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

**HEARING ON OLIGOPOLY MARKETS**

-- Note by Costa Rica --

**16-18 June 2015**

*This document reproduces a written contribution from Costa Rica submitted for Item 5 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/oligopoly-markets.htm](http://www.oecd.org/daf/competition/oligopoly-markets.htm).*

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## COSTA RICA

1. Costa Rica, like many countries, faces oligopolistic markets in key sectors of the economy, which in some cases are protected by special laws or regulations that create entry barriers. These markets are characterized by the existence of a very limited number of vendors who are conscious of being interdependent in their pricing decisions and production.

2. The objective of competition legislation, Law 7472 for the Promotion of Competition and Effective Consumer Protection, is to effectively protect the legitimate rights and interests of consumers, the protection and promotion of the process of competition and free concurrence, through the prevention, prohibition of monopolies, monopolistic practices and other restrictions on the efficient functioning of the market. The Commission to Promote Competition (COPROCOM) is the body responsible for the implementation of this legislation.

### **1. Problems that Coprocom has faced in these markets and representative cases**

3. In oligopolistic markets the relating Costa Rican competition law allows to act through the control of monopolistic practices or of structure through the control of merger. Also, the COPROCOM may issue an opinion on the regulations that allows maintaining these structures however these opinions are not binding on the Public Administration.

4. In its 20 years of existence, the COPROCOM has investigated and punished a large number of economic agents, many of them in oligopolistic markets. It is important to highlight the cases of pension market operators, processors of palm fruit, soft drinks, road construction, telecommunications, and insurance companies, among others.

5. While it was relatively easy to access to the evidence of anti-competitive acts when COPROCOM started functions, it became increasingly difficult to identify collusive agreements. With the amendment to the law made in 2012, COPROCOM obtained the power to conduct inspections in order to gather evidence that would allow it to identify the existence of anti-competitive behavior. However, the legislation lacks elements such as a leniency program, which will provide COPROCOM access to the required evidence.

6. On the other side it is interesting to present the cement market case as one of the most representative in the country. This market responds to a duopolistic market structure, in which multinational enterprises participate, with operations in over 70 countries through their subsidiaries located in three continents. In addition to the structure of this market, the sector has been characterized by the establishment of non-tariff barriers and other restrictions on entry.

7. Coprocom has issued various criteria with respect to this market, for example, opinions on the prevailing prices in this market<sup>1</sup>, the regulations that rule them which contribute to the maintenance of the structure of this market<sup>2</sup>. As is established in the Law for the Promotion of Competence and Effective Defense of Consumers, Law No 7472, the restrictions to trade must be only those that are established to the end of safekeeping the health, environment, quality and safety.

8. Hence the responsibility of the Public Administration to effectively monitor that the restrictions imposed on the manufacture and marketing of products obey the above reasons and that do not become barriers to the entry that prejudice consumers and the economy in general. It is of special competence and responsibility on those who issue technical regulations about not allowing that these have the effect of limiting the competence and free concurrence to the market.

## 2. Legal instruments from the Commission to Promote Competence

9. Law No. 7472 “*Law for the Promotion of Competence and Effective Consumers Defense*” they contain a set of laws to combat anti-competitive behavior and uphold the constitutional principles of freedom of industry and trade inherent in Article 46 of the Constitution, which also expressly prohibits private monopolies and empowers the State to repress monopolistic practices.

10. As monopolistic practices, establishing specifically, the horizontal agreements as absolute monopolistic practices set out in Article 11 of Law 7472. For its part, Article 12 defines the vertical behavior.

11. Also, in 2013 the ex-ante control is performed on merger. It is important to indicate that the legislation indicates that has to be approved concentrations which do not have as their object or effect:

- Acquiring or increasing significantly substantial market power, thus leading to a limitation or elimination of competition;
- Facilitating tacit or explicit co-ordination among competitors or producing adverse results for consumers;
- Lessening, harming or impeding competition or free market participation with respect to equal, similar or substantially related goods or services.

