

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Challenges Faced by Small Agencies and those in Developing Economies

Contribution from the RECAC

-- Session III --

7-8 December 2017

This contribution is submitted by the RECAC (Red Centroamericana de Autoridades Nacionales Encargadas del Tema de Competencia - Central American network of domestic authorities in charge of competition) under Session III of the Global Forum on Competition to be held on 7-8 December 2017.

Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: lynn.robertson@oecd.org].

JT03423980

Challenges Faced by Small Agencies and those in Developing Economies: Advocacy

-- RECAC --

Challenges faced by the RECAC¹ competition authorities

1. Introduction

1. It is widely understood that diverse Competition Law and policy models are suitable for different socio-economic contexts. Regardless of the characteristics of the jurisdiction, when fulfilling their mandate all competition agencies face challenges related to the history, culture, finances, idiosyncrasy and other particularities of the economy in which those apply.
2. In 2006 the Ministries of Economy of five Central American countries² formally instituted a Working Group on Competition Policy in the Central American Economic Integration (GTPCC), active until 2012 when the RECAC was created by members of the former GTPCC and Panamá.
3. The RECAC constitutes a permanent mechanism to facilitate communication and cooperation among the Central American competition authorities in the matters of their specialty, without prejudice to the future existence of a formally established regional competition body. This Central American National Competition Authorities Network is formed by the competition authorities of Costa Rica, the Dominican Republic, El Salvador, Honduras, Nicaragua and Panamá.³
4. The RECAC competition authorities share comparably challenging operational contexts, although each has developed its unique manner to adjust to those. Still, several common areas stand out and this contribution discusses some frequent features of those.
5. Naturally, this contribution does not constitute an exhaustive or in-depth review of all challenges faced by the six RECAC competition authorities, not even of all or most pressing ones. In addition, it is not the aim of this document to compile six agencies

¹ Red Centroamericana de Autoridades Nacionales Encargadas del Tema de Competencia (Central American network of domestic authorities in charge of competition).

² Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

³ **Costa Rica:** Comisión para Promover la Competencia (COPROCOM).

El Salvador: Superintendencia de Competencia (SC).

Honduras: Comisión para la Defensa y Promoción de la Competencia (CDPC).

Nicaragua: Instituto Nacional de Promoción de la Competencia (PROCOMPETENCIA).

Panamá: Autoridad de Protección del Consumidor y Defensa de la Competencia (ACODECO).

República Dominicana: Comisión Nacional de Defensa de la Competencia (PROCOMPETENCIA).

standpoints about the difficulties each faces but to provide the readers with a glimpse of some compelling common challenges of Central American competition agencies along with its perceptible examples, in majority provided by the agencies themselves during the sessions about each successes and challenges, in the XI Central American Competition Forum⁴, and public sources.

6. Not all positive results achieved by these authorities are mentioned in this contribution. Otherwise, this paper will be too lengthy. Hence, just few examples are exceptionally included to illustrate the favorable results of an effective competition law promotion and enforcement.

Considering the RECAC competition agencies are not strange to differences in institutional design, context, attributions, powers, experience, standpoints, among other variables, the concepts used in this contribution have been normally standardized and could be used indistinctively to facilitate comparisons, contrast and analogies.

2. Overview of Challenges faced by the RECAC Competition Authorities

7. The RECAC competition agencies difficulties are influenced by the close economic and commercial history of the contemporary States. For instance, in colonial times the Spanish Crown created *estancos* in these territories, ie. regulated restrains to the private production and commercialization of goods from industries reserved for the government, which could confer those rights to the privates of its choice⁵.

8. After the Republics emerged, for several years' economic activities used to be conducted without sufficient care for competition. Hundreds of years after, the enactment of each Competition Law⁶ in the region took time.

9. Costa Rica was the first RECAC country to enact its competition law in 1994. Panamá followed in 1996. Ten years after Costa Rica, El Salvador adopted its Competition Law (2004), although it entered into force until 2006, the same year Nicaragua approved its Law. Honduras enacted its Competition Law in 2005. The Dominican Republic did the same in 2008, although its Competition Law has just started to be fully enforced since last January (2017).

10. Those Competition Laws came into force in a domestic environment that frequently included no less than cultural and ancillary challenges, as described below.

11. **Cultural challenges:** 1) a culture of misunderstood competition among businesses and society at large; 2) widespread unawareness of Competition Law and limited understanding of the peculiarities, analysis and benefits of competition among the

⁴ San Salvador, El Salvador, October 10th 2017.

⁵ For detailed information see: Escalante Arce, Pedro et al. Los Estancos, las Prácticas Monopólicas y las Rentas del Estado en El Salvador. 2008. Dirección de Publicaciones e Impresos. Primera Edición. Superintendencia de Competencia.
https://issuu.com/mario.lopezsc/docs/20_los_estancos_las_practicas_monop

⁶ In this contribution, when alluding to the RECAC members, the term “Competition Law” encompasses the Laws that created the respective agencies part of the RECAC (see footnote 3 above), with independence of the matter those cover in addition to competition, the design of the institution and the exact denomination of the respective Law.

citizens, privates, public sector and judicial bodies; and 3) unfamiliarity about the transversal nature of the Competition Law and/or disinterest about the cross-connections among competition and different policies (economic, commercial and industrial), areas (competitiveness, investment, others) and sectoral support decisions.

