICE SECTOR ECONOMIC AGENTS OF THE NATIONAL ASSOCIATION OF INDUSTRIALISTS	Fixing of rice marketing volumes (art. 11, section b)
PALM NUT	Price-fixing in the purchase of African palm nuts, and fixing of refined oil sales volume (art. 11, section a)

<b>Sector, enterprise or economic agent</b>	<b>Type of practice</b>
COCA COLA INTERAMERICAN CORPORATION and EMBOTELLADORA PANAMCO TICA S.A.	Price imposition and exclusivity contracts (art. 12, sections a and b)
CORPORACIÓN DE SUPERMERCADOS UNIDOS	Imposition of conditions and invitation to suppliers to exert pressure on customers (art. 12, sections b and e)
STEEL CONSTRUCTION RODS	Sale of steel rods tied to the purchase of other steel products (art. 12, section c)
CABLE INFRASTRUCTURE LEASING	Exclusion of competitors by refusing to lease infrastructure (art. 12, section g)
CABLE INFRASTRUCTURE LEASING	Exclusion of competitors by not renewing infrastructure leasing contract (art. 12, section g)

*Source:* COPROCOM and technical support unit archives.

#### **D. Selected competition cases**

COPROCOM enforcement has been focused mainly on “absolute monopolies” in agreements among competitors (art. 11). When COPROCOM started its work, price-fixing was easily detected via information available to the public (publication of fixed price lists in national newspapers and similar places); economic agents were unaware of the illegal nature of these practices. Fines were smaller and symbolic in order to promote awareness of the law and encourage compliance with Act No. 7472.

Price-fixing and other forms of cartels covered ice factories (1995), bean processors (1998), advertisers (1998) and container truckers (1999). The bean processor case was especially important in that it was the first investigation into information-sharing among competing agents and, specifically, price-fixing. The investigation revealed that although not all the agents that attended the meeting shared information, all of them took advantage of the data disclosed and thereby gave effect to the cartel.

In 2002, two palm oil producers and manufacturers were fined 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 in Costa Rica, including fines levied on various individuals representing corporations, who participated in the cartel agreements.

In 2003, an investigation was conducted into airline companies for fixing ticket sales commissions for travel agencies. Despite the difficulty in prosecuting the case, the resulting fines ranged from 140 to 280 minimum wages. However, the ruling was appealed by the parties, which supplied additional information on the functioning of market, leading COPROCOM to reconsider its ruling and acquit the defendants.

In the area of relative monopolies, one case worth noting is that involving an electrical component supplier with a major share of the market that sought to exclude a competitor through resale price-fixing and tied selling, among other things. This was one of the first investigations undertaken by COPROCOM in 1995. A total fine equivalent to 100 minimum wages was imposed and the firm was ordered to cease the practices in question.

In 2004 an investigation into the soft drinks and fruit juice market (resale price maintenance and exclusivity agreements with the distributors) led to sanctions for imposing resale prices and setting up exclusivity contracts, mainly in elementary and high schools. The company was ordered to eliminate these conditions from its contract. The penalties totalled the equivalent of 820 minimum wages.

Another case that took several years to investigate involved four types of illegal conduct: (a) the imposition of conditions on suppliers to provide price and discount information to third parties; (b) the imposition of a requirement that suppliers provide studies reflecting competitors' price changes; (c) the imposition of larger discounts for the chain from suppliers in the face of other competitors' lower prices; and (d) an invitation to suppliers to impose reprisals against competitors. The party was fined the equivalent of 1,640 minimum national wages

Finally, mention should be made of the most recent cases involving two enterprises supplying electricity in two different regions of the country. In one case, the firm had decided not to renew the pylon infrastructure lease for the only company providing a cable television service in the region. In the other case, the company decided not to lease the pylon infrastructure for wide-band cable Internet signal transport. The two cases are especially important as they concern companies with a public utility concession – electricity – which is exempted from the scope of Act No. 7472. Nonetheless, COPROCOM considered that infrastructure-leasing was a different service from the concession and therefore Act No. 7472 was applicable.

These two new cases are the only ones to have been prosecuted under section (g) of the Act, which refers in general terms to any deliberate act to exclude competition. Although COPROCOM had been cautious about enforcing this section, it considered that such enforcement was proper in these cases, given that the conduct was intentional and had no other justification other than to restrict competition. This new interpretation of the competition law, which has extended its scope to include commercial transactions of public entities, could have implications for future applications.

#### **IV. Competition policy scope: exceptions and special regulatory regimes**

The following are exempted from enforcement of the law: (a) providers of public services by virtue of a concession, under the conditions provided by law; (b) State monopolies created by law; and (c) municipal or local governments, in both their internal regime and their relations with third parties (arts. 9 and 72 of the Act and art. 29 of the regulations).

In addition, the Constitutional Chamber has confirmed that the fixing of minimum fees by professional associations is also excluded from Act No. 7472 as long as it is explicitly allowed by other laws. Moreover, the definition of an “economic agent” exempts businesses and chambers and associations from enforcement of the competition law if they do not participate in economic activities as buyers or sellers of goods or services. This is an important limitation, as several market enquires by COPROCOM have shown that a number of anti-competition agreements were reached within the confines of these associations.