12. Furthermore, as provided in Article 5 of the Law aforementioned the Ministry of Economy, Industry and Commerce has the authority to regulate the prices of products or services in monopolistic or oligopolistic markets, while these conditions are maintained. It should be noted that previously to the setting the opinion of Coprocom should be consulted about the desirability of such measures.

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<sup>1</sup> Ordinary Session of the Commission for Promotion of Competition No. 03-2006, Article Five, consultation by Congressman Gerardo Vargas-Leiva about some concerns related to market involving the production and marketing of cement.

<sup>2</sup> Ordinary Session of the Commission for Promotion of Competition No. 28-2006, Article fifth report on research in the Cement and Concrete market.  
Ordinary Session of the Commission for Promotion of Competition No. 09-2010, section three, Report regarding the report on the Technical Regulations Cement.

### **3. Identification and proof**

13. Coprocom has powers of investigation and requesting for information to economic agents, conferred by the Law 7472 through reasoned request, information relevant to the investigation of the truth of the facts being investigated.

14. Also, COPROCOM may authorize officials of the Technical Support Unit, prior authorization of a judge of administrative litigation, to visit and inspect the industrial and commercial establishments of traders, when it is essential to collect, avoid that is lost or destroyed the evidence for the investigation of absolute or relative monopolistic practices within the law. The Amendment to the Law for the Promotion of Competition and Effective Consumer Protection of September 20, 2012.

### **4. Remedies**

15. COPROCOM can order, by a reasoned founded resolution and taking into account the ability to pay, to any operator who violates the provisions contained in Chapter III of the Law, its suspension, correction or deletion of the practice or concentration that the case relates to, without prejudice of the payment of the appropriate fine.

16. COPROCOM may order the necessary actions to counteract the anticompetitive effects caused by monopolistic practices or concentrations. The faculty is ample and may vary according to each case analyzed.

17. It may also issue an opinion on markets with oligopolistic or monopolistic conditions, in order to encourage actions are taken to introduce competition to the sector and enable the consumer to have demand options.

18. The regulation of prices, established by Law 7472, can be applied by the Public Administration as a last resort in those cases where the market has a monopolistic or oligopolistic structure.

### **5. Strengths and weaknesses of the tools**

#### ***5.1 Control of merger***

19. With the reform of legislation on competition by Law No. 9072 of September 20, 2012, the Costa Rican control system of concentrations changed from an ex post control to a prior mandatory control system for transactions that meet certain thresholds, adapting it to international best practices. With this reform the definition of more solid and broad concentration, covering a range of business arrangements such as mergers, transfers of shares, purchase of assets, sale of business premises, such as mergers, shares transfers, purchase of assets, purchase-sale of commercial establishments, among others were introduced.

20. According to the regulations, Coprocom may impose one or more of the following conditions to authorize a concentration, in order to reduce or offset the potential anticompetitive effects of an economic concentration:

- The conveyance, transfer, license or sale of one or more of the assets, rights, stocks, distribution system or services to a third party authorized by the Commission.
- The limitation or restriction to provide certain services or selling certain goods, or the delimitation of the geographical area in which these can be provided, or the type of customers to which they may be offered.
- The obligation to supply certain products or provide certain services on non-discriminatory terms and conditions, to specific customers or other competitors.
- The introduction, elimination or amendment of the clauses contained in written or verbal contracts, with its clients or suppliers.

21. In addition, the law contains a broad subparagraph that allows it to impose any other condition, structural or behavioral necessary to prevent, reduce or counteract the anticompetitive effects of the concentration.

22. If the concentration can lead to significant anti-competitive effects, Coprocom may condition its approval to certain commitments whether proposed by the notice-server or taxes, in which case they will run on the terms indicated by the resolution.

23. As part of the recommendations being made to COPROCOM in the peer by the OECD in 2014 examination, it is included changing the definition of concentration, which is currently associated with the acquisition of control, by a definition that requires less interpretation, which only could be thresholds. It was also recommended reforming the rule allowing the notification to economic concentrations once the transaction is formalized.