12. **Ancillary challenges:** 1) legal provisions in different regulations that collided with the Competition Law projects or concurring competences of the competition agency with other public bodies that needed to be addressed; and 2) institutional resource constraints.

13. Over time, other types of challenges to be described hereunder also gained importance:

14. **Contextual challenges:** 1) RECAC members operate in middle-income economies with concentrated markets and a large informal sector. Recently, the RECAC competition agencies, following El Salvador's SC initiative, have started to analyze if and where the particularities of developing countries stand in competition enforcement. 2) Digital economy is recently developing in most RECAC jurisdictions and peer-to-peer services are expanding in the region, despite significant digital gaps between countries.

15. **Developmental challenges:** 1) the transversal nature of Competition Laws demand fostering these agencies work and relations with other governmental entities, especially sectoral regulators, and its capacity to sensitize those stakeholders with regard to binding and non-binding powers and acts of the competition agency for a better promotion, protection and guarantee of competition in the marketplace; 2) the experience gathered over years of applying the respective Competition Laws evinced the appropriateness of improving those for a more effective fulfillment of these agencies mandates, that includes an increased observation of budgetary and/or institutional design issues, faculties (for instance, regarding settlement, leniency and merger review), legal time limits, thresholds, as well as the deterrent effect of the agency's sanctions; and 3) the role of the judiciary in effective Competition Law enforcement.

16. Despite the efforts and effectiveness of the RECAC agencies in promoting and protecting competition in the market, the abovementioned four types of common challenges constitute the basis for the pressing domestic Competition Law enforcement difficulties faced nowadays by the RECAC authorities, as characterized below.

17. In addition, an external collective challenge of most RECAC membership⁷ is complying with the commitments of the Agreement establishing an association between Central America and the European Union and its Member States to adopt a Regional Competition Regulation and to designate a Regional Competition Body for its enforcement.

⁷ Bounded RECAC members: Costa Rica, El Salvador, Honduras, Nicaragua and Panamá.

3. The Challenges in Detail

3.1. Cultural challenges

3.1.1. Effectively advocate⁸ in favor of competition towards economic agents and the public

18. Consumers are normally more acquainted with consumer protection matters because they experience those on a regular basis while acquiring goods and services. On the contrary, competition matters are not that obvious for the average consumer, even if those regularly face the effects of anticompetitive practices or a healthy competition and an appropriate Competition Law enforcement. Competition benefits or restraints reach society, and this might diffuse its individual sensitiveness among citizens.

19. Regardless of the competition authority's effectiveness it must achieve credibility before the consumers, private and public sector, and society at large. In Central America, the RECAC agencies have perceived a widespread unawareness of Competition Law and a limited understanding of the peculiarities and benefits of competition among the citizens, private and public sector and the Judiciary. In response, the RECAC competition authorities have been highly active and creative in competition advocacy.

20. Dominican Republic's PROCOMPETENCIA took advantage of its availability to perform promotion activities since 2008, and it has been constantly raising awareness of competition among citizens. Thus, they start to recognize the agency. That created a new challenge: to clarify more emphatically PROCOMPETENCIA's attributions and powers, to avoid recurring mistakes among PROCONSUMIDOR (the consumer agency) and PROCOMPETENCIA (the competition agency). Other RECAC authorities without an explicit consumer defense mandate (ie. agencies that are not both, the consumer defense and the competition agency) faced similar experiences. For instance, Honduras CDPC and El Salvador's SC.

21. Dominican Republic's PROCOMPETENCIA has explained Competition Law and the benefits of competition to economic agents, to reduce its chances of engaging in anticompetitive conducts. Moreover, PROCOMPETENCIA offers economic agents a voluntary compliance program service upon request.⁹

22. All other RECAC agencies (Panamá's ACODECO, Nicaragua's PROCOMPETENCIA, Honduras CDPC, Costa Rica's COPROCOM, and El Salvador's SC) have tirelessly raised awareness among economic agents, using presentations about

⁸ In this contribution competition advocacy and promotion are used indistinctively, encompassing all acts covered by the traditional notion of "competition advocacy", in accordance with: International Competition Network, Advocacy and Competition Policy, Report prepared by the Advocacy Working Group, ICN's Conference Naples, Italy, 2002. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>. Page i.

"...Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."

⁹ <http://procompetencia.gob.do/servicio-de-plan-de-cumplimiento/>.

Competition Law and the benefits of competition and/or other tools, as Nicaragua's PROCOMPETENCIA Guidelines for trade associations.¹⁰

23. For instance, the CDPC has trained in Competition Law over 500 businesses and more than 5,000 citizens.¹¹ The CDPC was also among the winners of the International Competition Network (ICN)-World Bank (WBG) 2015-2016 Competition Advocacy Contest for its efforts to increase competition by engaging the Honduran Pharmacists Association and by abolishing a restriction that prevented the establishment of a new pharmacy within 250 meters of an existing one.¹²

24. After more than ten years, El Salvador SC has perceived clear results of its effective and persistent competition advocacy efforts towards economic agents: in 2016, cases for negligent cooperation with the SC¹³ decreased in 50% with respect to 2015¹⁴.

