



COST RICA: ASSESSMENT OF COMPETITION LAW AND POLICY 2020

Costa Rica: Assessment of Competition Law and Policy 2020

Please cite this publication as:

OECD (2020), *Costa Rica: Assessment of Competition Law and Policy 2020*,
www.oecd.org/daf/competition/costa-rica-assessment-of-competition-law-and-policy2020.pdf.

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Foreword

The OECD Council decided to open accession discussions with Costa Rica on 9 April 2015. On 8 July 2015, the Council adopted a Roadmap for the Accession of Costa Rica to the OECD Convention [C(2015)93/FINAL] (the Roadmap) setting out the terms, conditions and process for accession. The Roadmap provides that in order to allow the Council to take an informed decision on the accession of Costa Rica, Costa Rica will undergo in-depth reviews by 22 OECD technical committees, including the Competition Committee.

This process included a requirement to evaluate Costa Rica's willingness and ability to implement the substantive OECD legal instruments within the Competition Committee's competence, and to assess Costa Rica's policies and practices in comparison to OECD best policies and practices in the field of competition policy. The report that follows provides the results of this assessment, which were discussed by the Competition Committee on the 3rd December 2019, during the 132nd Competition Committee meeting.

The report, prepared by Pedro Caro de Sousa, competition expert at the OECD, was finalised in the course of the September 2019 and the information in this report is current up to that date.

In accordance with paragraph 14 of Costa Rica's Roadmap, the Competition Committee agreed to declassify this Report and publish it under the authority of the Secretary-General, in order to allow a wider audience to become acquainted with its content. Publication of this document and the analysis and recommendations contained in it do not prejudice in any way the results of the reviews of Costa Rica conducted by technical committees as part of Costa Rica's process of accession to the OECD.

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Executive Summary

Costa Rica was subject to a first accession review at a meeting of the 125th Competition Committee on 16 June 2016. This review proceeded based on a draft Report by the Secretariat, which built on a number of recommendations advanced in the 2014 Peer Review jointly pursued by the OECD and the IDB, some of which called for legislative action.

At the time, the Competition Committee acknowledged that Costa Rica had made considerable efforts towards establishing the necessary legal and institutional framework for competition enforcement in Costa Rica. At the same time, the Competition Committee review identified a number of challenges for Costa Rica. The Competition Committee consequently communicated a number of recommendations to Costa Rica to the effect that Costa Rica should: (1) ensure that the competition agencies (COPROCOM and SUTEL) enjoy formal, budgetary, operational, administrative and technical autonomy and independence; (2) adequately resource these competition agencies, so that they are able to fulfil their competences while preserving their autonomy and independence; and adopt the necessary measures to allow the competition agencies to engage in effective competition law enforcement; (3) identify and pursue in-depth reviews of sectors and industries currently exempt from competition law, with a view to remove unjustified exemptions; (4) create conditions for effective engagement in international co-operation, which is an important tool for reinforcing competition law enforcement both domestically and abroad. As in 2014, a number of these recommendations required legislative action.

On 29 August 2019, Costa Rica's Legislative Assembly adopted Law 9736 (the "2019 Competition Reform Act"), which significantly reformed the competition regime. This law seeks to implement the Competition Committee's recommendations and thereby to further align Costa Rica with OECD standards in the competition field.

The main strengths of the Costa Rican competition regime result from the analytic soundness of its competition law, which provides a solid foundation for applying competition policy. In line with best international practices, the primary criterion for applying competition law and other commonly encountered competition policy concerns is efficiency-based analysis.

Horizontal restrictive arrangements are prohibited *per se*, and agreements to undertake them are legally void. With respect to unilateral conducts and vertical agreements, the competition law stipulates that such conducts are illegal only if they demonstrably harm competition, if the responsible parties has substantial market power in the relevant market and if those parties fail to provide an efficiency defence. The 2019 Competition Reform Act clarifies the types of conduct that infringe competition law, and significantly increases the severity of sanctions that businesses can be subject to.

The 2016 accession review found that there were a large number of markets exempt from competition law, including markets where the introduction of competition could result in a more efficient functioning of the economy and, consequently, in substantial gains for consumers. Following this, Costa Rica identified the actual scope of exemptions from its competition law and found they were more limited than anticipated. In any event, most of the exemptions that did exist were not justified from a competition perspective, and COPROCOM has long insisted in the necessity to eliminate them by various means, including market

studies and opinions. The 2019 Competition Reform Act has significantly further reduced the scope of these exemptions, which are now limited to a number of specific acts in five economic sectors – sugar, coffee, rice, maritime transport and regulated professions.

Moreover, Costa Rica's merger control has been undergoing a steady evolution. In 2012, its regime went from an *ex post* merger control regime to an *ex ante* (but non-suspensory) regime that not only allows for the identification of possible anticompetitive transactions but also empowers the authorities to carry out the measures necessary to prevent the implementation of such transactions.

The 2019 Competition Reform Act addresses a number of limitations of this regime. It sets up an *ex ante* notification system with suspensory effects, and precludes the possibility of transactions only being notified once they have been closed. In tandem with this, the law also provides for significant sanctions for companies that infringe this merger control notification and review regime. Secondly, the 2019 Competition Reform Act adopts a two-phase procedure – which replaces the current unitary procedure – with an initial stage devoted to identifying problematic transactions and quickly clearing non-problematic ones. Thirdly, the merger notification thresholds were modified to allow for a more efficient use of COPROCOM's resources and to avoid the review of transactions without a relevant nexus to the Costa Rican markets. Lastly, COPROCOM will now be competent to review mergers in the financial sector, even if financial regulators can exceptionally overrule it when a transaction poses a systemic risk to the financial system.

Yet another strength of the Costa Rican competition regime is its willingness to discuss policy changes in order to align the country's competition framework with best international practices. This is evident in the 2012 reform of Law 7472, and in the efforts to reform the competition law regime leading to the adoption of the 2019 Competition Reform Act.

Finally, the competition authorities have been particularly active in advocating for competition law, issuing numerous opinions directed at other government institutions in an attempt to prevent or modify regulations that could lead to anticompetitive effects. While the 2016 assessment identified as a problem that COPROCOM rarely issued opinions concerning markets exempt from competition law, COPROCOM has worked intensively in these sectors in recent years, and the 2019 Competition Reform Act now explicitly empowers the competition agencies to conduct market studies as regards exempt sectors and conducts. Another concern was that COPROCOM's opinions and recommendations had been disregarded. The 2019 Competition Reform Act seeks to address this, by requiring addressees of such recommendations to provide reasons to the relevant competition authority for not implementing these recommendations.

Despite these strengths, the competition regime in Costa Rica still displays limitations that negatively affect its performance and outcomes – even if many of these will be addressed in the context of the implementation of the 2019 Competition Reform Act.

The 2016 accession review noted that the institutional design of the Costa Rican competition regime could be significantly improved. While the 2019 Competition Reform Act takes important steps in this direction, until it is implemented the situation on the ground has remained and will remain the same as then.

The 2016 assessment also found that the fact that commissioners work part-time has sometimes led to tensions in the relationship between commissioners and TSU's officers, and to problems regarding conflicts of interest. The situation does not seem to have changed significantly since then. Many observers remarked on the recurring existence of conflicts of interest – some very serious and affecting the resolution of individual cases – and on the challenges that this poses to determining what is the correct composition of the Board to decide individual cases.

These problems are similar to others that the Committee identified in 2016, and which led it to conclude that legal reforms were necessary. Those reforms have now been adopted, but remain to be implemented.

Following the 2019 legal reforms, COPROCOM will become a body enjoying technical, administrative, political and financial independence. Its budget will increase exponentially, to USD four million, and is

protected from political interference by law. Board members will henceforth be employed on a full-time basis by members selected on the basis of criteria related to their expertise – including a minimum eight years of expertise on competition matters – and recruited through a public procedure.

The new law also provides for a special labour regime and recruitment system that allows COPROCOM to select and hire its staff. Further, COPROCOM's staff will henceforth be subject to a labour regime and benefit from compensation packages in line with other economic regulators, which will allow COPROCOM to offer more competitive wages to hire specialised and experienced professionals in competition matters.

Ultimately, the success and effectiveness of this reform will depend on its implementation – a matter to which Costa Rica has devoted significant efforts and which led to the adoption of a detailed roadmap.

Another current weakness of Costa Rica concerns the intensity of its competition enforcement. The 2016 assessment found that despite its limited resources, COPROCOM had repeatedly proved its willingness to enforce its competition law.

It is thus unfortunate that there has only been very limited enforcement since then – driven by COPROCOM's continuing resource limitation, to which can be added an increase in merger control activity. Since 2016, Costa Rica's competition authorities have sanctioned a single instance of anticompetitive conduct – related to a unilateral conduct which investigation began in 2012.

Regarding procedure, the 2016 accession review found that COPROCOM had to follow Costa Rica's general administrative procedure. This procedure was not well suited for the specificities of competition law enforcement, could lead to investigations taking too long in certain cases failed to provide a sufficient distinction between investigators and adjudicators, and prevented investigated parties from having timely access to the file and from presenting their case before the Commissioners in an oral hearing. Furthermore, the number of opened investigations was much higher than the number of cases in which sanctions were imposed, which may indicate a need to prioritise enforcement procedures and increase their effectiveness. The 2016 assessment also found that, while COPROCOM had the authority to conduct dawn raids, the agency still lacked some the necessary means to conduct them, alongside other tools to fight cartels effectively, such as a leniency programme. As regards unilateral conducts, Law 7472 is silent on how to apply the rule of reason, and up to this date the Commission has not issued any guidelines, criteria or legal framework in that matter.

Again, the situation has not changed in any of these procedural matters since 2016 – with the notable exceptions of the clear decrease in enforcement activity, and the changes introduced by the 2019 Competition Reform Act, which will only come into effect in the coming years. The 2019 Competition Reform Act introduces a special competition procedure designed with the specific purpose of responding to the complexities of competition matters to be applied by both competition authorities; introduces a leniency programme; and creates and clarifies mechanisms for the early termination of infringement procedures (e.g. archiving a procedure, or entering into settlements and commitments).

It is expected that the proper resourcing of COPROCOM, when combined with these procedural reforms, will ultimately lead to antitrust enforcement coming back to life in Costa Rica following the 2019 Competition Reform Act. However, and as in other matters, whether this will indeed be the case ultimately depends on how the Act is implemented – a matter on which Costa Rica has prepared a detailed roadmap for the coming years.

Another area of concern flagged in the 2016 accession review, which did not see any significant improvements, other than the adoption of the 2019 Competition Reform Act, is international cooperation. The 2016 review found that COPROCOM faced significant limitations regarding its ability to engage in international co-operation in enforcement matters, with the result that the further COPROCOM has gone regarding international cooperation has been to interact informally with their counterparts in other agencies.

The 2019 Competition Reform Act now grants COPROCOM legal personality to sign agreements – including with other competition agencies – and empowers it to share information with other competition authorities, as long as that information is adequately protected. This should facilitate international cooperation in the future, in line with the plan outlined in Costa Rica’s roadmap for implementing the 2019 Competition Reform Act.

1. Context and Background

1.1. Background to the 2019 Accession Review

On 9 April 2015, the OECD Council decided to open accession discussions with Costa Rica. The Council noted the close co-operation of Costa Rica with the OECD since the adoption of the Resolution of the Council on Strengthening the OECD's Global Reach [C(2013)58/FINAL, Item I, vii)], and the actions undertaken by Costa Rica to prepare for its future accession process, including the substantial progress made towards participation in the work of committees and adherence to OECD legal instruments and policy standards.

The Roadmap for the Accession of Costa Rica to the OECD Convention [C(2015)93/FINAL] (the Roadmap) was subsequently adopted by Council on 8 July 2015. The Roadmap instructs the Competition Committee, alongside 21 other OECD technical committees, to undertake an in-depth review of Costa Rica, with a view to providing: (i) an evaluation of the willingness and ability of Costa Rica to implement any substantive OECD legal instruments within the Committee's competence; and (ii) an evaluation of Costa Rica's policies and practices as compared to OECD best policies and practices in the field of competition policy, with reference to the corresponding "Core Principles" set out in the Appendix to the Roadmap.

The Roadmap sets out three such Core Principles, which synthesise elements in the OECD legal instruments on competition policy:

- Ensuring effective enforcement of competition laws through the establishment and operation of appropriate legal provisions, sanctions, procedures, policies and institutions;
- Facilitating international co-operation in investigations and proceedings that involve application of competition laws;
- Actively identifying, assessing and revising existing and proposed public policies whose objectives could be accomplished with less anti-competitive effect, and ensuring that persons or bodies with competition expertise are involved in the process of such competition assessment.

Costa Rica was subject to a first formal accession review at a meeting of the 125th Competition Committee on 16 June 2016. This review proceeded on the basis of a draft Report by the Secretariat. The draft Report built on a number of recommendations advanced in the 2014 Peer Review, some of which called for legislative action.

The Competition Committee therefore acknowledged that Costa Rica had made considerable efforts towards establishing the necessary legal and institutional framework for competition enforcement in Costa Rica. At the same time, the Competition Committee review identified a number of challenges for Costa Rica, with an emphasis on:

- The institutional design of the competition agency, which, in an independent administrative enforcement agency model, should enjoy formal, budgetary, operational, administrative and technical autonomy and independence.

- The resourcing of the competition agency, including the availability of commissioners, the number and expertise of staff, and the allocation of sufficient budget and means to allow the competition agency to pursue effective competition enforcement.
- The extent of exemptions from competition law, including markets and sectors where the introduction of competition could result in a more efficient functioning of the economy and, consequently, in substantial gains for consumers.
- The creation of conditions for effective engagement in international co-operation, which is an important tool for reinforcing competition law enforcement both domestically and abroad.

The Competition Committee consequently communicated a number of priority recommendations to Costa Rica in the form of a letter from the Chair of the Competition Committee 16 August 2016. The recommendations were that Costa Rica should:

- adopt an independent competition agency with formal, budgetary, operational, administrative and technical autonomy and independence;
- adequately resource this competition agency, so that it is able to fulfil its competences while preserving its autonomy and independence; and adopt the necessary measures to allow the competition agency to engage in effective competition law enforcement;
- identify and pursue in-depth reviews of sectors and industries currently exempt from competition law, with a view to remove unjustified exemptions;
- create conditions for effective engagement in international co-operation, which is an important tool for reinforcing competition law enforcement both domestically and abroad.

In order to address the recommendations set out in the letter of the Chair of the Competition Committee, Costa Rica created an Interdisciplinary and Inter-Institutional Commission. This Commission comprises officials from the Ministry of Economy, Industry and Commerce (MEIC), as the governing ministry on competition matters, COPROCOM, as the national competition authority, SUTEL, as the sectoral authority on competition for the telecommunications sector, and COMEX, the Ministry of Foreign Trade, as the coordinator of the accession process of Costa Rica to the OECD.

Since its inception, the Interdisciplinary and Inter-Institutional Commission worked to reform Costa Rica's competition law framework. On 29 August 2019, Costa Rica's Legislative Assembly adopted Law 9736 (the '**Competition Reform Act**'), which significantly reformed the competition regime. This law seeks to implement the Competition Committee's recommendations and to thereby further align Costa Rica with OECD standards in the competition field. Section 1.3.2 below provides an overview of the main changes brought about by this reform.

1.2. Political, Economic and Social Context

Costa Rica is classified by the World Bank as an upper-middle-income country of 5 million inhabitants,¹ and is also often regarded as an example of successful development which stands out in Central America for its political and economic stability.² The country has succeeded in combining strong economic performance with rising living standards and sustainable use of natural resources. Almost universal access to health care, pensions and education have contributed to high levels of life satisfaction, and this has been facilitated by robust economic growth and continued convergence towards OECD living standards (OECD, 2018^[1]).

1.2.1. Political Context

After a civil conflict in 1948, a Constituent Assembly drafted and approved the 1949 Constitution which – in addition to proscribing the existence of a standing army – established the Supreme Tribunal of Elections

and made it responsible for organising, directing and controlling all suffrage-related acts. Since then, the entire adult population has had the right to vote in free and fair elections every four years, in which all political forces are able to compete for office. The 1949 Constitution fostered the creation of a political regime characterised by a clear separation of powers with a robust system of checks and balances. Free and fair elections, peaceful alternation of power and the guaranty of extensive human and democratic rights have characterised the country's political system for a long time. The establishment of a solid institutional framework has guaranteed social and political stability (OECD, 2015^[2]).

The system adopts the traditional three branches of government (executive, legislative and judiciary), and adds to these a fourth, the electoral branch (the National Electoral Tribunal). From a comparative perspective, the executive is relatively weak despite Costa Rica being a presidential democracy. The executive's decree powers are limited, and rarely used. Control of the legislative agenda is shared with the Legislative Assembly, passing to the President only during extraordinary sessions.

An additional component of the separation of powers in Costa Rica is the existence of horizontal control mechanisms through which the activities of the executive power and its administrative entities can be monitored and regulated. Chief among these is the Comptroller General's office, which has a broad and strong mandate to supervise the use of public funds, not only as regards the legality of their use but also with respect to efficiency and outcomes.

The judiciary is independent and free from intervention by other institutions. The economic independence of the judiciary system is guaranteed by a constitutional provision assigning it 6% of the central state's revenues.

1.2.2. Economic Context

While widely seen as a model of successful development, Costa Rica has not been exempt from periods of economic instability. Adverse economic conditions during the late 1970s pushed the state-centred model adopted by the country in the early 1950s into a process of structural reforms during the early 1980s.³

Significant liberalisation took place during this period, mainly within the trading sector in the form of significant tariff and duty reductions. However, privatisation was restricted to unprofitable state enterprises, while state monopolies in banking, insurance, electricity and telecommunications were left untouched. Only gradually did liberalisation advance in these areas, starting with the banking sector in the 1990s.

Trade liberalisation was accompanied by strong market-opening strategies aimed at attracting foreign investment and promoting exports. The freedom to enter contracts using any currency is legally protected, and there are no restraints on making and withdrawing investments. Foreigners enjoy the same rights and obligations that are extended to nationals. In fact, the economy has flourished in recent years on the basis of foreign investment.

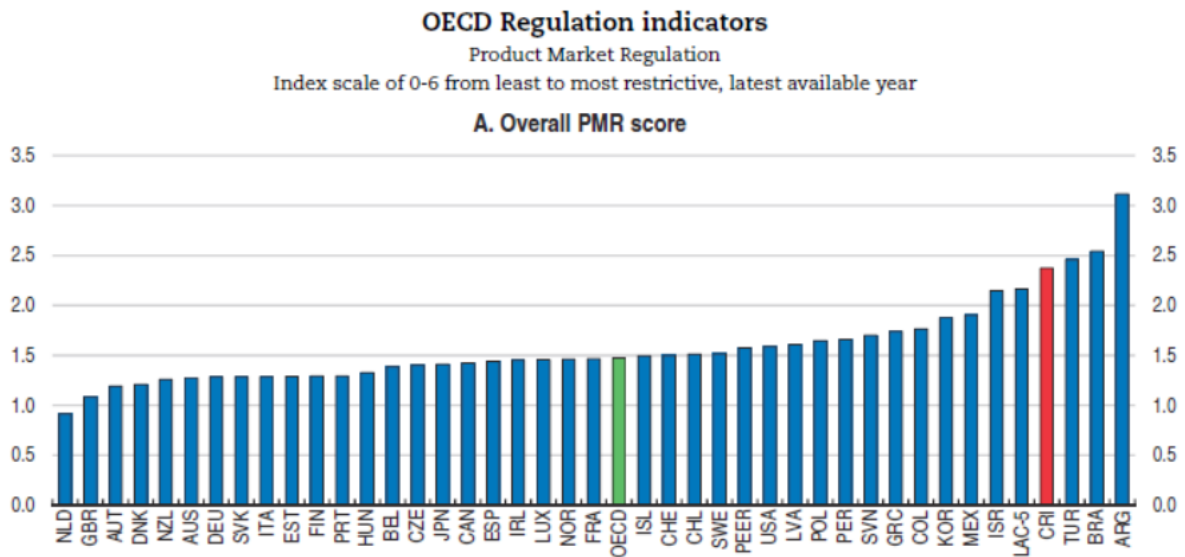
Costa Rica joined the General Agreement on Tariffs and Trade (GATT) in 1990 and ratified the WTO treaty in 1994. It has been an active participant in the multilateral trade system, including the Doha round trade negotiations, while at the same time actively pursuing bilateral and preferential free trade agreements.

The liberalisation process was later intensified through the ratification of the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR), which was preceded by the country's first referendum in 2007. These developments allowed Costa Rica to diversify its production base, first through non-traditional agricultural exports and later through high-tech industries clustered in free-trade zones. Exports have been driven by the greater dynamism of the free zone companies, which grew in 2018 with respect to the previous year by 11%. As in the last three years, in 2018 the surplus in net exports of services significantly exceeded the trade deficit of goods, consistent with the change in the productive and export structure of the country.⁴

Costa Rica is currently an attractive FDI destination because of its friendly FDI regime, and it ranks rather well in the OECD FDI Regulatory Restrictiveness Index.

At the same time, according to the OECD’s Product Market Regulation (PMR) indicator, Costa Rican product markets are subject to stringent regulation. Among OECD countries, only Turkey has a higher PMR index than Costa Rica; Latin American peers, such as Chile, Mexico and Colombia, perform better than Costa Rica (OECD, 2018_[1]).

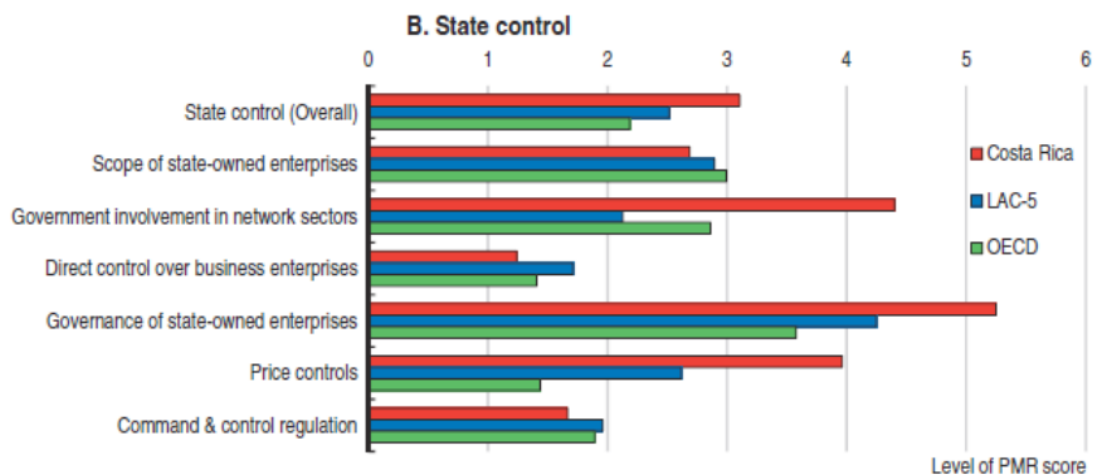
Figure 1. Overall PMR score

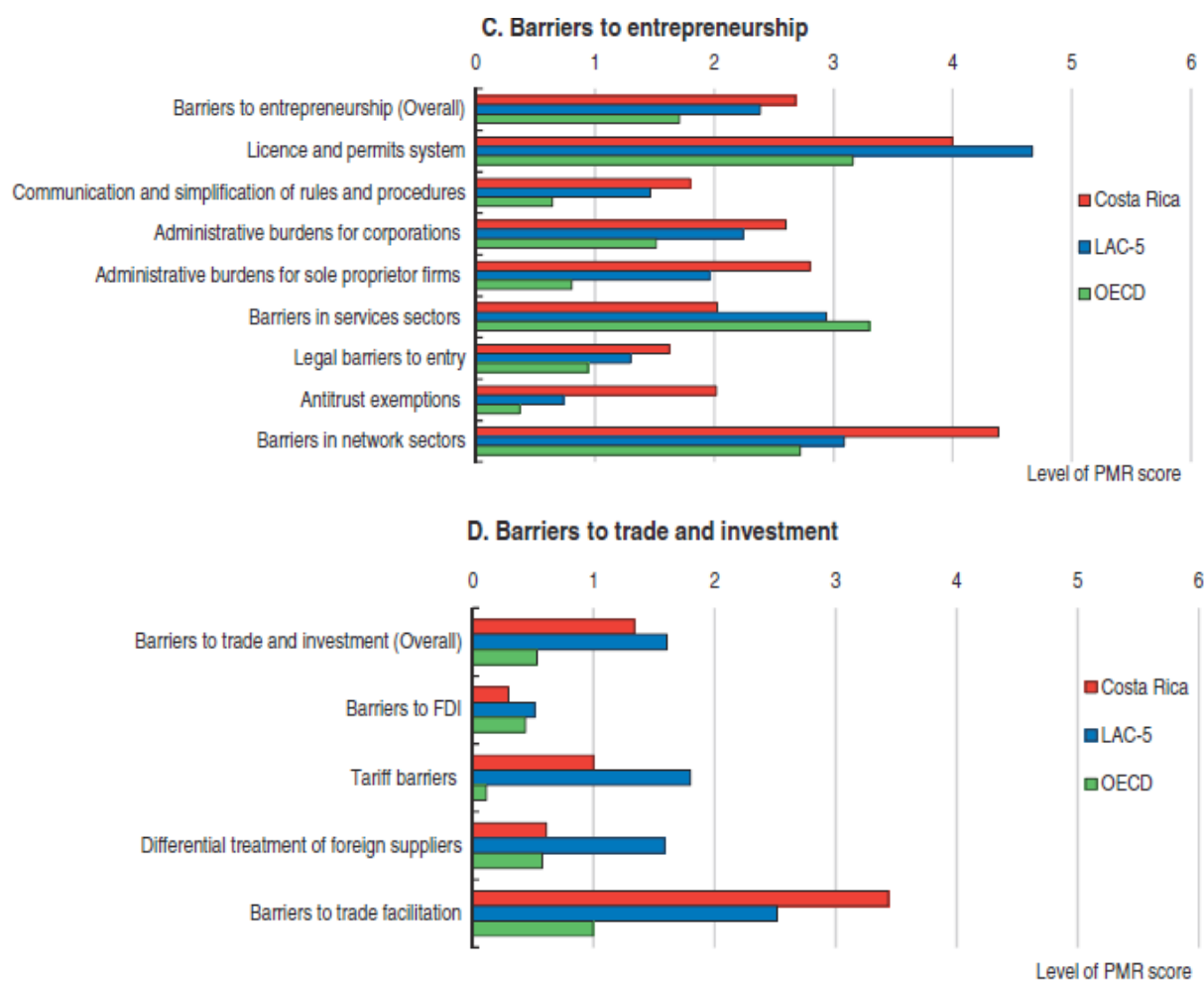


Source: (OECD, 2018_[1])

State controls are particularly restrictive, with substantial government involvement in network sectors, price controls and poor governance of state-owned enterprises (SOEs). Barriers to entrepreneurship in Costa Rica are also high due to licencing and permits systems, administrative burdens on small firms and restrictions in network sectors (OECD, 2018_[1]).

Figure 2. PMR scores by subcategory





Source: (OECD, 2018^[1])

The adoption of CAFTA-DR led to the adoption of a set of laws that introduced competition into the telecommunication and insurance sectors. Nonetheless, a significant number of other sectors remain state monopolies or were until very recently exempt from competition law. Furthermore, State-owned enterprises (SOEs) play a dominant role in many key sectors, such as electricity, transport infrastructure, banking, insurance and petroleum products.

The OECD Working Party on State Ownership and Privatisation Practices (WPSOPP) in its review of Costa Rica against the OECD Guidelines of Corporate Governance of State-Owned Enterprises identified a number of shortcomings with respect to the government's oversight of state-owned enterprises and their governance. To address this, a SOE Action Plan was launched in July 2017. In this context, Costa Rica created an Advisory Unit for the Direction and Co-ordination of State Ownership and the Management of Autonomous Institutions, which has already delivered important outputs, such as a Protocol on Relations between the State and the SOEs (Ownership Policy), and a 2019 aggregate report on the characteristics and financial performance of its SOEs. More transparent and merit-based processes for appointment of SOE board members and training programmes have also been established, as well as decrees requiring disclosure of both non-financial information and financial performance according to International Financial Reporting Standards.

The telecommunications state monopoly was first opened to competition in Internet and other related services in 2009. The first public auction for cellular frequencies was held at the end of 2010, with two private companies (Claro and Telefónica) entering the market. Within a few months of launching their networks, these new companies had secured around 500 000 customers between them. As a result, Costa Rica has experienced lower prices and a large expansion of the sector and use of telecommunication services, closing the gap with peer countries. Competition within the insurance sector, meanwhile, started in 2010 with medical policies, and was extended in 2011 to include vehicle and liability insurance.

The financial sector has been open to competition for several years, though significant regulatory asymmetries favour state-owned banks, hindering full competition between public and private banks. As a result of regulatory differences and business and corporate practices, profitability is lower in state-owned banks. Intermediation margins are also lower for state-owned banks when compared to private banks. However, while state-owned banks' intermediation margins show a declining trend, the opposite is occurring for private banks as a whole (OECD, 2018_[1]).

Costa Rica's banking system is solid and administered according to international standards that include prudential supervision and capital adequacy requirements. All intermediaries must be registered and unregulated players are currently rare, though they were a problem in the past. There are strict disclosure rules, and information on market participants is available to the public. Loans grew aggressively during the period of high economic growth starting in 2002, without jeopardising loan quality or the solvency of the financial system. The global financial crisis of 2008 slowed growth, but it did not have widespread negative repercussions on the financial system. The financial sector regulator (SUGEF) was credited with competently anticipating and successfully managing the effects of the crisis.

In short, open trade and foreign direct investment have underpinned the country's structural transformation from an agricultural-based economy to one with a more diversified structure that is integrated into global-value chains, even if there is still significant State involvement in the economy and pockets of limited competition (OECD, 2018_[1]).

These developments have led the Costa Rican economy to post substantial growth rates for most of the past 25 years. Indeed, the economy grew at an annual average rate of 6% throughout the 1990s (or an annual average rate of 5% during the past 25 years) and has generally outpaced the average growth rate for the region since 2000 (OECD, 2016_[3]). Costa Rica's GDP per capita increased four-fold between 1950 (USD 847) and 2000 (USD 3 315 in 1990 US dollars), in a region where GDP per capita barely doubled during this period.⁵

Costa Rica's GDP per capita (at purchasing power parity, PPP) in 2018 was USD 17 645.⁶ This figure compares relatively well with other countries in the region such as Nicaragua (USD 5 523), Honduras (USD 5 129), Guatemala (USD 8 447) and El Salvador (USD 8 317). The only country in this region of Central America with a GDP per capita higher than Costa Rica is Panamá (USD 25 508).⁷ By comparison, Mexico (an OECD member country) had a per capita GDP of USD 19 969 in 2018.⁸

The 2009 global crisis hit Costa Rica and the economy went into recession, with GDP growth slowing from about 7.5% in 2005-07 to -1% in 2009 (OECD, 2016_[3]). However, the recovery in output growth after the global financial crisis was rapid and robust, with GDP growing in excess of 4% in most years since 2010 (OECD, 2018_[1]).

However, in 2018, economic activity only grew 2.7% in real terms. This lower growth rate was associated with the loss of dynamism of domestic demand, especially of private consumption and consumption of the General Government. Economic activity is projected to pick up, supported by infrastructure investment and improved business expectations upon the approval of fiscal reforms. It is estimated that the restoration of confidence will also result in a boost to consumption, investment and credit, with positive effects on economic growth and employment. The Costa Rican economy is projected to grow 3.2% in 2019 and 3.0% in 2020.⁹

1.2.3. Social Context

Costa Rica is well-known for its socio-economic achievements, which the OECD has recognised. Its life expectancy at birth (79.6 years) is substantially higher than in most Latin American countries (Mexico (75.0 years), Colombia (74.2 years) and LAC (75.2 years), while infant and child mortality rates (8.5 years) are significantly lower (Mexico 12.5, Colombia 13.6 and LAC 15.2 years) (OECD, 2018^[1]).

Costa Rica also has one of the lowest poverty and income inequality rates in the region. While the position of the country in terms of human development remains relatively high, overall progress since the early 2000s has been moderate. 21.1% of the Costa Rican population is considered poor and 6.3% extremely poor.¹⁰ The Gini coefficient increased from 48.1 in 2010 to 48.3 in 2017.¹¹ The country's score on the UNDP's Human Development Index increased from 0.773 in 2012 to 0.794 in 2018, coming in 63th on the 2014 Human Development and fourth among Latin American countries, just behind Argentina and Uruguay.

1.2.4. Developments since the 2016 accession review

There have been few developments regarding Costa Rica's political, social and economic context since 2016 that are worth emphasising for the purposes of the present review of Costa Rica's competition law and policy.

At the time of the 2016 accession review, Luis Guillermo Solís, of the centre-left Citizen Action Party (PAC), had been president since 2014, breaking with the previous two-party system. Despite winning the presidency, the Costa Rican Legislative Assembly was highly fragmented, and the PAC only obtained 13 out of 57 seats in the Legislative Assembly.

In 2018, Carlos Alvarado Quesada, also from the PAC and a minister in the previous administration, was elected president. The PAC won 10 out of the total 57 seats in the Legislative Assembly, whilst the National Liberation Party won 17 seats; the National Restoration Party won 14 seats; the Social Christian Unity Party won nine seats; the National Integration Party won four seats; the Social Christian Republican Party won two seats; and left-wing Broad Front won one seat. The result was less, but still significant fragmentation.

Nevertheless, a number of reforms, including legislative acts, have been adopted in the last two years in the context of Costa Rica's process of accession to the OECD. The process was driven by the Special Commission for OECD Affairs established within the Legislative Assembly to review OECD accession-related bills in order to help expedite their adoption, which comprises representatives from five political parties. Legislative acts related to OECD accession have included, in the economic field, reforms to the tax system,¹² to the Central Bank,¹³ to the free trade zone's regime,¹⁴ to the national statistics regime,¹⁵ and to corruption and bribery.¹⁶

It was in the context of this wider reform process that the 2019 Competition Reform Act was adopted on 29 August 2019.

1.3. Foundations of Competition Policy

1.3.1. Historical Background

Article 46 of the 1949 Constitution, still in effect today, sets out the fundamental rights of citizens to enjoy free trade, agriculture and business, and expressly prohibits private monopolies, empowering the State to repress monopolistic practices. This provision did not necessarily lead to pro-competitive policies. Until the 1980s, much of the Costa Rican economy was subject to price or entry control, or in the hands of state-owned monopolies, which were thought as preferable tools to address the risks of private monopolisation.

By the mid-1980s, Costa Rica started to adopt the liberalisation and export-based growth strategy described above. This was coupled with financial sector liberalisation and price deregulation and, starting in the early 1990s, opening the economy to world trade.

It was in this context that Law 7472 for the Promotion of Competition and Effective Consumer Protection (hereinafter referred to as “Law 7472” or “the Competition Law”) was approved by the Legislative Assembly in the last days of 1994, coming into force on January 19, 1995. More specifically, the law was adopted as a result of the Free Trade Agreement Costa Rica signed with Mexico and of a structural adjustment programme the country negotiated with the International Monetary Fund at the time.¹⁷

Law 7472 created the Costa Rican competition authority, the Commission to Promote Competition (hereafter “COPROCOM”, “Commission” or “Agency”), with powers to apply the new regulations regarding competition and regulatory improvement matters¹⁸. The law also contains rules governing consumer protection and unfair competition. These disciplines will be reviewed in Section 1.4 below.