It should be added that Costa Rica is in the process of liberalizing its insurance and telecommunications monopolies – specifically in private network, Internet and wireless mobile phone services. Draft legislation is under consideration in Congress that would 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 are envisaged in the Telecommunications Act.

## **V. Competition advocacy**

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. The power to issue opinions on competition issues with regard to laws, regulations, agreements, circulars and other administrative actions is particularly useful. 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 and beans.

As public services are exempt from competition policy, advocacy here has been minimal. On the other hand, advocacy has been greater in other regulated sectors of the economy, combining settlements 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 recommended modifying import duties and import licensing. Moreover, COPROCOM has worked at promoting a culture of

competition since its inception. Its promotion and prevention efforts have focused on educational programmes and the dissemination of market studies, opinions and policy advice.

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

## **VI. 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 1980s). Costa Rica has played an active part in implementation and review conferences concerning the Set.

Costa Rica is developing both a multilateral and bilateral international cooperation agenda. Cooperation with more advanced economies and international organizations such as the UNCTAD, the World Bank, the Inter-American Federation of Insurance Companies (FIDES) and the competition authorities of various countries has led to the provision of technical resources to build capacity (COPROCOM, 2007).

Costa Rica has also made commitments in terms of competition policy within the free trade agreement with Canada, where a bilateral agreement requires notification that an

investigation has been 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 on cooperation and competition policy is under negotiation within the Partnership Agreement between Central America and the European Union.

Cooperation has also evolved through agreements of understanding with other competition agencies on the establishment of joint technical assistance activities, information exchange and other joint measures, similar to those in place with the Chilean National Economic Attorney's Office, the El Salvador Superintendency of Competition, and the one under preparation with the Competition Authority of Panama.

Moreover, Costa Rica is one of the beneficiaries of the UNCTAD Compal programme on competition policy and consumer protection (UNCTAD Compal Programme, 2006). Under Compal, diagnostic studies of the law and amendments to it, leaflets on competition and regulation, manuals and guidelines for investigating anti-competitive practices, training for officials and university professors, and detachment to the Swiss competition authority and Peru have been extended to COPROCOM by UNCTAD.

## **VII. Findings and conclusions**

Ten years of enforcement show a mixed record: (a) there has been a build-up of experience for both COPROCOM and the technical support unit, as well as for the regulatory bodies and other public administration and judicial branch sectors and civil

society stakeholders; and (b) the limitations of the scope of application remain a major challenge for COPROCOM.

The main challenge for Costa Rica, as outlined in government development plans and objectives, is to bring competition policy into line with development goals. This requires introducing competition into key economic sectors (energy, infrastructure, communications, industrial inputs, security, business services, etc.), while ensuring that basic consumer goods and services (food, medicines, health care, education, etc.) remain affordable to all citizens, including those on low incomes.

## **VIII. Policy options and recommendations**

### **A. General recommendations**

Act No. 7472 has been amended on several occasions, but not in areas dealing with competition issues. An UNCTAD report prepared under the Compal programme proposed, inter alia: (a) to expand the scope of the laws to include all economic agents, including State enterprises and public concessions; (b) to give COPROCOM a more robust institutional framework that will increase its independence as well as its financial and human resources and its power to enforce Act No. 7472; (c) to clarify the methodology for analysing absolute and relative monopolies; (d) to incorporate a pre-merger control mechanism for concentrations; and (e) to increase the deterrent power of sanctions.

It is recommended that COPROCOM mobilize support in Congress to enact these legal reforms. In addition, it is proposed that COPROCOM pursue regional cooperation for dealing with competition cases that have a regional impact and are harmful to competition in more than one country.

## **B. Specific policy options and actions to be taken**

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. Prepare manuals for investigating relative monopolistic practices under art. 12, bringing together domestic and international experience in this area.
3. Expand the preventive and repressive scopes of the law by means of the following:
  - (a) Set up a mechanism for notifying and providing preventive control of concentrations;
  - (b) As an interim measure, it is recommended that COPROCOM develop a strategy to communicate and persuade the private sector to voluntarily pre-notify mergers;
  - (c) 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) COPROCOM should be empowered to reach settlements with the parties;
  - (e) If raising the amount of fines is not viable, consider sanctions involving economic agents' reputations, such as obliging them to notify customers, suppliers, shareholders and the general public, nationally and internationally;

- (f) Strengthen the dissemination and communication of competition policy in the government administration, judicial branch and civil society.
4. 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) Set up sanctions for cases where agents do not comply with requested precautionary measures or commitments, or do not notify of a concentration.
5. Give COPROCOM and its technical support unit more institutional independence from the government administration and from the lobbying power of economic agents, and consider:
- (a) Appointing commissioners on the basis of a competitive examination and their track record;
  - (b) Making it mandatory for commissioners to work exclusively or full-time for COPROCOM;
  - (c) Giving both COPROCOM and the technical support unit budgetary independence and control over the hiring of staff;
  - (d) Setting out clearly the causes for dismissal of commissioners and technical support unit staff;
  - (e) Setting out clearly 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) Improving and standardizing investigative and administrative procedures – for example, by getting appropriate ISO certification for COPROCOM’s internal procedures.