25. By contrast, Dominican Republic's PROCOMPETENCIA experiences trouble with collaboration by third parties in market studies and investigations, due to its non-compulsory nature. PROCOMPETENCIA believes lack of collaboration is rooted in insufficient or inadequate knowledge of the matter and/or the institution's mandate, despite its vast advocacy efforts.

26. All RECAC members consider a critical challenge to effectively convey the importance and the benefits of competition as well as the perjury of anticompetitive practices/conducts to unaware audiences despite their scarce resources. Ultimately, public support for competition and competition agencies largely depends upon understanding this technical matter.

27. The RECAC agencies face numerous challenges when designing competition advocacy interventions for the public. Examples of shared considerations are: resource constraints, population living in poverty, governmental austerity and budgetary cuts, public policy priorities, literacy, percentage of post-secondary education graduates, insecurity or crime.¹⁵

28. Keeping that in mind, El Salvador's SC made great use of its staff creativity to develop a wide portfolio of low-cost competition advocacy tools within its Public Education Program, collected in the SC Tour, aimed at promoting, in an entertaining and easily understandable manner, the benefits of a healthy competition in the markets and its impact over economic and social development.¹⁶ The SC invested around

¹⁰ Available at: <http://procompetencia.gob.ni/?p=1369>.

¹¹ Honduras CDPC estimations.

¹² For details please check: <http://www.worldbank.org/en/events/2015/10/30/the-2015---2016-competition-advocacy-contest-how-to-build-a-culture-of-competition-for-private-sector-development-and-economic-growth#5> Theme 4.

¹³ For precise wording, please review the Competition Law's Article 38. http://www.sc.gob.sv/site/uploads/Ley_competencia_y_reglamento_oct2015.pdf

¹⁴ Source: SC data.

¹⁵ For illustrative purposes, some tangentially related data is available at: <https://data.worldbank.org/>.

¹⁶ For more information please check the SCTour activities in social media: @SCcompetencia or Superintendencia de Competencia.

USD\$ 19,095.45 for the 2016 SC Tour, and -up to May 2017- it reached nearly 2 million Salvadorans who got acquainted with competition.¹⁷

29. Dominican Republic's PROCOMPETENCIA developed an observatory of competition conditions in the markets, which is a quarterly economic research tool of six variables that favors identifying and weighting competition restrictions. Results are visually presented as a traffic-light, to ease its understanding and engage the audience.¹⁸

30. Nevertheless, challenges are endless. For instance, Costa Rica's COPROCOM has identified the need to improve its competition training efforts towards economic agents, public sector and the Judiciary.

31. When each RECAC agency emerged, it perceived a lack of familiarity of the Judiciary¹⁹ with Competition Law, including its concepts and analysis. Thus, these agencies included it among the targets of their competition advocacy efforts, to bring judges and courts closer to competition policy's concepts, goals, instruments and to the technical analysis used by competition authorities. This has been one area where technical assistance and cooperation programs have collaborated to facilitate specialized training to these bodies.

32. For instance, the Dominican Republic's PROCOMPETENCIA provided training to the Attorney General's Office. Nicaragua's PROCOMPETENCIA organized several activities for the Judiciary within the UNCTAD's framework.²⁰ Honduras CDPC has also organized international training for judicial bodies.²¹

33. For independence and impartiality reasons, some agencies arrange the training to be provided by a third party and coordinated directly by the addressee. For instance, that was the case of El Salvador's SC that obtained training for the Supreme Court of Justice within UNCTAD's COMPAL II Program.

34. Nevertheless, the challenge to raise awareness in the Judiciary persist in all RECAC countries. Thus, it remains a target of competition advocacy efforts. For instance, Costa Rica's COPROCOM identifies as a challenge to promote training on competition for judges, specifically about evidence and economic evidence in anticompetitive practices cases.

¹⁷ Source: SC estimation up to May 2017. Broadly includes: direct contact with 4,900 persons in 39 events (21 puppet shows, 8 film screening, 10 educational presentations); 11,000 persons reached by word of mouth; 999,000 persons reached through expansion of social media advertisement (includes: entries, interactions and clicks); 1,815,460 persons reached through every digital channel and 54,340 entries to the TriviaSC online game.

¹⁸ For detailed information and Reports please visit: <http://procompetencia.gob.do/observatorio-de-condiciones-de-mercado/>

¹⁹ It could cover: judges, courts, General Attorney Office and others of the Judicial branch.

²⁰ Example: http://www.poderjudicial.gob.ni/prensa/notas_prensa_detalle.asp?id_noticia=3310

²¹ Example: https://www.cdpc.hn/?q=www.capasitacion_loc

3.1.2. Effectively convey the transversal nature of competition matters and encourage policymakers to consider potential competition effects of public policy acts

35. Even though competition policy scope of coverage encompasses different regulatory areas and policies its technical terms might lead to confusion or misunderstandings in newly aware or unaware subjects. That can result in a disbelief of the pertinence of adopting measures after a careful consideration of potential consequences over competition in the affected markets. Consequently, a common challenge of RECAC authorities is to coordinate competition policy with the application of other policies.

36. A shared struggle of these competition agencies is to effectively convey competition knowledge to policy-makers and let them embrace the matter while respecting independence boundaries. An additional challenge is to place competition as one important concern over several in -unrelated to competition- policymaker's minds, discourse and acts.