The law, and its implementing regulations, remained broadly unchanged from its approval in 1994 until late 2012. The adoption of Law 9072 in 2012 provided COPROCOM with additional investigative powers, such as the faculty to conduct inspections; allowed economic agents to require the early termination of an investigation into anticompetitive practices (e.g. to apply for commitments); and established a merger control regime. This latter innovation, when combined with the lack of reforms to COPROCOM’s infrastructure and resourcing, has led to a progressive deployment of resources into merger control matters from the other competences of COPROCOM, including antitrust enforcement.

Until 2008, the telecommunications sector in Costa Rica was exempted from the competition provisions set forth in Law 7472. In June 2008, the Costa Rican Legislative Assembly approved Law 8642. This Law explicitly defined that the operation of networks and telecommunications services will be subject to a sectoral competition regime, ruled by the provisions of this law, and that the criteria established in Law 7472 will apply in an auxiliary manner. SUTEL was henceforth given the power to apply the regulations regarding competition in the telecommunications sector. In order to ensure coherence in the application of competition law in Costa Rica, Articles 55 and 56 of Law 8642 set forth communication and cooperation requirements between SUTEL and COPROCOM.

1.3.2. The 2019 ‘Competition Reform Act’

Further to the recommendations made by the Competition Committee in 2016, Costa Rica’s authorities have in recent years been working to reform the competition law framework.

In 2016, the Government presented Bill of Law 19.996 on the Creation of the Administrative Competition Tribunal, which sought to reform Law 7472 and Law 8642 and address the main weaknesses of Costa Rica’s competition regime identified by the Competition Committee. Faced with difficulties in passing this bill, the Government prepared a new draft bill which, despite being more ambitious, was thought to have better prospects of success. This bill was submitted to public consultation in December 2018. In March 2019, the Government consequently presented Bill of Law 21.303 ‘For the Strengthening of the Competition Authorities in Costa Rica’ to the Legislative Assembly. This bill, which was adopted on 29 August 2019 as Law 9736 (the ‘Competition Reform Act’), significantly reformed the competition law regime in Costa Rica. The new law is expected to go into effect on the second half of November 2019, upon publication – i.e. between the publication of the present report and the Accession Session.

The following subsections provides a non-exhaustive description of the main changes that the 2019 Competition Reform Act brought about to Costa Rica’s competition regime. Throughout this Report, when reviewing specific topics, this Report will also include discussions of the particular impact of the Competition Reform Act.

Substantive Scope of Competition Law

A first change concerns the substantive scope of Costa Rica's competition law. Under the previous law, a significant number of industries and economic sectors were exempt from competition law. According to Article 9 of Law 7472, competition law was applicable to "all economic agents" – with the exception of those who were granted the concession of a public service by law (*'los concesionarios de servicios públicos en virtud de una ley'*), those executing acts authorised in special laws (*'aquellos que ejecuten actos debidamente autorizados en leyes especiales'*), and state monopolies. Additionally, Article 72 established that the law "shall not be applicable to the municipalities in their internal regime, as well as in their relations with third parties".¹⁹ The provisions above seemed to leave many markets and sectors outside the scope of competition law and, hence, of COPROCOM's jurisdiction.

Under the new regime, only acts duly authorised in special laws remain exempt from competition law. In accordance with this new definition, five sectors will have specific acts exempted from the scope of competition law: the sugarcane industry, the rice market, the coffee industry, maritime transport and professional associations – corresponding to around 4% of Costa Rica's economy. Nevertheless, certain specific acts – identified below – but not the whole sector, will be exempt from competition law. Despite benefitting from exemptions, COPROCOM can evaluate these sectors through market studies and formulate the pertinent recommendations to promote competition.

These matters are discussed in greater detail in Section 2.2.2 below.

Substantive Rules

Under the previous law, a severe infringement could only be sanctioned with a fine equal to 680 times the minimum monthly wage (approximately USD 365 160). Relative monopolistic practices and unlawful mergers could only be sanctioned with a fine of up to 410 times the minimum monthly wage (approximately USD 200 000). Only particularly severe infringements or repeat offenders could be fined up to 10% of their annual value of sales. As a result, the 2016 assessment found that penalties for conduct which is not "particularly severe" are low by comparative standards, and that their amounts were too low and unlikely to be deterrent.

The Competition Reform Act increases the types of conduct that infringe competition law and the severity of sanctions that businesses can be subject to. Fines are now to be calculated by reference to the economic agent's gross income during the tax year prior to the imposition of the fine. Fines for minor infringements go up to 3% of this amount, while severe infringements can be sanctioned with fines of up to 5% and very severe infringements can be sanctioned with fines of up to 10% of turnover.

All infringements of substantive competition law – i.e. all antitrust violations – are now classified as very severe infringements by the Competition Reform Act.

The new law also empowers the competition authority to sanction a number of procedural infringements, with a view to ensure the effectiveness of competition enforcement. Some of these infringements are classified as minor (e.g. to provide incomplete or delayed information when requested to do so, to submit a merger notification after the relevant deadline, or to hinder an inspection or investigation), some are said to be severe (e.g. to refuse to provide information when required to do so; to provide false, altered, or misleading information; to fail to notify a merger, or to implement it without obtaining prior authorisation; and to prevent an investigation or inspection from taking place), and some are very severe (e.g. failure to comply with decisions requiring a company to cease engaging in an anticompetitive practice; failure to abide by remedies imposed by the competition authority in antitrust or merger control proceedings; breaching commitments approved by the competition authority; breaching interim injunctions; and failure to notify or unauthorised implementation of an illegal merger – i.e. a merger that was not by the parties and which, in addition, generates anticompetitive effects²⁰).

In addition, the new law modifies the merger control regime. Under the previous regime, a merger could be notified up to five business days after it closed, and the law did not provide for any suspensory effects before a merger's approval when a transaction had to be notified. The new regime sets up an *ex ante* notification system with suspensory effects. It also adopts a new standard of review in line with international practices – substantial impediment to competition – which requires the authority to analyse the effects of the transaction and not only the structure of the market in which the operation takes place.

Institutional Design of COPROCOM

Under Article 21 of Law 7472, COPROCOM was a body of “maximum de-concentration” within the Executive branch, more specifically within the Ministry of Economy, Industry and Commerce (MEIC). This meant that, although the Commission was formally independent from the government on competition law enforcement matters, it depended on MEIC for budgetary, recruitment and administrative purposes. This was unlike some other bodies of “maximum de-concentration” which have administrative and budgetary autonomy, such as Costa Rica's financial regulators.

The 2016 assessment found that COPROCOM was subject to a degree of budgetary and administrative dependency from the Ministry that could affect its independence. Furthermore, it was found that the Minister of Economy would be able to annul COPROCOM's decision if there was a prior supporting opinion by the Attorney General – and that this had indeed occurred in the past.²¹

COPROCOM's board members were appointed on advice of the Minister of Economy and did not work full-time. Instead, they met in regular weekly sessions for which they were paid for their attendance – around USD 50 per session, which sometimes barely covered the costs of attending each session. As such, Commissioners have a main job elsewhere, with attending consequences in terms of time commitment and potential conflicts of interest.

COPROCOM's staff comprised career civil servants employed by MEIC, under the direction of an Executive Director personally appointed by the Minister of Economy. At the time of the 2016 accession review, only a minority of the staff had experience in competition law, with many having been recently appointed from other positions as civil servants.

Back in 2016 – as is currently still the case –, it was widely accepted that staff numbers and COPROCOM's resources were manifestly insufficient for COPROCOM to effectively fulfil its responsibilities. COPROCOM's budget was conspicuously lower than those of other economic regulators in Costa Rica and of comparable competition agencies in the region.

The new law strengthens COPROCOM as an entity with administrative, functional and budgetary independence. In particular, it ensures that decisions by COPROCOM can only be reviewed and annulled by judicial courts – unlike what it used to be the case, whereby the Minister could in exceptional circumstances modify a decision by COPROCOM.

Furthermore, the Competition Reform Act ensures that COPROCOM's main source of revenue cannot be impacted by short-term political decisions. To guarantee that COPROCOM has the necessary financial resources to attend its functions, the law expressly requires a transfer of a minimum amount on the part of the Government. The proposed amount very substantially increases the resources of COPROCOM, matching its budget to other Costa Rican regulatory agencies and international competition authorities

Regarding personnel, the law replaces the current part-time system for commissioners and establishes one with fewer commissioners working full-time for COPROCOM. The Board of COPROCOM will now comprise three proprietary members, including at least one lawyer and one economist, who will work full-time and will be fully dedicated to their functions, except for teaching. Commissioners will be appointed by the Council of Ministers following an open procedure which requires them to be technically suitable and specialised in competition matters. Appointment will take place in a staggered fashion. Board members

can only be dismissed for a specific cause established in the law, and due process must be followed to dismiss a board member.

COPROCOM will now also have autonomy on who to hire and appoint its technical staff, outside the strictures of the generic civil service rules. In addition, the employment status and pay of COPROCOM's staff will be set not by reference to generic civil service rules, but in accordance with the special labour regime of the Vice-Ministry of Telecommunications.

Enforcement and Merger Control Procedure

Under the previous legal regime, COPROCOM had to follow the general administrative procedure when enforcing competition law. Furthermore, there were no sanctions for procedural infringements, such as the destruction of evidence.

The new law adopts a special procedure for competition law and imposes procedural sanctions with the specific purpose of addressing the complexities of competition enforcement. This special procedure comprises three independent stages – the investigation stage, the instruction (pre-trial) stage and a resolution/decision-making stage. This procedural structure institutes a separation of functions among the staff who participate in each stage of enforcement proceedings with a view to guaranteeing due process and rights of defence.

The 2019 Competition Reform Act also expressly introduces a leniency program, and three mechanisms that allow undertakings to request the early termination of an investigation: termination due to manifest inadmissibility (archiving), early termination with acknowledgement of the commission of the infraction (settlement), and early termination with an offer of commitments.

Merger control procedure is also modified. First, the new regime sets up an ex ante notification system with suspensory effects, and precludes the possibility of transactions only being notified once they have been closed – and, as noted above, provides for significant sanctions for companies that infringe this merger control regime. Secondly, the Competition Reform Act adopts a two-phase procedure – which replaces the current unitary procedure – with an initial stage devoted to identifying problematic transactions and quickly clearing non-problematic ones. Thirdly, the merger notification thresholds were modified to allow for a more efficient use of COPROCOM's resources and to avoid the review of transactions without a relevant nexus to the Costa Rican markets.

Lastly, COPROCOM is now competent to review mergers in the financial sector, even if it can exceptionally be overruled by financial regulators when a transaction poses a systemic risk to the financial system – or, to be more precise, when necessary to protect and mitigate risks to the solvency, soundness and stability of entities or the financial system, as well as to protect financial consumers.²²

Advocacy and Market Studies

The new law reinforces the power of the competition authorities to promote the elimination or modification of regulations that create barriers to competition in the markets. COPROCOM and SUTEL are also expressly empowered to issue opinions, recommendations and guidelines.

In effect, the rules governing the transition to the new regime require the competition authorities to issue a number of guidelines – on the analysis of anti-competitive practices, merger review, competition procedures and compliance programs – within 12 months of the law coming into effect. As will be reviewed in Section 9. below, there is a detailed plan, to be implemented in cooperation with the Interamerican Bank for Development, for the competition authorities to develop and publish a number of guidance instruments, including on these matters. In addition, SUTEL and COPROCOM will be able to carry out training activities and the promotion of procompetitive legal frameworks.

Furthermore, the law now grants the competition authorities broad powers effectively to conduct market studies. In particular, they are now empowered to request information from both public and private entities, and to make all recommendations they deem necessary. While these recommendations do not have binding effects, their addressees are under a duty to provide reasons to the relevant competition authority for not implementing its recommendations.

1.4. Related Regimes

1.4.1. Consumer Protection

Law 7472 – which governs competition law – also includes rules on consumer protection and creates the National Consumer Commission Agency (NCC). The NCC is empowered to penalise acts that may harm consumers, and may also take precautionary measures, such as the freezing or seizure of property, suspend services or require the suspension of practices that infringe consumer protection law.

COPROCOM does not have consumer protection competences, and its activities in this area have been limited to coordination efforts with the NCC and competition advocacy.

SUTEL is endowed with powers to protect the rights of telecommunications services users, but the National Consumer Commission maintains its general competence to protect consumer rights. The Attorney General has found that the division of competences between the two institutions is clear.²³

1.4.2. Unfair Competition

The concept of “unfair competition” in Costa Rica is concerned with the “diversion of customers” through dishonest and misleading actions. Since this is not related to competition enforcement, COPROCOM lacks competences as regards unfair competition. Instead, unfair competition is addressed through actions brought before the judicial courts. If, at the same time, these actions may harm consumers, then the National Consumer Commission may intervene.

SUTEL, as the telecommunications regulator, is responsible for addressing cases of unfair competition incurred by network operators and telecommunications service providers.

(i) Developments since the 2016 accession review

There have not been any reforms regarding these matters in the past five years, and the recent legal reform did not affect them.

However, recently two other bills were discussed which considered granting COPROCOM powers to regulate interest rates and other charges related with the use of credit cards, and to regulate the prices of medicines.²⁴ While COPROCOM issued opinions to the effect that it would not be appropriate for it to have such competences,²⁵ as of early November 2019 such bills remained under discussion by the Legislative Committee on Economic Affairs.

2. Substantive Competition Framework

2.1. Goals of Competition Law

The goal of competition law in Costa Rica is to protect and promote the competitive process and free market participation by preventing and prohibiting monopolies, monopolistic practices and other restraints to the efficient functioning of markets. The main goal of competition law is thus to promote consumer welfare, and efficiency is the primary criterion for applying competition law.

2.1.1. Special Telecommunications Regime

SUTEL, who is responsible for enforcing competition law in the telecommunications sector, is also responsible for regulating this sector. As such, SUTEL pursues a number of goals in addition to those related to competition.²⁶ As regards the latter, SUTEL is responsible for promoting effective competition in the telecommunications market as a mechanism to increase the availability of services, improve their quality and ensure affordable prices. In this respect, SUTEL prioritises the promotion of consumer welfare, economic efficiency, innovation and a competitive industry structure.

2.2. Scope of Competition Law

The Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors [[OECD/LEGAL/0181](#)] requires regulatory regimes and exemptions from competition law to be justified by public policy objectives and restrict competition as little as possible, and for countries to review the need to regulate or exempt these sectors on a regular basis. In addition, Recommendation of the Council on Competition Assessment [[OECD/LEGAL/0376](#)] urges the introduction of a process to identify existing or proposed “public policies” (defined as including “regulations, rules, and legislation”) that unduly restrict competition; and recommends a specific process to revise public policies that unduly restrict competition – culminating in the adoption of the more pro-competitive alternative.

The 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)] also recommends, among other things, that adherents restrict exemptions, if any, from the coverage of Adherents’ laws against hard core cartels to those indispensable to achieve their overriding policy objectives. To this effect, Adherents should make their exemptions transparent and periodically assess them to determine whether they are necessary and limited to achieving their objectives.

The scope of Costa Rica’s competition law extends to all economic agents participating in the Costa Rican market, except when a specific exception applies. This includes domestic or foreign agents, private or public agents, individuals or companies. It also means that actions taken in other countries will fall within the scope of Costa Rican law if they affect or involve the Costa Rican market.

While the legal formulae outlined above posit a broad scope for Costa Rica's competition law, in the past it was contradicted by extremely broad exemptions. Prior to a legal reform in 2012, all public service providers operating under a state concession, companies executing acts authorised in special laws (*'aquellos que ejecuten actos debidamente autorizados en leyes especiales'*) and state monopolies were exempt from competition law. Furthermore, competition did not apply to municipalities.

The 2012 reform restricted the scope of these exemptions by requiring that a concession be granted by a primary legal act in order to be exempt from competition law. The 2012 amendment, therefore, resulted in public service providers which concession had not been granted by statute no longer being exempt from competition law. Furthermore, the courts and the competition agency interpreted exemptions granted to public concessionaires restrictively, so that only those public services listed in a concession were exempt. It followed that services provided under a concession were exempt, and that acts by a public concessionaire regarding services not included in a concession could be, and were investigated and sanctioned for anticompetitive practices.²⁷

Public companies, state-owned or not, are subject to competition law unless they benefit from an exemption. Until the 2019 Competition Reform Act, this exemption extended to acts identified in primary laws (statutes) granting public service concessions or establishing a state monopoly. Public companies were thus in the overwhelming majority of circumstances subject to competition law, which is reflected in numerous investigations and infringement decisions against such companies as described below.

As noted in the 2016 accession review, these rules left many markets and economic sectors outside the scope of competition law. It was furthermore impossible to assess the extent of these exemptions, since at the time Costa Rica was unable to exhaustively identify all relevant special laws and laws granting concessions.

In the light of this, the Competition Committee recommended that Costa Rica:

- Identify and pursue an in-depth review of the sectors and industries currently exempt from competition law, with a view to remove unjustified exemptions.
- Review, and establish mechanisms to periodically review legally authorised cartels, to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives.

In its attempts to implement the Competition Committee recommendations, Costa Rica identified the scope of exemptions from its competition law. These exceptions are listed in Table 1 below. Exemptions from competition law apply solely and exclusively to: 1) concessioned services by virtue of a statutory act, in the case of concessionaires of public services, 2) monopolies awarded by the State, and 3) actions allowed by special law.

Most of these exemptions are not justified from a competition perspective. COPROCOM has long insisted in the necessity to eliminate them by various means, including market studies²⁸ and opinions²⁹.

Table 1. Exemptions from Competition Law Prior to Legal Reform

COMPANY OR ENTITY	SERVICE OR SECTOR	EXCEPTION
CONCESSIONARIES OF PUBLIC SERVICES BY VIRTUE OF A LAW		
Correos de Costa Rica S.A.	Postal Communication Social Service	Granted exclusively for the provision of these services.
Instituto Costarricense de Electricidad (ICE) Empresa de Servicios Públicos de Heredia (ESPH) Junta Administradora del Servicio Eléctrico de Cartago (JASEC)	Generation and Distribution of Electricity	
Instituto Costarricense de Ferrocarriles (INCOFER)	Railway Transportation	
Instituto Nacional de Seguros (INS)	Occupational risks insurance	
ACTIONS DULY AUTHORISED BY SPECIAL LAWS		
Liga Agrícola Industrial de la Caña de Azúcar (LAICA)	Sugar	Fixing production quotas and sale prices
Corporacion Arrocerá (CONARROZ)	Rice	Chaff rice import and distribution among industrial companies
Instituto del Café de Costa Rica (ICAFE)	Coffee	Fixing profit percentages for the miller and the exporter
Shipping Companies	Maritime Transportation	Rate agreements and route distributions between competitors (Maritime Conferences)
STATE MONOPOLIES		
Fabrica Nacional de Licores (FANAL)	Alcohol	Ethyl alcohol production and import for liquor and industrial purposes
Refinadora Costarricense de Petróleo (RECOPE)	Fuels	Importing, refining, and wholesale distribution of crude oil and its derivatives
Junta de Protecional Social (JPS)	Lottery and Bingos	Lottery and similar activities
JUDICIAL INTERPRETATION		
Professional Associations	Professional Services	Fixing minimum reference rates

Source: Costa Rica

2.2.1. Special Telecommunications Regime

The operation of networks and telecommunications services in Costa Rica is subject to a special sectoral competition regime. This regime applies to any individual or a company in possession of any kind of authorisation to operate or provide telecommunications services³⁰ – i.e. the operation of networks and services in the telecommunications sector, and to the operation of broadcasting networks. This special regime does not extend to broadcasting services.

2.2.2. Developments since the 2016 accession review

Following the 2016 accession review, Costa Rica engaged in a project to review its exempted or regulated sectors in line with OECD Recommendation on Competition Policy and Exempted or Regulated Sectors ([[OECD/LEGAL/0181](#)]). With the support of the European Union and the collaboration of COPROCOM, Costa Rica commissioned studies into the state alcohol monopoly and the regulation of the wholesale oil distribution market by external consultants. COPROCOM's technical unit has since also reviewed the state monopoly granted to the postal service, the taxi market and the exclusive concession granted as regards vehicle technical inspections. It is currently finishing studies related to minimum fees set by professional associations and maritime transport.

More recently, Law 9736 (the '2019 Competition Reform Act') adopted in August this year extends the scope of competition law. Following its expected entry into force in November 2019, only acts duly authorised in special laws remain exempt from competition law – and public concessions and state monopolies will be subject to competition law. Furthermore, municipalities will be subject to competition law as well.

As a result, there are now only five sectors in Costa Rica where some specific acts are still exempt from the scope of competition law: the sugarcane industry as regards the fixing of production quotas and sale prices; the rice market as regards the import of rice in grain and its distribution between industrialists; the coffee industry as regards the fixing of profit percentages for coffee processors and exporters;³¹ maritime transport as concerns maritime conferences that agree on tariffs and route distribution between competitors; and professional associations, concerning the setting of minimum reference fees.

Table 2. Exempted Acts following Legal Reform

COMPANIE OR INSTITUTION	SERVICE OR SECTOR	EXEMPT ACTS	ACTS NO EXEMPT
Liga Agrícola Industrial de la Caña de Azúcar (LAICA)	Sugar	Setting production quotas and sales prices	Any other anti-competitive act will not be exempt from competition law.
Corporación Arrocera (CONARROZ)	Rice	Importation of rice in grain and distribution among industrialists	
Instituto del Café de Costa Rica (ICAFE)	Coffee	Setting profit percentages for the benefiter and exporter	
Navieras	Marine transport	Fare agreements and route distribution between Competitors (Maritime Conferences)	
Professional Associations	Professional services	Setting professional fees	

Source: Costa Rica

COPROCOM will continue to assess whether these exemptions are justified,³² and has advocated for the abolition of some of them in the past.³³ However, removing them will require the adoption of legislative acts to that effect.

Furthermore, the reform clarifies the territorial scope of Costa Rica's competition law. Until the recent reform, competition law was silent about whether it applied to conduct undertaken outside Costa Rica with effects in the local market. While the authority interpreted the law as reaching such acts, attempts to implement such an interpretation faced practical challenges – e.g. delivering COPROCOM's decisions, forcing company representatives to appear in the process, etc.

In effect, so complicated was this matter that the 2016 Accession Report found that “*Costa Rican competition law cannot be applied to companies without legal presence in the country, as this would exceed the jurisdictional reach of Costa Rican competition law. As such, only [companies with legal presence in the country] can be subject to remedies and sanctions under Costa Rica's competition law.*”

To address this, the 2019 Competition Reform Act clarifies that COPROCOM has the power to apply Costa Rica's competition law to all economic agents whose conduct have effects in Costa Rica.

2.3. Substantive provisions

There are a number of OECD legal instruments that recommend Adherents to have competition law provisions meeting certain standards in place.

In 2019, the OECD Council adopted a new Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)]. This Recommendation sets out that Adherents should make hard core cartels illegal regardless of the existence of proof of actual adverse effects on markets, and design their anti-cartel laws, policies and enforcement practices with a view to ensuring that they halt and deter hard core cartels and provide effective compensation for cartel victims, in accordance with their legal frameworks, institutional set up and procedural safeguards.

Of particular concern, in this regard, is that the law should provide for effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels – including bid rigging – and incentivise cartel members to defect from the cartel and co-operate with the competition agency.

In addition, the Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors [OECD/LEGAL/0181] urges adherents to assure that competition authorities are granted appropriate powers to challenge abusive practices by enterprises, and to undertake to detect and investigate anticompetitive agreements “which, although lawful if notified to or approved by the competent authorities, have not been so notified and approved.”

2.3.1. Absolute Monopolistic Practices

A number of anticompetitive horizontal agreements, which could be broadly described as ‘hard-core cartels’, are called absolute monopolistic practices in Costa Rica. Absolute monopolistic practices include all acts, contracts, agreements, arrangements or combinations between actual or potential competitors that engage in price fixing, output restriction, market allocation, bid rigging or collusive boycotts.

The legal framework also specifies as unlawful certain particular kinds of conduct within each of these categories. For example, the price fixing provision prohibits information exchanges with the purpose or effect of fixing or manipulating the price of goods and services. The output restriction provision prohibits commitments related to the volume or frequency with which goods and services are produced. The market allocation provision covers potential as well as existing markets. Finally, the bid-rigging provision contains agreements respecting both participation in tenders and the fixing of bid prices.

Absolute monopolistic practices are prohibited *per se*. They are legally void (i.e. not legally enforceable) and cannot be defeated by claims that they are efficient, as the law presumes their inefficiency conclusively.

Special Telecommunications Regime

Similar rules have been adopted for the special competition regime applicable in the telecommunications sector.³⁴ Absolute monopolistic practices include four categories of hard-core cartels: price fixing, output restriction, market allocation and bid rigging. These practices are prohibited *per se*, and agreements to undertake them are legally void.

2.3.2. Relative Monopolistic Practices

All agreements that do not amount to hard core cartels are categorised as relative monopolistic practices. This category applies to a variety of practices which actual or potential effect is or can be the exit from the market of economic agents, a substantial impediment of access to the market by economic agents, or the granting of exclusive advantages to the benefit of one or more economic agents.

Despite its broad wording, a relative monopolistic practice will be unlawful only if the responsible party has substantial market power in the relevant market, and the practice is carried out in relation to the products or services of such market. This raises questions regarding how Costa Rica’s competition law addresses practices that seek to leverage market power from one market into another. However, both COPROCOM and SUTEL have found that a conduct involving products or services in which the economic agent has market power will be anticompetitive even if the effects are felt in other markets (e.g. in instances of tying or bundling).

A concern that may arise in this regard is that a number of horizontal practices that do not amount to hard core cartels effects may not be subject to competition law – in particular if it is found that the parties do not, individually or jointly, have market power, despite the horizontal practice having anticompetitive

effects. Given the reduced level of enforcement, however – which will be discussed in greater detail below – it is unclear whether this is a problem in practice.

While the law provides an extensive indicative list of relative monopolistic practices, this list is not exhaustive. It includes vertical market allocation by reason of area and/or time; vertical price restrictions; tied sales; exclusive dealing; exclusionary group boycotts; predation; refusals to deal; price discrimination; imposition of sales or purchasing conditions; and raising rivals' costs. In 2012, the legislature added a number of exploitative abusive practices to this list.

In line with international best practices, relative monopolistic practices must be analysed under the rule of reason, i.e. they are illegal only if they demonstrably harm competition. To determine whether these practices should be sanctioned, the competition authorities must review and analyse evidence submitted by the parties to demonstrate efficiencies and the investigated conducts' procompetitive effects.

However, COPROCOM has not issued guidelines, opinions or rules regarding how the rule of reason is to be applied, or how defences based on pro-competitive effects or efficiency considerations are to be considered. Given the reduced level of enforcement, these matters also seem not to have been addressed in decision-making practice either, even if COPROCOM explained that it uses guidance instruments prepared by other competition authorities in its practice.

In effect, the lack of sophistication – and particularly economic sophistication – on the part of COPROCOM was a topic that emerged in the meetings that took place in the context of the OECD's fact-finding mission.

Special Telecommunications Regime

As with the general competition regime, in the special telecommunications regime relative monopolistic practices will only be illegal if they exclude other economic agents, substantially limit their access, or establish barriers to entry or exclusive advantages in favour of certain economic agents. Furthermore, an infringing economic agent must have substantial market power in the relevant market and fail to substantiate a defence on efficiency grounds. In this assessment, SUTEL follows the guidelines it issued in 2015.³⁵

2.3.3. Merger Control

The Recommendation of the Council on Merger Review [[OECD/LEGAL/0333](#)] provides guidance about multiple aspects of merger control, including effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers.

Merger control is the area of substantive competition law that has gone through the largest change as the result of the adoption of the Competition Reform Act in August 2019.

Under the previous regime, all transactions involving two or more previously independent economic agents, and involving a change in control of at least one of them, will be subject to merger control if they meet certain thresholds. A transaction had to be notified where: (1) the total value of the productive assets of all the undertakings involved in the transaction, including their headquarters, exceeds 30 000 minimum monthly wages (approximately USD 15 907 891.60); or (2) the total revenues generated by all economic agents involved within the national territory exceed 30 000 minimum monthly wages (approximately USD 15 907 891.60). However, only those mergers that, in addition to meeting these thresholds, have a sufficient local nexus (i.e. when at least two of the parties of the transaction have ordinary operations with incidence in Costa Rica) must be notified.³⁶

According to the law in force until August 2019, a merger had to be notified to COPROCOM before it took place or within five business days of its execution. However, a duty to notify did not trigger any suspensive effects, i.e. the merging parties could close and implement the transaction prior to it being cleared.

Failure to comply with the obligation to notify a transaction was punishable with fines of up to 410 times the minimum monthly wage (approximately USD 217 407.85) for the relevant companies, and fines up to 75 times the monthly minimum wage (around USD 40 000) for natural persons who participate directly in such concentrations. In addition, the Commission could impose measures to eliminate or offset any anticompetitive effect of the merger, and order the suspension, surpassing and unwinding of mergers implemented prior to COPROCOM's authorisation.

According to the earlier version of the law, notified mergers would be cleared if they did not have the object or effect of: (a) acquiring or increasing significantly substantial market power, thus leading to a limitation or elimination of competition; (b) facilitating tacit or explicit co-ordination among competitors or producing adverse results for consumers; or (c) lessening, harming or impeding competition or free market participation with respect to equal, similar or substantially related goods or services.

If such an anticompetitive object or effect was identified, COPROCOM should assess whether: (a) the merger was necessary for attaining economies of scale or developing efficiencies, which benefits were greater than its anticompetitive effects; (b) the merger was necessary to avoid the exit from the market of the productive assets of one of the economic agents involved in the merger; and (c) the anticompetitive effects could be offset by remedies. Efficiencies had to be directly generated by the merger, not achievable by less restrictive means, verifiable and sufficient to counterbalance the potential anticompetitive effect of the merge.

Under a failing firm scenario, mergers would have been authorised regardless of their effects, provided the financial situation of the entity being acquired was such that the target would exit the market in the short term if it could not be reorganised under any insolvency proceeding, and when, prior to the merger, efforts had been made to seek another purchaser or alternatives to the merger. This remains the case under the new law.

The pre-reform version of the competition law also empowered COPROCOM to impose the following remedies to mergers it approved conditionally: (a) the assignment, transfer, licensing or sale of one or more of the assets, rights, shares, distribution systems or services of a merging party to a third party authorised by the Commission; (b) limiting or restricting the provision or selling of specific services or goods, or the marking off of the geographic area in which these can be provided or the type of customers to which they can be offered; (c) the obligation to supply specific products or provide specific services under non-discriminatory terms and conditions to certain customers; (d) the introduction, elimination or modification of clauses included in the contracts with its customers or suppliers; and (e) any other structural or behavioural remedy necessary for preventing, reducing or offsetting the merger's anti-competitive effects.

Conditions and remedies must last a maximum term of ten years, which may be extended for five additional years if there are still anticompetitive effects. The conditions imposed by the Commission had to be sufficient to address the specific effects of the merger, and not addressed to improve existing market conditions. Breaching a merger condition could be sanctioned with fines up to 680 times the minimum wage (USD 365 160).

If the anticompetitive effects cannot be offset by the remedies, the authority should reject the concentration.

According to secondary legislation, a number of mergers are presumed not to create anticompetitive effects and should therefore be approved by COPROCOM. This includes mergers without overlaps, where the parties' market shares were below certain thresholds and the merger would not increase them significantly; when a party acquired exclusive control over a firm over which it already enjoyed joint control; when the relevant company did not have local activity.³⁷ However, this presumption would not apply if the current market share of the parties was reasonably likely to increase, when there were indications of co-ordination among competitors, or when COPROCOM determines that the presumption should not apply.

The 2016 accession review acknowledged that the merger control regime had made significant strides in the preceding years. However, the 2016 accession review also found that the regime led to a number of problems.

In particular, the Costa Rican merger control regime was more a hybrid than a pure *ex ante* merger control system, since mergers could be consummated before merger control. Given that both Costa Rican and international experience clearly indicate that unwinding a consummated merger is a notoriously difficult task, this compromised the effectiveness of the regime, while also making international cooperation with other *ex ante* control regimes difficult.

A further issue concerned the financial regulators' exclusive competence to review mergers in the financial sector. This was subject to a duty to consult COPROCOM, but not a duty to follow COPROCOM's opinion, with the result that financial sector regulators were theoretically empowered to approve anticompetitive mergers in markets under their supervision independently of COPROCOM.

Another concern was the lack of alignment between Costa Rica's rules on local nexus and international recommendations to the effect that such nexus should be established by reference to the notification thresholds themselves.

A last concern focused on the limited amount of resources that COPROCOM had to deal with mergers, which led to a number of mergers being tacitly approved because COPROCOM failed to decide on time³⁸ and to a few decisions being of doubtful analytical soundness.

This led the OECD Competition Committee to recommend that Costa Rica:

- Ensure that all mergers meeting certain thresholds are subject to control as to their impact on competition.
- Ensure that the competition agency has the budget, staff, premises, and support services necessary to effectively enforce competition law.

Special Telecommunications Regime

The special competition regime defines mergers as the fusion, acquisition, alliance or any other consolidation between two or more independent network operators, telecommunication service providers, associations, capital stock, trust funds or other assets in general. Although the relevant statute does not associate the definition of merger with the acquisition of control, the Regulatory Authority of Public Services (hereinafter referred to as ARESEP)³⁹ issued secondary regulation in 2008 where it stipulated that only mergers involving changes in control shall be notified to SUTEL for prior approval.

There are no notification thresholds. As a result, all concentrations involving telecommunication suppliers or operators must be notified and approved prior to being implemented.

Beyond this, the special and general merger control regimes were identical. Like COPROCOM, SUTEL shall not authorise mergers that result in the acquisition of market power or that could potentially increase the possibility of exercising market power, could ease express or tacit coordination between operators and/or providers, or could cause adverse effects on consumers' welfare. However, and like COPROCOM, SUTEL may evaluate if the merger is necessary to achieve economies of scale, develop certain efficiencies or avoid the exit of a competitor from the market. In its assessment, SUTEL follows guidelines it issued in 2015.⁴⁰

To ensure coherence in the application of competition law in Costa Rica, the General Telecommunications Law provides for communication and co-operation requirements between SUTEL and COPROCOM.

2.3.4. Sanctions

The OECD Recommendations – and particularly Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)] – recommended that a competition law should provide for effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels and other competition infringements, and incentivise cartel members to defect from the cartel and co-operate with the competition agency.

Under the law in place until very recently, COPROCOM could only impose a maximum fine equal to 680 times the minimum monthly wage (approximately USD 360 400) as regards absolute monopolistic practices.⁴¹ COPROCOM could also impose a fine of up to 75 minimum monthly wages (approximately USD 40 000) to individuals (which include directors and managers) who participated directly in monopolistic practices on behalf of companies, or their account. There are no criminal penalties for absolute monopolistic practices.

For recurring perpetrators, or whenever a monopolistic practice is considered “particularly severe”, COPROCOM could fine each of the involved economic agents up to 10% of their annual value of sales in the tax year before the infringement. There are no guidelines on what conduct is “particularly severe”.

Penalties for relative monopolistic practices and unlawful mergers were smaller: up to 410 times the minimum monthly wage (approximately USD 217 000).

