

**Third Meeting of the
LATIN AMERICAN COMPETITION FORUM
Madrid, 19-20 July 2005**

**Commission for the Promotion of Competition
(*Comisión para Promover la Competencia*)**

San José, Costa Rica

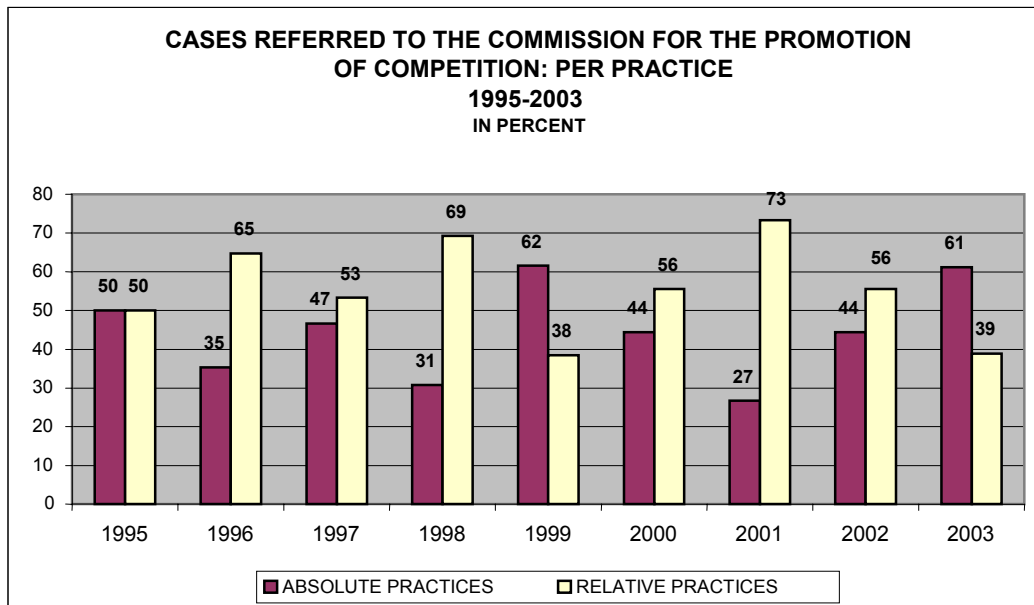
I. Notes on combating cartels

For the purposes of achieving effective competition, the market must consist of suppliers who are independent of each other. To that end, it is essential to prevent certain companies from agreeing to collude instead of competing. The most common example of collusion occurs in the field of prices: the cartels by which competing companies jointly agree to fix the level of prices prevent consumers from being able to take advantage of competition between suppliers in order to obtain competitive prices.

Agreements of this kind are prohibited in most legal codes. In the case of Costa Rica, with the promulgation of the Law on the Promotion of Competition and Effective Defence of the Consumer, Law 7472 of 20 December 1994, collusive practices between competing economic agents which are intended, among other things, to fix or manipulate prices are deemed *per se* to have no legal effect. To this end, Article 11 of Law 7472 defines as absolute monopoly practices (which the law distinguishes from vertical or relative ones) understandings, arrangements or agreements between competing economic agents with any of the following aims:

- a) To fix, raise, agree or manipulate the purchase or sales price at which goods or services are supplied or demanded in the markets or to exchange information to the same end or effect;
- b) To create an obligation to produce, process, distribute or market only a restricted or limited quantity of goods or to provide a restricted or limited number, volume or frequency of services;
- c) To divide, allocate, assign or impose parts or segments of an existing or future market for goods or services by specific or specifiable clients, suppliers and times or spaces;
- d) To establish, agree or coordinate participation or non-participation in bids, tenders, sales or public auctions.