37. The RECAC agencies make great use of their common non-binding competition advocacy powers to assess and promote competition towards other governmental entities, including sectoral regulators. For instance, by making use of market studies and/or reports²², opinions and/or public reports, public policy recommendations and/or reasoned recommendation reports, promotion and other advocacy initiatives, as applicable.

38. Those powers cover different governmental acts, depending on the jurisdiction. Among the shared ones: technical regulations, regulations and other acts of public bodies that might have an impact over competition (in some cases, with exceptions)²³. Additional covered matters include the analysis, from a competition perspective, of administrative processes that establish bureaucratic fees that might limit competition²⁴, State aids²⁵ and public procurement processes²⁶.

39. Despite extensive competition advocacy efforts, unawareness among some policymaker's (about the potential effects several public policy decisions might have over competition) is still perceivable. The rotation of governmental officials, from the day each agency started advocating in favor of competition, might have a part.

40. As expressed by the CDPC, the OECD and the World Bank identified higher levels of regulations with a restrictive effect over competition in Honduras (barriers to entrepreneurship, barriers to trade and investment and regulations origin on state control)

²² For this documents' purposes broadly includes: market studies, market reports, analysis, non-binding reports of competition in regulated markets, among others of similar objective.

²³ For instance, in the Dominican Republic, PROCOMPETENCIA can analyze State legal acts of all kinds, except for Decisions of the Judiciary.

²⁴ Dominican Republic PROCOMPETENCIA.

²⁵ Dominican Republic PROCOMPETENCIA.

²⁶ Opinions. El Salvador SC.

than in other RECAC countries (be those Costa Rica, Dominican Republic, Nicaragua and El Salvador).²⁷

41. The CDPC considers the Honduras Government has intervened over different markets, mainly through agreements with agricultural producer associations to fix prices of rice, beans, sorghum, and others, as well as recurring temporary price freezing measures. It considers those governmental acts resulted in speculation, shortages and competition discouraging prices. Consequently, it started to promote the creation of guidelines that identify “essential goods” and define its prices during limited periods, in special situations as emergency or disaster.

42. In the opinion of Dominican Republic’s PROCOMPETENCIA, in its country the Ministry of Agriculture facilitated agreements with rice and tomato producers. In the milk sector an agreement was made easier by the Ministries of Basic Education and Agriculture. PROCOMPETENCIA believes policymakers might not be fully aware of the severe implications over competition of specific measures that could initially appear to be innocuous.

43. Thus, the success of competition advocacy acts lies on their permeability among its addressees, despite the non-binding nature of most -if not all- competition advocacy interventions. Therefore, all RECAC agencies have engaged in competition advocacy work towards public bodies.

44. For instance, the Dominican Republic’s PROCOMPETENCIA and El Salvador’s SC actively participate in technical regulation committees to promote public policy recommendations and/or the observance of competition principles during its formulation process, as applicable. The SC also participates in the National Consumer Protection System committees (SNPC) and in inter-agency technical working groups to analyze, along with the addresses, the technical feasibility to implement its public policy recommendations, resulting in a proposal to drive its adoption.

45. Some public policy recommendations issued by El Salvador’s SC were adopted by the respective competent institution after the SC’s constant and long-lasting promotion efforts -of the same- within the National Consumer Protection System financial services, health and pharmaceuticals, telecommunications, and foodstuff committees and its Executive Committee. In the Dominican Republic, two out of three PROCOMPETENCIA’s recommendations to the Regulation on Assets Evaluation²⁸ were adopted by the respective regulator.

46. Although regulations respond to public interest, when those affect competition a careful observation of those concerns may enable to find less competition-restrictive alternative measures that fulfill the intended legitimate objective with comparable efficacy.

47. Another form the RECAC agencies are contributing to less competition restrictive legal frameworks is by making available guidelines that allow policymakers to identify unnecessary effects over competition of regulations. For instance, Honduras CDPC, along with the OECD and the United States Federal Trade Commission, are developing a structured mechanism that allows assessing the potential impact over competition of

²⁷ Information gathered by Hondura’s CDPC. Source: OECD Product Market Regulation Indicators. WBG/OECD/PMR data 2013-2014

²⁸ Reglamento de Evaluación de Activos.

proposed and existing regulations. In 2013, El Salvador's SC developed Guidelines to evaluate legal rules that might impose restrictions to competition²⁹, receiving an Honorable Mention in the ICN- WBG 2013 Competition Advocacy Contest.

48. The RECAC authorities have also directed its competition advocacy efforts towards improving competition in public procurement. For instance, Dominican Republic's PROCOMPETENCIA reviewed the main public procurement rules to identify if ruled-based barriers exist. El Salvador's SC is currently performing a project of competition audits over 5 years' public procurement processes of four supplies purchased by the Social Security Institute (ISSS).

49. Finally, RECAC competition agencies also understand the great value of the media to influence public understanding of competition concerns, even though not all RECAC members have equal media exposure. For instance, Costa Rica's COPROCOM challenge is to increase its use of press releases.

50. A great example is Panamá's ACODECO, whose mandate covers consumer protection and competition. Indirectly, the wide range of issues addressed by that agency have supported its vast media coverage, which has been legitimated by its consistent and timely acts. ACODECO has successfully produced synergies by combining advocacy efforts, as opinions, and media presence for an effective open encouragement of a careful analysis over public policy decisions with an impact on competition. Under those circumstances, a strategic reaction of concerned stakeholders has been to weigh ACODECO's opinion, as it occurred within the discussions of 120 Law bill.