## **5.2 Abuse of joint position**

24. The Costa Rican law does not establish the figure of "abuse of dominance"; however, the practices commonly performed under this system, are set forth between the monopolistic practices. Law No. 7472 provides that in order to determine the illegality of such conduct, the following must be demonstrated:

- That the economic agent who commits the practice has substantial power in the relevant market.
- Prove the behavior established in the standard.
- To demonstrate the anticompetitive effects of the conduct, specifically that it has or may have the object or effect of unduly displace other market players, substantially preventing access or by establishing exclusive advantages in favor of one or more persons

25. According to the above, the analysis of relative monopolistic practices requires a determination whether the company under investigation has "substantial market power", which is defined as the ability to set prices unilaterally or substantially restrict supply in the relevant market, with no other operators may, at present or in the future, countering that power. In addition these practices are punishable if and only if the company that runs has that power in the relevant market defined in addition to the remaining aforementioned elements included in the rule.

26. This, coupled with the recent reform which introduced the obligation for the deciding body to analyze and comment on evidence supplied by the parties to demonstrate the pro-competitive effects of the conduct, shows that the determination of a relative monopolistic practice in Costa Rica serves a very similar to the known rule of reason, which is necessary to make a balance of pro and anti-competitive effects analysis.

27. Neither the law, nor the Commission to Promote Competition has established rules generally applicable to such conduct; each case is independent and has particular effects on the competitive process.

28. In relation to these behaviors, the recommendations of peer review are to strengthen the economic analysis in the study of cases of vertical or unilateral conduct. Also issue guidelines or guidelines that describe the criteria and methodologies used in the analysis of these cases.

29. Throughout its history, the COPROCOM has analyzed several cases in which a joint analysis of the involvement of agents in the defined market, example is the case involving auto parts is made and the tobacco companies. The latter was a vertical restraint imposed by the only two cigarette companies in the country.

30. In the case of auto parts, conduct investigation was carried out by a large group of suppliers of spare parts, the power to hold these companies could not be measured individually but rather as a whole front of the main insurer of cars the country, which allowed research to conclude that substantial that power all the member companies in a partnership, is determined by the variety of brands that could offer the largest inventory in product, exclusives in some parts as well and because the concerted refusal of that group of companies to participate in the system were practically nugatory its implementation.<sup>3</sup>

31. It is noteworthy that the abuse merely exploitative of the dominance or monopoly position, that is, when it is only seek to maximize profits without restricting competition, is not contemplated by the regulations therefore it can be sanctioned by COPROCOM.

### 5.3 *Horizontal Agreements*

32. On the cartels, the rules are about taxes of what is a punishable horizontal agreement and it does not establish thresholds or minority criteria for determining it. In addition, and as defined by statute are null and void, which means that are contrary to the law regardless of their effects, the size of the relevant market or the economic agents involved in it. This feature is equivalent to the application of the per se rule commonly used in competition law.

33. The legal analysis to determine the illegality of an absolute monopolistic practice (horizontal agreements), is to demonstrate: a) that the participants agents are competing with each other; b) they have incurred in any of the agreements prohibited by Article 11 of the Law 7472.

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<sup>3</sup> Vote 33-2013 of the Commission to Promote Competition.  
<http://www.Coprocom.go.cr/resoluciones/2013/voto-33-2013-resolucion-final-caso-aivema.pdf>

34. Article 28, paragraph e) of Law No. 7472 states that such practices may be penalized with a fine of up to 680 times the amount of the lowest monthly minimum wage<sup>4</sup> and a suspension, correction or deletion of the practice in question. In the event that the offenses referred are particularly severe, according to COPROCOM, sanctions may be imposed as a fine of up to 10% of the annual sales by the offender during the previous fiscal year.