Furthermore, until recently Costa Rica’s competition law failed to provide penalties for undertakings assisting in the anticompetitive conduct, which prevented COPROCOM from fining some intervenient in past competition infringements.⁴² This has now been rectified by the new law, which sets out that it is unlawful – and a severe infringement – to assist, facilitate, encourage or induce monopolistic practices or unlawful mergers.⁴³

When imposing a fine, COPROCOM had to take into account the seriousness of the infringement, the threatened or caused damage, whether the infringement was intentional, the perpetrators’ market share, the size of the affected market, the duration of the illegal conduct or merger, the recidivism of the perpetrator and its ability to pay. There are no guidelines on how to apply these various criteria.

COPROCOM could also order – in addition to imposing a fine – the suspension, correction or elimination of the infringing conduct, as well as any other actions required to counteract the anticompetitive effect caused by it. As a rule, whenever COPROCOM finds a violation of competition law, it always includes in its decisions an order that all economic agents and individuals participating in absolute and relative monopolistic practices must stop, and refrain in the future from carrying out any act that violates Costa Rica’s competition law.

In addition, COPROCOM can also impose fines for procedural infringements. For example, delays in submitting information or the submission of false information can be sanctioned with fines of up to 50 and 75 times the lowest minimum monthly salary in Costa Rica, respectively (i.e. USD 28 000 and USD 40 000). However, many procedural infringements which could impair the effectiveness of competition enforcement – such as impeding an inspection or investigation, beaching an interim order imposed by COPROCOM, or failing to comply with cease-and-desist orders or remedies imposed by COPROCOM – were not subject to any sanction under the regime in place prior to the adoption of the Competition Reform Act.

The enforcement of decisions by the competition authorities followed the general administrative regime. In particular, enforcement had to be preceded by two consecutive warnings to comply with the decision. If compliance is not forthcoming, the authorities can obtain police support and use public force – within the limits of what is strictly necessary. Regarding fine collection, if undertakings did not pay following being warned twice, the process was passed along to the Office of the Attorney-General of the Republic who is

responsible for bringing enforcement proceedings before the courts. Under the new regime, COPROCOM is empowered to bring court proceedings to enforce its decisions and collect fines.

The 2016 accession review found that penalties of conduct other than ‘particularly severe’ infringements were low by comparative standards and that they were not deterrent for economic agents considering engaging in anticompetitive practices. This remained the case until the adoption of the Competition Reform Act on 29 August 2019.

Special Telecommunications Regime

Under the special competition regime, both absolute and relative monopolistic practices were characterised as severe offences that could be penalised with fines between 0.5% and 1% of the infringing party’s turnover during the previous tax year. Where an infringement was “particularly severe”, SUTEL could impose a fine from 1% to 10% of the offender’s annual turnover. Furthermore, SUTEL was entitled to order the suspension, correction or elimination of the unlawful conduct. While these amounts are below average for competition infringements in other jurisdictions, SUTEL considers these percentages enough to deter competition law infringements, since it means that the five leading telecommunication operators in Costa Rica can be subject to sanctions of millions of USD.

SUTEL sets its penalties in a gradual and proportional manner, taking into account: (1) the seriousness of the offence; (2) duration; (3) recidivism; (4) the potential benefits obtained; (5) the harm caused and; (6) the offender’s payment capacity.⁴⁴

2.3.5. Developments since the 2016 accession review

As regards antitrust infringements, the 2019 Competition Reform Act expands the concept of anticompetitive information exchanges. Currently, information exchanges are only prohibited if they have the purpose or effect of fixing or manipulating price. Under the new law, information exchanges are prohibited if they have the purpose or effect of leading to one of the four categories of hard-core cartels included in the law: price fixing, output restriction, market allocation and bid rigging. Furthermore, the law now lists cross-subsidies and margin squeeze as abusive practices.

The law also extends the scope of competition infringements to include assisting in the commission of an antitrust infringement. Under the new law, it is now a severe infringement to assist, facilitate, encourage or induce monopolistic practices or unlawful mergers.⁴⁵

In addition, the recent legal reform made substantial changes to two problematic areas identified by the 2016 accession review: merger control and sanctions.

Merger Control

As already pointed out above at Section 1.3.2, the new law introduces an *ex ante* notification system with suspensory effects. Additionally, it also adopts new merger control thresholds to allow for a more efficient use of the authority resources and to avoid the review of transactions without a relevant nexus to the Costa Rican markets. Further, it adopts a new standard of review in line with international practices – substantial impediment to competition – which requires the authority to analyse the effects of the transaction on the market, and not only the structure of the market in which the operation takes place.

In addition, the 2019 Competition Reform Act modifies the rules concerning merger notification. Under the previous regime, a merger could be notified up to five business days after its closing, and the law did not provide for any suspensory effects before a merger’s approval even when that transaction had to be notified and cleared by COPROCOM. The new regime sets up an *ex ante* notification system with suspensory effects.

From a procedural standpoint, the 2019 Competition Reform Act replaces the current merger control procedure, which treats all mergers alike, with a two-phase procedure, with the purpose of dealing more efficiently and swiftly with non-problematic transactions.

Sanctions

The 2019 Competition Reform Act substantially increases the fines for each type of infringement, and expands the type of conduct that a competition authority can sanction. First, fines are now to be calculated by reference to the economic agent's gross income during the previous tax year. Fines for minor infringements go up to 3% of this amount, while severe infringements can be sanctioned with fines of up to 5%, and very severe infringements can be sanctioned with fines of up to 10% of turnover.

Second, all antitrust infringements are now categorised as very serious infringements. This means that the maximum fine increases from *circa* USD 365 160 for hard core cartels, and *circa* USD 200 000 for all other practices, to up to 10% of their annual turnover.⁴⁶ Furthermore, under the new regime COPROCOM is now responsible for carrying out fine collection processes before the courts.

In addition, the 2019 Competition Reform Act allows the competition authority to sanction a number of procedural infringements, with a view to ensure the effectiveness of competition enforcement. Some of these infringements are minor (e.g. to provide incomplete or delayed information when requested to do so, to submit a merger notification after the relevant deadline, or to hinder an inspection or investigation), some are severe (e.g. to refuse to provide information when required to do so; to provide false, altered, or misleading information; to fail to notify a merger, or to implement it without obtaining prior authorisation; and to prevent an investigation or inspection from taking place), and some are very severe (e.g. failure to comply with resolutions from the competition authority regarding matters such as ceasing to engage in an anticompetitive practice, failure to abide by remedies imposed by the competition authority in antitrust or merger control proceedings, or a breach of interim injunctions; breaching commitments approved by the competition authority; and failure to notify or unauthorised implementation of an illegal merger – i.e. a merger that was not by the parties and which, in addition, generates anticompetitive effects⁴⁷).

Furthermore, the law now sets forth that, in addition to other applicable sanctions and remedies, economic operators participating in collusive tenders can be banned from being party to any type of administrative contract with any public entity for a period of between two and ten years (*blacklisting*). The 2019 Competition Reform Act also determines that public officials who assist, facilitate, encourage or participate in the realisation of monopolistic practices are subject to a fine up to 680 salaries.⁴⁸

Finally, the new law adopts a single standardised regulatory framework – substantive and procedural – applicable to all competition procedures regardless of the body enforcing competition rules. The uniformity of the procedures and substantive legal provisions should ensure consistency in the application of competition law and policy in Costa Rica.

The law also includes provisions to formalise coordination between SUTEL and COPROCOM, with a view to avoid divergence in the application of competition law and strengthening cooperation between both authorities. This includes the preparation of joint guidelines, which should help further guarantee consistency in the application of competition policy.

Costa Rica has also developed a detailed plan to implement the legal reforms, which include the preparation of guidelines, some of which must be published within 12 months from the law coming into force.⁴⁹ Implementation measures will be discussed below in Section 9. .

3. Institutional Framework

Section 7.3 of the 2012 Council Recommendation on Regulatory Policy and Governance recommends that the establishment of “independent regulatory agencies” should be considered where the agency’s decisions “*can have significant economic impacts on regulated parties and there is a need to protect the agency’s impartiality.*” This principle is reflected in other international competition instruments. For example, Section XII C, comment 1, of the ICN’s Recommended Practices for Merger Notification Procedures states that “*Enabling legislation and governmental policies and practices should ensure that competition agencies have sufficient independence to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents.*” As a result, this principle applies to an enforcement agency like COPROCOM, which issues decisions with at least as much economic impact as those of regulatory agencies, and SUTEL, which is also a sectoral regulator.

In addition, competition agencies should have the requisite resources to adequately discharge their duties. For example, the Recommendation of the Council on Merger Review [[OECD/LEGAL/0333](#)], in its Section on ‘Resources and Powers of Competition Authorities’, requires competition authorities to have sufficient powers and resources to conduct efficient and effective merger review.

3.1. Introduction

The current section will provide an analysis of the institutional framework of Costa Rica’s competition agency at the time this report was finalised, i.e. as of September 2019. In late August, a new law was adopted which reformed this framework, but due to the transition period for its implementation the situation described herein will still be in place at the time of the Competition Committee meets to discuss this report.

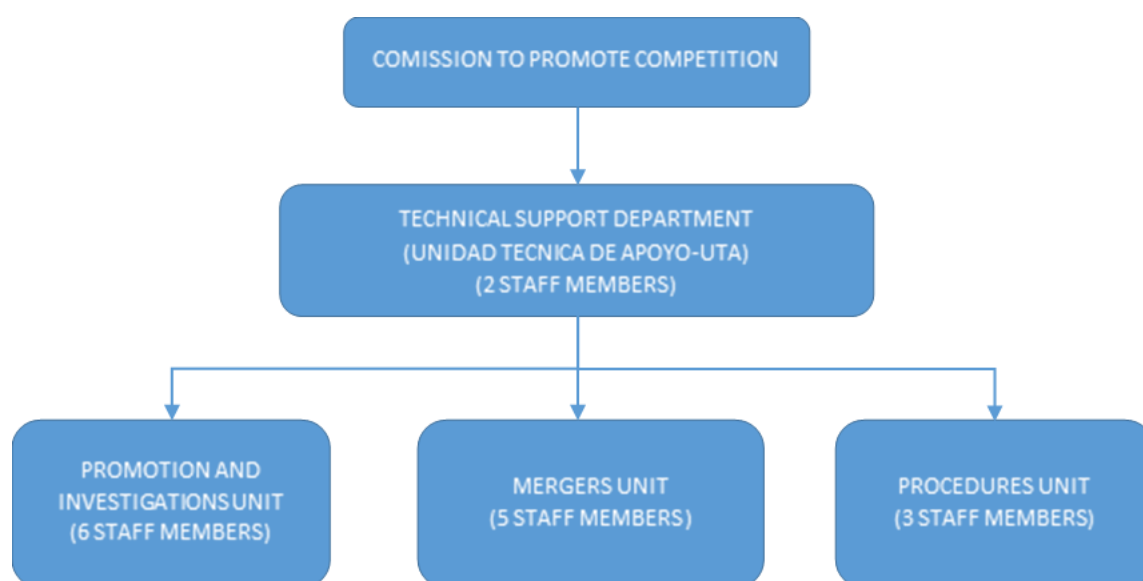
A detailed discussion of the extent of the reform brought about by the 2019 Competition reform Act – which is substantial – and of the planned implementation process can be found at the end of this section, at sub-section 3.3 .

The Commission to Promote Competition (hereinafter referred to as “COPROCOM”, “Commission”, “Agency” or “Authority”) is the authority in charge of enforcing the competition law in Costa Rica. The Commission is empowered, on its own initiative or in response to complaints, to investigate and sanction, where appropriate, any and all practices restricting competition and free market participation.

COPROCOM is a maximum deconcentration body regarding competition matters, attached to the Ministry of Economy, Industry and Commerce (MEIC). Although the Commission is formally independent from the government on competition law enforcement matters, it depends on MEIC for budgetary, recruitment and administrative purposes, unlike other bodies of “maximum deconcentration” which have administrative and budgetary independence, such as the financial regulators.

COPROCOM comprises a Board of commissioners (also called Commission), and a technical staff unit (TSU) that is divided into three units. Each of these elements will be described in detail below.

Figure 3. COPROCOM's Organisational Chart



Source: Costa Rica

Regarding the special telecommunications regime, competition law is enforced by SUTEL, a maximum deconcentration body from the ARESEP – the Regulatory Authority of Public Services – which oversees a number of regulators and is not subject to the Executive branch's legal framework⁵⁰. SUTEL has its own legal personality to carry out contractual activity, manage its resources and budget, as well as to sign the contracts and agreements required for the fulfilment of its functions.

COPROCOM does not have formal agreements signed with other government entities, and is not empowered to enter into any such agreements. However, it coordinates with other institutions that provide information and cooperate on the cases under investigation, such as the Ministry of Health, the Ministry of Agriculture and the Ministry of Finance.

SUTEL signed a framework agreement with the National Institute of Statistics and Censuses (INEC) in 2012, allowing SUTEL to access the surveys conducted by this body. It also entered into a framework agreement with the judicial power in 2014 regarding cooperation in training and advisory activities, research, and/or any other type of actions that contribute to the joint development of the two institutions, within the scope of their competences⁵¹.

SUTEL and COPROCOM enjoy a close relationship, which allows them to undertake joint efforts, e.g. training activities. While COPROCOM was not empowered to enter into agreements with other bodies until the entry into force of the 2019 Competition Reform Act, in 2013 SUTEL tried to enter into a cooperation agreement with it through MEIC. Whilst COPROCOM formally approved this initiative, the MEIC did not subscribe the instrument. Now that COPROCOM has been granted the power to do so by Law 9736 (the 'Competition Reform Act'), efforts are underway to sign said agreement.

This section will focus on the institutional framework for the enforcement of generic competition law by COPROCOM. The special competition regime will be discussed below at Section 3.2 below.

3.2. COPROCOM

The institutional framework of COPROCOM was reviewed by the Committee in 2016. The accession review report at the time found that the institutional design of the Costa Rican competition regime could be substantially improved.

The fact that commissioners work part-time could lead to conflicts of interest, inconsistent decisions, unjustified delays in decision-making, and tensions in the relationships between commissioners and TSU's officers. COPROCOM being part of the MEIC implied a degree of budgetary and administrative dependence that posed risks to the Commission's independence and autonomy. The same risks arose from the appointment of commissioners following the proposal of the MEIC, from the Minister's role in the appointment and removal of TSU's executive director, and from the fact that TSU officials are MEIC employees. A further concern was that COPROCOM's resources were notoriously scarce.

In its letter to Costa Rica in August 2016, the Competition Commission chair identified the two following deficiencies of Costa Rica's competition regime: "*The institutional design of the competition agency, which, in an independent administrative enforcement agency model, should enjoy formal, budgetary, operational, administrative and technical autonomy and independence. [and] The resourcing of the competition agency, including the availability of commissioners, the number and expertise of staff, and the allocation of sufficient budget and means to allow the competition agency to pursue effective competition enforcement.*"

These deficiencies have been acknowledged by Costa Rica in the context of the present review. Costa Rica notes that, while COPROCOM is formally independent from the government on competition law enforcement matters and enjoys technical independence, it depends on MEIC for budgetary, recruitment, operational and administrative purposes. According to Costa Rica, COPROCOM does not have the level of independence and budgetary, administrative or operational autonomy that an agency of its type should have.

The legal reform adopted on 29 August 2019 adopts a number of measures to address these concerns and implement the Committee's recommendations to Costa Rica. Since they have not yet been implemented – and are only planned to be implemented over forthcoming years – they will be reviewed in detail at Section 3.3.2 below.

3.2.1. The Board

The Board of COPROCOM comprises five members and five alternates. Board members are appointed in staggered fashion by the Minister of Economy, and approved by the President of Costa Rica, for four-year terms, renewable for a further four years. In order to be eligible for appointment to COPROCOM's board, a person must have: (1) be technically suitable, (2) have "vast experience" in competition matters, (3) have recognised independence of judgement.

The Board of COPROCOM selects its president among its own members for a two-year term. The Board is legally required to comprise one lawyer, one economist and two professionals with a university degree in subjects related to the activities of COPROCOM. The other members are merely required to comply with the eligibility requirements outlined above.

The quorum required for the sessions is four commissioners, and the decisions require the support of at least three commissioners. If a commissioner is absent by reason of legal impediment or "excuse", alternate members will temporarily replace them and be allowed to participate and vote in Board meetings. Alternate members do not replace permanent members in any other circumstances – such as illness or vacation.

Commissioners do not work full-time; instead, they receive an allowance for their attendance in regular weekly sessions. The allowance amounts to USD 80 per session for members and USD 40 for alternates.

Members of the Board may only be dismissed before the end of their term for reasons outlined in law. These are: (a) inefficiency in the performance of their positions; (b) repeated negligence that delays the substantiation of processes; (c) being found guilty of the commission or attempt to commit a criminal offense; (d) failure to excuse oneself when appropriate; (e) failure to attend three meetings during a calendar month, or absence from the country for more than three months without authorisation from the Commission; (f) physical or mental disability that does not allow a person to hold her position for a period of at least six months".⁵²

The dismissal of a Board member must follow the process set out in the General Law on Public Administration, which applies generically to the dismissal of members of Costa Rica's civil service and sets out a number of rights of defence for the person at risk of dismissal.

These reasons to dismissal are the same that apply to other independent regulatory bodies in Costa Rica. The main difference concerns who is responsible to make the ultimate decision regarding dismissal – e.g. ARESEP for SUTEL, the Council of Ministers for COPROCOM – but this is a consequence of the General Law on Public Administration setting out that competence to dismiss belongs to the same body that has competence to appoint. For example, it results that, following the recent legal reform, dismissal of a member of the Board of COPROCOM will now require a decision by Costa Rica's Council of Ministers, reviewable by the courts.⁵³

As noted in the 2016 accession review, Board members work part-time and their pay is negligible, sometimes barely covering the costs of attending each session. As such, Board members have a main job elsewhere, which has a number of consequences. First, Board members do not always have the time to develop in-depth knowledge of the cases they are assessing. Secondly, this means that TSU members working full-time enjoy a substantial information advantage over commissioners. Thirdly, the fact that Board members have primary professional activities means that they may find themselves in situations of conflict of interest. As a result, it is a frequent occurrence for Commissioners to excuse themselves from participating in the decision making process, and for the group of Commissioners that issues a ruling in one case to be different from the group of Commissioners responsible for other cases.

During the fact-finding mission in September 2019, it was found that this situation has not improved since 2016. Many observers remarked on the recurring existence of conflicts of interest and on the challenges that this poses to determining what is the correct composition of the Board to decide individual cases.

The Competition Committee recommended that Costa Rica:

- Adopt a procedure for the appointment of commissioners and competition agency staff that is transparent and ensures the commissioners' independence and technical expertise.
- Set out in the law the qualifications and experience necessary to be a commissioner by reference to the work to be undertaken and the requisite level of competency.
- Ensure that COPROCOM's Board members benefit from guarantees concerning their independence, autonomy and ability to discharge their statutory duties similar to those of other economic regulators in Costa Rica such as SUTEL.
- COPROCOM's Board members be appointed for periods long enough for them to develop and apply expertise acquired on the job, be subject to rules on conflict of interest set out explicitly in statute, and be removable before their term only with cause following a statutorily prescribed procedure.

3.2.2. Technical Staff Unit

The Technical Support Unit (hereinafter referred to as TSU) of COPROCOM has the responsibility to conduct all procedures falling under COPROCOM's competences, including antitrust investigations and merger control. In addition, the TSU is responsible for conducting market studies and supporting the

advocacy work of the Commission, which includes drafting responses to consultations made by third parties, preparing opinions and conducting outreach activities.

The TSU contains three departments. The Department for Promotion of Competition and Investigations is responsible for conducting market studies and the advocacy duties of the COPROCOM. It is also responsible for conducting preliminary investigations. If in a preliminary investigation it is determined that there is evidence of an anticompetitive practice, the Department of Procedures is then responsible for conducting the formal procedure. Specifically, the unit is responsible for notifying the statement of objections, requesting information, resolving the appeals, conducting the oral and private hearing in which the parties present all evidence and prepare a final report with a recommendation to the Commission. Finally, the Department of Mergers is responsible for merger analysis; and. In practice, the personnel of the different units work on the issues depending on the workload of the authority.

All departments and staff are under the supervision of the Director-General of the Competition Division of MEIC, who is appointed by the Minister of Economy and can be removed by her at any moment. The designation of the second and third tiers of agency management and decision-making, as well as any other officials, follows the rules of the civil service labour regime.

The TSU is staffed by civil servants assigned to the MEIC, which has the ability to transfer them and restructure the TSU as happened in 2015. Further, TSU staff is paid in line with civil service compensation rules, is subject to the Civil Service Regime and its selection is made through the General-Directorate of Civil Service. Civil services rules must be followed by MEIC when appointing, promoting, transferring and dismissing TSU staff. Dismissal of staff must follow the procedure set out in the General Law on Public Administration.⁵⁴

As a result, COPROCOM is not involved in the recruitment, appointment or promotion of TSU's officers. In practice, this means that COPROCOM is unable to recruit the specialised staff required, given the rigidity of the Civil Service Regime recruitment system; and is dependent on MEIC, which is able to interfere with the staffing of the TSU.

The 2016 assessment noted that staff numbers at the time were very low (12 professionals and three administrative staff). and that only a minority of them had experience in competition law. This was found to be manifestly insufficient.

In the light of this, the Competition Committee recommended that Costa Rica:

- Formally make the competition authority and its personnel fully autonomous from the executive branch by granting the agency full control over its budget, staff, premises, support services and administrative priorities.
- Ensure that the competition agency has the budget, staff, premises, and support services necessary to effectively enforce competition law.
- Grant administrative autonomy to the competition agency regarding which staff to hire, when to hire them and their employment and compensation conditions.

3.2.3. Resources and Autonomy

COPROCOM depends on the MEIC from a budgetary and administrative perspective. The Minister of Economy must approve COPROCOM strategies and operational plans. Likewise, COPROCOM is subject to the supervision of the Internal Audit of MEIC.

Regarding its budget, the Director-General of the TSU must submit to COPROCOM and MEIC a draft budget, that is incorporated into the total budget of the Ministry. The approval of the budget of COPROCOM, as well as its purchases and expenses, depends on the previous approval of the MEIC. In turn, the MEIC must comply with the budgetary guidelines that apply to Costa Rica's central administration. This means that, in practice, it is the Government (Ministry of Finance) who sets MEIC's budget.

The 2016 accession review found that the way that COPROCOM was funded seriously impinged on its autonomy and independence. It also found that CORPOCOM's budget was conspicuously lower than those of other economic regulators in Costa Rica and those of other comparable competition agencies in the region.

In the light of the above, the Competition Committee recommended that Costa Rica:

- Ensure that the competition agency is provided with the budget, staff, premises, and support services necessary to effectively enforce competition law.

Since then, there have been no significant changes in the budget amount and staffing of COPROCOM – nor, as we will see below, with SUTEL.

Table 3. COPROCOM's Staffing

YEAR	Persons-year	Budget (US\$)
2019	16	907 692
2018	16	851 744
2017	18	871 617
2016	15	736 635
2015	16	688 359
2014	15	739 683

Source: Costa Rica

COPROCOM is currently staffed with 16 permanent employees. There are seven lawyers, all of which possess a speciality in Notarial and Registry Law. Additionally, two of the lawyers have a specialisation in Tax and Customs Law. There are also six economists, two of which have a master's degree in Business Administration, while another has a master's degree in Economy with an emphasis on Banking and Capital Markets. There is also one computer engineer who also has a law degree, one criminologist specialised in forensic audit, and one administrative support person.

The rigidity of the Civil Service Regime makes it difficult to promote staff according to their experience and skills. Further, staff often transfer to SUGEF, ARESEP or SUTEL, because these institutions offer stability and better career opportunities, as well as higher salaries.

Table 4. Average Pay in Costa Rican Regulators (second quarter 2018)

Salary Category	COPROCOM	SUTEL	ARESEP	Central Bank of Costa Rica
Professional 2 / Professional 1	1 419 930.70	1 489 125.00	1 489 125.00	1 428 847.00
Professional 5 / Professional 3	1 507 747.17	1 946 550.00	1 946 550.00	2 136 968.00
Professional Head / Professional 4	1 966 753.00	2 426 775.00	2 426 775.00	2 626 289.00
Director-General	2 955 153.50	4 031 500.00	4 031 500.00	3 823 196.00
Council Member / Regulator / Superintendent	N/A	5 475 500.00	7 061 500.00	9 541 571.00

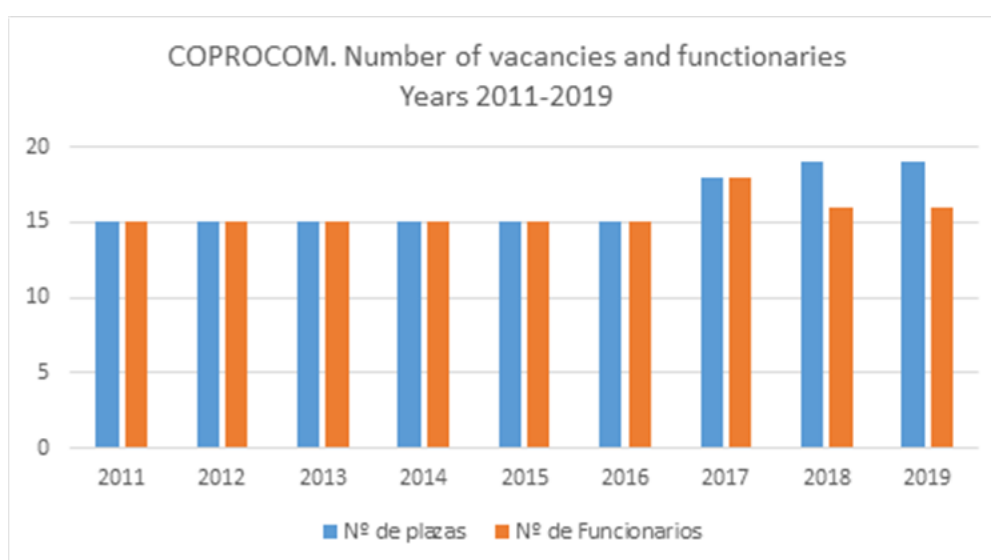
Source: Costa Rica

Table 5. Turnover of COPROCOM staff since 2015

YEAR	STAFF TURNOVER	REASONS
2015	Resignation: One economist and one lawyer.	Both staff resigned in search of better job opportunities. One joined the private sector, while the other went to work in SUTEL on competition issues.
2016	No changes	-
2017	Resignation: one economist Hire: one lawyer, one criminologist, and one computer engineer	The economist left looking for better working conditions, and joined ARESEP. Three professionals were hired to form the Inspection Unit.
2018	Resignation: one lawyer	Looking for better working conditions.
2019	Resignation: one economist Hire: one economist	The economist left looking for better working conditions and went on to work on competition matters at SUTEL.

Source: Costa Rica

Staff turnover, as well as the Government freezing of vacancies, have led to COPROCOM having three openings, which have no possibility of being filled. Thus, even if the budget covers 19 positions, the authority currently has only 16 staff members.

Figure 4. Number of Available Positions and Actual Staff with COPROCOM

Source: Internal registries of COPROCOM.

The only variation took place in 2017, where COPROCOM's budget was raised to provide for the creation of a new unit within TSU specialised on inspections and dawn raids, comprising three additional positions. However, this increase in jobs was not accompanied by other necessary investments, such as a laboratory equipped with the hardware and software required fulfilling this new unit's function and to ensure the security and confidentiality of the information obtained. As a result, this unit's staff has been working in the preparation of the protocols and procedures to conduct raids, and receiving training. In addition, they have supported the TSU in other tasks in the context of day-to-day operations.

As we shall see below, the reform introduced by the 2019 Competition Reform Act is expected to substantially change this situation.

3.2.4. Prioritisation and Evaluation Mechanisms

COPROCOM engages in formal exercises to identify its priorities by preparing strategic plans. Factors taken into account when selecting priorities are the expected impact on the Costa Rican economy, on a specific sector, or on consumers. While priorities are evaluated internally, COPROCOM takes into consideration external inputs such as complaints, studies and declarations by other entities.

MEIC can issue an appraisal of COPROCOM's priorities, but responsibility for final approval of priorities lies with COPROCOM. The priorities of COPROCOM are set out in the Budget Act, and are also published on MEIC and COPROCOM's websites. Some of COPROCOM's priorities have been incorporated into the Government's 2018-2022 National Development Plan, in particular its identification as a priority to pursue market studies of sectors that are regulated or exempted from competition law.

Importantly, under the General Law of Public Administration, competition agencies are unable to prioritise cases. If a complaint is reviewed, it must be analysed. Only if a complaint is found to be groundless will it be rejected. The rejection is then notified to the party who filed the complaint, who can appeal the decision before the courts.

COPROCOM does not have key performance indicators for self-evaluation. Nonetheless, COPROCOM is under a mandatory duty to perform six-month and yearly assessment of how it is meeting its priorities by reference to its budget and the goals set out in the National Development Plan. In addition, an annual self-evaluation is performed and published with the MEIC Institutional Memorandum. The Annual Institutional Report, the Report on Budgetary Implementation Accountability and the priorities set out in the Budget Law are published in the websites of MEIC and COPROCOM.⁵⁵

3.3. Developments since the 2016 accession review

3.3.1. Practical Developments

This section is limited to developments that occurred until the end of August 2019, given the date of preparation of the present Report.

Over the past five years, COPROCOM has focused on addressing complaints, opinion requests and merger control. An important priority has been the fulfilment of commitments to the OECD, and in particular meeting the recommendations of OECD on competition policy and drafting the 2019 Competition Reform Act, which significantly reforms Costa Rica's competition regime. Another OECD-related priority has been addressing the OECD's recommendations on exempted and regulated Sectors. Thus, COPROCOM has supervised a number of market studies on these sectors, as discussed in greater detail elsewhere in this review.

Other priorities have included pursuing market studies, and advocacy on bid rigging and technical regulations. A particular focus of attention has been the preparation and divulgation of a Competition and Public Procurement Guide, and related capacity building, and the preparation of a guide on the imposition of fines.

Otherwise, the situation seems not to have changed significantly since the last accession review – with the very important exception of the new law. In terms of amount of resources and staffing, the situation is similar to what it was then – to the point where approved hires were frozen due to lack of funding, and a new unit was set up which was unable to fulfil its roles because it was not endowed with the necessary means.

It became apparent from various meetings during the fact-finding mission in September 2019 that the situation has also not significantly improved since 2016 as regards the functioning of the Board either. Many observers remarked on the recurring existence of conflicts of interest – some very serious and

affecting the resolution of individual cases – and on the challenges that this poses to determining what is the correct composition of the Board to decide individual cases. The extent of these conflicts of interest is such that it seems to have interfered, on occasion, with the effective enforcement of competition law.

In one instance, a member of the Board was hired to consult in a matter falling under the competence of COPROCOM which was being addressed by MEIC, raising concerns that he had had privileged access to information as a result of his position as a commissioner of COPROCOM.⁵⁶ In more detail, in 2018 the Construction Chamber requested the opinion of COPROCOM regarding the application of a safeguard measure. COPROCOM issued its opinion in April 2018 but, before COPROCOM discussed and issued its opinion, the commissioner refused himself from the case. The concerns identified above led to the MEIC bringing the issue before the Governing Council. There, the commissioner was exonerated, since he was not part of the decision taken by COPROCOM.

The minutes of the Commission also describe how failures to respect the requirements related to incompatibilities on the part of commissioners led to the annulment of enforcement proceedings against a failure to notify a merger. COPROCOM noticed that a wholesale distributor of medicines already integrated with some pharmacies had acquired three other pharmacies. An investigation into this was then pursued, and COPROCOM concluded that the merger amounted to a transaction that should have been notified. When COPROCOM started a formal investigation into this failure to notify, one of the commissioners considered that she was not precluded from voting on the relevant case resolutions. This was challenged on the grounds that the commissioner was legally impeded from participating in the proceedings. As a result, the relevant resolution was annulled. The result was that the merger was implemented, and COPROCOM was unable to investigate both whether the merger would have anticompetitive effects and whether the failure to notify should have been sanctioned.⁵⁷

It was also apparent that, despite announced proposals to grant autonomy to the Technical Unit from the Ministry of Economy,⁵⁸ the situation in practice remained as before; and on all administrative and resource-related matters, the Technical Unit has remained subject to the Ministry.

It is reported in minutes that members of the Technical Unit attended meetings in 2018 regarding an ongoing investigation of anticompetitive conduct with the complainants at the request of the Vice-Minister of Economy⁵⁹ – in the course of an investigation which seems to have led to the only infringement decisions to have been adopted by COPROCOM since the last Peer Review.⁶⁰ It should be noted, however, that the official who attended the meeting did not participate in any investigation related to the case, and her role in the meeting was restricted to advising the economic agents on competition matters.

The Commission, which had been invited to this meeting, kept its autonomy and refused to participate in it. It should also be emphasised that MEIC later accepted that this was not an appropriate course of conduct, and that measures should be adopted to avoid similar issues in the future.⁶¹ At the same time, this infringement decision is now being challenged *inter alia* on the basis of breaches of due process and independence of COPROCOM related to this.

Many observers also expressed concerns about continued interference with the functioning of the Commission, particularly by members of MEIC. While there has not been any claim that this has affected the outcome of cases or interfered on technical matters, this seems to have taken the form of Ministers engaging informally with Commissioners, and even intervening during Commission meetings where certain cases were being discussed. Numerous observers were also concerned about the political nature of appointments to the Commission and Technical Unit, and the lack of expertise of a number of appointees.

Naturally, these problems are similar to others that the OECD Committee identified in the past, and which led it to conclude that legal reforms were necessary. Those reforms have now been adopted, but remain to be implemented. They are described below.

3.3.2. The 2019 Competition Reform Act

Costa Rica acknowledged that COPROCOM lacked the level of independence and budgetary, administrative or operational autonomy that an agency of its type should have. It has thus sought to ensure that COPROCOM meet the requisite standards in this respect.

Under Costa Rica's laws, technical, administrative, political and financial independence can be achieved through a variety of legal structures – in particular, as either autonomous bodies or maximum deconcentration bodies. The benchmark for autonomous institutions enjoying the requisite levels of autonomy and independence are State-owned banks (such as the National Bank of Costa Rica and the Bank of Costa Rica), the National Institute of Insurance, or ARESEP and the bodies under its supervision, such as SUTEL. Examples of autonomous and effective maximum deconcentration bodies are the Administrative Tribunals – which typically fall within the scope of the Executive branch – and the financial sector superintendencies, which are maximum deconcentration bodies from the Central Bank of Costa Rica – an autonomous body outside the sphere of the Executive branch.

More than the legal form adopted, Costa Rica submits that what matters is that COPROCOM enjoys the requisite level of autonomy and independence. At present, COPROCOM is a maximum deconcentration body, but lacks independence and budgetary, administrative or operational autonomy.

However, the Attorney-General's Office has expressed a view that a decentralised body can have administrative independence and autonomy, provided that the legislator grants it by means of instrumental legal personality.⁶² The grant of instrumental legal personality will allow COPROCOM to administer its resources independently by endowing it with legal mechanisms and instruments necessary to enable COPROCOM to carry out its competences. However, such instrumental capacity is subject to the terms and conditions laid down in the law creating and regulating the relevant maximum deconcentration body.