The statistics show that the cases submitted to the Commission for the Promotion of Competition for absolute practices have represented, throughout the ten years of the Commission's existence, a significant percentage of all cases investigated and penalised, and this trend is being maintained. This can be seen from the following chart:



As regards the penalising of collusive practices, Law 7472 presumes the special seriousness of these practices by penalising them with the higher parameters¹. It is hoped that the increase in penalties will be a useful instrument in discouraging collusive practices, even though the amounts of the sanctions in Costa Rica are thought low in relation to international standards. The total amount of the fines imposed by the Commission can be seen in the following table²:

**AMOUNT OF FINES IMPOSED BY THE COMMISSION
1995 - JUNE 2004**

YEAR	NO. OF WAGES	COLONS	DOLLARS
1995	250	11,180,741	62,033
1996	0	0	0
1997	5	156,410	672
1998	12	626,400	2,433
1999	633	35,369,920	123,697
2000	839	56,179,012	182,139
2001	1,947	6,692,260	20,331
2002	1,965	151,233,523	419,918
2003	1,254	122,587,048	307,128
2004	870	72,758,120	168,500
Total	7,775	456,783,434	1,286,852

¹ Absolute monopoly practices are punishable by a fine of 0 to 680 the minimum wage; or up to 10% of annual sales generated during the previous financial year or up to 10% of the value of the offender's assets, whichever shall be the greater. The minimum wage payable in June 2005 is 117,014 Costa Rican colons, which is equivalent to approximately US\$245.

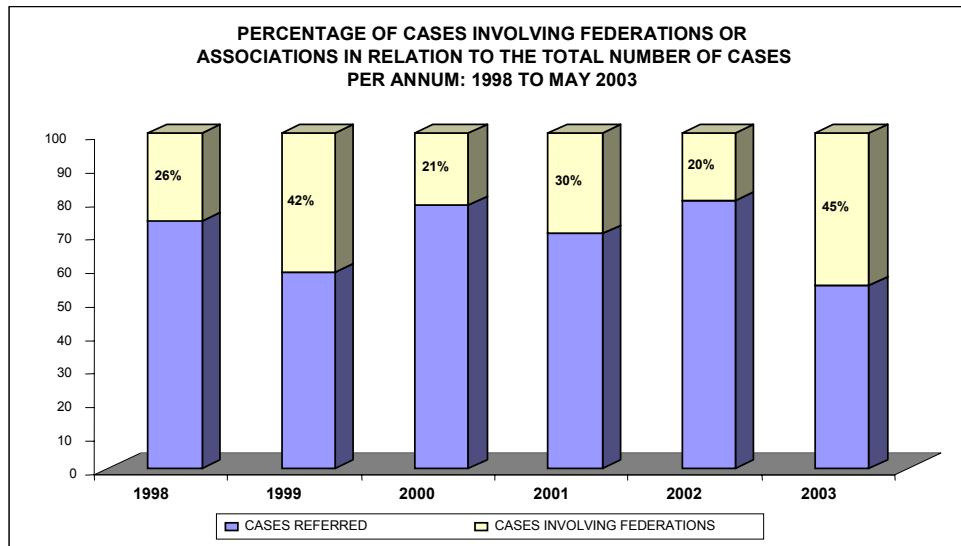
² The dollar amounts were calculated using the average exchange rate for each year.

As far as suppression of collusive practices is concerned, it is a fact of life that, due to greater awareness of competition legislation and its reaches, pursuing cartels is becoming an increasingly more difficult task and obtaining evidence is becoming increasingly more limited due precisely to the caution of companies acting in collusion, who are now more concerned to leave little or no evidence. This is combined with legal constraints with which the Commission for the Promotion of Competition is faced with regard to its powers to collect evidence compulsorily or by means of searches or seizures, instruments which it is not expressly authorised to use in the law, as well as budgetary constraints too.