3.2. Ancillary challenges

3.2.1. Concurring competences of the competition agency with other public bodies

51. Normally, the enactment of a Competition Law produces the extinction of former legal provisions (related to the new Law and the powers of the new agency) in different regulations to avoid conflict. For instance, in El Salvador, legal provisions in the Commercial Code, Criminal Code, General Maritime and Ports Law, Civil Aviation Law, Electricity Law, among others were abolished after the entry into force of the Salvadoran Competition Law.

52. Universally, the diverse institutional designs of competition agencies and sectoral regulators can render concurring, shared or overlapping competences when the Competition Law scope of application includes sectoral regulated matters. For instance:

53. In Panamá, ACODECO considers it has managed its concurring competences (regarding banking merger authorizations) with the Banking and Insurance regulators, resulting in positive synergies instead of conflicts. However, its current challenge is to manage the interaction among its Law and the Law of the Public Services Authority, for an effective enforcement over public services.

54. In Honduras, the Competition Law³⁰ covers activities regulated by their own special rules. The CDPC has noticed some legal provisions for regulated markets overlap

²⁹ Available at: http://www.sc.gob.sv/site/uploads/Guia_normas_juridicas.pdf

³⁰ Formally, Ley para la Defensa y Promoción de la Competencia. Available at: https://www.cdpc.hn/?q=www.marco_juridico

with the Competition Law, as for merger review in the telecommunications sector. Thus, it is a challenge for the CDPC to enhance its inter-agency relations with sectoral regulators.

55. In the Dominican Republic, due to PROCOMPETENCIA's institutional structure it shares competences over unfair competition matters with other public bodies in charge of consumer protection, intellectual and industrial property and copyrights, respectively. PROCOMPETENCIA has identified different overlapping attributions.

3.2.2. Institutional resources constraints

56. Costa Rica's COPROCOM, El Salvador's SC, Honduras CDPC, Nicaragua's PROCOMPETENCIA and Panamá's ACODECO face human and budgetary resource constraints. RECAC competition agencies are small, in so far each have less than fifty full-time employees working on competition defense and/or advocacy.³¹

57. The abovementioned could have an impact over human resources, staff turnover and workload. As Dominican Republic PROCOMPETENCIA points out these agencies' results must meet great social expectations, because they operate with public funds.

58. Costa Rica's COPROCOM budget for 2017 amounts for 2.20% of the Ministry of Economy and Commerce (MEIC) budget, and 94% of it is used for salaries and social security contributions (*cargas sociales*).³²

59. While executing its budget, El Salvador's SC suffered budgetary cuts during the following four fiscal years (2006, 2009, 2014 and 2017). It also received budgetary rises during three fiscal periods (2007, 2008 and 2011).³³ Honduras CDPC experienced a similar situation. It was granted an equal budgetary amount for several years until its authorities finally managed to increase it. However, the CDPC suffered a budgetary cut last year. Currently, its challenge is to achieve economic stability to properly fulfill its mandate in accordance with its Strategic Institutional Plan.

60. Although the nature and attributions of governmental entities differ, comparing the resources granted to other domestic agencies could be highly illustrative. Costa Rica's COPROCOM budget is inferior to other regulators³⁴ and El Salvador's SC 2017 budget is

³¹ Quantity of staff working in competition advocacy and/or defense in each agency (2015 data): Panamá:39, El Salvador:31, Honduras:16, Costa Rica: 11, Nicaragua: 10. Source: Page 23 of UNCTAD, "Voluntary Peer Review of Competition Law and Policy: Uruguay", 2016. Available at: http://unctad.org/es/PublicationsLibrary/ditccplp2016d1_es.pdf For Dominican Republic's PROCOMPETENCIA December 2015 data please check: http://procompetencia.gob.do/Docs/Recursos_Humanos/2015/N%C3%B3mina_Dic_2015.pdf

³² COPROCOM's data.

³³ Source: Annual Report (Memoria de Labores) 2006 to 2016 and SC data.

³⁴ COPROCOM's data.

lower than other autonomous institutions³⁵, even though according to a publication the SC holds the highest budget among five RECAC members.³⁶

61. Besides budgetary constraints, as time goes by the agencies' evolution and triumphs might also intensify the challenge to meet public expectations. For instance: Honduras CDPC opened a regional office in San Pedro Sula. Although it implies a success towards a better competition protection and promotion, it also requires resources to operate properly. In the Dominican Republic, PROCOMPETENCIA's advocacy efforts have boost competition complaints allegations by citizens, even though some are not competition problems. Thus, PROCOMPETENCIA is reinforcing its citizen education activities.

3.3. Contextual challenges: The latest topics

3.3.1. Particularities of developing countries and of middle-income economies with concentrated markets and a significant informal sector

62. RECAC members share the following particularities: 1) all operate in middle-income economies³⁷ with concentrated markets and a large informal sector³⁸, and 2) the interest in analyzing if and where the particularities of developing countries stand in competition enforcement, following El Salvador's SC initiative, to adapt as needed.