Following this analysis, the 2019 Competition Reform Act sets up COPROCOM as a decentralised body with instrumental legal personality, and guarantees the functional, administrative, technical and financial independence necessary for the effective application of competition law. To this end, COPROCOM is endowed with legal personality to carry out autonomous contractual activity, manage its resources and budget, as well as to sign any agreements required for the fulfilment of its functions.

The reform also legally empowers COPROCOM to appear before the courts to defend its decisions and represent itself before the courts. The Attorney-General will only intervene in matters related to labour or regarding acts that are detrimental to the public interest.

This law also makes a number of reforms as regards COPROCOM's Board, Technical Staff Unit and resources.

As regards the Board, its member will henceforth be employed on a full-time basis. COPROCOM's Board will have three proprietary members, including at least one lawyer and one economist. All Board members will be selected on the basis of criteria related to their expertise and character – including a minimum 8 years of expertise on competition matters – and recruited through a public procedure. Furthermore, the law sets out transitional arrangements that ensure the phased appointment of Board members.

Regarding the TSU, the law provides for a special labour regime and recruitment system that allows COPROCOM to select and hire its staff. Further, TSU's staff will henceforth be subject to a labour regime and benefit from compensation packages in line with other economic regulators. In particular, the staff's special labour regime will be the same as that applicable to the Vice-Ministry of Telecommunications, which is aligned with that of Costa Rica's economic regulators and will allow COPROCOM to offer more competitive wages to hire specialised and experienced professionals in competition matters.

As regards resourcing, the 2019 Competition Reform Act provides COPROCOM with a minimum statutory budget, which will increase every year in amount in line with inflation. The law also grants COPROCOM

the power and autonomy to manage its budget – including by hiring all staff and services necessary to the effective fulfilment of its competences.

This budget will be five thousand three hundred nine point zero five (5,309.05) base salaries, which is equivalent to around four million dollars (USD 4 000 000), and is set in line with estimations regarding the staff and resources required to effectively apply competition law.

It is estimated that in order to enable COPROCOM to perform adequately the responsibilities conferred to it by law, it will require approximately a staff of 60 workers. As such, it will be necessary to add 41 new positions to the already existing 19. These changes are expected to be in place by the end of 2021, per the implementation procedure described in Section 9. below.

While deemed a clear improvement over the previous regime, there were some concerns that the new appointment mechanism – whereby the commissioners will be selected by the Council of Ministers, subject to approval by the Legislative Assembly – would in practice not change much, since the Council of Ministers would very likely appoint whomever the Minister of Economy recommends. At the same time, it was consensual that the new appointment criteria ensure that Commissioners will have the requisite expertise, and that approval by the Legislative Assembly amounts to serious, and at times strict, scrutiny of appointees.

Costa Rica points out that, while some stakeholders may express concerns about the appointment of commissioners, the 2019 Competition Reform Act requires that Board members be appointed as a result of a public contest, following a selection process that must be published prior to the beginning of the process. Moreover, all applicants must take an examination on their technical knowledge, and the Legislative Assembly needs to ratify the appointments. Consequently, Costa Rica considers that there are several filters to avoid politically motivated appointments, which is reinforced by the limitations on the dismissal of commissioners.

During the September 2019 fact-finding mission, it was a recurrent topic among all types of stakeholders that the most important factor for the success of this reform lies in the selection of the first batch of Commissioners. The OECD team was repeatedly told that the success of this reform, and of competition enforcement in Costa Rica, would greatly depend on the appointment procedure set forth in the regulatory instruments implementing the 2019 Competition Reform Act.

4. Enforcement Powers

The 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [\[OECD/LEGAL/0452\]](#) recommends, among other things, that Adherents should ensure that competition authorities have effective powers to investigate hard core cartels by applying an effective cartel detection system. This requires providing competition authorities with the powers to conduct unannounced inspections (“dawn raids”) at business and private premises; to access and obtain all documents and information necessary to prove cartel conduct, and to access electronic information that could help establish a cartel violation including electronic material that is stored remotely.

The Recommendation also sets out that competition authorities should have access to appropriate investigative techniques, such as communications interception and surveillance authorisations. For this purpose, competition authorities should have trained specialised staff and adequate hardware and software equipment.

In addition, competition authorities should be able to request and obtain information from investigated and third parties, including other government entities; obtain oral testimony from individual witnesses; and impose sanctions for non-compliance with mandatory requests and for obstruction of investigations.

The 2016 accession review concluded that, while enforcement procedures have not been an obstacle for the Commission’s work and provide minimum due process guarantees, the fact that COPROCOM must follow Costa Rica’s general administrative procedure is not well suited for the enforcement of competition law.

In particular, the review found that Costa Rica’s general administrative procedure was not well suited for the specificities of competition law enforcement; could lead to investigations taking too long in certain cases; it failed to provide a sufficient distinction between investigation and decision-making; and prevented investigated parties from having timely access to the file and from presenting their case before the commissioners, who are the ultimate decision-makers, in an oral hearing.

Another concern was that, even if COPROCOM obtained the authority to conduct dawn raids in 2012, the agency still lacked some the necessary means to pursue them, alongside other tools to fight cartels effectively.

It was in light of these concerns that the Competition Committee recommended that Costa Rica:

- Adopt procedural rules that enable competition law enforcement tools, such as a leniency programme and the competition authority’s ability to undertake unannounced on-site inspections.

As we shall see below, at the time of writing, the situation on the ground had not changed significantly. However, the entry into force of the 2019 Competition Reform Act, which adopts a specific procedure for competition cases, has the potential to substantially improve the way competition law and policy is pursued in Costa Rica.

The analysis contained in this section reflects the situation as of August 2019, unless it is indicated that the available data was for developments up to an earlier date.

4.1. Procedure

Up until the 2019 Competition Reform Act entered into force – which means for all antitrust enforcement actions pursued to date – competition investigations followed the “ordinary administrative procedure” applicable for most administrative acts. COPROCOM and SUTEL each have their own internal procedures regarding investigations.

The analysis below therefore focuses on the competition enforcement procedure that has been followed thus far. Given the issues this procedure has raised in the past, the Competition Reform Act adopted a new, special procedure for competition investigations, which will be described below.

Costa Rica’s competition agencies can start their investigation either *ex officio* or after receiving a complaint. Some *ex officio* investigations arise from anonymous complaints. The number of investigations starting *ex officio* or as a result of complaints are listed in the tables below.

Table 6. Investigations initiated *ex officio* by COPROCOM (2014-2019)

	2014	2015	2016	2017	2018
Total Ex Officio Investigations	13	14	6	6	2
Absolute Monopolistic Practices	3	4	-	-	-
Relative Monopolistic Practices	3	6	-	3	2
Failure to Notify a Merger	7	4	6	3	-

Note: These include preliminary investigations, most of which did not conclude with the opening of a formal investigation.

Source: COPROCOM Database

Table 7. Investigations initiated by COPROCOM after complaints (2014-2019)

	2014	2015	2016	2017	2018
Total Investigations of Complaints	4	4	10	6	6
Absolute Practices	2	-	3	2	3
Relative Practices	2	4	7	4	3
Failure to Notify a Merger	-	-	-	-	-

Note: These include preliminary investigations, most of which did not conclude with the opening of a formal investigation.

Source: COPROCOM Database

In addition, until June 2019 COPROCOM also started one *ex officio* investigation into relative monopolistic practices, and an investigation into a failure to notify a merger following a complaint.

Due to lack of resources, COPROCOM prioritises investigations in those markets that affect consumers and productive sectors. However, competition agencies are unable to prioritise cases whenever there is a complaint, since they are unable to reject complaints based on the need to follow certain priorities or efficiently allocate resources – all complaints must be followed up on. COPROCOM can only reject a complaint if: (i) it is extemporaneous, inappropriate or evidently inadmissible; (ii) when the complaint does not meet the requisite formal requirements.⁶³

If a complaint is admitted, the TSU will prepare a preliminary report to assess the evidence of an infringement of competition law. The report must contain, among other items, a detailed analysis of the claimant and defendant, an assessment of whether the minimum requirements to file a complaint are met, as well as any evidentiary elements available. The TSU will then submit its findings to the Commission, which will decide whether to start an investigation – either preliminary or formal – or whether to reject the complaint. If the latter, the rejection is then notified to the party who filed the complaint, who can appeal the decision before the courts.

In practice, the procedure often begins with competition authorities carrying out a preliminary investigation in order to gather information to assess whether they should open an ordinary administrative procedure.⁶⁴ During this preliminary stage, the competition authorities may gather further information, analyse documents, write reports and take other actions to secure enough elements to support their decisions.

As discussed elsewhere in this Report, Costa Rica does not yet possess a leniency regime and, while it is legally possible for COPROCOM to conduct dawn raids, COPROCOM does not possess the means to actually engage in unannounced inspections.

This means that both preliminary and formal investigations rely extensively on information requests. COPROCOM has the power to request information from investigated parties, third parties and public authorities during its investigations. Addressees of information requests are under an obligation to provide the information requested. Delays in submitting information or the submission of false information would, until the adoption of the 2019 Competition Reform Act, be sanctioned with fines of up to 50 and 75 times the lowest minimum monthly salary in Costa Rica, respectively (i.e. USD 28 000 and USD 40 000).

The law does not foresee any penalties in cases of refusals to comply with the information request, or in case the company provides incomplete information. Instead, only delays in the provision of information were punishable. However, this does not mean that the refusal to provide requested information or the provision of incomplete information has gone unpunished: COPROCOM has used its powers to sanction delays in providing information to punish both types of behaviour in the past.

Following a preliminary investigation, the TSU reports its findings to COPROCOM, which will decide by means of a reasoned decision whether to initiate a formal investigation under the ordinary administrative procedure or to dismiss the complaint. The formal investigation procedure can also be initiated without a preliminary investigation, e.g. if a complaint provides enough information.

Preliminary investigations are confidential. COPROCOM is not required to notify the possible parties about such preliminary investigation, or grant them access to the file, which is entirely confidential at this stage. When an ordinary procedure is opened, however, the parties must be notified of the investigation.

Notification to the parties once the formal investigation begins under the ordinary administrative procedure creates a number of rights for investigated parties, such as the right against self-incrimination and due process rights protected by the Constitution.⁶⁵ In the context of competition enforcement actions, these rights take a number of specific forms.

First, all evidence and documentation gathered by the competition agencies must be made available to the interested parties for review and for their defence. The minimum period that must be given to the parties to consult this evidence is ten days, even though the relevant administrative authorities may grant a longer period if appropriate.⁶⁶

All this evidence must be produced at the oral hearing that concludes the enforcement procedure. Nonetheless, access to certain contents of the file may be restricted if they consist of: (1) State secrets; (2) confidential information of other parties; or (3) in general, if such access grants a party undue privilege or an opportunity to unlawfully harm the Administration, a counterparty, or third parties involved in the procedure or otherwise.⁶⁷ Furthermore, certain documents are protected by legal privilege, particularly in the context of attorney-client privilege. Legal privilege is regulated in the Bar Association's Code of Behaviour.

There is an obligation for COPROCOM and its staff to keep and respect the confidentiality of documents and information. Failure to fulfil duties of confidentiality can lead to criminal liability.⁶⁸

Second, the parties can submit evidence during the formal investigation and at the hearing that concludes this investigation. If the parties want to submit evidence that is not in their possession, the competition authorities must obtain that evidence and examine it, when possible.

Other important rights concern the possibility of pursuing judicial appeals. One such right concerns appeals against final decisions of COPROCOM, which will be reviewed in greater detail in the section on judicial review.

Further, once the ordinary administrative procedure is initiated and the corresponding charges are formally notified, the investigated economic agent has twenty-four hours to file an ordinary administrative appeal against a number of elements contained in the statement of objections, such as the lack of competence of the competition authority or instructing body, the charges, or the evidence that makes up the file, among others.⁶⁹ The competition authority resolves such appeals within eight days.

Administrative law stipulates that an administrative body will have two months to conclude an ordinary administrative procedure. At the same time, decisions adopted beyond this two-month deadline will be valid, which means that for all practical purposes this timeline is merely indicative and does not constrain competition investigations.

In the course of the investigation, a team of three TSU officials (the procedure's executive board) are usually given responsibility for the investigation and, therefore, may order any and all evidence to be produced. The procedure's executive board is also empowered to assess the evidence and make a factual determination regarding the facts under review.

Third-parties can participate in the administrative procedures under generally applicable administrative rules as long as they can demonstrate a legitimate interest. If their request to participate in the procedure is rejected by COPROCOM, they can challenge that decision before the administrative courts.

Once the relevant information has been requested and received, the procedure's executive board is obliged to summon the parties for a private oral hearing. The competition agency must present all evidence at the oral and private hearing so that the parties may cross-examine witnesses and refute statements.⁷⁰ The competition authority will grant 15 business days for the parties to prepare this defence. This is the deadline provided for in the general administrative procedure applicable to all administrative procedures.

The private oral hearing has two purposes: (i) granting the parties involved in the investigation access to COPROCOM's docket; and (ii) allowing the parties to submit *de jure* and *de facto* pleas, as well as evidence. It should be noted that, although COPROCOM's commissioners have access to the file, they do not attend this hearing.

Upon conclusion of the hearing, and unless the procedure's executive board deems it necessary to introduce new facts or additional evidence – in which case a new hearing may be held – the board submits the case and its recommendation to the Commissioners for their review and decision. The parties are not entitled to a hearing before the Commissioners.

During the procedure, economic agents under investigation may request the overruling of: the act that initiated the investigation; an act that denies an oral hearing; or an act that deems evidence produced during the oral hearing inadmissible. The authority that issued the relevant act (i.e., the TSU or COPROCOM) is responsible for considering these requests.

The administrative procedure ends with the adoption of a final decision by COPROCOM, which may impose sanctions if a competition law infringement has been established.

COPROCOM's decisions may be appealed within three working days. Although it is possible for COPROCOM to change its decision following this appeal, COPROCOM officials acknowledge that this has seldom occurred in practice.

4.1.1. Special Telecommunications Regime

The procedure for investigating competition infringements in the telecommunications sector is similar to the one outlined above. Like COPROCOM, SUTEL can also start investigations *ex officio* or following a

complaint. Since 2014, SUTEL has conducted just one *ex officio* investigation concerning a presumed hard-core cartel in the market for paid television.

Like COPROCOM, SUTEL is obliged to address all complaints submitted by economic agents. Therefore, all cases are investigated as they are submitted. The table below contains the number of investigations that began as a result of complaints over the past five years. None of them led to a finding of infringement.

Table 8. SUTEL Competition Investigations Following a Complaint (2014-2019)

Year	Number of investigations started
2014	2
2015	6
2016	3
2017	8
2018	5

Note: These investigations include preliminary investigations.

Source: Costa Rica

In addition, SUTEL had also started three investigations from January to August 2019.

Investigations are structured as follows: SUTEL must investigate all complaints, unless they do not fulfil some formal requirements or do not refer to a competition matter. Once a complaint is deemed complete, the relevant technical staff and the Director of the Directorate-General of Markets (hereinafter referred to as DGM) send a report to the SUTEL Council, which may order a preliminary investigation or, if applicable, consult with COPROCOM about the need to open a procedure.

In the event the Council orders a preliminary investigation, the DGM Director will submit a report to the SUTEL Council once this is finalised. The Council will then decide whether to open an ordinary administrative procedure or to dismiss the complaint.

Since SUTEL does not have the power to conduct dawn raids, its investigations rely on information collected in other ways. SUTEL has general powers to request information from investigated parties, third parties and public authorities. However, only telecom operators are under a duty to provide information subject to an information request.

The refusal by telecommunication operators to provide information requested by SUTEL, or the concealment or misrepresentation of such information, is a serious offence subject to a fine ranging between 0.5% and 1% of the gross income of the operator during the previous tax year. SUTEL can also impose fines in the same range for “*failure to comply with the instructions adopted by SUTEL in the exercise of its powers*”.

4.2. Dawn Raids

As already noted above, the 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)] recommends, among other things, that adherents should empower competition authorities to conduct unannounced inspections (“dawn raids”) at business and private premises. For this purpose, competition authorities should have trained specialised staff and adequate hardware and software equipment. The goal of such powers is to allow the agency to access and obtain all documents and information necessary to prove cartel conduct, and to access electronic information that could help establish a cartel violation including electronic material that is stored remotely.

Since 2012, COPROCOM can authorise the TSU, with prior judicial authorisation, to conduct unannounced inspections of industrial and commercial establishments where this is essential to collect or prevent the

loss of evidence related to absolute or relative monopolistic practices. For the purposes of these inspections, the Commission may ask for the support of the police.

In theory, COPROCOM's personnel may review and copy all accounting books, agreements, mails, emails and any other document and electronic data related to the manufacturing, promotion, marketing, and sale strategies of the inspected economic agents. The officials in charge of an inspection are authorised to interview and request information, on the spot, from any employee, representative, director or shareholder during the visit. These individuals are required to provide any useful information related to the existence and location of data and documents that are relevant to the investigation

However, there are significant obstacles to pursuing dawn raids in practice. First, while a new TSU unit specialised on inspections and dawn raids was created in 2017, and three additional positions were approved to this end, the necessary investments to ensure that this unit could operate – such as the acquisition of laboratory equipped with the hardware and software required to fulfil this new unit's function and to ensure the security and confidentiality of the information obtained – were not made.

Second, Costa Rica's competition law until recently did not provide for penalties of any kind to economic agents who hinder, destroy or disrupt relevant information with the purpose of hindering or preventing a dawn raid.

The outcome of this is that, to this day, COPROCOM has never pursued a dawn raid.

4.2.1. Special Telecommunications Regime

SUTEL is not empowered by law to conduct unannounced inspections or obtain information through dawn raids.

4.3. Leniency

The 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)] recommends that competition authorities should introduce effective leniency programmes which: (1) set incentives for self-reporting by providing total immunity to the first applicant that reports its cartel conduct and fully co-operates with the competition authority and sanction reductions for subsequent applicants; (2) provide clarity on the rules and procedures governing leniency programmes and the related benefits; (3) facilitate reporting by using a marker system to encourage early reporting and provide certainty to applicants; (4) establish clear standards for the type and quality of information that qualifies for leniency; (5) ensure continued co-operation between the leniency applicant and the competition authority throughout the investigation by taking into account factors such as the value of information submitted and the timing of the submission in determining the level of sanction reductions; (6) provide protection or reduction from sanctions for qualifying officers and employees of corporate leniency applicants; (7) exclude the availability of immunity for cartel coercers; (8) provide appropriate confidentiality protection to leniency applicants; and (9) seek to reduce unnecessary burdens for parties seeking leniency.

In the 2016 accession review it was noted that the absence of a leniency program was an example of COPROCOM lacking the necessary means to effectively fight cartels. No developments occurred in this respect until the adoption of the 2019 Competition Reform Act, as discussed below.

4.4. Commitments and Settlements

Under the general competition law regime, investigated parties can offer commitments to terminate an investigation. These commitments must be aimed at eliminating or avoiding the effects attributable to the

anticompetitive conduct under investigation. Commitments do not require that the parties accept liability or guilt, even in the case of hard core cartels.

There are a number examples of COPROCOM adopting commitment orders as regards hard core cartels without imposing a financial penalty. In 2008, faced with price fixing practices by customs agents through their professional association, COPROCOM did not impose a pecuniary penalty. Instead, it merely required: (a) the Association to stop publishing and distributing documents containing service fees within one month; (b) the Association to notify COPROCOM and all customs agents of the decision to stop such distribution and publishing and use such numbers to set customs' tariff rates.

In 2015, three investigations into absolute monopolistic practices ended with the adoption of commitments proposed the investigated parties. Commitments were accepted, without COPROCOM imposing a financial sanction, in the context of investigations into alleged price fixing agreement between hotels in the Tortuguero area,⁷¹ into alleged bid rigging agreement between printing companies,⁷² and into alleged price fixing agreement between various pork meat producers.⁷³ In addition, commitments were also accepted as regards a relative monopolistic practice concerning the alleged imposition of conditions to avoid intra-brand competition on insurance agents of State insurer.

Commitments can be enforced if they are breached by the relevant party.⁷⁴ As noted elsewhere, failure to comply with commitments accepted by the parties can give rise not only to the imposition of fines of up to 680 times the lowest minimum monthly salary in Costa Rica (approximately USD 360 000), but also to criminal liability for the crime of disobedience.

4.4.1. Special Telecommunications Regime

SUTEL may order the suspension, correction or elimination of the unlawful conduct. However, undertakings in the telecommunications sector may not settle or offer commitments in competition investigations.

4.5. Judicial Review

Only judicial courts may overrule decisions adopted by the competition authorities, including as regards merger control.⁷⁵ There are two levels of appeal. On first instance, the appeal can be of revocation - against final infringement and merger control decisions – and appeal – against decisions related to matters such as interim injunctions, dismissing a claim or integrating all respondents that should be part of a procedure (*litis consorcio necesario*). There are no appeals against matters of mere procedure.

On second instance, an extraordinary recourse of cassation – before the Supreme Court, against sentences or resolutions that have the force of *res judicata* and violate procedural and substantive rules of the legal system – and review may arise.

In addition, if parties to a proceeding before the COPROCOM consider their constitutional rights to have been infringed, they can appeal to the Constitutional Chamber of the Supreme Court of Justice. Parties can file constitutional “Amparo” petitions at any stage of the administrative procedure, if they consider any principle of due process to have been infringed by the authority. The Constitutional Court may order the competition authorities to suspend the administrative procedure until the Court reaches a final decision.

Appeals may be filed, broadly speaking, by anyone who has suffered harm to their legitimate interests or subjective rights – or, in certain circumstances, by their representatives and proxies identified in law.⁷⁶

Unlike other regulators, COPROCOM does not have legal personality. Consequently, Costa Rica's Attorney General's Office represents COPROCOM in court. The Attorney General's staff will approach the matter independently from COPROCOM, even if they may coordinate any necessary assistance with COPROCOM. The Attorney General's Office, therefore, has the power to settle, or decide not to uphold, a

COPROCOM decision in court. This is not the case with SUTEL, which Legal Unit is in charge of responding to appeals and to represent SUTEL before the courts.

A significant number of administrative acts can be subject to judicial review, including acts marking the end of the administrative procedure (final administrative acts), the outcome of administrative appeals (definitive administrative act), and acts suspending, interrupting or terminating a procedure (interim administrative act).⁷⁷

Judicial review will consider both procedural issues and the merits of the decisions taken by the competition authorities.

On procedural matters, the focus is to ensure that due process and rights of defence have been respected.⁷⁸ Due process includes not only respect for the legally-set procedure, but also for specific elements, such as the notification of the interested party on the nature or purpose of the proceeding; the right to be heard and the provision of an opportunity to present arguments, evidence and allegations; the right to be represented and counselled by lawyers; access to information; appropriate notification of an administrative decision and its reasons; and the right of appeal to the courts.

Regarding the review of the merit of competition authorities' decisions, courts will review whether the authority applied the law correctly.

At the time of the 2016 accession review, only one COPROCOM decision had been annulled by the courts. Since then, an additional six COPROCOM decisions that have been annulled on both procedural or substantive grounds.

Most annulments have been a consequence of procedural impropriety. This has included incompetence on the grounds that the newly constituted telecommunications sectoral regulator was the competent entity.⁷⁹ However, the main reason for annulment seems to be infringements of rights of defence. A prominent example of this is the absence of criteria for setting fines;⁸⁰ but some decisions have been annulled for failures to outline the market conditions which underpinned findings of infringement of competition law, or properly to attribute the infringing conduct.⁸¹

On substantive grounds, the courts have identified elements that must be assessed when evaluating anti-competitive practices. These requirements can arise in the context of assessing the effects of a prohibited merger or when defining a market, in which case all elements identified in the law should be taken into account regardless of how extensive the competition authority's analysis was.⁸² The courts have also assessed whether certain corporate behaviour amounts to an unlawful agreement or concerted practice,⁸³ and whether the implementation of an agreement is a requisite element of a competition infringement.⁸⁴

The average duration of judicial review cases on competition matters from 1995 to 2018 was 5 years and 2 months. Out of six decisions adopted by competition authorities since 2014, only four have been subject to appeal. Of these, two appeals are still pending, while one infringement decision has been upheld and another one has been annulled.⁸⁵

Table 9. Judicial Review of Antitrust Decisions adopted since 2014

Competition Infringement Decision	Decision Date	Date of appeal	First Instance Judgment	Second Instance Judgment	Outcome	Duration (months)
Decision 8-2014	20/5/2014	14/4/2016	Pending	Pending	Pending	Pending
Decision 9-2015	10/3/2015	30/9/2015	Pending	Pending	Pending	Pending
RCS-88-2015 (SUTEL)	22/5/2015	11/9/2015	10/11/2017	6/2/2019	Annulled	40.1
RCS-149-2015	19/8/2015	9/9/2015	1/4/2016	N.A.	Upheld	6.6
Decision 40-2016	10/8/2016	N.A.	N.A.	N.A.	N.A.	N.A.
Decision 28-2014	12/8/2014	N.A.	N.A.	N.A.	N.A.	N.A.

Source: Costa Rica

There is, under Costa Rican administrative law, an exception to the exclusive competence of judicial courts to review competition authorities' decisions. Law 6227 General Law of Public Administration allows the annulment by the head of the Administration organs in cases where there is an evident nullity, with the prior favourable opinion of the Attorney-General's Office.

Based on this provision, in 2015 the Minister of Economy revoked a sanctioning decision in the Credomatic case, where COPROCOM had imposed its highest ever fine for infringement of competition law. However, the Attorney General held that several elements of this decision clearly undermined the legality of COPROCOM's decision. These included: (1) severe due process violations, such as refusing to take into account evidence submitted by Credomatic; (2) imposing sanctions and fines in flagrant violation of the statute of limitations (4 years); and (3) failures to properly motivate and reason the decision. In line with this opinion, the Minister of Economy revoked COPROCOM's decision.

The 2016 accession review noted that this case changed local perceptions on the merits of the Attorney General's role in defending COPROCOM's decisions. Concerns raised then included lack of legal certainty regarding when the Attorney General could deem a decision by COPROCOM to be absolutely, clearly and evidently null and void, and, therefore, about when MEIC could overrule COPROCOM's decisions.⁸⁶ Many also expressed fears that the Attorney General, with the aim of maintaining a high success rate in judicial appeals, might decide not to defend a technical decision by COPROCOM because its prospects of success were low. The Attorney General could also theoretically settle a case without considering COPROCOM's technical assessment and concerns.

In this regard, the Competition Committee recommended that Costa Rica:

- Ensure that enforcement decisions adopted by the competition agency cannot be overturned by the executive branch, but only by the courts.

4.6. Developments since the 2016 accession review

The Competition Reform Act adopted in August 2019 adopts a number of provisions to address a number of deficiencies in the way competition enforcement powers are pursued in Costa Rica, and to implement the OECD's recommendations on the matter.

4.6.1. Special Competition Procedure

Arguably, the most significant innovation introduced by the new legal regime is the creation of a special competition procedure designed with the specific purpose of responding to the complexities of competition matters to be applied by both competition authorities.

The special procedure identifies three independent stages for any competition investigation. The investigation stage of the new procedure will allow competition authorities to collect all those elements necessary to prepare an accurate and detailed statement of objections, which in turn will allow the parties to know with precision what are infringing behaviours are imputed to them. The instruction stage (pre-trial) provides parties under investigation the possibility to present their defence in writing within 60 business days. The final resolution stage will take place before the Board, which is not only the decision-making body but also comprises people other than those involved and responsible for the investigation and instruction (pre-trial) stages.

To ensure transparency, legal certainty, due process and rights of defence, the new procedure clearly identifies which officials can participate in each stage of the procedure, and outlines and divides functions among the officials who participate in each stage. Due process is particularly reinforced by the decision-making body comprising people other than those responsible for investigating and instructing the procedure.

Furthermore, the 2019 Competition Reform Act sets out timeframes for each stage of the procedure, in order to ensure the right of defence of the investigated parties and allow for thorough analysis in complex cases. For example, the introduction of an instruction stage granting parties 60 business days to prepare a written defence and the provision for a preparatory hearing regarding the admissibility of evidence introduced by the parties further reinforce the parties' right of defence.

Article 44 of the 2019 Competition Reform Law outlines all elements that must be included in statements of objection. This seeks to ensure not only that the imputations made by the competition authority are duly motivated, but also contain all the essential elements to enable the parties to exercise their right of defence.

4.6.2. Leniency

The new law introduces a leniency programme, which will allow competition authorities to improve the detection of horizontal agreements. Under this programme, a first leniency applicant will benefit from full immunity, while the second, third, and fourth applicants may benefit from fine reductions.⁸⁷ Furthermore, penalties for individuals that cooperate with the competition authorities during the investigation of cases may be waived or reduced.

With the objective of protecting leniency applicants, the law also sets out that, while not exempt from being liable for competition damages in follow-on claims, the first leniency applicant will only face civil liability subsidiarily to the other offenders.

4.6.3. Commitments and Settlements

In addition to the already existing possibility of adopting commitments, the new law introduces new mechanisms for the early termination of an investigation. This includes the adoption of settlements – i.e. parties that are being investigated for a hard-core collusive practice may benefit from a fine reduction by acknowledging liability or guilt. This reform also prevents cartellists from entering into commitments without being sanctioned,⁸⁸ unlike what has been practice up to this point.

The settlement regime will have to be implemented by secondary regulation. There are still no details available about how this policy will be implemented – including on how settlements will affect the ultimate fine amount.

4.6.4. Judicial Review

As regards judicial review, the new law now sets forth that the decisions of the competition authorities can only be annulled by judicial courts. This means that it is no longer possible for the Minister of Economy to annul COPROCOM's decisions, even if the Attorney General issues an opinion that a COPROCOM decision is an evident nullity.

While the first draft bill of the adopted law provided for the creation of a specialised court in the field of competition law, this was removed during the approval process, with the result that judicial review of competition decisions will still be pursued by the general administrative courts.

5. **Enforcement Practice**

The 2016 accession review found that, despite its limited resources, COPROCOM had repeatedly proved its willingness to enforce competition law. Until then, COPROCOM had ruled against cartels and unilateral conducts, and issued numerous opinions that advocate changes to regulations that might result in anticompetitive effects.

As explained above, the resourcing of COPROCOM and the applicable legal and procedural framework has not changed significantly since then. Unfortunately, there has been little competition enforcement since then.

The reasons to explain this absence of enforcement were the subject of widespread agreement by the observers interviewed in Costa Rica during the OECD fact-finding mission. Three reasons were repeatedly invoked to explain this state of affairs: the continued lack of resources of COPROCOM; a substantial increase in merger control activity, which siphoned off resources from antitrust investigations; and the burden of supporting efforts to reform Costa Rica's competition law and comply with the other OECD recommendations made in the context of the 2016 accession review. To these, one can no doubt add the expenditure of resources in investigating every complaint received by the competition authorities.

As we have seen above, enforcement practice is likely to change significantly over the next few years as a result of the reform to Costa Rica's competition regime introduced by the 2019 Competition Reform Act.

5.1. Absolute Monopolistic Practices

As already noted above, the 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [\[OECD/LEGAL/0452\]](#) recommends that adherents make hard core cartels illegal regardless of the existence of proof of actual adverse effects on markets, and design their anti-cartel laws, policies and enforcement practices with a view to ensuring that they halt and deter hard core cartels and provide effective compensation for cartel victims, in accordance with their legal frameworks, institutional set up and procedural safeguards.

An area of particular concern for the OECD Competition Recommendations is bid rigging. The 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [\[OECD/LEGAL/0452\]](#) recommends, among other things, that competition agencies use pro-active cartel detection tools such as analysis of public procurement data, to trigger and support cartel investigations.

In addition, the Recommendation of the Council on Fighting Bid Rigging in Public Procurement [C(2012)115/CORR1] sets out the necessary requirements for effectively fighting bid rigging in public procurement. It recommends that Adherents: (i) assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders, so that public procurement tenders at all levels of government are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money; (ii) ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion; (iii) encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement; and (iv) develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

Since its inception, COPROCOM has sanctioned 17 cartels. It was remarked in the 2016 assessment that, at the time, COPROCOM's had sanctioned 26 absolute monopolistic practices. The majority of investigations kicked-off as a result of complaints or COPROCOM becoming aware of business conduct through national press publications. Although all punished conducts were hard-core cartel cases, only one was considered "particularly severe" by COPROCOM.

Table 10. Absolute Monopolistic Practices Sanctioned by COPROCOM

Final decision's date of issue	File Number	Sanctioned Agents	Type of Conduct	Total amount of fines imposed**
1995	08-95	5 ice producers	Price fixing	¢201 750 (c. USD 1 200)
1999	15-98	11 members of the National Bean Chamber	Price Fixing	¢35 582 820 (c. USD 130 000)
1999	11-99	23 radio announcers	Price fixing	¢167 580 (c. USD 610)
2000	34-99	11 container carriers	Price fixing	¢44 261 280 (c. USD 147 000)
2000	36-99	3 tanneries*	Price fixing	¢14 917 332 (c. USD 50 000)
2001	31-99	5 members of the National Rice Chamber*	Output restriction	¢30 280 820 (c. USD 94 000)
2002	28-00	28 real estate brokers	Price fixing	¢4 251 110 (c. USD 13 000)
2002	IO-06-01	22 pork breeders*	Price fixing	¢32 632 793 (c. USD 94 000)
2002	IO-03-01	2 palm processors*	Price fixing and output restriction	¢114 349 125 (c. USD 332 000)
2008	IO-11-04	5 members of the National Horticulturist Corporation's Board	Price fixing	¢82 003 (c. USD 164)
2008	IO-04-05	64 custom agents	Price fixing	No fines
2009	IO-16-04	7 pension funds	Price fixing	¢2 475 392 315 (c. USD 4 381 000)
2009	D-05-06	5 public parking operators	Price fixing	¢15 894 873 (c. USD 28 000)
2012	D-06-08	4 telecom hardware producers*	Bid rigging	¢515 000 000 (c. USD 1 020 000)
2014	D-22-10	5 toilet paper producers	Bid rigging	¢153 758 987 (c. USD 310 600)
2015	IO-30-12	4 bull ring administration companies*	Bid rigging	¢237 246 495 (c. USD 446 000)

Note: * Cases where individuals were also sanctioned. / ** Exchange rates calculated at the rate for January of the year in which COPROCOM issued the final ruling of the case was used.

Source: 2016 Accession Report of Costa Rica

No cartel has been sanctioned since the 2016 accession review. This has a number of explanations. In the overwhelming majority of cases, COPROCOM did not find sufficient indications of wrongdoing to justify opening formal procedure. Furthermore, three formal investigations were terminated by commitments by the investigated parties.⁸⁹

Prior to 2008, investigations involving collusive practices that concluded with the imposition of a fine lasted less than two years. Between 2008 and 2016, the length of investigations increased significantly. As the 2016 assessment noted, the two investigations that have led to a sanction since 2012 took 30 and 44 months respectively.

5.1.1. Bid Rigging

While there has been limited enforcement activity against bid rigging in recent years, significant efforts have been made by the competition agencies together with state agencies to ensure that government procurement promotes competition and reduces the possibility of collusive tendering.

In 2017, COPROCOM published a guide on "Administrative Procurement and Competition", which provides directions for the design, development and implementation of procurement procedures to avoid unjustified restrictions on competition, and guidance for preventing or avoiding collusive actions by bidders.

This guide is available in COPROCOM's website⁹⁰ and used as support training material. It was updated in 2018.

This guidance instrument incorporates insights from investigations carried out by COPROCOM, and addresses issues such as how to deal with offers made by related companies, unjustified requirements requested by the Administration, consortium offers when companies can compete individually, framework agreements for purchases, and infringements of competition neutrality.