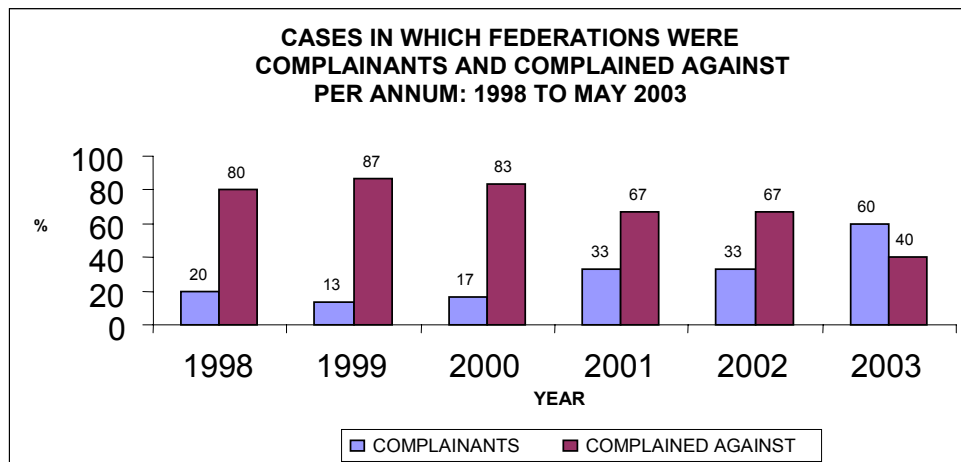
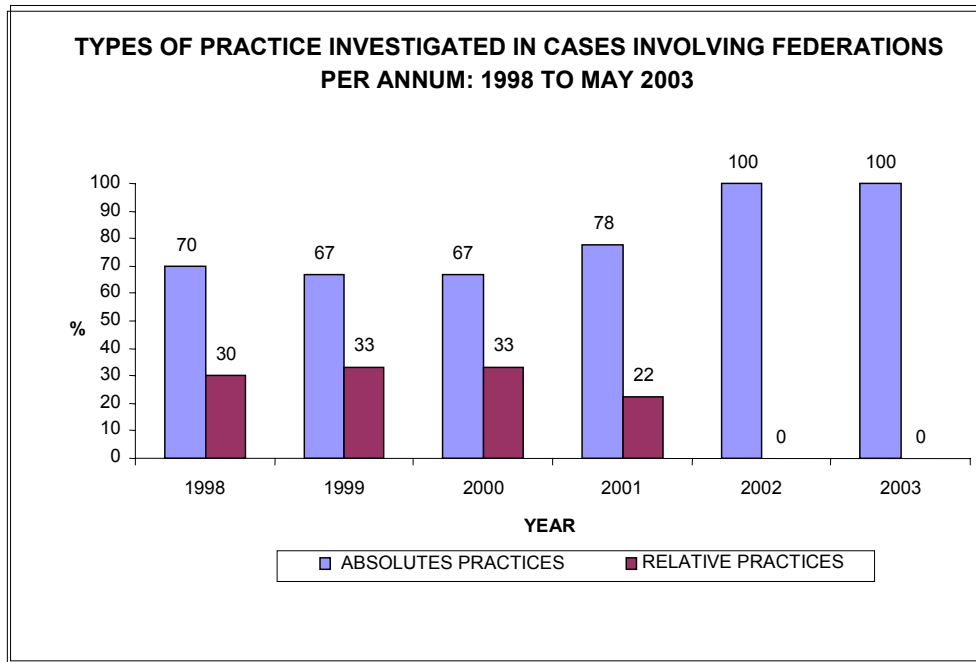
In other legal codes, in order to combat collusive practices particular importance has been attached to policies aimed at encouraging those involved in cartels to provide evidence of the agreements themselves. To that end, the fight against cartels has been stepped up by the adoption of policies of leniency. Another mechanism which could help to promote the reporting of these cartels is to make it easier to bring claims for damages (bringing private lawsuits).

The Commission for the Promotion of Competition has tried to spread word of competition legislation to the corporate sector, essentially to business federations and associations, as being institutions which might to some extent lend themselves to reaching price agreements between competitors.

In fact, out of the cases heard by the Commission, many have involved business federations or associations, as can be seen from the following chart:



In the great majority of cases in which business federations or associations have been involved the practices reported have been horizontal or absolute monopoly practices. In the same way, in the majority of cases the position of the business federation or association involved has been that of the party against whom the complaint was filed and not that of the party filing the complaint (except in 2003, when the reverse tendency was seen for the first time). The foregoing can be seen from the following charts:



As mentioned earlier, the Commission for the Promotion of Competition has made efforts to promote the culture of competition in the business federations and associations sector, even though it is clear to us that the creation of a competition culture is a slow process, which may take several decades.

II. Notes on the control of mergers

Within any modern competition policy, in addition to the central theme of suppressing anti-competitive behaviour, as in the case of the fight against cartels, there is also the control of structures, that is to say, the field of the control of mergers.