63. Nicaragua's PROCOMPETENCIA and El Salvador's SC have developed market studies and reports to analyze competition conditions and barriers to entry that affect micro and small enterprises (MSE's). For instance, PROCOMPETENCIA studied the following markets: tourism, wood furniture, dairy, and bread markets. The SC studied the barriers to entry MSE's face to become effective public procurement suppliers and characterized the financial services markets for MSE's.³⁹

³⁵ For instance: Ports and Maritime Authority (AMP), the General Superintendency on Electricity and Telecoms (SIGET), and the Consumer Defense Agency (Defensoría del Consumidor). Source: http://www.transparenciafiscal.gob.sv/ptf/es/PresupuestosPublicos/Presupuestosvotados/Ano_2017.html#_vTab2506

³⁶ Sittenfeld, Pamela. (September 2017). Table 7. Page 26 <https://www.academiaca.or.cr/wp-content/uploads/2017/09/Analisis-Sittenfeld-2017B.pdf>

³⁷ Costa Rica (upper middle-income economy), Dominican Republic (upper middle-income economy), El Salvador (lower middle-income economy), Honduras (lower middle-income economy), Nicaragua (lower middle-income economy), Panamá (upper middle-income economy). "Current Classification by Income". World Bank. <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>

³⁸ For data up to 2013, please check: International Labour Organization, 2014. Second Printing 2017. 1. Thematic Labour Overview. Transition to Formality in Latin America and the Caribbean. http://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_314469.pdf Statistical Annex.

³⁹ Available at: http://www.sc.gob.sv/site/dirs.php?Id=28&Id_menu=306010

64. In El Salvador, Micro enterprises represented in the 2011-2012 period 96.16% of all economic units⁴⁰, and the SC statistics demonstrate Salvadoran economic agents exceptionally meet its merger thresholds. Data shows the SC's merger thresholds are higher than other RECAC jurisdictions⁴¹, and the SC is proposing to reduce those in its Competition Law reform, to review transactions that nowadays fall outside its control. Nevertheless, the SC is successfully enforcing the Competition Law over the mergers it can review, take for instance an operation in the breweries sector that was conditioned upon, among others, a disinvestment.⁴²

65. Finally, RECAC agencies are interested in decomposing the specificities of traditionally accepted criteria and competition analysis to discover if peculiarities of developing economies play a part and how to best adapt those to the reality of these countries. The SC is organizing the first international seminar in the region to discuss "Competition Law and Economic Development: Does One Size Fits All?" on November 21st and 22nd, 2017.⁴³

3.3.2. Digital economy and "disruptive innovations" are recently expanding in most RECAC countries

66. In the last State of the Broadband in Latin America and the Caribbean (2016) the Economic Commission for Latin America And the Caribbean (ECLAC) identified gaps in the increase of homes with internet access in these jurisdictions. Higher growths occurred in Costa Rica, followed by other countries, among those Panamá, Honduras, El Salvador y Nicaragua.⁴⁴ The active subscriptions to mobile broadband are greater in the Dominican Republic, followed by Panamá, El Salvador, Honduras and Nicaragua.⁴⁵

67. As markets change and technology advances different competition issues have emerged. Despite significant digital gaps between countries, peer-to-peer services as UBER⁴⁶ and Airbnb⁴⁷ have been expanding in the RECAC region in the last five years.

⁴⁰ Dirección General de Estadísticas y Censos (DIGESTYC), Ministerio de Economía (MINEC). Base de Datos del Directorio de Unidades Económicas. 2011-2012.

⁴¹ According to El Salvador's SC estimations its current assets thresholds of USD\$ 180 million are significantly higher than Honduras (around USD\$19.1 millions) and Costa Rica (approximately USD\$16.06 millions). The difference among income thresholds for merger review is also extreme among El Salvador and those other two jurisdictions. [Comparison among El Salvador's assets and income thresholds for 2017 and the same thresholds for 2016 in Costa Rica and Honduras. Source: SC, based on 2016 international jurisprudence.

⁴² Details available at: <http://www.sc.gob.sv/site/pages.php?Id=1868>

⁴³ More information at: <http://www.sc.gob.sv/seminario2017/>

⁴⁴ See: ECLAC, Estado de la Banda Ancha en América Latina y El Caribe. LC/W.710/Rev.1 October 2016.

http://repositorio.cepal.org/bitstream/handle/11362/40528/S1601049_es.pdf?sequence=6&isAllowed=y Graphic 3, Page10

⁴⁵ ECLAC (2016). Graphic 7. Page 17

⁴⁶ For instance, UBER operates in Panamá since 2014, in Costa Rica since 2015, in El Salvador since 2017. Cabify operates in Panamá and the Dominican Republic since 2016.

Thus, “Disruptive innovations” development is a new issue for the RECAC competition authorities.

68. For instance, in 2016 Panamá’s ACODECO analyzed passenger transport services provided through technological platforms and delivered recommendations⁴⁸. On August 23rd, 2017 El Salvador’s SC issued an opinion regarding the provision of passenger transport services using digital platforms.⁴⁹

4. Developmental challenges

69. Improvements to strength the application of the Competition Law in the RECAC countries have been assessed domestically, by each agency, and formally assessed internationally, by 60% of the RECAC membership, through renowned in-depth reviews of competition policy frameworks, frequently referred to as voluntary Peer Reviews on competition law and policy.