In addition, and as described in greater detail in the section on advocacy below, COPROCOM has provided extensive training to local authorities, as well as the most important public institutions in charge of purchasing goods and services.

5.1.2. Special Telecommunications Regime

The 2014 Peer Review of Costa Rica found that SUTEL's enforcement record in competition matters during its first years of existence was modest. At the time, this could be explained by the absence of competition in telecommunication markets, which were in the process of being liberalised and were extensively regulated. Despite increased market liberalisation, the 2016 assessment found that only one absolute monopolistic practice had been investigated by SUTEL in its history, in an investigation that began in 2013 and which had not led to a finding of infringement.

Almost three years later, SUTEL has not yet sanctioned any economic agents for engaging in absolute monopolistic practices. It has initiated two additional investigations into alleged absolute monopolistic practices – one in 2016 and another one in 2018 –, but in each case it concluded that there were no sufficient indications of wrongdoing.⁹¹

5.2. Relative Monopolistic Practices

As noted above in Section 2.3.2, while theoretically all agreements that do not amount to hard core cartels are categorised as relative monopolistic practices, in practice the application of competition law is restricted to instances where one of the parties has substantial market power in the relevant market. There is no record of investigations into horizontal practices other than those amounting to hard-core cartels, i.e. absolute monopolistic practices.

Since it started to operate, COPROCOM has sanctioned four anticompetitive vertical arrangements.

Table 11. Vertical Arrangements sanctioned by COPROCOM

Year	Sanctioned Economic Agents	Type of Conduct	Penalty (Colones)	Penalty (USD)
1995	Bticino de Costa Rica	Vertical price restrictions	3 128 241	17 388.5
2004	Embotelladora Panamco Tica, S.A.	Vertical price restrictions	34 028 360	77 592.88
2007	Abonos Agro S.A.	Tied sales	63 980.090	123 676.04
2013	Credomatic de Costa Rica, S.A.	Exclusivity agreement	12 036 368.377	23 809 404.7

Source: Costa Rica

COPROCOM has conducted 13 preliminary investigations into potentially anticompetitive vertical arrangements since 2015 – a number of them started *ex officio* by COPROCOM –, particularly regarding exclusive arrangements⁹² and resale price maintenance⁹³. However, all these procedures have all been archived for lack of evidence to support initiating an administrative procedure.

It is solely as regards unilateral practices by firms with market power that sanctions have been imposed by COPROCOM since the 2016 accession review. In 2018, COPROCOM sanctioned four economic agents (belonging to the same economic group) active in the pharmaceutical market. They were found to have imposed artificial barriers to prevent other drugstores from entering the market through exclusivity contracts that limited competition and raised prices for consumers.

As is apparent from the table below, this was the sole sanction imposed by COPROCOM as regards unilateral practices – or, as made clear elsewhere in this report, as regards any antitrust infringement – since the 2016 accession review. Furthermore, since the investigation originally began in 2012, this process refers to practices that took place – and were originally investigated – well before the last accession review.

Table 12. Unilateral Conduct sanctioned by COPROCOM

Year	Sanctioned Economic Agents	Type of Conduct	Penalty (Colones)	Penalty (USD)
1999	Cámara Nacional de Farmacias (CANAFAR)	Exclusionary boycott	178 560	124 795
2001	10 members of the Cámara Nacional de Arróz	Exclusionary boycott	92 035 140	280 389.7
2005	Corporación de Supermercados Unidos S.A.	Discrimination in purchasing conditions and exclusionary boycott	205 911 840	431 373.5
2008	Coopealfaro Ruíz R.L.	Refusal to deal	21 320 910	40 205.37
2009	Coopelesca R.L.	Refusal to deal	63 980 090	110 642.4
2011	Empresa de Servicios Públicos de Heredia	Refusal to deal	90 341 642	110 766.1
2013	22 car and auto parts dealers	Exclusionary boycott	515 658 295	1 020 035
2014	Instituto Nacional de Seguros (INS)	Monopolization	94 034 192	172 637.9
2018	CEFA Central Farmacéutica S.A. and other three economic agents from the same group	Deliberate acts to exclude competitors.	11 890 947 100	20 752 089

Source: Costa Rica

A number of preliminary investigations have been initiated by COPROCOM into various types of unilateral conduct – such as discriminatory practices⁹⁴, predatory pricing⁹⁵, refusal to deal,⁹⁶ – but no evidence has been found to support the opening of an administrative procedure. A single formal procedure has been opened since 2016, regarding practices such as exclusivity, discrimination and refusal to sell, among others, in the sugar market. It is currently under investigation.⁹⁷

As with absolute monopolistic practices, during the first years of COPROCOM's existence investigations involving relative monopolistic practices that concluded with the imposition of a fine lasted significantly less than those concluded more recently. Without considering the CREDOMATIC case, which investigation was open for ten years, the average time required by COPROCOM to issue a resolution involving relative monopolistic practices between 2011 and 2015 years was 43 months.

As we saw above, since then a single case has led to the adoption of an infringement decision. It took six years to be decided – from 2012 to 2018.

5.2.1. Special Telecommunications Regime

In applying virtually identical provisions, SUTEL has achieved similar results as COPROCOM in enforcing its sectoral competition regime.

As regards vertical arrangements, and like COPROCOM, SUTEL started a number of preliminary investigations since 2015 into potentially anticompetitive vertical arrangements – one in 2015, six in 2017 and three in 2018.

These investigations were mainly into exclusive arrangements between condominium managers and telecommunication operators. However, all these investigations were archived for lack of evidence.⁹⁸ At the same time, in most of these cases the investigation led condominium managers to grant access to more than one telecommunication operators, since the preliminary investigation clarified that the applicable contractual framework did not, in effect, compel the condominium managers to have exclusive arrangements with a single operator.

The same scenario can be observed as regards unilateral practices. Since 2015, a number of preliminary investigations have been pursued into unilateral practices – four in 2015, two in 2016, two in 2017 and two in 2018. The investigated practices included discrimination⁹⁹, predatory pricing¹⁰⁰, refusal to deal¹⁰¹ and margin squeeze¹⁰². However, they have all have been archived, and SUTEL has imposed a single fine regarding an abuse of dominant position conduct – a decision which was quashed on appeal.¹⁰³

5.3. Merger Control

The Recommendation of the Council on Merger Review [[OECD/LEGAL/0333](#)] provides guidance about multiple aspects of merger control, including effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers.

The Recommendation is to the effect that merger control regimes should: (i) allow competition agencies to obtain sufficient information to assess the competitive effects of a merger; (ii) avoid imposing unnecessary costs and burdens on merging parties and third parties without limiting the effectiveness of the review process; and (iii) ensure that merger review is conducted, and decisions made, within a reasonable and determinable time frame.

Merger control was introduced in Costa Rica in 2012. According to the regime adopted then, any transaction involving two or more previously independent economic agents, and involving a change in the control of at least one of them, would have to be notified if: (i) the total value of the productive assets of all the undertakings involved in the transaction, including their headquarters, exceeds 30 000 minimum monthly wages (approximately USD 15 907 891.60); or (ii) the total revenues generated by all economic agents involved within the national territory exceed 30 000 minimum monthly wages (approximately USD 15 907 891.60). However, only mergers with a local nexus (i.e. when at least two of the parties of the transaction have ordinary operations with incidence in Costa Rica) must be notified.¹⁰⁴

A merger notification did not have suspensory effect on the implementation of the transaction. This was so much so that mergers could be notified either before they took place or within five business days of closing, and they could be implemented while being reviewed by COPROCOM.

Mergers would not be cleared when they had the object or effect of: (a) acquiring or increasing substantial market power, thus leading to a limitation or elimination of competition; (b) facilitating tacit or explicit coordination among competitors or producing adverse results for consumers; or (c) lessening, harming or impeding competition or free market participation with respect to equal, similar or substantially related goods or services.

Failure to comply with the obligation of notify a transaction was punishable with fines of up to 410 times the minimum monthly wage (approximately USD 217 407.85). In addition, the Commission could impose measures to eliminate or offset any anticompetitive effect of the merger.

As we saw above, merger control is the area of substantive competition law that has gone through the largest change in the reform to Costa Rica's competition law adopted by means of the 2019 Competition Reform Act. This new law introduces an *ex ante* notification system with suspensory effects. It also adopts new merger control thresholds to allow a more efficient use of the authority resources and to avoid the

review of transactions without a relevant nexus to the Costa Rican markets. Further, it adopts a new standard of review in line with international practices – substantial impediment to competition – which requires the authority to analyse the effects of the transaction and not only the structure of the market in which the operation takes place.

5.3.1. Merger Control Procedure

The Recommendation of the Council on Merger Review [[OECD/LEGAL/0333](#)] also contains a number of procedural suggestions, such as: (a) that the rules, policies, practices, and procedures involved in the merger review process are transparent and publicly available; (b) procedural fairness for merging parties; (c) the opportunity to consult with competition authorities at key stages of the investigation; (d) opportunities for third parties with a legitimate interest to express their views; (e) equal treatment for foreign firms, and; (f) protection of business secrets and other confidential information.

As the law is expected to have entered into force only on the second half of November, the analysis conducted below reflects the previous status quo, whilst also setting out the reforms resulting from the new law.

In Costa Rica, all parties involved in a notifiable transaction had the obligation to notify the transaction to COPROCOM either prior to, or five days after the transaction is closed or it starts to take effect, whichever happens first.

A notification had to include a detailed description of the transaction, including its economic justification; the identification of all companies involved in the transaction, including their corporate structure with reference to operations in Costa Rica and audited accounts; a detailed description of goods and services offered by the merging entities in Costa Rica; descriptions of the relevant market, including market substitutes and competitors; a description of distribution channels; estimated market shares; a description of barriers to entry; an analysis of the potential pro-competitive and anti-competitive effects of the transaction; if applicable, proposed means to countervail the anti-competitive effects of the transaction; and any other relevant information.

Once the transaction was notified, the Commission had 10 calendar days to determine whether the information provided was incomplete, and to request additional information. This was the only occasion for COPROCOM to request additional information. The parties would be granted a maximum period of ten calendar days for presenting this information. If the requested information was still incomplete, COPROCOM would then grant an additional and final three day period for the parties to perfect their merger notification, after which COPROCOM would reject the notification.

Within three days of a merger notification, the applicant was required to publish a brief description of the merger in a newspaper, including a list of the parties involved, and send a copy of this to COPROCOM. Third parties would then have ten days to file information and evidence before the agency. The Commission could also request information from third parties at any time during the procedure, which must respond within five working days.

Once the parties submitted all required information, COPROCOM had 30 calendar days to issue its decision. During the review period, COPROCOM's Technical Support Unit could ask for meetings with the parties in order to discuss the information provided to the agency. In such cases, a record of the meeting had to be kept and signed by all participants.

Once this period expired without a decision, the concentration was deemed to have been authorised without any condition. However, COPROCOM could, in cases of special complexity, extend this period once for up to 60 additional calendar days by means of reasoned decision. This was a discretionary decision adopted on a case-by-case basis.

During this period, COPROCOM would have to determine whether the transaction has the object or effect of: (1) acquiring or increasing substantial market power, thus leading to a limitation or elimination of competition; (2) facilitating tacit or explicit co-ordination among competitors or producing adverse results for consumers; or (3) decreasing, harming or obstructing competition or free competition of equal, similar or substantially related goods or services.

In its assessment, COPROCOM followed a set of Merger Control Guidelines first issued in 2014. This document, while not formally binding, guided COPROCOM's approach to matters such as the concept of transaction; economic control; types of mergers (horizontal, vertical and conglomerate); market definition; market power; determination of market shares and levels of concentration; analysis of horizontal, vertical and conglomerate mergers; buying power; barriers to entry and expansion; efficiency gains; failing firms; ancillary restrictions; and remedies.

A number of transactions were presumed not to be anticompetitive, subject to proof to the contrary. Mergers presumed not to pose competition issues included: (1) mergers where there is no horizontal or vertical overlap between the parties; (2) mergers where, despite the existence of limited overlaps, the impact on competition is limited;¹⁰⁵ (3) mergers where an economic agent acquires exclusive control over an undertaking over which it already had joint control; (4) when the merged entity's activities in Costa Rica are non-existent or marginal.¹⁰⁶ However, this presumption would not apply if the current market share of the parties is reasonably likely to increase, when there were indications of co-ordination among competitors, or when COPROCOM determined that the presumption should not apply.

A merger could also be approved, despite its anticompetitive effects: (1) if efficiencies were directly generated by the merger, not achievable by less restrictive means, verifiable and sufficient to counterbalance the potential anticompetitive effect of the merger; (2) the merger was necessary to avoid the exit from the market of the productive assets of one of the economic agents involved in the merger; or (3) the anticompetitive effects could be offset by remedies.

COPROCOM could impose the following remedies to address a merger's anticompetitive effects:

1. The assignment, transfer, licensing or sale of one or more of the assets, rights, shares, distribution systems or services of a merging party to a third party;
2. Limiting or restricting the provision or selling of specific services or goods, or limiting the geographic area in which these can be provided or the type of customers to which they can be offered;
3. The obligation to supply specific products or provide specific services under non-discriminatory terms and conditions to certain customers;
4. The introduction, elimination or modification of clauses included in the agreements with its customers or suppliers; and
5. Any other structural or behavioural remedy necessary for preventing, reducing or offsetting the merger's anti-competitive effects.

Conditions and remedies could last a maximum term of ten years, which could be extended for five additional years if there were still anticompetitive effects. The conditions imposed by the Commission had to be sufficient to address the specific effects of the merger, and not aim to improve existing market conditions.

If remedies were required and the applicants proposed them in their initial filing, COPROCOM could accept them, or inform the applicants that the foreseeable negative effects of the merger could not be offset by them.

However, parties may also – if COPROCOM so allows – propose a remedy after a decision has been taken. As a result, once the merger review was concluded, the Commission could adopt one of four steps: (1) to authorise the merger without conditions; (2) to authorise the merger subject to conditions; (3) to prohibit the merger; (4) to inform to allow the parties to propose remedies that address the merger's

anticompetitive effect. In this latter instance, the parties would then have ten further days to propose new remedies. After this period, the Commission could either: (1) authorise the merger subject to the conditions submitted by the parties; (2) authorise the merger subject to conditions other than those submitted by the parties; or (3) prohibit the transaction.

If the Commission approved the transaction subject to conditions other than those submitted by the parties, the merging parties would have three business days to state whether they agree with them or not. If the parties did not say anything in this period, this was taken to mean that they reject the conditions. Rejections of the conditions would lead to the transaction being prohibited. On the other hand, acceptance of the conditions would lead to the merger being approved subject to them.

Once a merger was approved, COPROCOM could not review it again unless approval has been granted on the basis of false information, or the parties had failed to comply with the conditions or remedies imposed by the Commission.

Special Telecommunications Regime

The merger control procedure followed by SUTEL as regards mergers in the telecommunications sector was broadly similar to that applicable to SUTEL. Nonetheless, there were a number of differences.

First, instead of being able to extend its 30 days review period by 60 days in exceptionally complex cases, SUTEL could only extend the deadline a single time up to 15 additional business days.

Importantly, with a view to ensure coherence in the application of competition law in Costa Rica, when dealing with mergers SUTEL had to request COPROCOM's non-binding technical opinion before taking a final decision, which had to be issued within 15 days.¹⁰⁷ In practice, in merger cases SUTEL sent to COPROCOM the complete file and a preliminary report of the merger, including the description of the transaction, the definition of the relevant markets affected by the merger, the effects of merger in the market and the efficiencies of the merger. With this information, COPROCOM analysed the merger and provided SUTEL with its technical opinion of the merger. COPROCOM's non-binding opinion had to include a recommendation on whether the merger should be cleared, cleared with remedies, or blocked. If SUTEL deviated from COPROCOM's opinion, SUTEL had to duly motivate its decision and approve it by a qualified majority.

Secondly, instead of penalties for failure to notify or to comply with conditions being set by reference to minimum national salaries, SUTEL could impose fines between 0,5% and 1% of the annual gross income of the offender, as well as partial or total divestiture of the merged companies. SUTEL could also impose fines in these amounts for refusal to provide information requested, and when information was concealed or misrepresented.

Thirdly, the presumption that mergers are not anticompetitive applied to situations: (1) when an acquirer is entering the market for the first time, and is not an actual or potential competitor in the relevant or related markets; (2) when shareholders that already control a company increase their participation in that company.

5.3.2. Merger Control in Practice

There were 166 mergers notified to COPROCOM between 2004 and 2019. An outline of mergers notified from 2014 until July 2019 can be found in the table below.

Table 13. Notified Mergers (2014-2019)

Outcome	2014	2015	2016	2017	2018
Cleared	24	22	37	31	29
Cleared with remedies	1	1	0	2	2
Blocked	0	0	0	0	1
Withdrawn by parties	1	1	0	0	0
No notification required	0	0	0	4	0
Total per year	26	24	37	37	32

Note: The withdrawn notifications were international transactions that had to be resubmitted as a result of remedies imposed by other competition authorities.

Source: Costa Rica.

In addition, nine notifications were cleared, and another was notified but then withdrawn by the parties, between January and July 2019.

As is apparent from this, only seven out of 159 mergers were subject to commitments or blocked. This amounts to 4.4% of all mergers, meaning that over 95% were cleared without conditions.

The remedies imposed in these mergers, and the reasons for imposing them, are outlined in the table below. Short descriptions of these mergers are provided further below.

Table 14. Commitments Imposed by COPROCOM in Merger Control

YEAR	Companies	Competition Concerns	REMEDIES
2014	Yara International / ASA / OFD Holding Inc. Decision number 35-2014.	The transaction would lead to the acquisition or increase of substantial market power in fertiliser markets. In addition, there was a high probability of increased collusion in the Costa Rican and regional market because of stable markets and relatively homogeneous products, with a high degree of concentration and low demand elasticity.	Divestment of assets. Obligation to supply small producers for five years at no profit. Creating a firewall between teams within different companies within merger entity. Limits to extending scope of existing distribution agreement between entities of the merger entity. Duty to avoid any vertical and horizontal restrictions to competition Obligation to regularly report market information for the affected markets
2015	Essilor Internacional and Grupo Visión. Decision number 14-2015 and 21-2015.	Transaction could lead to market foreclosure as a result of Essilor stopping to supply current or potential customers.	Obligation to continue to supply third party retailers as regards finished and semi-finished ophthalmic lenses, and treatment and wholesale of ophthalmic lenses, including through the acquired entities. Requirement for parties to submit monitoring report to COPROCOM for five years.
2017	Pharmacy "La Bomba" / "Cuestamoras Salud Costa Rica, S.A." Decision number 60-2017 and 61-2017	Vertical foreclosure as regards restricted-sale drugs. Elimination of competition in the market. Ten year non-compete clauses that would further restrict competition.	Structural remedies regarding separation of distribution and retail businesses of the merged entity, and of some retail businesses within the merged entity Behavioural remedies regarding supply of affected products to third-party distributors and pharmacies Separation of retail businesses (Farmacias Fischel and La Bomba) from each other. Shortening of period of non-compete clauses/

YEAR	Companies	Competition Concerns	REMEDIES
	Abonos del Pacifico S.A. as purchaser and Fertilizantes NORDIC de Costa Rica S.A. vendedoras Decision number 72-17-CE and 12-19-CE	Possible acquisition of substantial power in the fertilizer market. Non-competition clause leading to market exit of a competitor for a long period.	Supply obligation as regards fertilizers without discriminating between purchasers being allowed. Shortening of period of non-compete contract
2018	Metalco, S.A., which acquired economic control of Aceros Abonos Agro, S.A. Decision number 16-2018.	Unilateral and portfolio anticompetitive effects, in the Costa Rican wholesale distribution industry regarding: 1. Ceilings and accessories, 2. Profiles and pipes, 3. Rods, platinums and angles, 4. Beams, 5. Smooth sheets and 6. Steel wires.	Imposition of independent commercial areas for Aceros Abonos Agro and Metalco. Limitations to scope of ancillary restraints. Prohibition of exclusivity agreements in the relevant markets. Prohibition from tying and bundling of products that are not individually available individually, under reasonable market conditions.
2018	UPL Corporation Limited and Arysta Lifescience Inc. Decision number 66-2018 and 80-2018	Anti-competitive effects related to duration of non-competition clause.	Shortening of period of non-compete contract to three years.
2018	Corporación de Supermercados Unidos (CSU-WALLMART) and Grupo Empresarial de Supermercados S.A. (GESSA). Decision number 093-2018	Increase in Walmart's market power. Increased coordination possibilities for market participants. Reduced competition as a result of elimination of competitor.	Blocked transaction

Source: Costa Rica

Box 1. Examples of Mergers where Remedies were Imposed

Yara International / OFD

Yara International, a Norwegian multinational manufacturer and seller of fertilisers and related chemical products, notified COPROCOM of its intention to acquire Grupo Abocol, a Colombian producer, distributor and seller of fertilisers and industrial chemical products that imported and sold fertilisers and multi-nutrients, among other products, in Costa Rica through its subsidiaries Fertitec and Cafesa.

Yara already held a 34% participation in Abopac, a company dedicated to the import and exclusive distribution in Costa Rica of the products produced by YARA globally. COPROCOM defined two fertiliser markets in Costa Rica, and found that the transaction would endow Yara with c. 80-90% in one market and 70-90% in the other, up from 70-80% and 50-60% before the transaction. In other words, the transaction would allow Yara to acquire or increase its market power in both markets. The Commission also took into account that entry barriers were relatively high in both markets, and that one of the competitors that would remain in the market bought inputs from Yara's distributor in Costa Rica.

In its resolution, COPROCOM ordered the parties to present remedies to counteract such negative effects.

COPROCOM eventually approved the transaction subject to the following conditions: i) Yara's divestment of Fertitec; ii) Yara must annually sell 10 000 tons of urea and 5 000 tons of MAP/DP to small producers for five years at no profit; iii) because YARA would continue to have a participation in Abopac and would also be the owner of Abocol, a firewall must be built between the employees that represent Yara's interest in Abocom and those who work in Abocol; iv) Yara

must not increase the scope of the distribution agreement that already exists with Abopac; v) Yara must keep Cafesa and Abopac as separate legal entities.

WALMART / GESSA

The sole merger blocked by COPROCOM was the acquisition by Walmart of a retail supermarket chain. The merger is also notable for COPROCOM having carried out a financial analysis of the audited and monthly financial statements provided by GESSA, in order to determine that the company was not about to leave the market – and, hence, the transaction was not exempt from merger control.¹

COPROCOM concluded that the merger raised three important anticompetitive concerns. First, it would lead to an increase in the already substantial market power that Walmart enjoyed in the relevant markets. Second, it would lead to a change in market structure that increased the possibility of collusion. Third, it eliminated from the market a disruptive competitive player.

As a result, COPROCOM blocked the merger without requesting that the parties submit possible remedies, since it considered that neither structural nor behavioural measures could counteract the anticompetitive effects of the merger.² The decision is currently under appeal.²

Notes:

¹ Article 55 of Regulation to Law 7472 (Executive Decree 37899-MEI), provides an exception from merger control for “Mergers made to avoid the exit of the market”.

² The competition authority has both the power to give the parties the opportunity to submit remedies or to reject the merger. In this case, COPROCOM evaluated the possibility of imposing corrective measures. However, the analysis carried out concluded that the anti-competitive effects could not be counteracted with any structural or behavioural measures.

³ A number of observers criticised this decision during the OECD fact-finding mission, particularly because it defined product and geographic markets differently from what is usually done in more other jurisdictions (i.e. the product market was for national supermarket chains, and the geographic market was national), and reached conclusions without an adequate theoretical or evidential basis.

The average duration of merger review is outlined below. It should be remembered that COPROCOM has 30 calendar days to issue a decision, which can be extended once for up to 60 days in especially complex cases. However, the initial notification must contain all the information required by law. In cases where the required information is missing, the 30 days term only starts once the missing information is submitted.

Table 15. Average Duration of COPROCOM's Merger Reviews (days)

OUTCOME	2013	2014	2015	2016	2017	2018	2019(*)
CLEARED							
<i>Average</i>	47	32	40	37	55	54	48
<i>Maximum</i>	60	73	74	69	249	222	61
IN-DEPTH INVESTIGATION							
<i>Average</i>	104	73	104	76	117	81	156
<i>Maximum</i>	110	78	106	81	134	99	156
CLEARED WITH REMEDIES							
<i>Average</i>	-	256	164	-	159	148	106
<i>Maximum</i>	-	256	229	-	206	211	126
BLOCKED							
<i>Average</i>	-	-	-	-	-	138	-
<i>Maximum</i>	-	-	-	-	-	138	-

Note: * The duration of merger reviews in 2019 was affected by a constitutional review (file no. 18-019669-0007-CO) that, for around two months, did not allow COPROCOM to issue decisions. The data covers only mergers up to July 2019.

Source: Costa Rica

It is obvious that the average, let alone the maximum duration of merger control procedures significantly exceeds the statutory limits. This seems to relate to a gap between the date when a company first notifies the transaction, and the date when the parties submit the required information and the notification becomes complete.

As noted above, failure to comply with the obligation of notify a transaction has up until now been punishable with fines of up to 410 times the minimum monthly wage (approximately USD 217 407.85), and of fines of up to 75 times the monthly minimum wage (around USD 40 000) to natural persons who participate directly in such concentrations. Furthermore, breaching a merger condition can be sanctioned with fines up to 680 the minimum wage (approximately USD 360 000).

In 2016, COPROCOM sanctioned Aditi S.A. and La Nación S.A. for failure to notify a merger. La Nación was fined one minimum monthly salary, i.e. two hundred and eighty-nine thousand eight hundred and twenty-eight colones with sixty-two cents (₡ 289 828.62, circa USD 545), while Aditi was fined half a monthly minimum wage, i.e. one hundred forty-four thousand nine hundred fourteen colones with thirty-one cents (₡ 144 914.31, circa USD 272.5).¹⁰⁸

Special Telecommunications Regime

Since 2014, SUTEL has blocked one merger¹⁰⁹ and cleared three mergers subject to conditions.¹¹⁰

Table 16. Merger Notifications to SUTEL (2014-2019)

Outcome	2014	2015	2016	2017	2018
Cleared	4	5	3	1	3
Cleared with remedies	-	-	-	-	3
Blocked	-	1	-	-	-
Withdrawn by parties	2	1	0	0	0
Not notification required	1	1	0	1	2
Total per year	7	8	3	2	8

Note: At the time of drafting, there was one merger under review.

Source: Costa Rica

In addition, between January and July 2019 a merger notification was made which was deemed unnecessary.

The sole merger blocked by SUTEL was between two companies in the television and internet services market.¹¹¹ The main concerns were related to the elimination of a maverick competitor in the paid television market, leading to reduced competition in this market and increased coordination between the remaining operators in the market. SUTEL also considered that the remedies offered by the parties did not address the anticompetitive effects of the merger.

As noted above, SUTEL has a duty to consult COPROCOM prior to adopting a decision on a merger. While SUTEL traditionally followed COPROCOM's recommendations, SUTEL has recently adopted a decision running against a recommendation from COPROCOM.

In this merger,¹¹² COPROCOM advised SUTEL to block a merger because there was one geographic market affected by the merger in which market shares would reach a level (58%) deemed anticompetitive by COPROCOM. This was because the undertaking would reach a level that was considered *per se* anticompetitive by the national competition authority.

However, SUTEL considered there was no evidence that the merger would have unilateral or coordinated anticompetitive effects. Furthermore, SUTEL considered that: (i) there were some procompetitive effects and efficiencies that needed to be taken into account, such as upgrades to broadband and paid television

services in the geographical markets affected by the transaction, which were rural counties; (ii) the merger would also lead to increased competition in broadband services.

On average, SUTEL takes 61 business days between initial notification and completion of the review procedure and decision. The maximum length of time that a merger review has taken is 174 business days. The duration of review is, understandably, significantly shorter if one starts counting from the moment the notification is complete.

Table 17. Duration of Merger Review by SUTEL (2014-2019) from initial notification

Outcome	Average	Maximum
Cleared	60	96
Cleared with remedies	52	56
Blocked	174	174

Source: Costa Rica

Table 18. Duration of Merger Review by SUTEL (2014-2019) from complete notification

Outcome	Average	Maximum
Cleared	39	86*
Cleared with remedies	37	38
Blocked	45	45

Note: *This refers to a non-notified merger.

Source: Costa Rica

5.3.3. Sanctions for Failure to Comply with Merger Control

As noted above, COPROCOM has started a number of investigations into failures to comply with the rules on merge control.

Table 19. Investigations for Failure to Notify a Merger

	2014	2015	2016	2017	2018
Ex Officio	7	4	6	3	-
Complaints	-	-	-	-	-

Source: Costa Rica

In addition, there was one investigation into a failure to notify a merger, following a complaint, up to July 2019.

Most of these investigations originated from information in the press. However, almost all investigations revealed that these transactions did not trigger a duty to notify a merger. The only instance where the notification thresholds were met also led to the single finding of infringement for failure to notify a merger to date, leading to the imposition of a fine of USD 744 in 2016.¹¹³ As noted above at section 3.3.1, one investigation into a failure to notify a merger collapsed as a result of a commissioner failing to excuse themselves.

Special Telecommunications Regime

SUTEL has never sanctioned a company for infringements related to merger control, even if there is an investigation currently ongoing.

5.4. Sanctions and Remedies

Table 10, Table 11 and Table 12 above contain the fine amounts imposed by COPROCOM in sanctioning absolute and relative monopolistic practices. Since 1995, fines were collected in 73% of the cases where they were imposed. Cases where fines were not collected occurred either in the early years of COPROCOM's operation, or are currently under appeal.

Since there have been very few developments in enforcement since 2016, the conclusion of the 2016 accession review that took place in that year still stands: penalties imposed for conduct other than 'particularly severe' infringements were low by comparative standards and they were not deterrent for economic agents considering engaging in anticompetitive practices. Of course, there have been significant increases in the severity of penalties in the 2019 Competition Reform Act, but these have not been implemented yet.

Third parties can request COPROCOM to issue interim measures at any time during the procedure where it is necessary to maintain certain situation or conditions that might otherwise deteriorate during the procedure (*periculum in mora*), where the party has good legal grounds for the request (*fumus boni iuris*), and where no superior interests would be affected by the measure. To date, there has only been one case in which COPROCOM has issued an interim measure. This was already discussed in the 2016 assessment.¹¹⁴

Whenever there is an infringement of competition law, COPROCOM orders that the parties cease from pursuing the infringing conduct and refrain in the future from carrying out any act that violates Costa Rica's competition law. The imposition of remedies in addition to a fine is possible, but will depend on the type of conduct and the anti-competitive effect that is intended to be countered.

When they are imposed, remedies are usually accompanied by follow-up measures to ensure compliance. These measures are typically requirements to the effect that the relevant undertakings must provide documents or information demonstrating their compliance with the remedies.

Box 2. Remedies other than fines imposed by COPROCOM

Below are listed some remedies imposed by COPROCOM in the context of absolute and relative monopolistic practices.

As regards hard-core cartels amounting to absolute monopolistic practices, examples include:

- In its 2002 decision regarding real estate brokers' association's price fixing practices, the brokers were told to cease their conduct and abstain from further absolute monopolistic practices in the future. They were granted one month to modify the terms of their Code of Ethics, in order to eliminate any reference to commissions, percentages, or other indications that may suggest a price in any way. Once these changes were made, the Chamber of Real Estate Brokers had to issue a statement to its associates to inform them of this amendment.
- In the 2008 decision concerning price fixing practices by customs agents by means of their association, COPROCOM required: (a) the Association to stop publishing and distributing documents containing service fees within one month; (b) the Association to

notify COPROCOM and all customs agents of the decision to stop distributing and publishing such numbers.

- In its 2014 decision concerning bid rigging as regards hygiene paper products, the investigated parties were told to stop establishing, arranging and coordinating bids; and to abstain in the future from engaging in anticompetitive monopolistic practices.

As regards vertical arrangements amounting to relative monopolistic practices, examples include:

- In its 2004 decision on the beverages market, COPROCOM required the investigated company to remove a number of resale pricing and exclusive dealing clauses from its contracts with distributors and retailers.

Finally, regarding unilateral conduct amounting to relative monopolistic practices, examples include:

- In its 2005 decision against a supermarket chain, COPROCOM precluded it from engaging in discriminatory practices against its suppliers based on their pricing and discounting practices towards third parties.
- In its 2014 decision against Instituto Nacional de Seguros (INS), COPROCOM ordered this undertaking to refrain from granting rebates in a discriminatory, non-objective and standardised manner. It also imposed information requirements whereby INS had to prove that it had complied with the remedies imposed by COPROCOM within a certain period.

Source: Costa Rica

Up until the entry into effect of the 2019 Competition Reform Act, COPROCOM could impose sanctions of up to 680 times the lowest minimum monthly salary in Costa Rica (approximately USD 360 000) for failure to comply with conditions or commitments imposed in the context of antitrust or merger control decisions. However, the regulations prior to the 2019 Competition Reform Act lacked sanctions for failures to comply with orders issued by COPROCOM in other circumstances, such as orders allowing an inspection to take place or interim injunctions. Furthermore, COPROCOM considers that the available fines under the previous regime were not effective in guaranteeing compliance with the orders issued. As discussed above, this situation has changed significantly with the adoption of the 2019 Competition Reform Act.

While competition infringements do not give rise to criminal liability, someone failing to comply with orders issued by COPROCOM or SUTEL will incur criminal liability under the crime of disobedience set forth in the Criminal Code. For the prosecution of such an infringement, the relevant competition authority must present a complaint before the Attorney General, who will then prosecute it.

To date, COPROCOM has filed a single complaint, regarding a case where a company did not comply with an order to give access to their networks to another company in 2011. The criminal complaint was for the failure to abide with COPROCOM's order, not for the anticompetitive conduct.

5.4.1. Special Telecommunications Regime

To this day, SUTEL has imposed a single pecuniary penalty for infringement of competition law, in 2015 – namely, a fine of USD 4 010 829.37 for a prohibited unilateral conduct.¹¹⁵ However, this decision was quashed on appeal for failing to precisely impute the infringing practice (margin squeeze) to the sanctioned company, thereby infringing its right of defence.¹¹⁶

At a procedural level, SUTEL can impose fines ranging between 0.5% and 1% of the gross income of the telecommunications operator “*failure to comply with the instructions adopted by SUTEL in the exercise of its powers*”. No such fine has been imposed to date.

5.5. Private Enforcement

The 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)] recommends that Adherents should provide a mechanism that gives anyone who has suffered harm caused by a hard core cartel the right to obtain redress or claim compensation for that harm from the persons or entities that caused it, carefully balancing the interaction of public and private enforcement, in particular to protect leniency programmes. To this effect, Adherents should aim to: (1) establish rules that enable parties to access the evidence necessary to bring a claim for compensation; (2) protect leniency statements, as well as settlement submissions, from disclosure to ensure the right balance between public enforcement by competition authorities and private enforcement by victims of cartels; (3) allow private enforcement actions that do not follow on infringement decisions by competition authorities, so as to allow enforcement in cases where there is no prior decision; (4) introduce collective redress mechanisms, which allow groups of similarly situated claimants to request compensation collectively; (5) grant adequate probative value to final infringement decisions by competition authorities, in private enforcement actions concerning the same hard core cartel; (6) suspend private enforcement limitation periods for the duration of the investigation by the competition authority.