35. Indeed, one of the weaknesses identified peer review made by the OECD in 2014 was the amount of penalties, therefore it was recommended schemes of strongest sanctions in order to deter illegal conduct and provide incentives to cooperate with the authority. It was also recommended that Costa Rica includes in its competition a program of leniency.

#### 5.4 *Market Studies*

36. COPROCOM has the legal faculty to conduct market research in accordance with Article 27 paragraph c) and e) of the Law on Promotion of Competition and Effective Consumer Protection Law No. 7472, which states: "c) investigate the existence of monopolies, cartels, practices or concentrations prohibited by this law; for this, it may require individuals and other operators, relevant information or documents and punish where appropriate "; "E) Establish coordination mechanisms to punish and prevent monopolies, cartels, concentrations and illicit practices."

37. As part of the study made by the OECD "*Competition and market studies in Latin America, cases of Chile, Colombia, Costa Rica, Mexico, Panama and Peru*", it was recommended to Costa Rica to have explicit legal authority to conduct market studies and to request information from the agents participating in the market.

#### 5.5 *Competition Advocacy*

38. The promotion of the process of competition and free concurrence is one of the most important functions for Coprocom, function which it implements through various instruments:

- Carrying out activities addressed to the general or specialized public.
- Publication of jurisprudence of Coprocom in its web page. ([www.coprocom.go.cr](http://www.coprocom.go.cr))
- Distribution of a bimonthly Newsletter.

39. Coprocom criteria have covered a lot of both general issues, to promote the law and its impact on the economy and consumers; as well as specific and as diverse topics as parallel imports of medicines, intellectual property, insurance and telecommunications, among others.

40. One of the recommendations of the OECD in this field is to increase the scope of competition issues to a wider public audience, in order to strengthen the culture of competition in Costa Rica, both in the public and private sectors. This is why it is developing a promotional plan to bring competition issues to the universities, strengthen the training of judges and prosecutors and to continue the training of public and private sectors.

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<sup>4</sup> The minimum monthly wage currently stands at ¢ 283,799.64 (approximately \$ 526), so that the maximum fine can in terms of wages be of ¢ 192 million colons, about \$ 360 thousand dollars.

## 5.6 Challenges

41. It becomes necessary to introduce the missing regulatory reforms to counteract monopolistic practices by agents in oligopolistic markets. Also address the recommendations made in the peer review OECD study in order to facilitate the work of this body and add legal certainty to the governed. It is therefore expected that the reforms that the OECD has suggested to this entity in the country's path to its integration to that body, can serve of support and impetus for the important changes that the country needs in Competition Law

42. These market structures not only occur in the country, but are common throughout Central America, since it is a small market with companies involved in the whole area, and often are associated with anticompetitive conducts that present in two or more countries of the region. However, there are legal instruments for joint-level research in Central America region.

43. That is why the Central American Network of Competition Authorities (Recac)<sup>5</sup> since 2009 carried out efforts to have a regional instrument, which allows the Central American region to have a regional policy and competition authority allowing the investigation and punishment of anticompetitive behavior in the region. Furthermore, the Agreement of Association between Central America and the European Union<sup>6</sup>, it is established the commitment to establish and designate a Central American Competition Body; as well as the adoption of the Central Competition Rules, which deadline is July 2020.

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<sup>5</sup> The Recac consists of: Commission for the Promotion of Competition- COPROCOM (Costa Rica); Superintendent of competence SC (El Salvador); Commission for the Defense and Promotion of the Competition- CDPC (Honduras); National Institute for the Promotion of Competition- PROCOMPETENCIA (Nicaragua); Authority and Consumer Protection and Defense of Competition- ACODECO (Panama). The Ministry of Economy of Guatemala participates as a guest, since it does not yet have legislation or competition authority.

<sup>6</sup> "Article 279 Implementation 1. The Parties shall adopt or maintain in force comprehensive competition laws to effectively address anti-competitive practices referred to in Article 278, paragraph 2, letter a) to c). The Parties shall establish or maintain competition authorities designated and properly equipped for the transparent and effective implementation of competition laws. (...)"