Economic policy in Latin America has gradually been moving towards greater liberalisation and flexibility of the productive sectors, so much so that when it comes to the defence of competition, it is necessary to take due precautions to prevent the processes of change in market structures from giving rise to an excessive increase in the degree of corporate concentration. For that reason, it is essential to introduce a series of instruments to ensure greater control of concentration operations between companies and greater efficiency of those controls.

To that end, there can be no doubt that it is vital to establish a compulsory requirement to notify the competition authority in advance of those concentrations which exceed certain thresholds. Some legal codes have highlighted the desirability of introducing the possibility of terminating the procedure by mutual agreement, in order to make it more flexible and speedy.

In the case of Costa Rican legislation the regulatory framework applying to the control of business concentration operations is short and simple. Practically the only provision is Article 16 of Law 7472, which stipulates:

"Concentrations. What shall be understood by concentration shall be any merger, acquisition of control or any other act by virtue of which companies, partnerships, associations, shares, capital stock, trusts or assets in general are amalgamated that are effected between competitors, suppliers, clients or other economic agents, which have the intention or effect of reducing, impairing or impeding free competition in goods or service of an equal, similar or substantially related nature.

In the investigation of concentrations, the criteria for measuring substantial power in the relevant market laid down in the present Law in relation to relative monopoly practices shall be observed."

In addition, under Law 7472 "prohibited concentrations" are punishable by total or partial deconcentration, as may be ordered by the Commission, and by a fine of up to 410 times the monthly minimum wage. In particularly serious cases the offender may be fined a sum of up to 10% of annual sales generated during the previous financial year or up to 10% of the value of its assets, whichever shall be the greater, i.e. the same penalty as applies to absolute monopoly practices.

Following on from what was said earlier, there is in no requirement in Costa Rica to notify the competition authority of mergers in advance nor are any precise thresholds set for determining which mergers should be analysed, which results in a case-by-case analysis of the mergers that take place which come to the notice of the Commission or of which it is notified voluntarily. In those circumstances it is

essential for the Commission to carry out publicity work concerning the problems that could arise if a concentration of which it has not been notified prior to its completion is determined to be of an anti-competitive nature. This means making an effort to ensure that economic agents understand this risk and take it into account in their decisions and resort voluntarily to obtaining a prior opinion on the possible effects of any mergers or concentrations they are planning to complete. Preventive work is more desirable than corrective work after the event; the latter can prove very complex and expensive, especially in a case like that of Costa Rica, given the limitations of the legislation in this field.

In general, monitoring and assessing concentration operations is a matter of public interest, insofar as these operations can lead to an increase in market power and, therefore, to a restriction of free competition. This is so insofar as a business concentration entails changes in the structure of the markets which may impact on the behaviour and performance of the companies participating in them.

One major topic for the analysis of the effects of a concentration on the market is undoubtedly the detailed study of barriers to entry. Some people maintain that when one has a market with few or very low barriers to entry, new competitors can be expected to enter if situations of sustained and significant increases in prices arise as a result of a concentration of power, and that in the reverse situation, i.e. when a market has very high barriers to entry, it is not restrained in the long term by potential competition, as a result which one could envisage the structure of the market being maintained, thereby increasing the incentives for possible abuses of market power.

For others, the subject of potential competition is of less relevance in markets in which the degree of concentration reaches high figures and where those changes in market structure as result of a business concentration operation result in themselves in the creation of barriers to entry or the exit of competitors, so that competition and efficiency would suffer damage from the concentration itself.

We believe that the legislation and the practices of competition authorities in Latin America in the field of merger controls should not be based solely on assessing whether a dominant position is being created or strengthened but should take as its fundamental criterion the possible hindering of the maintenance of effective competition in the market. The appraisal of concentrations should therefore consider not only the position of the company that is created by the concentration on the markets affected but also other factors, the most prominent of which are the existing competition, the potential competition, the barriers to market entry and the compensatory power of demand (or supply), among others.

On this subject, it has been stressed that these factors must be assessed in the context of the recent development and future prospects of the market, taking into account both its short-term growth and its technological maturity and the importance of the substitution process for more innovative alternative products. Technology-intensive markets, for example, being characterised precisely by the importance of knowledge and innovation and whose competitive structure is based essentially on offering new products, require an analysis that focuses not only on current competition but also on barriers to entry.