Theoretically, any person or entity who has been damaged or has suffered an injury has the right to obtain compensation. Claims for damages must be brought in the courts. However, compensation claims must be preceded by a finding of infringement by the relevant competition agencies.

Until now, no claim to civil damages derived from a competition infringement has been filed. As a result, there is no experience or jurisprudence regarding the interaction of private and public competition enforcement.

With the objective of protecting leniency applicants, the 2019 Competition Reform Act now sets out that, while not exempt from being liable for competition damages in follow-on claims, the first leniency applicant will only face civil liability subsidiarily to the other offender – i.e. the first leniency applicant will only face civil liability to the extent that other cartel members are unable to pay the fully amount of awarded damages.

6. Competition Advocacy

There are a number of OECD legal instruments in the area of competition that address competition advocacy. For example, Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)] recommends that adherents support the advocacy efforts of competition authorities vis-à-vis private and public stakeholders, regarding the effective prevention, detection and correction of hard core cartels and regulations that prevent collusive conduct.

It also relevant for this purposes that Recommendation of the Council on Fighting Bid Rigging in Public Procurement [[OECD/LEGAL/0396](#)] recommends that members: (i) assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders, so that public procurement tenders at all levels of government are designed to promote more effective competition and reduce the risk of bid rigging while ensuring overall value for money; (ii) ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion; (iii) encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement; and (iv) develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

In particular, the Recommendation encourages competition agencies to: (i) partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds; (ii) provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and (iii) establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

In addition, the Recommendation of the Council concerning Structural Separation in Regulated Industries [[OECD/LEGAL/0310](#)] urges that, in markets in which a regulated firm is operating in both a non-competitive activity and a competitive complementary activity, Adherents should carefully balance the benefits and costs of structural separation measures against the benefits and costs of behavioural measures. The benefits and costs to be balanced include the effects on competition, effects on the quality and cost of regulation, effects on corporate incentives to invest, the transition costs of structural modifications, and the economic and public benefits of vertical integration, based on the economic characteristics of the industry under review.

Nonetheless, arguably the most relevant legal instrument for this purpose is the Recommendation of the Council on Competition Assessment [[OECD/LEGAL/0376](#)], which urges the introduction of a process to identify existing or proposed “public policies” (defined as including “regulations, rules, and legislation”) that unduly restrict competition, and recommends a specific process to revise public policies that unduly restrict competition – culminating in the adoption of the more pro-competitive alternative. This Recommendation incorporates a number of earlier recommendations made in the Recommendation of the Council on

Competition Policy and Exempted or Regulated Sectors [[OECD/LEGAL/0181](#)] concerning the need for countries to review the need to regulate or exempt these sectors on a regular basis.

In Costa Rica, both competition authorities in have advocacy competences.

COPROCOM is the national authority in charge of promoting competition. Its advocacy takes the form of non-binding opinions, the pursuit of market studies, the publication of guidelines, the preparation and distribution of competition law bulletins containing COPROCOM's most recent opinions and resolutions, the publishing of its opinions and final decisions in its official website, and the provision of training sessions to various public entities.

As the sectoral competition authority, SUTEL has a duty to promote competition in the national telecommunications market and to analyse the degree of effective competition in the telecommunications market. In pursuit of its advocacy competences, SUTEL relies on market studies, opinions and market studies regarding competition in the telecommunications market.

6.1. Market Studies

The 2016 assessment found that Costa Rican legislation at the time did not expressly refer to market studies as a specific function of the competition authority. However, based on Articles 27(c) and 27(e) of Law 7472, and COPROCOM's powers to publish the studies it prepares provided that it respects parties' right to confidentiality (Article 27(k) of Law 7472), COPROCOM considered that it had the power to conduct market studies. SUTEL also considered that it had the authority to perform market studies, though it had not yet published any at the time.

In recent years, in the context of Costa Rica's accession to the OECD, and of the OECD Competition Committee's recommendations on exempted and regulated sectors in particular, COPROCOM has concluded various market studies. To this end, COPROCOM has engaged external experts with the support of the European Union.

With the assistance of external experts, COPROCOM recently conducted market studies into the state monopoly on alcohol production; and on the regulation of remunerated transportation of passenger taxis and similar transport modes. The TSU has also conducted market studies into the postal sector, the gas station market, and into Vehicular Technical Revision Services (RITEVE) regulations.

Market studies into maritime transport and professional services are ongoing and will be presented to COPROCOM's board soon.

SUTEL can pursue two different types of market studies, reflecting its dual regulatory/competition role. Both kind of market studies examine a market in its entirety – looking at its legal and regulatory framework, its structure, and the behaviour of market players, including consumers, businesses and public bodies. The main difference between both types of studies is the nature of SUTEL's conclusions and recommendations.

A regulatory competence of SUTEL is to pursue market studies to declare the existence of competition in the telecommunications market. When, following such a study, SUTEL determines that there are satisfactory conditions to ensure effective competition, prices regulation is eliminated and telecommunications operators are allowed to set prices freely. The recommendations of these studies are mandatory.

Since 2016, SUTEL has pursued 14 'regulatory' market studies into competitive conditions in various telecommunication markets with a view to determine whether they are competitive and whether regulations should be replaced by competition enforcement.¹¹⁷ These studies ascertained that these markets have become competitive, which has led SUTEL to switch its focus from regulating these markets to enforcing competition rules in them. In addition, these studies have led to the elimination of retail price controls in all

telecommunication retail markets except fixed telephony. Further, they identified market restraints that should be analysed in future market studies, e.g. regarding regulations that discriminate between SOEs and private operators.

SUTEL can also pursue more 'traditional' competition market studies, which pursue in-depth assessments of how markets work; to this end, SUTEL has produced and issued its guidelines on market studies in 2017. Such market studies occur when there are reasons to believe that a market, or even a sector, is not working well for consumers, but there is no evidence that the reason for this is an infringement of competition law. Market studies determine whether the market is malfunctioning and, if so, identify the causes for this and advance non-binding recommendations.

In August 2019, SUTEL concluded its first market study on "Access to common telecommunications infrastructure in residential condominiums and all those residential buildings, which have common facilities necessary for the provision of telecommunications services".¹¹⁸ In addition, SUTEL has launched two market studies on "Access to common telecommunications infrastructure in business condominiums and all those commercial buildings, which have common facilities necessary for the provision of telecommunications services",¹¹⁹ and regarding "Public procurement of telecommunications services"¹²⁰.

6.2. Opinions

6.2.1. Voluntary Opinions

COPROCOM and SUTEL are empowered to issue non-binding opinions regarding laws, regulations, agreements, guidelines, and other administrative acts – in particular, regarding how such acts impact competition and free market participation. Except in certain specific circumstances outlined below, the decision to issue such opinions is at the discretion of COPROCOM and SUTEL.¹²¹

However, there are a number of circumstances in which COPROCOM and SUTEL can be requested to provide an opinion. First, the Legislative Assembly can request COPROCOM and SUTEL's opinion concerning laws and public policies. Conventionally, the Legislative Assembly consults COPROCOM and SUTEL concerning all bills of law that intend to modify the competition, or that are related to their competences. Normally, these consultations are carried out before the bill is discussed by the legislative plenary.¹²² Furthermore, COPROCOM and SUTEL keep track of the Legislative Assembly plenary agenda, and of the agendas of the committees of the Legislative Assembly, with the purpose of intervening as regards regulations that may impede or limit competition in areas falling under their competence.¹²³

Secondly, COPROCOM and SUTEL can issue opinions in answer to consultations from other public bodies and market agents. Furthermore, COPROCOM often issues, of its own initiative, opinions regarding technical regulations that may create barriers to entry and obstacles to competition.

SUTEL has only issued two formal opinions to public bodies regarding competition matters in the last five years.¹²⁴ On occasion, it has also answered questions regarding compliance with competition law.¹²⁵

COPROCOM has been more active as regards the issuance of opinions, as is made clear by the table below.

COPROCOM's opinions have addressed a vast number of topics, including whether technical regulations restrict competition,¹²⁶ public tenders¹²⁷ and price regulation;¹²⁸ and covered a number of specific economic sectors such as transportation,¹²⁹ the postal sector,¹³⁰ gas stations¹³¹ and telecommunications.¹³²

COPROCOM's opinions are not binding. Notwithstanding, COPROCOM carries out many efforts to disseminate and raise awareness regarding the benefits of introducing competition rules in their activities, as described below.

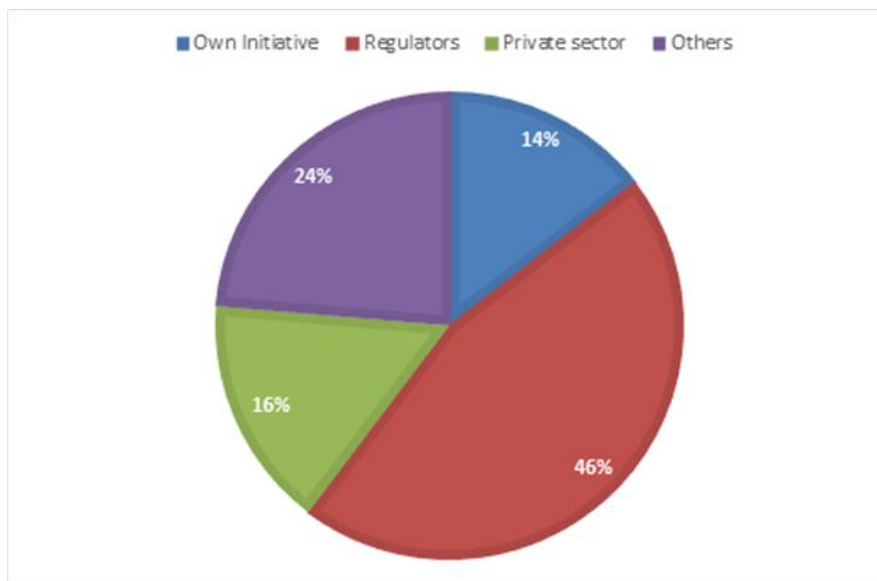
SUTEL's Opinions are also not binding, except if they are issued in the context, and in respect of assessments of the competitiveness of telecommunication markets, as outlined above.

Table 20. Opinions issued by COPROCOM since 2014

Year	
2014	20 opinions for: 2 private sector, 8 SUTEL and Ministry of Science, Technology and Telecommunications (MICITT), 1 Ministry of Economy, Industry and Trade (price regulation), 4 Technical Regulation Direction, 4 General Superintendence of Financial Entities (SUGEF) and 1 Legislative Assembly.
2015	21 opinions for: 6 SUTEL, 8 SUGEF, 2 Legislative Assembly, 1 National Treasury, 1 Alcoholism and Drug Dependence Institute (IAFA) and 3 public sectors.
2016	25 opinions for: 5 SUTEL, 3 Legislative Assembly, 6 SUGEF, 6 private sector, 1 municipality (municipal government), 3 Technical Regulation Direction and 1 Ministry of Economy, Industry and Trade (price regulation).
2017	22 opinions for: 5 SUTEL, 7 Legislative Assembly, 1 Ministry of Economy, Industry and Trade (price regulation), 4 private sector, 4 SUGEF and 1 Technical Regulation Direction.
2018	27 opinions for: 5 private sector, 5 market sectors initiated by COPROCOM, 1 Foreign Trade Ministry, 8 SUTEL, 1 Technical Regulation Direction, 3 SUGEF and 2 Legislative Assembly.
2019	16 opinions up <i>until June 2019</i> for: 6 Legislative Assembly, 1 SUGEF, 3 SUTEL, 2 Technical Regulation Direction, 1 private sector, 1 Ministry of Economy, Industry and Trade (price regulation) and 2 public sectors.

Source: Costa Rica

Figure 5. Origin of COPROCOM Opinions (2014- June 2019)



Source: Costa Rica

6.2.2. Mandatory Opinions

In some circumstances – in particular, prior to the adoption of governmental price regulation in monopolistic and oligopolistic markets, and before the setting up of import or export licences – COPROCOM is required to issue opinions by law.¹³³

However, the number of COPROCOM opinions on price regulation of goods and services provided under monopolistic or oligopolistic conditions, and on the establishment of import and export licences, is limited.

This was already noted in the 2016 assessment, and remains the case. Since then, no consultation request has been made regarding any of these topics.

6.3. Other Advocacy Initiatives

Since 2016, COPROCOM has pursued numerous advocacy initiatives in different areas.

An area of focus has been public procurement. In 2016, COPROCOM published its "Public Procurement and Competition Law Guidelines", which build on OECD recommendations on the topic. These Guidelines were updated in 2018 to include recent decisions regarding the use of framework agreements for the purchase of goods and services, which removed unjustified advantages that public companies enjoyed in dealing with public bodies.

This latter amendment built on a COPROCOM study and opinion regarding a directive by the National Treasury (the entity in charge of public procurement in Costa Rica) which favoured hiring public companies in public procurement. COPROCOM considered that this violated competitive neutrality and was to the detriment of private agents that were able to offer the same services at a lower cost. In light of COPROCOM's efforts, the National Treasury revoked this directive.

In addition, COPROCOM has also issued opinions regarding restrictions to competition arising from the treatment of "related companies" and "companies in consortium" in public procurement procedures. The recommendations outlined in these opinions have also been adopted by the National Treasury.¹³⁴

Furthermore, COPROCOM has promoted competition law principles in public tenders by health sector public institutions. This has involved coordinating meetings regarding the application of these principles and providing training to the procurement departments of the Social Security Administration.

Other advocacy initiatives adopted by COPROCOM include collaborating in the issuance of a "Best Commercial Practices Code" between supermarket chains and their food suppliers; promoting the inclusion of competition law criteria in the cost-benefit analysis of technical regulations; or participating in the National Commission for Deregulation chaired by the Minister of Economy on regulatory improvements. In addition, Commissioners and TSU staff have participated as competition experts in different fora organised by business chambers, the Academy of Central America, and other bodies of civil society.

The table below describes the advocacy initiatives in which COPROCOM and its staff have participated over the past five years.

In addition, up to June 2019 COPROCOM also held two training sessions organised by social security bodies for the detection of collusive tenders and improving competition in public procurement.

COPROCOM tries to engage actively with specialised media, where it advertises some of its most important decisions and opinions. It has also kept open channels with business chambers and with professional and consumer associations.

Table 21. Advocacy and Training Events by COPROCOM 2014-2019

Year	Number	Type of Activity
2014	7	<p>"20th Anniversary of Competition Law in Costa Rica", with the participation of OECD, IDB, and the French, Chilean and Mexican competition agencies.</p> <p>Lecture for students of the Costa Rican Technological Institute.</p> <p>Lecture at the Commerce Chamber "How can Competition Law aid to avoid incurring in practices in restraint of trade?"</p> <p>Executive Breakfast "Problems in Mergers and Acquisitions and the new competition law", organised by the Costa Rican-American Chamber of Commerce (Amcham) and Arias & Muñoz Law Firm.</p> <p>Diffusion of the Merger Guidelines.</p> <p>Lecture at the Chamber of Coffee Roasters.</p> <p>Workshop for procurement departments of public institutions: "Public Procurement in Costa Rica: From Collusive Tenders to International Good Practices"</p>
2015	21	<p>During 2015, eight lectures were provided to general or specialised audiences (chambers, procurement departments, law firms, advisors, among others).</p> <p>Furthermore, lectures to over 130 officials of 13 municipalities were provide regarding the prevention and detection of collusive tenders.</p>
2016	15	<p>Advocacy activities during 2016 were directed at different public and private institutions. 464 entities attended these events, including numerous municipalities, public and industry bodies.</p>
2017	15	<p>In 2017, advocacy efforts were directed to the health sector. COPROCOM specifically trained officials in charge of tenders and public procurement for a larger number of health service providers.</p>
2018	6	<p>On 2018, COPROCOM organised two training programs in cooperation with the United States Federal Trade Commission (FTC), and the Brazilian Administrative Council of Economic Defense (CADE). These training programs were attended by numerous public officials from entities such as SUTEL, SUGEF, the Attorney General's office, the Judicial Branch. These events were also attended by the private sector, including chambers, associations and private entities.</p> <p>Furthermore, COPROCOM participated in four training sessions organised by social security for the detection of collusive tenders and in improving competition in public procurement.</p>

Source: Costa Rica

SUTEL has organised several workshops and seminars on competition matters. For example, in 2015 SUTEL held an open workshop to explain merger and anticompetitive practice guidelines; in 2015, 2016 and 2017 it organised capacity-building workshops courses for judges; and, in 2017, it held a workshop to present its market studies guidelines. A great variety of actors have participated in these activities, from consumer associations and business chambers, to officers from other public institutions and government branches, like the Attorney General's Office.

It is worth mentioning that SUTEL's competition unit also provides training in competition matters on request.

Table 22. Competition Advocacy and Training Events by SUTEL 2014-2019

Year	Number	Type
2015	5	<p>Training course to the judicature.</p> <p>Workshop to present SUTEL guidelines regarding mergers and anticompetitive practices.</p> <p>Workshop on market studies (jointly with OECD).</p> <p>Workshop on leniency (jointly with OECD).</p> <p>Workshop on mergers (jointly with OECD).</p>
2016	6	<p>Training course to the judicature.</p> <p>4 Workshops to present the methodology to determine effective competition on telecom markets.</p> <p>Workshop on institutional design.</p>
2017	4	<p>Training course to the judicature.</p> <p>Workshop on market studies (jointly with OECD).</p> <p>2 Training courses to law firms on competition matters.</p>

Source: Costa Rica

6.4. Developments since the 2016 accession review

In the 2016 assessment, it was noted that while COPROCOM had been particularly active in advocating for competition law, many of these opinions and recommendations had been disregarded. Furthermore, it was found that COPROCOM rarely issued opinions with regards to markets exempt from competition law, or proactively recommended or supported the introduction of procompetitive changes in markets where competition is inexistent or marginal. Adding to this, it was found that in Costa Rica there was neither a process in place to identify existing or proposed public policies that unduly restrict competition, nor specific criteria for performing competition assessments.

An important practical development in this area has been the pursuit by COPROCOM of a number of market studies to identify sectors exempt from competition law and assess whether such exemptions are justified, as described above.

Nonetheless, the most significant changes took place recently, as a result of the adoption of the 2019 Competition Reform Act.

A first significant change concerns market studies. While market studies have been pursued by COPROCOM under the previous legal regime, that regime did not expressly refer to market studies as a specific function of the competition authority. Instead, the studies were pursued in accordance with COPROCOM's interpretation of the law, which was thought to provide them with a general power to pursue market studies.

The new law explicitly recognises that COPROCOM and SUTEL can pursue market studies, and grants the competition authorities broad powers to this end. Furthermore, the new law also extends the scope of market studies that COPROCOM can pursue. COPROCOM is now explicitly empowered to conduct market studies as regards exempt sectors and conducts – something which was of doubtful legality before.

In addition, the 2019 Competition Reform Act now contains a number of rules that aim to ensure the relevant that market studies are relevant and effective. The new law establishes an obligation to prioritise the markets to be studied. It also seeks to ensure that stakeholders are involved in the market studies, by establishing mechanisms to inform interested parties of their existence, to incentivise their participation, and to ensure that stakeholders play a role in the design of the recommendations derived from the study. Perhaps more importantly, the law empowers the competition authorities to request information from both public and private entities and gives them explicit powers to impose sanctions for non-compliance with these requests.

The competition authorities are empowered to make all the recommendations they deem necessary. While these do not have binding effects, its addressees are under a duty to provide reasons to the relevant competition authority for not implementing its recommendations.

In addition, and importantly, Costa Rica's authorities will now have the authority to establish cooperation agreements with public or private, national or international entities.

A last area of development concerns the development of a plan to implement the legal reform brought about by the 2019 Competition Reform Act, which will be discussed in detail below at Section 9. .

7. International Elements

The Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings [[OECD/LEGAL/0408](#)] and a number of related OECD instruments – such as sections IB and IC of the 2005 Council Recommendation on Merger Review, and the Competition Committee’s 2005 Best Practices Statement for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations – focus on urging co-operation and co-ordination among competition agencies.

The 2014 Council Recommendation, which consolidates and elaborates the relevant elements of the previous recommendations concerning co-operation, urges adherents to “commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions” in their laws or that hinder effective enforcement co-operation among competition authorities.

7.1. Jurisdiction and International Considerations

Until the recent reform, Costa Rica’s competition law was silent about whether it applied to conduct undertaken outside Costa Rica with effects in the local market. While COPROCOM interpreted the law as reaching such acts, attempts to implement such an interpretation were not effective. In effect, so complicated was this matter that the 2016 Accession Report found that *‘Costa Rican competition law cannot be applied to companies without legal presence in the country, as this would exceed the jurisdictional reach of Costa Rican competition law. As such, only [companies with legal presence in Costa Rica] can be subject to remedies and sanctions under Costa Rica’s competition law.’*¹³⁵

Even if the scope of Costa Rica’s competition law extended to all economic agents participating in the Costa Rican market, COPROCOM could not compel evidence from foreign enterprises unless they had legal representation in the country. In the past, the difficulties inherent in investigating foreign entities has led to one enforcement action being abandoned due to procedural difficulties related to bringing the foreign firm to the process.

If COPROCOM wanted to obtain information from such firms and did not receive voluntary disclosure, it relied solely on its co-operative relationships with foreign competition authorities. To date, however, COPROCOM has never relied on these relationships to compel evidence from foreign firms. Furthermore, to date no remedy has been imposed on a foreign economic agent, nor has cooperation from foreign authorities regarding enforcement been sought.

International considerations are nonetheless taken into account by the competition authorities of Costa Rica in a number of ways. One such way is market definition, e.g. when the market is defined as regional or international, or when market shares are calculated according to the sales or production of international markets. Even if the geographic market is limited to Costa Rica, the competition authorities can take into account foreign elements – such as supply substitutability, distribution networks, possibilities for consumers to make purchases from foreign markets – when defining and analysing the relevant markets. Another way through which international considerations are taken into account is by assessing the effects of foreign conduct on Costa Rican markets.¹³⁶

7.1.1. Developments since the 2016 accession review

The 2019 Competition Reform Act makes it clear that COPROCOM has the power to apply Costa Rica's competition law to all economic agents whose conduct have effects in Costa Rica. It also provides mechanisms to promote international cooperation, as shall be seen below.

7.2. International Cooperation and Agreements

Up until the adoption of the 2019 Competition Reform Act, COPROCOM did not have the authority to pursue joint investigations with other countries, nor to share confidential information. The competition law prohibited COPROCOM from exchanging information with competition agencies of other countries. Moreover, all information provided by economic agents to COPROCOM was deemed confidential, and any official that violated the confidentiality of this information would commit a serious fault in the exercise of his/her duties.

As a result, Costa Rica's competition authorities have never pursued a joint investigation or enforcement action in cooperation with other competition authorities.

Further, competition authorities in Costa Rica have, to this date, only entered into agreements regarding technical cooperation (sharing experiences, training), and sharing public information.

In the context of the Free Trade Agreements entered into with Korea, the European Union, the European Free Trade Association (Iceland, Liechtenstein, Norway, Switzerland), Singapore, Peru and Canada, Costa Rica and these jurisdictions established a mutual notification mechanism for enforcement actions. These Agreements also contain provisions on the exchange of public information between competition agencies in the context of their activities.

COPROCOM presently has a formal cooperation agreement with the members of the Central American Network of Competition Authorities (RECAC) – which includes the competition agencies of El Salvador, Honduras, Nicaragua and Panama.¹³⁷ In 2018, COPROCOM entered into a cooperation agreement with the Administrative Council of Economic Defence (CADE) of Brazil. Currently, efforts are underway to sign a cooperation agreement with Mexican authorities.

COPROCOM has also benefited from technical cooperation with Switzerland in the context of COMPAL program in which more than 17 countries participated. COPROCOM had the opportunity to participate in Peru's Indecopi Training School and benefitted from an internship at Indecopi about inspections. However, country-specific activities ended in 2015.

Informal relationships developed with officials from other jurisdictions have allowed informal technical cooperation between COPROCOM and these jurisdictions' competition agencies. These have taken the form of joint workshops with competition agencies such as COFECE (Mexico), IFT (México), FTC (USA), DOJ (USA), CNMC (Spain), TDLC (Chile) and CMA (UK), CADE (Brazil).

SUTEL has not entered into any cooperation agreement with other competition authorities. Nonetheless, SUTEL is empowered to exchange information with competition agencies in other countries, and there have been instances of informal information exchange.¹³⁸ SUTEL is currently in negotiations with several competitions authorities to establish formal cooperation agreements; in particular with Superintendencia de Competencia of El Salvador¹³⁹, COFECE of Mexico¹⁴⁰, IFT of Mexico¹⁴¹, FNE of Chile, INDECOPI of Peru, Opsitel of Perú.

Further, as a result of informal relationships of its officials, SUTEL has organised workshops with officials from foreign agencies, such as COFECE (Mexico), IFT (Mexico), ACODECO (Panama), DOJ (USA), CNMC (Spain), TDLC (Chile) and CMA (UK).

Lastly, Costa Rica's competition authorities are regular participants in international competition fora. COPROCOM and SUTEL have participated in the OECD's Competition Forum and Global Competition Forum since 2014; and in all Latin American and Caribbean Competition Forum held in the last five years, including the Ibero-American Forum meetings that take place at the same time. Both authorities also regularly participate in ICN initiatives, including its annual conference.

The 2016 accession review found that the greatest obstacle to international co-operation by Costa Rica in competition matters arose from the prohibition on its competition agencies to exchange information with competition agencies in other countries, particularly when coupled with the very wide scope given to confidential information. This led to a near complete absence of cooperation provided to, or obtained from foreign competition agencies.

In light of this, the Competition Committee recommended '*The creation of conditions for effective engagement in international co-operation, which is an important tool for reinforcing competition law enforcement both domestically and abroad.*' In particular, the Chair recommended that Costa Rica:

- Allow the competition agency to exchange information with competition agencies in other countries, including relevant confidential information, subject to appropriate safeguards.
- Implement the relevant international agreements on international co-operation to which Costa Rica is a party.
- Make any further legal amendments needed to make international co-operation possible, and put in place the necessary framework for co-operation with competition agencies from other countries.

7.2.1. Developments since the 2016 accession review

In addition to the informal cooperation efforts described above, and the agreements signed with the Brazilian competition authority and currently being negotiated with Mexico, the main developments since the 2016 accession review relate to the adoption of the 2019 Competition Reform Act. The new law grants COPROCOM legal personality to sign new agreements independently from the Minister of Economy. COPROCOM is empowered to share information with other competition authorities, as long as that information is adequately protected.

8. Special Competition Regimes

8.1. Financial Regulation

8.1.1. Antitrust Enforcement

COPROCOM has competence to investigate and sanction absolute and relative monopolistic practices by entities supervised by the financial regulators. The financial regulators are under a duty to present a complaint before COPROCOM for any practices contrary to competition law. In such cases, the financial regulators may participate in the corresponding competition procedures as interested parties.

When investigating entities supervised by the financial regulators, COPROCOM must request the relevant financial regulator's non-binding opinion on the matter. The financial regulator shall issue its non-binding opinion within 15 days.

Whenever the relevant regulator explicitly advises that a sanction should not be imposed because of the risk it poses to the stability of the financial system, and COPROCOM decides to sanction the financial entity nonetheless, COPROCOM must justify why its decision goes against the financial regulator's opinion.

8.1.2. Merger Control

Up until the 2019 Competition Reform Acts, financial regulators¹⁴² were responsible for authorising mergers between economic undertakings under their supervision.

Once a merger authorisation request was received by any of these regulators, they had to consult COPROCOM on the effects on the competition procedure. COPROCOM could then issue a non-binding opinion within 15 days. While COPROCOM's opinion was not legally binding, in those cases where the financial regulators decided to deviate from COPROCOM's opinion, they had to justify their decision not follow COPROCOM's opinion.

Sectoral regulations contains no provision requiring mergers approved by the financial regulators not to be anticompetitive. As a result, the financial sector regulators were theoretically empowered to approve anticompetitive mergers in markets under their supervision. In practice, no financial sector regulator has ever adopted a merger decision that deviated from COPROCOM's opinions; on the other hand, COPROCOM has never found that a merger in the financial sector created competition issues.

One of the recommendations in the 2014 Peer Review was to transfer to COPROCOM the power to authorise merger transactions in the financial sector, while empowering the relevant financial sector regulatory authority to issue non-binding opinions to COPROCOM. Financial regulators should only be able to overrule COPROCOM's decision if it were necessary to avoid systemic risks.

This recommendation, and the concerns underpinning it, were reiterated in the context of the 2016 accession review, as a result of which it was recommended that Costa Rica "*Ensure that all mergers meeting certain thresholds are subject to control as to their impact on competition*".

8.1.3. Developments since the 2016 accession review

The 2019 Competition Reform Act grants COPROCOM the power to control mergers in the financial sector, and ensures that the financial regulators will not have the power to override COPROCOM's merger control decisions – with the sole exception of mergers that pose a systemic risk to the financial sector.

The new law states that the financial regulator will have jurisdiction to decide on mergers when appropriate to “*protect and mitigate risks to the solvency, soundness and stability of entities or the financial system, as well as protect financial consumers*”. In this case, the sectoral regulator, the National Supervision Council of the Financial System (CONASSIF) and the corresponding financial superintendence will decide.

The new law also requires COPROCOM must enter into a cooperation agreement with CONASSIF within a year of the appointment of the new Board of COPROCOM.

8.2. Telecommunications Sector

Until 2008, telecommunications in Costa Rica were subject to a state monopoly under the supervision of the Costa Rican Institute of Electricity (ICE). As a result, the sector was exempted from competition law.

Following the signing of the Free Trade Agreement with the United States, and a tightly contested referendum in October 2007 that endorsed the ratification of this agreement by a 51.6% to 48.4% margin, in June 2008 the Costa Rican Legislative Assembly approved the General Telecommunications Law which opened the sector to private investment.

Competition policy is one of the five pillars that supports the General Telecommunication Law, together with the authorisation regime, universal service regime, consumer protection regime, sectoral competition regime and the access and interconnection regime.

Costa Rica's law delegates the Telecommunications Regulatory Authority (hereinafter referred to as SUTEL) the following responsibilities regarding competition matters: (a) to promote competition principles in the telecommunications market; (b) to declare that effective competition exists in the telecommunications market; (c) to guarantee access of operators and providers to the telecommunications market and to essential facilities under reasonable and non-discriminatory conditions; and (d) to prevent the abuse of market power and monopolistic practices.

As a result, SUTEL has the exclusive jurisdiction to oversee competition policies in the telecommunication sector. The particularities of how SUTEL performs this role, and how it compares to COPROCOM, have been reviewed throughout this report. This section will focus on the institutional characteristics of SUTEL.

8.2.1. Institutional Framework

Competition policy is one of the five pillars that supports the General Telecommunication Law, together with the authorisation regime, universal service regime, consumer protection regime, sectoral competition regime and, access and interconnection regime.

As a result, SUTEL has the exclusive jurisdiction to oversee competition policies in the telecommunication sector. SUTEL is a maximum deconcentration body from the Regulatory Authority of Public Services (hereinafter referred to as ARESEP). ARESEP is an autonomous institution not subject to the Executive branch or to its legal framework. SUTEL is subject to the Board of Directors of ARESEP in some administrative matters, and must submit its strategies, annual operational plans, financial statements and its general rules of organisation for the approval of ARESEP.

SUTEL enjoys legal and budgetary independence, as well as technical and administrative autonomy; its staff is required to perform their duties with absolute independence. SUTEL has its own legal personality

to carry out contractual activity, manage its resources and budget, as well as signing contracts and agreements required for the fulfilment of its functions.

SUTEL is financed from regulatory charges (“canons”) – i.e. taxes and fees paid by telecommunications operators and service providers. SUTEL is thus able to determine its own budget every year, subject only to approval by the General Comptroller of the Republic. SUTEL’s budget, including the amounts devoted to competition law, are outlined in the table below.

Table 23. SUTEL’s Budget (USD, 2014-2019)

		2014	2015	2016	2017	2018	2019
SUTEL (total)	Staff	102	131	132	131	132	131
	Budget	17 617 570.69	20 015 699.45	18 709 988.37	19 848 407.24	19 436 254.95	19 653 796.30
SUTEL (competition)	Staff	4	6	6	6	5	6
	Budget	670 334.00	564 393.46	425 052.27	674 397.98	504 662.80	657 903.30

Note: All competition staff identified above are experts. This does not include administrative staff or support. Variations in SUTEL’s competition budget relates to the way the budget is allocated within the broader General Directorate of Markets to which the competition staff is assigned.

Source: Costa Rica

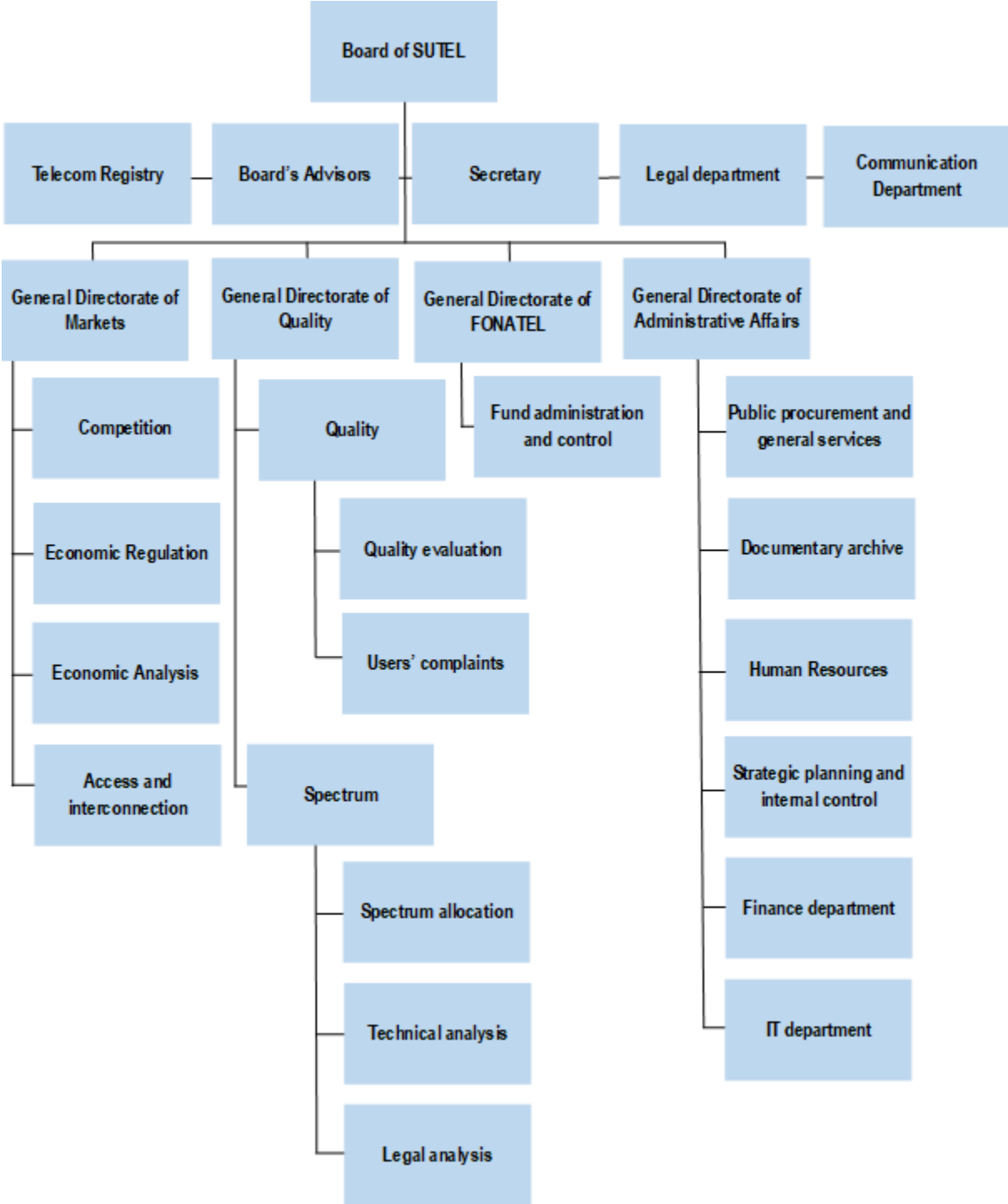
SUTEL comprises a Board and a number of directorates focusing on a variety of areas. Competition is a specific team within the Directorate General for Markets. This structure is currently undergoing revision to implement the recent reform to the competition regime.