6. Concentrate efforts on key sectors of the economy, because of their impact on:

- (a) Employment and development conditions (industrial raw materials, energy and similar markets); and
- (b) Living conditions and poverty (basic foods, medicines, health services and education).

7. Strengthen competition advocacy in all sectors of the economy, including those exempted from Act No. 7472. For this purpose, COPROCOM should execute an action plan identifying the sectors and problems to be analysed over the next few years, in the form of a three-year agenda for sectoral competition studies and pro-competition recommendations.

## References

- Brusick, Philippe, Ana María Alvarez and Pierre Horna (Eds.). *Fortalecimiento de instituciones y capacidades en el área de Políticas de Competencia y Protección del Consumidor. Casos de Bolivia, Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua y Perú*. New York/Geneva: United Nations, 2004.
- Coloma, Germán. *Normas y Políticas de Competencia y la Regulación de los Servicios Públicos*. Comisión para Promover la Competencia (COPROCOM), Costa Rica, 2006.
- Comisión para Promover la Competencia (COPROCOM). *Aplicación de la Normativa de Competencia 1995–2006*. Costa Rica, 2007.
- \_\_\_\_\_ *Guía Relativa alas Disposiciones sobre Abuso de una Posición Dominante en la Ley de Promoción de la Competencia y Defensa del Consumidor (Ley No. 7472)*, Costa Rica, 2006.
- Cuevas, Mario, Ana Carrasco, and Shyam Khemani. *Papel e Importancia de la Política de Competencia en la Promoción de la Inversión, el Crecimiento, la Competitividad y la Reducción de la Pobreza en Costa Rica*. Foreign Investment Advisory Service / World Bank Group, Washington, DC, 2007.
- Economic Commission for Latin America and the Caribbean (ECLAC). *Costa Rica: evolución económica durante 2006 y*



*perspectivas para 2007*. Mexico: ECLAC / United Nations, 2007.

Gamboa, Jaime Eduardo Barrantes. *Ley 7472 de Promoción de la Competencia y Defensa Efectiva del Consumidor. Anotada con Jurisprudencia y Dictámenes*. San Jose, Costa Rica: Biblioteca Jurídica Díké, 2003.

International Monetary Fund. *World Economic Outlook Database*. Washington, DC, 2007.

*Ley 7472 de Promoción de la Competencia y Defensa del Consumidor* (LPCDEC). 1994.

Motta, Massimo. *Competition Policy: Theory and Practice*. New York: Cambridge University Press, 2004.

Odio Rohrmoser, Edgar. *Diagnóstico sobre la legislación de competencia vigente comprendida en la Ley de Competencia y Defensa Efectiva del Consumidor, Ley No. 7472*. Compal/UNCTAD, Geneva, 2005.

Organization for Economic Cooperation and Development (OECD). *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*, Paris, 2005.

\_\_\_\_\_ *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, Paris, 1998.

OECD/World Bank. *A Framework for the Design and Implementation of Competition Law and Policy*. Paris/Washington, DC, 1998.

\_\_\_\_\_ *Glossary of Industrial Organisation Economics and Competition Law*. Paris/Washington, DC, 1996.

Petrecolla, Diego. *Agrocadena del Arroz – Estudio Sectorial de Competencia*. Study commissioned by COPROCOM. Foreign Investment Advisory Service / World Bank, 2006.

\_\_\_\_\_ *Best Practices in Defence of Competition in Argentina and Brazil: Useful Aspects for Central America*. Studies and Perspectives Series, No. 72. Mexico: ECLAC/United Nations, 2007.

\_\_\_\_\_ *Informe sobre las necesidades y prioridades en el área de Políticas de la Competencia en Costa Rica*, UNCTAD, Geneva 2003.

Rivera, Eugenio, and Claudia Schatan. *Los mercados en el Istmo Centroamericano y México: ¿qué ha pasado con la competencia?* Mexico: ECLAC/United Nations, 2006.

Sittenfeld, Pamela. *Ventajas y limitaciones de la experiencia de Costa Rica en materia de políticas de competencia: un punto de referencia para la región centroamericana*. Mexico: ECLAC/United Nations, 2007.

*The Economist*. Costa Rica: Factsheet. Country Briefings. 2007.

UNCTAD Compal Programme. *COMPAL Global Annual Report 2005*, Geneva, 2006.

UNCTAD. *United Nations Guidelines for Consumer Protection* (UNCTAD/DITC/CLP/Misc.21) 1999.

\_\_\_\_\_ “The United Nations Set of Principles and Rules on Competition” (TD/RBP/CONF/10/Rev.2) 2000.

\_\_\_\_\_ “Model Law On Competition” (TD/RBP/CONF.5/7/Rev.3) 2007.

World Bank. *Costa Rica at a glance*, 2007.