70. Of the forty-one voluntarily peer reviewed countries within the OECD and the Interamerican Development Bank (IADB) initiative⁵⁰, twelve are from The Americas, including four Central American countries (El Salvador, Panamá, Honduras and Costa Rica) with at least one peer review each (in 2008, 2010, 2011 and 2014, respectively).⁵¹ That is over 60% of the RECAC membership. Additionally, Costa Rica and Nicaragua took UNCTAD’s Voluntary Peer Review of Competition Law and Policy in 2008 and 2013, respectively.⁵² El Salvador, Honduras and Panamá engaged in OECD-IADB follow-up Peer Reviews in 2012.⁵³

Sources:

<http://elmundo.sv/uber-se-expande-en-centroamerica/>

<http://elmundo.sv/uber-entra-a-el-salvador-con-tarifa-desde-1-50/>

<http://www.eleconomista.net/2017/06/20/cabify-celebra-un-ano-en-panama-con-un-crecimiento-del-40>

⁴⁷ Rentals are offered for: Costa Rica, Dominican Republic, El Salvador, Honduras, Nicaragua, Panamá.

⁴⁸ August 31st, 2016 version is available at: <http://www.acodeco.gob.pa/acodeco/view.php?arbol=1&sec=13&pagi=0>

⁴⁹ Available at: <http://www.sc.gob.sv/site/pages.php?Id=1957>

⁵⁰ <http://www.oecd.org/regreform/sectors/countryreviewsofcompetitionpolicyframeworks.htm>

⁵¹ Source: Prepared by the author based on the information available in <http://www.oecd.org/competition/countryreviewsofcompetitionpolicyframeworks.htm>

⁵² See: United Nations Conference on Trade and Development (UNCTAD) <http://unctad.org/en/Pages/DITC/CompetitionLaw/Voluntary-Peer-Review-of-Competition-Law-and-Policy.aspx?Do=31,30,,>

⁵³ Source: Prepared by the author based on the information available in <http://www.oecd.org/daf/competition/follow-up-of-nine-latin-american-competition-reviews-2012.htm>

71. Peer evaluations offer advantages towards third parties: first, the international organizations prestige and endorsement of its content, particularly its conclusions and recommendations, which might facilitate overcoming internal or external resistance to change by the ones involved in the discussion and approval process of amendments to the Law. Second, Peer-Reviews constitute a transparent assessment of competition in the country.

4.1. Institutional Design

72. An initial difference among RECAC competition authorities are the matters those are responsible for. For instance, El Salvador's SC mandate is exclusively over competition matters whereas Panamá's ACODECO is responsible for competition and consumer matters, and Dominican Republic's and Nicaragua's PROCOMPETENCIA have competition and unfair competition attributions.

73. A second difference among the RECAC authorities are their institutional design models: most competition agencies are fully independent, except for Costa Rica's COPROCOM, which is an agency within the Ministry of Economy and Commerce (MEIC). According to the COPROCOM, it has technical autonomy in the matters of its competence but it is administratively and financially dependent from the MEIC.

74. The COPROCOM's highest authority, the Commission, is appointed by agreement of the Executive power, following the proposal of the Minister of Economy. Yet, it has a separate technical unit, which undertakes studies and investigations. An external analysis suggests the overall perception is COPROCOM conducts investigative processes with independence and impartiality.⁵⁴ The technical unit consumes most of the COPROCOM's budget, which is encompassed in the "competition promotion" concept of the MEIC's budget.⁵⁵

75. On the contrary, administratively independent enforcement models frequently signify autonomous institutions, with formal, operational, administrative and technical independence and budgetary semi-independence, because those agencies are mainly funded with the Nation's public budget.

76. COPROCOM's challenge is to analyze the recommendations of the diagnosis undertook within its OECD membership discussions, including those related to the structure of the competition body, to achieve a more independent competition authority.

4.2. Reforms⁵⁶

77. The most recent Competition Law amendments occurred in El Salvador (2007), Costa Rica (2012), Nicaragua (2014), Honduras (2015), and Panamá (2016). Currently,

⁵⁴ Sittenfeld, Pamela. Efectividad e Impacto de la Política de Competencia en Costa Rica. Análisi expost. Revista Análisi, Serie 11. September 2017. Page 45. <https://www.academiaca.or.cr/wp-content/uploads/2017/09/Analisis-Sittenfeld-2017B.pdf>

⁵⁵ COPROCOM's data.

⁵⁶ In this contribution reform and amendment are used as synonyms.

Costa Rica, Panamá and El Salvador competition authorities are promoting comprehensive reforms to their Competition Laws.⁵⁷

78. The OECD Council opened membership discussions with Costa Rica on April 9th, 2015. During that process, critical needs to reform the current competition system have been identified. Thus, Costa Rica's COPROCOM has an important external motivation to act upon its challenges, as identified by the OECD on August 2016: the institutional design, its resources, the exemptions to the Competition Law and the creation of conditions for an effectiveness international cooperation, among others.

79. At present, a project to reform Costa Rica's Competition Law is being studied in the Legislative. A recent external analysis⁵⁸ considers that Project addresses some of the challenges, although it does not completely overcome independence and budgetary concerns. Other viewpoints could differ.

80. Panamá's ACODECO is promoting comprehensive reforms to the *Ley 45 de 2007*. The proposal has been supported and embraced by the Industry Ministry, with legislative proposal powers. The Project is expected to be presented before the Commerce commission of the National Parliament Assembly for discussion.