The Board of Directors of SUTEL comprises three full-time members and one alternate member. The Directors are appointed through a public procedure organised by the Board of Directors of ARESEP in staggered fashion, and their selection by ARESEP is subject to a procedure of non-objection of the Legislative Assembly. Under this procedure, once the appointment is made by ARESEP and notified to the Legislative Assembly, this body has a 30-day period to object to such an appointment. If the Legislative Assembly does not object during this period, the proposed candidate will automatically take office.

SUTEL’s Board Members may only be dismissed for reasons outlined in law.¹⁴³ These include: (1) failure to meet the established requisites for appointment or incurring in a legally relevant impediment; (2) being absent from the country for more than one month, without authorisation from the Board; (3) failure to attend three consecutive ordinary sessions of the Board without justification; (4) infringing or consenting to the infringement of any of the provisions contained in the laws, decrees or regulations applicable to the SUTEL; (5) being responsible for fraudulent, illegal or malicious conduct; (6) repeatedly incurring in negligence when fulfilling the duties of their office; (7) to incur in inefficiency in the performance of their duties; (8) becoming unable to fulfil their position for six months due to physical disability; (9) being declared incapable; (10) participating in any decision in which she should have excused herself or for which she was impeded.

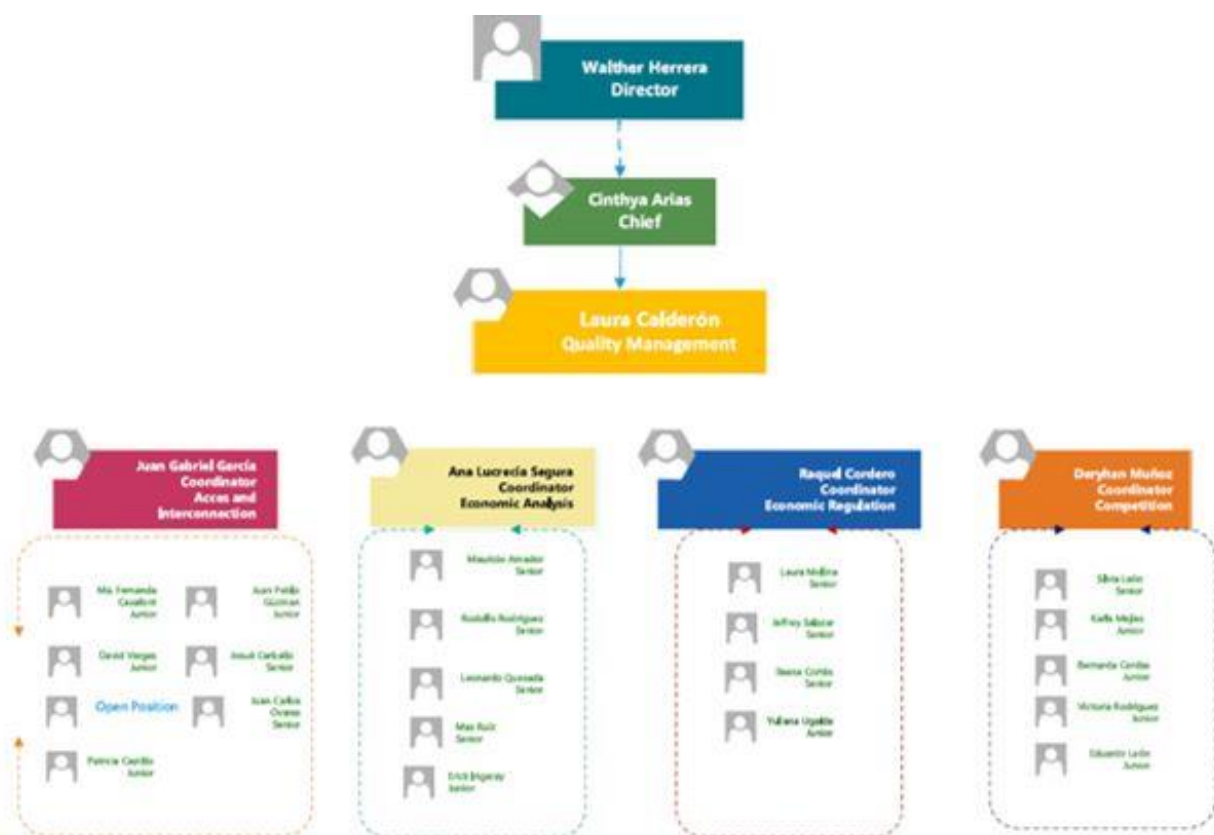
Despite some of these conditions for dismissal being written in a rather expansive manner, these reasons to dismissal are the same that apply to other independent regulatory bodies in Costa Rica – as was already apparent in our discussion of the reasons to dismiss members of COPROCOM’s board.

Figure 6. SUTEL's Structure



Source: SUTEL

Figure 7. Composition of Directorate General for Markets



Source: SUTEL

Dismissal must follow the procedure set out in the General Law on Public Administration.¹⁴⁴ This procedure applies generically to the dismissal of members of Costa Rica's civil service and sets out a number of rights of defence for the person at risk of dismissal. Following this procedure, the decisions to dismiss a member of the Board of SUTEL will have to be adopted by ARESEP, and this decision is reviewable by the courts.¹⁴⁵

The general rules applicable to Civil Service do not apply to SUTEL; as a result, SUTEL enjoys great flexibility when hiring its personnel and can hire candidates with an adequate level of expertise for the post. Staff are selected and appointed by the Board of SUTEL following public appointment procedures organised by SUTEL's Human Resources Department. The Board is also responsible for promoting, transferring and dismissing its staff, even if dismissal must follow the procedure set out in the General Public Administration Law.

The Board of Directors of ARESEP is responsible for setting the compensation of SUTEL's personnel. Compensation at SUTEL higher than in the civil service and COPROCOM, as is apparent from the table below. Furthermore, SUTEL has enough resources to train its personnel; for example, in the first semester of 2019, it invested USD 18 464 in training activities related to competition matters.

As is described in Table 23., in 2018 SUTEL employed 131 people, of which 27 belonged to the General Directorate of Markets and six to the Competition Affairs Bureau. The staff of the Competition Affairs Bureaus comprised three attorneys at law and three economists. All staff possess undergraduate degrees on their area of expertise, except for the team coordinator, who holds a master's degree in economy.

Table 24. Average Pay Levels for Economic Regulators in Costa Rica

Salary Category	UTA	SUTEL	ARESEP	BCCR
	COPROCOM	II Q 2018	II Q 2018	II Q 2018
Professional 2 / Professional 1	1 419 930.70	1 489 125.00	1 489 125.00	1 428 847.00
Professional 5 / Professional 3	1 507 747.17	1 946 550.00	1 946 550.00	2 136 968.00
Professional Head / Professional 4	1 966 753.00	2 426 775.00	2 426 775.00	2 626 289.00
Director-General	2 955 153.50	4 031 500.00	4 031 500.00	3 823 196.00
Council Member / Regulator / Superintendent	(**)	5 475 500.00	7 061 500.00	9 541 571.00

Note: (**) Not comparable, since COPROCOM's Commission members work part-time.

Source: Costa Rica

The table below outlines the level and reasons for staff turnover at SUTEL's competition team over the past four years.

Table 25. Staff Turnover – Competition Team, SUTEL (2015- June 2019)

YEAR	STAFF TURNOVER	REASONS
2015	Hired: two people joined the competition authority. One economist coming from COPROCOM. One lawyer coming from The Office of the General-Attorney.	Better working condition.
2016	No changes.	No changes.
2017	No changes.	No changes.
2018	Two people left the competition authority: The coordinator of the area. One lawyer. An employee of another department of SUTEL joined the competition authority.	The coordinator moves to the private sector to a compliance officer position. One lawyer decided to work in the Legal Department of SUTEL (not interested in competition matters) Looking for better working conditions.
Up to June 2019	Hired: An employee that previously worked for COPROCOM.	Looking for better conditions.

Source: SUTEL

8.2.2. Interface of Regulation and Competition Law

A specialised team is devoted to each of the five pillars of SUTEL's work – including competition. Competition matters in SUTEL are overseen by a specific group within the General Markets Directorate. There are some informal mechanisms that allow personnel from different departments to coordinate their work, thus avoiding conflicting decisions. Internally, the Board of Directors of SUTEL assures that all regulatory and competition enforcement decisions are consistent.

Internal procedures for competition matters, as well as competition guidelines and training, ensure that only competition concerns are considered when addressing competition matters. As regards coherence in the enforcement of competition law, except for one specific case in 2012, which was already discussed in the 2016 assessment, SUTEL's duty to implement *ex ante* regulation has not impacted on *ex post* regulation.

Furthermore, Articles 55 and 56 of the General Telecommunications Law set forth communication requirements between COPROCOM and SUTEL. Under Article 55, when dealing with anticompetitive practices SUTEL shall request COPROCOM's non-binding technical opinion prior to starting the enforcement procedures and before taking a final decision. Under Article 56, when reviewing a merger SUTEL shall request COPROCOM's non-binding technical opinion before taking a final decision.

COPROCOM's opinion shall be issued within 15 days from SUTEL's request. If SUTEL departs from COPROCOM's opinion, it must duly motivate its decision and the decision must be approved by a qualified majority of its Board.

Currently there is no cooperation agreement between COPROCOM and SUTEL, given that COPROCOM does not have the legal faculties to subscribe these agreements. In 2013, SUTEL tried to subscribe a cooperation agreement with COPROCOM through MEIC – since COPROCOM lacks the capacity to enter into agreements – but the process could not be completed. Whilst COPROCOM formally approved this initiative, the Minister of MEIC, who at the time was in charge of subscribing the agreement, did not take any actions concerning the subscription of the instrument

8.2.3. Prioritisation and Evaluation

Two main instruments guide SUTEL's activities: the strategic plan, which articulates, balances and prioritises all the objectives which SUTEL must statutorily pursue over 4-year periods; and SUTEL's annual operative plan, where SUTEL sets out all its annual projects in light of its strategic goals.

The annual operative plan must be preceded by the setting of the regulatory agenda, a consultation mechanism that SUTEL must engage in before setting out its short-term strategic priorities. The main objective of the regulatory agenda is to promote the participation of stakeholders in the formulation, implementation and evaluation of SUTEL's objectives, ensuring transparent formulation of projects and priorities.

The current regulatory agenda was developed with the active input of industry, officers, users and interested parties, in order to ensure the transparent formulation of projects, definition of priorities, and implementation of the regulatory agenda. A significant number of SUTEL's priorities, as identified in its regulatory agenda, focus on the regulation of the telecommunication sector. One priority (Factor 2-3) focuses on competition in this sector. This priority is to stimulate competition in the telecommunications industry by broadening the service offering and/or the number of service providers, reducing market concentration, lowering barriers to entry, promoting lower service prices and improving service quality.

SUTEL has also created an internal working group, comprising representatives from all SUTEL Directorates, to develop and propose methodologies and procedures in order to propose, manage, monitor and measure compliance with its regulatory agenda.¹⁴⁶

SUTEL's competition unit sets its priorities in the context of SUTEL's broader 4-year strategic plan. One important objective of the current 2016-2020 plan is to promote competition in the sector (other objectives are regulatory in nature), which includes the goal of addressing at least 70% of competition-related complaints.

Every quarter SUTEL measures itself against its objectives. Predefined criteria help measure SUTEL progress of each project and the overall strategic plan. Outcomes are used to determine actions to improve institutional performance. The results are forwarded quarterly to the Regulatory Authority for Public Services (ARESEP) and to the General-Comptroller of the Republic, subjecting SUTEL's assessment of whether its objectives are met to third-party scrutiny. The final report is posted on the SUTEL website.¹⁴⁷

In addition, SUTEL's General Markets Directorate has a Quality Management System (QMS), which produces performance indicators. The Competition Area uses process management indicators to analyse its work on monopolistic practices, merger control, and other related aspects such as requests to keep information confidential, requests for precautionary measures, and query responses. These indicators measure the time required to address each case brought to the Competition Area, and compliance with the lawful time limits established for each process. However, these indicators are only used internally and are not made public.

8.2.4. Developments since the 2016 accession review

The 2019 Competition Reform Act adopts a number of measures to ensure coherence in competition enforcement. First and foremost, it explicitly adopts a single substantive and procedural competition framework applicable in all competition procedures regardless of the competition authorities.

The law further includes some instruments to formalise the coordination between SUTEL and COPROCOM in addition to those already in place, thus, strengthening the collaboration between both authorities and avoiding divergences in the application of competition law. These include: (1) the ability for COPROCOM and SUTEL to coordinate with each other when engaging in activities to promote competition at the national level in priority sectors; (2) the possibility of COPROCOM and SUTEL pursuing joint advisory, training and dissemination activities in competition matters; (3) the possibility of SUTEL and COPROCOM entering into a cooperation agreement between themselves.¹⁴⁸ The foreseen adoption of joint guidelines by COPROCOM and SUTEL should also ensure consistency in the application of competition policy.¹⁴⁹

9. Implementing the Competition Law Reform

As noted at the start of this report, Costa Rica created an Interdisciplinary and Inter-Institutional Commission to implement the recommendations from the 2016 accession review. Up until recently, the main focus of this commission was the reform of Costa Rica's competition law.

However, a number of the recommendations made did not require a legal reform. This commission identified the following recommendations that could be implemented even absent a legal reform, mainly by operating a change in the behaviour of the competition authorities:

- Publishing guidelines: (1) describing the methodologies and criteria used by COPROCOM in its decisions on cases involving unilateral behaviours and vertical agreements (i.e. relative monopolistic practices); (2) providing guidance regarding business obligations and requirements, and on the applicable procedures for notifying mergers; (3) explaining the methodology and criteria used by COPROCOM to impose fines.
- Strengthening the economic analysis of decisions on unilateral behaviours and vertical agreements (i.e. relative monopolistic practices).
- Developing the necessary skills to effectively conduct dawn raids.
- Using the available powers for settling cartel investigations.
- Conducting market studies.
- Expanding the scope of COPROCOM's opinions to sectors that are currently exempt from the application of Law 7472, and using them as a mechanism to promote pro-competitive reforms.

At the time of writing, and as a result of limited resources and the focus on reforming its competition law, Costa Rica has not implemented most of these recommendations – with the exception of those related to market studies, particularly as regards exempted sectors.

Nonetheless, the Inter-Institutional Commission – led by Costa Rica's competition authorities – has been working on a strategic roadmap for next steps. This roadmap seeks both to implement the new legal framework in the most efficient way, and to implement those recommendations that fell outside the scope of the legal reform adopted in the 2019 Competition Reform Act.

This strategic roadmap adopts three pillars: (1) regulatory strengthening; (2) institutional strengthening; (3) effective application of the competition rules.

In the context of these initiatives, Costa Rica is currently negotiating a partnership with the Inter-American Development Bank (IDB) regarding its support, particularly in the context of the first pillar. This follows a recognition that the competition authorities need economic and technical support to implement some elements of the strategic roadmap, in particular as regards the preparation and adoption of guidelines and manuals, competition training and promotion, and as concerns the correct implementation of the new competition law.

Table 26. Implementation Plan – First Pillar

Detailed steps (2019 – 2022) (I – first half of the year; II – second half of the year)

General Actions	Specific Actions	Beginning	Deadline	IDB Support	
<u>Law 9736 for the Strengthening of the Competition Authorities in Costa Rica</u>	Publication in the Official Newspaper "La Gaceta"	II 2019 (August 29th)	II 2019 (
Secondary Legislation	Joint drafting of the Regulation to the Law 9736	II 2019	I 2020		
<u>Guidelines and Manuals</u>	Technical Decision - Fee charged for merger analysis	II 2019	II 2019		
	Technical Decision – Thresholds for Obligatory Notification of Merger Procedures	II 2019	II 2019		
	Technical Regulation regarding the handling of confidential information	II 2019	I 2020		
	Technical Regulation regarding Mandatory Prior Merger Notification Process	II 2019	I 2020		
	Technical Regulation for Early Termination Procedures	I 2020	II 2020		
	Drafting of the Technical Regulation and the Technical Decisions	II 2020	I 2021		
	Technical Regulation for the Surveillance and Compliance with Resolutions Issued by Competition Authorities (Art. 127 Law 9736)	II 2020	I 2021		
	Technical Regulation for Setting Fines	II 2020	I 2021		
	Technical Regulation for the Promotion and Advocacy of Competition Policy	II 2020	I 2021		
	Technical Regulation for Leniency Program	I 2020	II 2020		
	Technical Regulation for Conducting Dawn Raids	I 2021	II 2021		
	COPROCOM's Internal Organisation Regulation	II 2020	I 2021		
	Update Guidelines for the analysis of unilateral conducts and vertical agreements.		II 2020	II 2021	Yes
	Update of the "Guideline for Merger Analysis" in accordance with the new regulatory framework		II 2020	II 2021	
	Guidelines establishing the obligations and requirements for notifying mergers (including notification forms)		II 2020	I 2021	
	Guidelines on "Methodology and Criteria Used for the Imposition of Fines"		I 2020	II 2020	
	Guidelines on How to Conduct Market Studies		I 2020	I 2021	
Manual on How to Detect Collusive Public Tenders		I 2020	II 2020	Yes	
Manual for Handling Confidential Information		II 2019	I 2020		
Manual for the Application of the Leniency Program		I 2020	II 2020		
Manuals regarding Internal Procedures		I 2021	II 2021	Yes	
Manual for Conducting Dawn Raids		I 2021	II 2021	Yes	
Guidelines for <i>ex post</i> Analysis of Authority Decisions y		II 2021	II 2022	Yes	
Guidelines for Compliance Programs		II 2021	II 2022	Yes	

Note: Manuals correspond to detailed instructions that will be used by the officials of the competition authorities. Guidelines consist in detailed information provided to the economic agents to help them understand the agencies' actions and to facilitate their compliance with the requirements of the authorities.

Source: Costa Rica

The first pillar focuses on strengthening the regulatory framework in which Costa Rica's competition law is applied, with a view to ensure compliance and effective enforcement. The process of preparing and adopting the required secondary regulations to complement the new law is in its early stages. Secondly, Costa Rica will develop and adopt different guidelines and manuals for the application of the competition policy, in line – and even going beyond – what was recommended by the OECD.

The second pillar – institutional strengthening – has the objective of endowing Costa Rica's the competition authorities with the technical capabilities and tools necessary for the effective application of competition law. This includes reforming the institutional set-up of COPROCOM in order to ensure its administrative and technical independence, assigning it an appropriate budget, hiring the requisite human resources and implementing the requisite inter-institutional coordination mechanisms. As with the first pillar, the implementation of this pillar is, to date, limited to the adoption of the 2019 Competition Reform Act.

Table 27. Implementation Plan – Second Pillar

Detailed steps (2019 – 2022) (I – first half of the year; II – second half of the year)

General Actions		Specific Actions	Beginning	Deadline
<u>Budget</u>				
Start planning process, in accordance with the Law of Public Budget		Incorporation of COPROCOM's budget allocation within the budget of the Ministry of Economy, Industry and Commerce (MEIC)	II 2019	I 2020
<u>Restructuring the Competition Authorities</u>				
<i>COPROCOM</i>				
Proposed structure (Transitory IX)			II 2020	I 2021
Approval, implementation of the structure and recruitment process		This will be preceded by an organisation study undertaken by COPROCOM and the Ministry of Planning (Mideplan) between August 2020 to February 2021. Once the study is ready, it will be submitted for consultation. By May 2021, all observations/comments must have been incorporated in the document. The final version of the study will be published in June 2021, after which its implementation will take place.	II 2021	I 2022
<u>SUTEL</u>				
Proposed structure			I 2019	II 2019
Approval and implementation of the structure			I 2020	II 2020
<u>Infrastructure</u>				
Acquisition of Hardware and Software for Digital Forensic Analysis.		System Design	I 2020	I 2022
Acquisition of Hardware and Software for Digital Forensic Analysis.		Tender and allocation of the systems	II 2020	II 2023
		COPROCOM	II 2022	II 2023
		SUTEL	II 2019	II 2022
<u>Staffing</u>				
Appointment of Board	Appointment of the members of the Board of COPROCOM	Public contest held by the Governing Council (according to Transitional Provision VI)	II 2019	I 2020
		Non-objection process by the Legislative Assembly	II 2020	II 2020
Recruiting Staff	Staff Recruitment	Recruitment process (according to Transitional Provision IX) following necessary steps to restructure the competition authorities	II 2020	II 2021

General Actions		Specific Actions	Beginning	Deadline
Training Staff	Capacity Building	Development of a comprehensive training plan for competition authorities	II 2019	II 2019
		Initial training of current and new officials on best practices and the implementation of the new instruments granted by law (leniency, economic effects of unilateral behaviours and vertical effects, dawn raids, mergers, advocacy) ¹	II 2019	II 2023
<u>National and International Cooperation</u>				
International Cooperation	Strategic alliances with national and international organizations regarding competition regulation	Signing of cooperation agreements with other regional and international public institution and authorities	II 2019	II 2022
National Inter-agency Cooperation	Development of protocols for relations with other authorities and public institutions for the application of competition policy	Development and signing of the first technical cooperation agreements between competition authorities and between these and other institutions to coordinate the issues set forth in the Law	II 2019	II 2020
		Elaboration of the Guidelines regarding the coordination between COPROCOM and CTP	II 2019	II 2020
		Elaboration of the Guidelines regarding the coordination between COPROCOM and CONASSIF	II 2020	II 2021
	Elaboration of a market database ²	Pilot plan for the definition of indicators on the effects on the market of the resolutions of the competition authorities		
		COPROCOM	I 2021	I 2022
	SUTEL	I 2022	II 2022	
	Alert / monitoring system of market behaviour indicators.	I 2023 ³	II 2023	

Notes:

¹ The competition authorities need to engage in a preliminary assessment (2020) of the training needs of the current staff. Once the recruitment process of the new staff begins in earnest (2021-2022), the authorities will need to update their assessment and formulate a capacity building plan for the following years.

² Each authority will construct and compile a set of indicators that will allow the follow-up and monitoring of possible anticompetitive practices, in order to facilitate their identification and promote research, market studies, among others efforts.

³ The reason why this action only begins in 2023 is because the authorities need to engage in intermediate actions, such as: enter into cooperation agreements with other institutions, acquire hardware and software, and prioritise the relevant markets.

Source: Costa Rica

The third pillar focuses on the effective application of the competition rules in Costa Rica. This pillar will be implemented through actions in three areas: the conduct of market studies, in particular into sectors exempt from competition law; ensuring transparency and accountability; and promoting education and knowledge training. As is apparent from the table below, most of these initiatives will be adopted over the next few years.

Table 28. Ensuring compliance with Competition Law in Costa Rica

Detailed steps (2019 – 2022) (I – first half of the year; II – second half of the year)

General Actions		Specific Actions	Beginning	Deadline
Market Studies by SUTEL		Market Study into Condominiums		
		Market Study into Single Offeror/Bidder		
		Market Study into Municipal Infrastructure	I 2020	II 2022
		Market Study into Post Infrastructure and the impact in competition		
		Market Study into Professional Associations	I 2020	I 2021
COPROCOM Market Studies into Exempt Sectors		Market Study into Maritime Transport	I 2020	II 2021
		Market Study into Coffee Sector	I 2020	II 2021
		Market Study into Rice Sector	II 2021	I 2022
		Market Study into the Sugar Sector	II 2021	I 2022
Promoting Competition	Promoting Competition with the Wider Public	Dissemination and developing public awareness regarding the 2010 Competition Reform Act a	II 2019	I 2020
		Promoting competition law and providing training at large	I 2020	II 2020
	Promoting Competition with the Business Community	Development of communication and training strategy for economic agents	I 2020	II 2023
		Promoting Reforms with the Competition Community	Elaboration of a protocol for consultation, dissemination and implementation of Guidelines and Manuals	I 2020

Source: Costa Rica

The implementation roadmap also includes a requirement to account for its progress. Costa Rica expects the relevant authorities to submit a twice-yearly report on progress to the relevant legislative commission.

10. Conclusions

10.1. Strengths and weaknesses of Costa Rica's competition regime

This section will provide an overview of the main strengths and weaknesses of the competition regime in Costa Rica, as identified and discussed at greater length throughout this Report. It is not intended to be comprehensive.

The main strengths of the Costa Rican competition regime result from the analytic soundness of its competition law, which provides a solid foundation for applying competition policy. In line with best international practices, the primary criterion for applying competition law and other commonly encountered competition policy concerns is efficiency-based analysis.

Horizontal restrictive arrangements are prohibited *per se* and agreements to undertake them are legally void. With respect to unilateral conducts and vertical agreements, the competition law stipulates that such conducts are illegal only if they demonstrably harm competition, if the responsible party has substantial market power in the relevant market and if that party fails to provide an efficiency defence. The 2019 Competition Reform Act clarifies the types of conduct that infringe competition law, and significantly increases the severity of sanctions that businesses can be subject to.

The 2016 assessment remarked that there were a large number of markets exempt from competition law, including markets where the introduction of competition could result in a more efficient functioning of the economy and, consequently, in substantial gains for consumers. Following this, Costa Rica identified the scope of exemptions from its competition law and found they were more limited than anticipated. In any event, most of the exemptions that did exist were not justified from a competition perspective, and COPROCOM has long insisted in the necessity to eliminate them by various means, including market studies and opinions. The 2019 Competition Reform Act has significantly reduced the scope of these exemptions, which are now limited to a number of specific acts in five economic sectors – sugar, coffee, rice, maritime transport and regulated professions.

Moreover, Costa Rica's merger control has been undergoing a steady evolution. In 2012, its regime went from an *ex post* merger control regime to an *ex ante* (but non-suspensory) regime that not only allows for the identification of possible anticompetitive transactions but also empowers the authorities to carry out the measures necessary to prevent the implementation of such transactions.

The 2019 Competition Reform Act addresses a number of limitations of this regime. It sets up an *ex ante* notification system with suspensory effects, and precludes the possibility of transactions only being notified once they have been closed. In tandem with this, the law also provides for significant sanctions for companies that infringe this merger control notification and review regime. Secondly, the 2019 Competition Reform Act adopts a two-phase procedure – which replaces the current unitary procedure – with an initial stage devoted to identifying problematic transactions and quickly clearing non-problematic ones. Thirdly, the merger notification thresholds were modified to allow for a more efficient use of COPROCOM's resources and to avoid the review of transactions without a relevant nexus to the Costa Rican markets. Lastly, COPROCOM will now be competent to review mergers in the financial sector, even if financial regulators can exceptionally overrule it when a transaction poses a systemic risk to the financial system.

Yet another strength of the Costa Rican competition regime is its willingness to discuss policy changes in order to align the country's competition framework with best international practices. This is evident in the 2012 reform of Law 7472, and in the efforts to reform the competition law regime leading to the adoption of the 2019 Competition Reform Act.

Finally, COPROCOM has been particularly active in advocating for competition law, issuing numerous opinions directed at other government institutions in an attempt to prevent or modify regulations that could lead to anticompetitive effects. While the 2016 accession review identified as a problem that COPROCOM rarely issues opinions concerning markets exempt from competition law, COPROCOM has worked intensively in these sectors in recent years, and the 2019 Competition Reform Act now explicitly empowers the competition agencies to conduct market studies as regards exempt sectors and conducts. Another concern was that COPROCOM's opinions and recommendations have been disregarded. The 2019 Competition Reform Act seeks to address this, by requiring addressees of such recommendations to provide reasons to the relevant competition authority for not implementing these recommendations.

Despite these strengths, the competition regime in Costa Rica still displays limitations that negatively affect its performance and outcomes – even if many of these will be addressed in the context of the implementation of the 2019 Competition Reform Act.

The 2016 accession review noted that *the institutional design* of the Costa Rican competition regime could be significantly improved. While the 2019 Competition Reform Act takes important steps in this direction, until it is implemented the situation on the ground has remained and will remain the same as then.

The 2016 assessment found that the fact that commissioners work part-time has sometimes led to tensions in the relationship between commissioners and TSU's officers, and to problems regarding conflicts of interest. The situation does not seem to have changed significantly since then. Many observers remarked on the recurring existence of conflicts of interest – some very serious and affecting the resolution of individual cases – and on the challenges that this poses to determining what is the correct composition of the Board to decide individual cases. The extent of these conflicts of interest is such that it may have interfered, on occasion, with the effective enforcement of competition law.

Another institutional limitation of the Costa Rican system results from the scarce resources available to COPROCOM. In terms of amount of resources and staffing, the situation is similar to what it was in 2016 – to the point where approved hires were frozen due to lack of funding, and a new unit was set up but was unable to fulfil its roles because it was not endowed with the necessary means. Despite an increase in merger control activity, COPROCOM's resources remain broadly the same as they were at the time of the last Accession review – and conspicuously lower than those of other economic regulators in Costa Rica or those of other comparable competition agencies in the region.

The 2016 accession review also found that COPROCOM being part of the MEIC implies a degree of budgetary and administrative dependence that risks limiting the Commission's independence. The same risks arose from the appointment of commissioners following the proposal of the MEIC, from the Minister's role in the appointment and removal of TSU's executive director, and from the fact that TSU officials are employees of the Ministry. The situation has not changed since 2016. The Technical Unit has remained subject to the Ministry and on all administrative and resource-related matters, and many observers expressed concerns regarding the actual autonomy and independence of the Board, despite the absence of evidence of direct political interference.

Naturally, these problems are similar to others that the Competition Committee identified in the past, and which led it to conclude that legal reforms were necessary. Those reforms have now been adopted, but are still to be implemented.

Following the legal reforms, COPROCOM will become a body enjoying technical, administrative, political and financial independence. Its budget will increase exponentially, and is protected from political interference by law. Board members will henceforth be employed on a full-time basis by members selected

on the basis of criteria related to their expertise and character – including a minimum eight years of expertise on competition matters – and recruited through a public procedure.

The new law also provides for a special labour regime and recruitment system that allows COPROCOM to select and hire its staff. Further, TSU's staff will henceforth be subject to a labour regime and benefit from compensation packages in line with other economic regulators. In particular, the staff's special labour regime will be aligned with that of Costa Rica's economic regulators and will allow COPROCOM to offer more competitive wages to hire specialised and experienced professionals in competition matters.

Ultimately, the success and effectiveness of this reform will depend on its implementation – a matter to which Costa Rica has devoted significant efforts and which led to the adoption of a roadmap discussed in the previous chapter.

Another current weakness of Costa Rica concerns the intensity of its *competition enforcement*. The 2016 accession review found that despite its limited resources, COPROCOM had repeatedly proved its willingness to enforce its competition law.

It is thus unfortunate that there has only been very limited enforcement since then – driven by COPROCOM's continuing resource limitation, to which can be added an increase in merger control activity. Since 2016, Costa Rica's competition authorities have sanctioned a single instance of anticompetitive conduct – related to a unilateral conduct which investigation began in 2012.

Regarding procedure, the 2016 accession review found that COPROCOM had to follow Costa Rica's general administrative procedure. This procedure was not well suited for the specificities of competition law enforcement, could lead to investigations taking too long in certain cases failed to provide a sufficient distinction between investigators and adjudicators, and prevented investigated parties from having timely access to the file and from presenting their case before the Commissioners in an oral hearing.

Furthermore, the number of opened investigations was much higher than the number of cases in which sanctions were imposed, which may indicate a need to prioritise enforcement procedures and increase their effectiveness.

The 2016 accession review also found that while COPROCOM had the authority to conduct dawn raids, the agency still lacked some the necessary means to pursue them, alongside other tools to fight cartels effectively, such as a leniency programme. As regards unilateral conducts, Law 7472 is silent on how to apply the rule of reason, and up to this date the Commission has not issued any guidelines, criteria or legal framework in that matter.

Again, the situation has not changed in any of these procedural matters since 2016 – with the notable exceptions of the clear decrease in enforcement activity, and the changes introduced by the 2019 Competition Reform Act which will come into effect in the coming years.

The 2019 Competition Reform Act introduces a special competition procedure designed with the specific purpose of responding to the complexities of competition matters to be applied by both competition authorities; introduces a leniency programme; and creates and clarifies mechanisms for the early termination of infringement procedures (e.g. archiving a procedure, or entering into settlements and commitments).

It is expected that the proper resourcing of COPROCOM, when combined with these procedural reforms, will ultimately lead to antitrust enforcement coming back to life in Costa Rica following the 2019 Competition Reform Act. However, and as in other matters, whether this will indeed be the case ultimately depends on how the Act is implemented.

Another area of concern flagged in the 2016 accession review which did not see any significant improvements, other than the adoption of the 2019 Competition Reform Act, is international cooperation. The 2016 review found that COPROCOM faced significant limitations regarding its ability to engage in

international co-operation in enforcement matters, with the result that the further COPROCOM has gone regarding international cooperation has been to interact informally with their counterparts in other agencies.

The 2019 Competition Reform Act now grants COPROCOM legal personality to sign agreements – including with other competition agencies – and empowers it to share information with other competition authorities, as long as that information is adequately protected. This should facilitate international cooperation in the future, in line with the plan outlined in Costa Rica’s roadmap for implementing the 2019 Competition Reform Act.

10.2. Costa Rica’s conformity with the OECD legal instruments in the field of competition

This section provides an overview of the OECD legal instruments in the field of competition, a summary of Costa Rica’s position as expressed by Costa Rica with regard to these instruments, and an assessment in this regard.

10.2.1. Restrictive Practices, Cartels and Bid Rigging

Recommendation of the Council concerning Effective Action against Hard Core Cartels
[\[OECD/LEGAL/0452\]](#)

Summary of Content

This Recommendation sets out the basic OECD framework for fighting hard core cartels. The enforcement elements of the Recommendation specify that competition laws should: (i) provide for sanctions effective to deter cartel operations; and (ii) set up enforcement procedures and institutions with authority adequate to detect and remedy cartels, including the authority to impose penalties for non-compliance with investigative demands.

The Recommendation devotes some attention to the need to implement an effective cartel detection system. This includes introducing effective leniency programmes; use pro-active cartel detection tools to trigger and support cartel investigations; and facilitating the reporting of information on cartels by whistle-blowers who are not leniency applicants, providing appropriate safeguards protecting the anonymity of the informants.

The instrument also makes some recommendations regarding the need to ensure that competition authorities have effective powers to investigate hard-core cartels. Competition authorities should be empowered to conduct unannounced inspections (“dawn raids”) at business and private premises; to access and obtain all documents and information necessary to prove cartel conduct, including access to electronic information; and to request information from third parties and obtain oral testimony from individual witnesses.