81. El Salvador's SC presented its reforms proposal to the Presidency of the Republic. That agency is expecting legislative proposal powers over that Project to advance to its discussion on the Legislative. That Proposal is the result of a transparent, inclusive and participative process, including public consultations with different sectors.

82. The Dominican Republic's PROCOMPETENCIA is the only RECAC member that has not amended its Competition Law, which dates from 2008 but has just begun to be fully enforced since January 2017 after its instruction and sanction powers were enabled. Nowadays, PROCOMPETENCIA's most pressing challenge is to receive the Presidential approval over its Regulation (*Reglamento de Aplicación de la Ley*).

83. Nevertheless, Dominican Republic's PROCOMPETENCIA has preliminarily identified that a legal text revision will be desirable in the future, for a better protection of competition. Examples of improvements could be: including currently non-covered anticompetitive practices, introducing leniency provisions and cease commitments and increasing fines for a higher deterrent effect.

84. Honduras latest Competition Law reform occurred in 2015 and it allowed, among others, the introduction of its leniency program.

4.3. The role of the judiciary in effective Competition Law enforcement

85. As in every country, the Judiciary is a key actor for an effective competition enforcement and, as explained before, RECAC agencies have dedicated efforts towards raising awareness of competition in the Judiciary.

86. Nevertheless, the all RECAC agencies face great challenges before the Judiciary, because none of its bodies are specialized on competition matters nor on expertly handling the specialized economic evidence of these type of cases. That could potentially

⁵⁷ In Panamá the respective Law covers competition and consumer protection.

⁵⁸ Sittenfeld, Pamela. (September 2017). Page 21. <https://www.academiaca.or.cr/wp-content/uploads/2017/09/Analisis-Sittenfeld-2017B.pdf>

have an impact over the resolution of the competition cases challenged before the Courts by economic agents. Indirectly, these agencies could encounter other hypothetical challenges that fall beyond their control and knowledge. For instance, if economic agents try to exert their influence over the Judiciary.

87. According to a recent external analysis⁵⁹ COPROCOM has sanctioned 17 cartels and 12 relative monopolistic practices cases, which is a reasonable amount considering its budgetary constraints. In total, the COPROCOM has imposed sanctions in 28 case records (*expedientes*) and 20 of those were challenged before the Judiciary. Some results in the Judiciary are: in 11 cases the COPROCOM's Decision was upheld and in 6 cases the Decision was partially or totally overturned.⁶⁰

88. El Salvador's SC has sanctioned 49 cases, 17 of those for anticompetitive practices and 2 for failing to request merger authorization. Its estimations indicate 88% of its anticompetitive practices cases have been challenged by the economic agents before the Supreme Court of Justice (CSJ).⁶¹ At minimum, it takes the CSJ an average of three years and 8 months to resolve a competition-related case⁶² although the final judgement (favorable to the SC) over a cartel case in the wheat flour market took around ten years.⁶³ Proudly, not a single SC Decision has been overturned by the Contentious Administrative courtroom.

89. Collecting the fines is another challenge for the SC, although those funds enter the Nation's General Fund. Enforcing the collection of fines is an attribution of the Attorney General's Office (FGR). The SC estimates that 29 fines have already been collected by the FGR out of 62 enforceable fines.⁶⁴

90. Over the last seven years, Honduras CDPC imposed sanctions in 7 of 46 investigation records (*expedientes de investigación*) and reviewed around 88 mergers, none of it denied. The CDPC has obtained successes in the Judiciary but it has also experienced setbacks, as the reduction of a fine in one case. The CDPC considers proof that supports the responsibility of an economic agent might not always be equally weighed or interpreted in the CDPC and the Court. That agency has offered training to the Judiciary but it recognizes the mobility of judges to different tribunals might restrain competition awareness perpetuation.⁶⁵

91. Panamá's ACODECO immediate challenge falls outside the Judiciary although it is indirectly related. That agency is actively preserving the mechanism for early termination of anticompetitive practices processes, grounded on Article 86 of its Law (Ley 45/2007), which has proved to be an efficient mean to restore competition conditions in the market by making use of judicial and extrajudicial transactions.

⁵⁹ Sittenfeld, Pamela. (September 2017). Page 47.

⁶⁰ Sittenfeld, Pamela. (September 2017). Page 55.

⁶¹ Source: SC data.

⁶² Including all kinds of competition-related procedures. That is, the average is not exclusive for anticompetitive practices cases. Source: SC data.

⁶³ Details available at: <http://sc.gob.sv/appsc/caso.php?id=74>.

⁶⁴ Source: SC data.

⁶⁵ Source: CDPC data.

92. Finally, although Dominican Republic's PROCOMPETENCIA has just started to fully enforce its Law and, consequently, it has no experience in Court challenges it has perceived unfamiliarity with competition concepts in the Judiciary.

***RECAC final note:** It is worth mentioning that a great variety of circumstances, acts and/or considerations can occur and those might not necessarily be considered in this contribution. Consequently, this document is illustrative and for its nature it shall not be considered as binding for any act of the RECAC agencies, staff and authorities including investigations and Decisions issued and/or to be issued. Nothing in this document shall be understood as prejudging the analysis each RECAC agency and/or its staff and authorities could perform in specific cases or as an institutional statement. Finally, the RECAC does not necessarily endorse the reviewed bibliography. [El Salvador, November 2017]