The Recommendation sets forth that competition agencies should be able to adopt and incentivise early case resolution tools such as plea negotiation and settlements, which often require an admission of guilt and/or the admission of facts and/or a waiver of the right to appeal.

Finally, the Recommendation requires Members to provide a mechanism that gives anyone who has suffered harm caused by a hard-core cartel the right to obtain redress or claim compensation for that harm from the persons or entities that caused it, carefully balancing the interaction of public and private enforcement, in particular to protect leniency programmes.

Costa Rica's position

In its Initial Memorandum, Costa Rica accepted an earlier version of this instrument and requested a timeframe until March 2020 in order to implement the necessary reforms to comply with the Recommendation. Currently, Costa Rica accepts this instrument within one year from the start of the implementation plan of the 2019 Competition Reform Act – i.e. November 2020.

Costa Rica's competition law has, since 1994, prohibited hard-core cartels. The 2019 Competition Reform Act replaces the current general administrative procedure for conducting investigations and imposing penalties with a procedure designed specifically to respond to the complexities and specificities of competition cases. This includes introducing a leniency program that grants exceptions or reductions of fines to the agents that collaborate with the authorities in the investigation of absolute monopolistic practices; empowering both competition agencies to conduct dawn raids; protecting the anonymity of the informants; and introducing mechanisms that provide companies the possibility of requesting early termination with acknowledgment of the commission of the infringement (settlements) in hard core cartel cases.

The 2019 Competition Reform Act substantially increases the fines that COPROCOM can impose for antitrust infringements, by setting out fines by reference to a percentage on the volume of sales (up to 10%). Private individuals who participate in monopolistic practices can also be subject to fines, up to a maximum fine of up to six hundred and eighty base wages, i.e. circa USD 501 265.

The Costa Rican regime also allows for private damages claims for cartel conduct, while balancing the interaction of public and private enforcement. This balance is apparent in how the regime protects the leniency program by making the first leniency beneficiary's liability subsidiary to the liability of the other offenders.

87. Given the content of the 2019 Competition Reform Act, once this reform goes into effect, Costa Rican competition authorities should be able fully to implement this Recommendation within one year.

Assessment

Costa Rica has made great strides in aligning itself with this Recommendation since 2016. As will be discussed below, its competition law covers significantly more economic activities than it did then. All infringements of substantive competition law – i.e. all antitrust violations – are now classified as very severe infringements, and can be subject to severe and deterrent sanctions. The new law also empowers the competition authority to sanction a number of procedural infringements, with a view to ensure the effectiveness of competition enforcement.

The new law adopts a special procedure for competition law and imposes procedural sanctions with the specific purpose of addressing the complexities of competition enforcement. This special procedure comprises three independent stages – the investigation stage, the instruction (pre-trial) stage and a resolution/decision-making stage. This procedural structure institutes a separation of functions among the staff who participate in each stage of enforcement proceedings with a view to guaranteeing due process and rights of defence.

The 2019 Competition Reform Act also expressly introduces a leniency program, and three mechanisms that allow undertakings to request the early termination of an investigation: termination due to manifest inadmissibility (archiving), early termination with acknowledgement of the commission of the infraction (settlement), and early termination with an offer of commitments

These developments must be commended, but they do not amount to full compliance with the Recommendation. One of the main weaknesses of Costa Rica's competition regime – already noted in the 2016 accession session and elsewhere in this report – is COPROCOM's lack of sufficient financial and human resources to effectively enforce competition law. Investigations have usually started only as a result

of complaints. Even when they do take place, investigations take too long as a result of insufficient resources at the competition agencies, and of COPROCOM's inability to prioritise cases or economic sectors when allocating these resources.

While the 2019 Competition Reform Act is set to rectify some of these issues – most notably as regards the lack of resources, where COPROCOM is expected to be endowed with a budget of around four million dollars – at the time of this report the situation has not changed significantly since 2016. Furthermore, even after the 2019 Competition Reform Act Costa Rica's competition authority will continue to have to investigate every complaint made to them – despite the 2016 accession review recommending that Costa Rica should work on prioritising certain types of competition cases and work on priority economic sectors.

When coupled with the demands of increased merger control and of the OECD Accession process, this state of affairs has led to very limited enforcement from COPROCOM since the last accession review. No cartel has been sanctioned since then – in effect, the only antitrust sanction imposed since then was for a unilateral anticompetitive practice that was first investigated in 2012.

These considerations also extend to dawn raids, which were already allowed solely by COPROCOM in 2016. The 2016 accession review recommended that Costa Rica adopt the necessary steps to be able to pursue and reap the benefits of dawn raids. As noted above in this report, three new people were hired for COPROCOM to develop expertise on how to pursue dawn raids. However, the necessary investments to ensure that this unit could operate – such as the acquisition of laboratory equipped with the hardware and software required to fulfil this new unit's function and to ensure the security and confidentiality of the information obtained – were not made. In effect, no dawn raid has ever been done in Costa Rica.

Other reforms regarding cartel enforcement are welcome, but remain to be implemented. For example, the law provides for a leniency regime, but implementing regulation and guidance to make it effective are still lacking – as are enforcement actions that may incentivise cartelists to apply for leniency. While the 2019 Competition Reform Act adopts a settlement regime, this will have to be implemented by secondary regulation. At present, there are still no details available about how this policy will be implemented – including on how settlements will affect the ultimate fine amount.

In addition, price-fixing agreements in the sugar and rice industry, as well as those involving maritime conferences, are exempt from competition law. Section 9 of the Recommendation states that exemptions from prohibitions against hard core cartels should be restricted to those indispensable to achieve their overriding policy objectives. To this effect, Members should make their exemptions transparent and periodically assess their exemptions to determine whether they are necessary and limited to achieving their objective.

COPROCOM will continue to assess whether these exemptions are justified, and has advocated for the abolition of some of them in the past. However, in each case, the Government decided to depart from COPROCOM's opinion; and while assessing whether exemptions are justified is commendable, this does not amount to a periodic review – or a mechanism for such review.

Given this, it seems that even if it will take one-year for implementing the formal foundations for effective cartel enforcement, alignment with the Recommendation in practice is likely to take longer – since it will require adequately staffing the agency and activating its enforcement against hard-core cartels.

As such, it is recommended that Costa Rica pursue the implementation plan for the 2019 Competition Reform Act, resource the competition authorities to the level requisite to pursue effective competition enforcement, and revive its antitrust enforcement. It is additionally recommended that the competition authorities do not be subject to a duty to investigate every complaint they receive, and that are able to prioritise their action to reflect their economic and social impact.

Recommendation of the Council on Fighting Bid Rigging in Public Procurement
[\[OECD/LEGAL/0396\]](#)

Summary of Content

This Recommendation sets out the necessary requirements for effectively fighting bid rigging in public procurement. It recommends that members: (i) assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders, so that public procurement tenders at all levels of government are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money; (ii) ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion; (iii) encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement; and (iv) develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

In particular, the Recommendation encourages competition agencies to: (i) partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds; (ii) provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and (iii) establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

Costa Rica's position

In its 2016 Initial Memorandum, Costa Rica accepted this instrument but requested a timeframe until March 2018 in order to implement the necessary reforms to comply with it. In the context of the 2016 accession review, Costa Rica considered that its legislation included provisions that guarantee the proper implementation of the majority of the provisions referred to in the Recommendation, but acknowledged that some further efforts may assist in better complying with this Recommendation.

In particular, Costa Rica proposed to, until March 2018: (1) expand the existing legal framework so that all types of collusion mentioned in the Recommendation are expressly prohibited; (2) engage in further competition advocacy regarding procurement processes; (3) implement an action plan that sets out methodologies, guidelines, technical equipment, funds and human resources for investigations; (4) have the competition agency review Costa Rica's procurement rules.

At present, Costa Rica accepts the Recommendation without qualification. Costa Rican legislation includes provisions that guarantee the proper implementation of this Recommendation. The Costa Rican Public Administration is able to acquire goods and services through public tendering that incorporates the principles of free competition, efficiency and equity. The principles laid down in the OECD Recommendation are reflected in the national regulatory framework.

To address the commitments Costa Rica made in the context of the 2016 accession review, COPROCOM issued a set of "Guidelines for fighting bid rigging in public procurement" in 2017, which were updated in 2018. These guidelines offer guidance on how to avoid introducing unjustified restrictions on competition in public tendering and provides guidance to prevent collusive actions by bidders. In addition, the roadmap established by COPROCOM and SUTEL for the implementation of the 2019 Competition Reform Act

includes the elaboration of a manual to detect collusive tenders, which will include the provisions of the OECD's Checklist for Detecting Bid Rigging in Public Procurement.

The Competition authority has also been engaged in advocacy matters, through the promotion and dissemination of the benefits of competition and prevention of practices that could distort markets, in order to facilitate better results in procurement processes. In the last two years, COPROCOM has also conducted several investigations regarding competition issues in public procurement rules. COPROCOM has also participated in drafting a recommendation of the Ministry of Finance to promote competition and to prevent anticompetitive practices in public procurement.

Costa Rica says that it strives for public procurement tenders at all levels of government designed to promote more effective competition and to reduce the risk of bid rigging, while ensuring overall value for money. Costa Rica has sought to ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour, and unusual bidding patterns which may indicate collusion.

In relation to the collusive practices, Costa Rican legislation contains rules that prohibit such practices, and can sanction them additionally with disqualification to contract with the public administration. In addition, Costa Rica's competition law contains the necessary legal instruments to safeguard the competitiveness of public procurement procedures.

Assessment

Costa Rica has a public procurement framework, which is broadly in line with the Recommendation. In recent years, a substantial part of COPROCOM'S advocacy work has focused on promoting the elimination of barriers to competition in several government procurement processes. COPROCOM has been active in training government officials across various government agencies – at both the national and local level – on how to prevent collusion on purchases made by the public sector, as well as on techniques to detect them.

It is evident that Costa Rica has pursued significant efforts in aligning itself with the OECD's recommendations in this area – nowhere more obviously than in its adoption of its Guidelines on fighting bid rigging.

At the same time, the Recommendation is to the effect that the competition agency should establish a continuing relationship with procurement agencies such that those agencies will report suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct. It is notable that, despite recent advocacy efforts, the OECD has not been made aware of any such suspicions and there have been no investigations or sanctions into collusion in this area since the last accession review.

It is recommended that Costa Rica continue to work in promoting best practices regarding public procurement, but also that it build on this work to focus on combatting bid-rigging in collaboration with tendering authorities.

The Recommendation of the Council Concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements [\[OECD/LEGAL/0248\]](#) and the Recommendation of the Council Concerning Actions against Restrictive Business Practices Relating to the Use of Trademarks and Trademark Licences [\[OECD/LEGAL/0162\]](#)

Summary of Content

These Recommendations focus on the need to balance between exclusive intellectual property rights and free competition in order to foster innovation without impairing competition and consumers' rights. In particular, they recommend that the analysis contained in the conclusions of the Report of the Competition Law and Policy on Competition Policy and Intellectual Property Rights [CLP(89)3 and Corrigendum 1] should be taken into account when reviewing patent and know how licensing agreements from the perspective of competition law and policy.

Costa Rica's position

Costa Rica accepted both instruments already in 2016. Costa Rica is aware of the above mentioned need to strike a balance between exclusive intellectual property rights and free competition. It submits that its legal framework addresses this concern through its competition law and through Law 6867 on Invention Patents, Industrial Designs and Utility Models (Ley sobre Patentes de Invención, Dibujos y Modelos Industriales).

Costa Rica's competition law ensures free competition by entrusting COPROCOM with the duty to investigate monopolistic practices and other restrictions to the efficient functioning of the market, including those emerging from licensing of patents and know-how. At the same time, Law 6867 grants the patent holder an exclusive right to exploit its patent and transfer its right through licensing agreements, subject to the surveillance of COPROCOM in cases of anticompetitive practices.

Assessment

Costa Rica's legal framework is consistent with the relevant elements of the Recommendations.

10.2.2. Mergers

The Recommendation of the Council on Merger Review [\[OECD/LEGAL/0333\]](#)

Summary of Content

The 2005 Recommendation provides guidance about multiple aspects of merger control, including effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and investigation and reviewing powers. The international enforcement co-operation elements of the Recommendation are addressed separately in section 10.2.4 below.

Costa Rica's expressed position

In 2016, Costa Rica considered that it fully complied with the Recommendation, but that it could improve its practical implementation by providing greater resources to COPROCOM.

However, the Committee's assessment was that, while Costa Rica was in line with several of the provisions in the Recommendation, Costa Rica could further improve its compliance with the Recommendation in a number of respects. In particular, Costa Rica could: (1) subject transactions in the financial sector to merger

control; (2) assert jurisdiction only over those mergers that have an appropriate nexus with Costa Rica; (3) increase the competition agency's resources devoted to merger analysis, and ensure that the competition authorities have at all times the requisite resources and expertise to adequately deal with merger control.

At present, Costa Rica considers that, following the amendments brought about by the 2019 Competition Reform Act, it fully meets the OECD's recommendations regarding merger review. This new law sets forth a new procedure and new standard of review of mergers, following international best practices and OECD recommendations. It ensures that merger review is effective, efficient, and timely; that merger control rules, policies and procedures are transparent; that procedural fairness is ensured; that Costa Rica does not discriminate between foreign and domestic firms; and that merger review authorities protect business secrets and other confidential information.

Assessment

The 2019 Competition Reform Act fully meets the requirements of the OECD's recommendations on merger control, and has the potential to fully align Costa Rica with OECD standards and best practices.

However, formal alignment does not mean that Costa Rica is already materially aligned with those standards. Section C of the OECD Recommendation, on 'Resources and Powers of Competition Authorities' requires competition authorities to have sufficient powers and resources to conduct efficient and effective merger review. COPROCOM added *ex ante* merger control to its duties in 2012, and its merger control work seems to have increased since the 2016 accession review. Nonetheless, the current staff number remains the same as in 2011, and its competition experience is limited. Furthermore, while COPROCOM devotes a significant amount of its resources to merger control, a number of the most recent merger control decisions have been questioned as being of doubtful analytical soundness.

It is true that Costa Rica has addressed these matters in the 2019 Competition Reform Act, but this act remains to be implemented. It is recommended that, in line with what is set in this law, Costa Rica increase the competition agency's resources devoted to merger analysis, and ensure that the competition authorities have at all times the requisite resources and expertise to deal with merger control in an effective and timely manner. It is also recommended that Costa Rica adopt additional guidance documents regarding merger control, as foreseen in the roadmap discussed in section 9 above.

10.2.3. Competition assessment, structural separation, and related issues

Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors [[OECD/LEGAL/0181](#)]

Summary of Content

This Recommendation has several elements dealing with competition assessment, in paragraphs 1, 2, 3 and 6, which are effectively incorporated in the 2009 Competition Assessment Recommendation discussed below. Broadly speaking, these paragraphs require regulatory regimes and exemptions from competition law to be justified by public policy objectives and restrict competition as little as possible, and for countries to review the need to regulate or exempt these sectors on a regular basis.

Under paragraph 4 of this Recommendation, members are also urged to assure that competition authorities are granted appropriate powers to challenge abusive practices by [regulated] enterprises, including unfair discrimination and refusals to deal, particularly where such conduct is beyond the purposes for which the regulatory scheme was enacted. Paragraph 5 urges members to undertake to detect and investigate anticompetitive agreements "*which, although lawful if notified to or approved by the competent authorities, have not been so notified and approved.*"

Costa Rica's position

In 2016, Costa Rica accepted this instrument and requested a period until March 2020 to implement the necessary reforms to comply with the Recommendation. At present, Costa Rica accepts this instrument while requesting three years for its implementation.

Costa Rica considers that, when there are regulatory regimes and exemptions from the scope of the competition legal framework, it is important that the competition authorities review those sectors. In such review, it is necessary to consider the experience of other countries, and to provide adequate means of consultation and co-ordination between regulatory authorities and competition authorities.

In 2012, a legal reform extended the application of antitrust law to sectors that were excluded, such as passenger air transportation and distribution of liquefied petroleum gas. In the 2019 Competition Reform Act, the scope of the competition legislation was extended, so that now only those acts duly authorised in special laws remain exempted from competition law.

In accordance with this new definition, there are five sectors that will have specific conducts – and only those conducts – exempted from the scope of competition law: the sugarcane industry, the rice sector, the coffee industry, the maritime transport and professional associations. Further, COPROCOM is now expressly empowered to evaluate these sectors through market studies and formulate the pertinent recommendations to promote competition. Currently, COPROCOM is finalising studies related to professional associations and maritime transport.

In addition, COPROCOM has examined a number of economic sectors that were exempted from the scope of competition law prior to entry into force of the 2019 Competition Reform Act. These include studies of the alcohol market, of the wholesale distribution of crude oil and its derivatives, of the postal service, of vehicle technical inspections, and of paid passenger transportation such as taxis or similar.

These studies have been remitted to the corresponding government authorities and to Congress to be taken into consideration when writing bills or changes to existing regulations. Additionally, these studies were remitted to the media for its broadcasting and discussion.

COPROCOM and SUTEL 's roadmap for the implementation of the 2019 Competition Reform Act foresees the undertaking of a number of other market studies, particularly as regards those economic sectors still exempt from competition law. Consequently, Costa Rica considers that a period of three years is necessary for the competition authority to issue the five studies of those sectors still exempted from the application of the competition law after the publication of the 2019 Competition Reform Act.

Assessment

A particular concern expressed by the Committee in the 2016 accession review was the extent of Costa Rica's exemptions from competition law, despite the Government of Costa Rica having already extended the application of antitrust law to sectors that were previously exempt from its scrutiny in 2012. In 2016, such exemptions were granted to concessionaires of a public service by law ('los concesionarios de servicios públicos en virtud de una ley'), those executing acts authorised in special laws ('aquellos que ejecuten actos debidamente autorizados en leyes especiales'), state monopolies and municipalities.

In 2016, the Committee recommended that pursue an in-depth review of the sectors and industries then exempt from the competition law. This review should consider: (1) whether the initial reasons or circumstances which gave rise to regulations, or particular aspects thereof, remained valid under contemporary conditions; (2) the extent to which those regulatory regimes or particular aspects thereof had achieved their objectives and the true social, economic and administrative costs, as compared to benefits, of achieving those objectives by means of regulation; (3) whether the same objectives could in fact be achieved through the operation of markets subject to competition law, or by forms of government intervention which restrict competition to a lesser degree. Following this assessment, the Committee

further recommended that Costa Rica should extend the scope of competition law to those sectors where exemptions are unjustified.

Costa Rica has complied with these recommendations, and devoted a lot of attention to this issue. Following the 2016 accession review, Costa Rica commissioned studies by external consultants into the state alcohol monopoly and the regulation of the wholesale oil distribution market. COPROCOM's technical unit has since also reviewed the state monopoly granted to the postal service, the taxi market and the exclusive concession granted as regards vehicle technical inspections. COPROCOM is currently finishing studies related to minimum fees set by professional associations and maritime transport.

Following the entry into force of the 2019 Competition Reform Act, only acts duly authorised in special laws remain exempt from competition law – meaning that public concessions and state monopolies will be subject to competition law. Furthermore, municipalities will be subject to competition law as well.

As a result, there are now only five sectors in Costa Rica where some specific acts are still exempt from the scope of competition law, i.e. the sugarcane industry as regards the fixing of production quotas and sale prices; the rice market as regards the import of rice in grain and its distribution between industrialists; the coffee industry as regards the fixing of profit percentages for coffee processors and exporters; maritime transport as concerns maritime conferences that agree on tariffs and route distribution between competitors; and professional associations, concerning the setting of minimum reference fees.

These are very impressive achievements. At the same time, there are still areas for improvement.

The exemptions concerning the sugar and rice industry, as well as those involving maritime conferences, can be said not to be aligned with the OECD Council Recommendation concerning Effective Action against Hard Core Cartels. Section 9 of that Recommendation states that exemptions from prohibitions against hard-core cartels should be restricted to those indispensable to achieve their overriding policy objectives. To this effect, Members should make their exemptions transparent and periodically assess their exemptions to determine whether they are necessary and limited to achieving their objective.

COPROCOM will continue to assess whether these exemptions are justified,¹⁵⁰ and has advocated for the abolition of some of them in the past.¹⁵¹ However, in each case, the Government decided to depart from COPROCOM's opinion. While assessing whether exemptions are justified is commendable, this does not amount to pursuing periodic review – or a mechanism for such review.

It is recommended that Costa Rica continue to review whether existing exemptions from competition law are justified, and that it adopts a mechanism for the periodic review of all competition exemptions that may subsist.

Recommendation of the Council on Competition Assessment [[OECD/LEGAL/0376](#)]

Summary of Content

The Council's 2009 Recommendation on Competition Assessment, applicable to regulation at "all levels of government," has three principal parts. Section IA urges the introduction of a process to identify existing or proposed "public policies" (defined as including "regulations, rules, and legislation") that unduly restrict competition. Section IB recommends a specific process to revise public policies that unduly restrict competition, culminating in the adoption of the more pro-competitive alternative. Section IC urges that competition assessment be incorporated in the review of public policies in the most efficient and effective manner, that assessment occur at an early stage of policy formulation, and that assessment be conducted by competition bodies or officials with expertise in competition.

Costa Rica's position

In its Initial Memorandum, Costa Rica accepted this instrument and requests a timeframe until March 2020 to implement the necessary reforms to comply with the Recommendation. At present, Costa Rica accepts this instrument within the specific timeframe for implementation of the 2019 Competition Reform Act.

Costa Rica agrees that it is important to any country to have an appropriate process to identify existing or proposed public policies that unduly restrict competition and to develop specific and transparent criteria for performing competition assessment, so that the more pro-competitive alternative consistent with the public interest objectives pursued is adopted, considering the benefits and costs of implementation.

Although there is no specific provision that integrates the mandatory assessment of this issue as part of the implementation of public policies in Costa Rica, the competition authorities may issue opinions and views on regulations that could affect competition. The previous version of Costa Rica's competition law already empowered the national competition authority to issue an opinion in relation to bills of laws, laws, regulations, directives and similar. Additionally, in relation to the telecommunications market, SUTEL was under a duty to foster the principles of competition in the telecommunications market and to review existing and proposed policies in the field of telecommunications law so they do not unduly restrict competition.

The 2019 Competition Reform Act strengthens the power of COPROCOM to promote the elimination or modification of regulations that establish anticompetitive barriers in the market. The competition authorities will have enough powers to issue opinions and recommendations, guidelines and market studies. While recommendations issued in a market study will not have binding effects, public entities that deviate from these recommendations should inform the corresponding competition authority about the reasons for not implementing them.

Additionally, in compliance with this OECD Recommendation, COPROCOM has reviewed many existing and proposed regulations and policies to identify restrictions on competition, and issued numerous recommendations on its findings. COPROCOM has also trained the staff of the Regulatory Improvement Commission of the Ministry of Economy, Industry and Commerce (MEIC) – who have the duty to carry out the review of the cost-benefit analysis of each new regulation that is drafted – to detect those that may affect competition.

Assessment

The Committee in 2016 recommended that Costa Rica adopt the necessary measures to implement an appropriate process to identify, review and revise existing or proposed public policies that unduly restrict competition, and to develop specific and transparent criteria for performing competition assessments, in line with the Recommendation. In particular, it was recommended that Costa Rica consider implementing a general process for the systematic competition assessment of new regulations.

Currently, the regulatory impact assessment (RIA) process in Costa Rica focuses mainly on regulations that create formalities or administrative procedures (trámites), which does not amount to a competition assessment of their impact and limits the extent of the analysis. Additionally, and like COPROCOM, the Regulatory Improvement Commission faces resource constraints, which could limit its effectiveness.

The role of COPROCOM in issuing opinions and in training Regulatory Improvement Commission staff on competition assessments is commendable. However, despite the progress made in Costa Rica regarding competition assessments – both in terms of practical work by the competition authorities and in terms of the regulatory framework brought about by the 2019 Competition Reform Act – the fact remains that, as was the case at the time of the 2016 accession review, there is currently neither a process in place to identify existing or proposed public policy that unduly restricts competition, nor specific criteria for performing competition assessment, as provided by this Recommendation.

While commending Costa Rica for the developments that occurred since 2016, and which are reviewed elsewhere in this section, the particular recommendations made in this respect at the time – i.e. that Costa Rica adopt the necessary measures to implement an appropriate process to identify, review and revise existing or proposed public policies that unduly restrict competition, and to develop specific and transparent criteria for performing competition assessments, in line with the Recommendation – are reiterated here.

Recommendation of the Council Concerning Structural Separation in Regulated Industries [[OECD/LEGAL/0310](#)]

Summary of Content

This Recommendation deals with the re-structuring of markets in which a regulated firm is operating in both a non-competitive activity and a competitive complementary activity. The Recommendation urges that, in such circumstances, Members should carefully balance the benefits and costs of structural separation measures against the benefits and costs of behavioural measures. The benefits and costs to be balanced include the effects on competition, effects on the quality and cost of regulation, effects on corporate incentives to invest, the transition costs of structural modifications, and the economic and public benefits of vertical integration, based on the economic characteristics of the industry under review.

Costa Rica's position

In its 2016 Initial Memorandum, Costa Rica accepted this instrument and requested a timeframe until March 2020 to implement the necessary reforms to comply with the Recommendation. At present, Costa Rica accepts this instrument unconditionally.

Given the sensitivity of the topic and the importance of the structural changes required, reforms of regulated industries should be coordinated across various institutions. These include the Public Services Regulatory Authority (Autoridad Reguladora de los Servicios Públicos - ARESEP), SUTEL, the Public Transportation Council (Consejo de Transporte Público - CTP), the Ministry of Environment and Energy (Ministerio de Ambiente y Energía - MINAE), the MEIC and other relevant actors. Specific laws and regulations should be revised from a competition standpoint to pursue a cost–benefit analysis of possible reforms.

Under the current competition legal framework, Costa Rica's authorities can issue opinions regarding the benefits and costs of structural measures against behavioural measures in the context of privatisation, liberalisation and regulatory reform. Costa Rica also considers that COPROCOM's and SUTEL's advocacy powers are enough to issue opinion regarding bills of law, including any kind of legal or regulatory reform in non-competitive sectors; and that these powers have been reinforced by the 2019 Competition Reform Act. Costa Rica considers that these reforms allow the country to comply with this Recommendation.

Assessment

In Costa Rica, a significant number of industries where structural separation would be advisable remain under state control, and were until recently exempt from competition law. As discussed above, a number of important economic sectors continue to be exempt from competition law. A number of the issues this raises have been discussed above in the context of the Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors.

It is recommended that Costa Rica continue to engage in the necessary competition assessment in order to determine whether existing exemptions and regulations are justified. If Costa Rica concludes that competition exemptions are not justified, and whenever it decides to introduce competition into a sector not currently subject to competition law, policy-makers should carefully balance the benefits and costs of structural measures against the benefits and costs of behavioural measures.

The benefits and costs to be balanced include effects on competition, effects on the quality and cost of regulation, effects on corporate incentives to invest, the transition costs of structural modifications, and the economic and public benefits of vertical integration based on the economic characteristics of the industry. Moreover, the benefits and costs to be balanced should be those recognised by the relevant agency(ies), particularly the competition authority.

The Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies
[\[OECD/LEGAL/0228\]](#)

Summary of Content

This Recommendation urges Member governments to undertake an evaluation of proposed trade and trade-related measures. It further recommends that, when considering action to approve or otherwise exempt export cartels, export limitation arrangements or import cartels from the application of their competition laws, governments should, insofar as possible within existing national laws, take into account the impact of such practices on competition in domestic and foreign markets. This Recommendation partially overlaps with commitments states have assumed under the WTO, of which Costa Rica is a member.

Costa Rica's position

Costa Rica accepts this instrument. Costa Rica considers that consistency between competition and trade policies increases trade, leads to greater transparency in markets through the elimination of barriers and distortions to trade, and promotes competition at local and foreign levels. The Costa Rican authorities are aware of the importance of coordinating with foreign trade authorities in order to avoid conflicts among trade and competition.

According to the provisions of this Recommendation COPROCOM has coordinated with the Ministry of Foreign Trade (COMEX) the inclusion of competition policy chapters in negotiations of free trade agreements (FTAs) and other international instruments. Such is the case of FTAs that Costa Rica has in force with Canada, CARICOM, Colombia, Chile, the European Free Trade Area, the European Union, Panama, Peru and Singapore.

Assessment

Certain aspects of this Recommendation are covered by more detailed, legally binding provisions in the WTO agreements to which Costa Rica is a party. In these areas, Costa Rica's conformity with its obligations under the WTO agreements also fulfils the parallel requirements of the OECD Recommendation. Costa Rica fares well on this front.

Article 6 of Law 7472 foresees the elimination of all non-tariff restrictions and any and all quantitative and qualitative restrictions to product imports. It also establishes that while the government may, exceptionally, establish import and export licences, in such cases the government has to conduct technical studies to support its measures and obtain COPROCOM's opinion, which can only be departed from by means of a reasoned decision. No such opinions have been requested from COPROCOM, however, since no such licences have been imposed.

We are not aware of COPROCOM or other government institutions having undertaken any systematic and comprehensive evaluation of proposed trade and trade related measures (as well of existing measures) affecting competition. COPROCOM's efforts in this regard were mostly ad hoc and resulted from consultations made by undertakings affected by those measures or, alternatively, other government offices.

Costa Rica is an open economy committed to international trade, and seems to be aligned with the Recommendation. To ensure that this is and remains the case, it is recommended that Costa Rica engage in a systematic and comprehensive evaluation of proposed trade and trade related measures.

10.2.4. International Co-operation

Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings [[OECD/LEGAL/0408](#)] and related OECD instruments

Summary of Content

The last recital of the Council's Recommendation concerning Effective Action against Hard Core Cartels, sections IB and IC of the Council Recommendation on Merger Review, and the Competition Committee's 2005 Best Practices Statement for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations all urge cooperation and coordination among competition agencies.

The 2014 Council Recommendation consolidates and elaborates the relevant elements of previous recommendations concerning international co-operation. It urges members to “*commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions*” in their laws or policies (such as blocking statutes prohibiting private parties from responding to investigative demands from foreign competition authorities) that hinder effective enforcement co-operation among competition authorities.

To this end, members should aim inter alia to: (i) minimise the impact of legislation and regulations that might have the effect of restricting co-operation between competition authorities or hindering an investigation or proceeding of other members, such as legislation and regulations prohibiting domestic enterprises or individuals from co-operating in an investigation or proceeding conducted by competition authorities of other members; (ii) make publicly available sufficient information on their substantive and procedural rules, including those relating to confidentiality, by appropriate means with a view to facilitating mutual understanding of how national enforcement systems operate; and (iii) minimise inconsistencies between their leniency or amnesty programmes that adversely affect co-operation.

The 2014 Council Recommendation also contains detailed provisions concerning: (i) notifications, consultations, and co-ordination among authorities when competition-related activities in one jurisdiction overlap with or affect important interests of another, (ii) the exchange among competition authorities of information (including a recommendation to adopt means to exchange confidential information) in investigations and proceedings, and (iii) enhanced co-operation among authorities in the form of investigative assistance.

Costa Rica's expressed position

In its 2016 Initial Memorandum, Costa Rica accepted this instrument and requested a timeframe until March 2020 to implement the necessary reforms to comply with the Recommendation. Presently, Costa Rica still accepts this instrument, subject to the implementation of the 2019 Competition Reform Act.

Costa Rica is committed to participate in effective international co-operation and to take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities. However, in order to be able to adopt this Recommendation, Costa Rica's legal system required a reform.

The 2019 Competition Reform Act allows the competition authorities to enter into cooperation agreements with public and private entities, national or international.¹⁵² These agreements may establish mechanisms to collect evidence and conduct investigations inside and outside the national territory; conduct studies in conjunction with other competition authorities; facilitate technical cooperation and the exchange of

experiences; exchange information that facilitates the investigation of anticompetitive practices and mergers; and others that are related to the competences of each competition authority.

At the same time, these agreements must provide adequate mechanisms to safeguard the confidential information exchanged. Confidential information may only be used for the purposes for which it was requested, under the terms of the agreements signed by the authorities that are parties to the agreement with strict adherence to the protection of confidential information delivered or received. The officials of the competition authorities who fail to comply with this duty will be subject to sanctions.

But recognising that cooperation among competition agencies in investigations and proceedings is of utmost importance, the recently 2019 Competition Reform Act will enable the implementation of this Recommendation. This law will be in force as of its publication, which is expected to occur in November 2019.

Assessment

Costa Rica's competition authorities participate in fora where competition law and policy is discussed and experiences are exchanged. Indeed, Costa Rica is a participant in the OECD Competition Committee since 2014, and a member of the International Competition Network, The Regional Competition Centre for Latin America and the Interamerican Alliance for Competition Defence (Alianza Interamericana de Defensa de la Competencia). Moreover, COPROCOM is a regular participant in UNCTAD conferences, the OECD/IDB Latin Competition Forum, the OECD Global Forum on Competition and the Central American Competition Forum.

The most important obstacle to Costa Rica's compliance with the OECD *acquis* in this area under the previous legal regime resulted from a failure of Costa Rican law to expressly grant COPROCOM with the power to exchange information with competition agencies in other countries. The only exception occurred if an investigated company authorised COPROCOM to share confidential information with an authority in another country where a related investigation was taking place. Within this framework, COPROCOM officials admit that, when it comes to international cooperation, the further they have gone in an investigation concerning a prohibited conduct or a merger has been to interact informally with their counterparts in other agencies. To date, moreover, no foreign competition authority has asked that COPROCOM share confidential information in its possession.

As noted above in section 7.2 on international cooperation, Costa Rica and COPROCOM have entered into a number of partnerships with other countries and competition agencies – but without practical effects. This absence of practical consequences of the various international instruments that Costa Rica or its competition authorities have entered into is particularly noticeable because COPROCOM cannot compel evidence from foreign enterprises that have no legal presence in the country, or take legal action against them. If COPROCOM wishes to obtain information from such firms and does not receive voluntary disclosure, it relies on its cooperative relationships with foreign competition authorities. To date, however, COPROCOM has never relied on these relationships to compel evidence from foreign firms.

As acknowledged by Costa Rica, the country can greatly benefit from alignment with the recommendations on international cooperation, and the 2019 Competition Law Reform allows Costa Rica to align itself with OECD standards and instruments in this regard. Costa Rica's willingness to engage in these efforts is acknowledged.

However, it is recommended that, once the 2019 Competition Reform Act enters into force, Costa Rica's competition authorities must enter into the relevant arrangements with its international peers and to start developing a practice of interacting with other competition agencies in order to fully reap the benefits of international cooperation.

10.2.5. Institutions, process, and policy

Independence, Autonomy and Impartiality

Although none of the OECD Council's Recommendations dealing with competition policy include specific provisions on agency independence, Section 7.3 of the 2012 Council Recommendation on Regulatory Policy and Governance [[OECD/LEGAL/0390](#)] recommends that the establishment of “*independent regulatory agencies*” should be considered where the agency's decisions “*can have significant economic impacts on regulated parties and there is a need to protect the agency's impartiality.*” This principle applies equally to an enforcement agency like COPROCOM, which issues decisions with at least as much economic impact as those of regulatory agencies, and SUTEL, which is a sectoral regulator.

This is an area that raised the Committee's concerns in 2016. As already noted in the Peer Review in 2014, COPROCOM's institutional design allowed for the politicisation of the competition agency. At the same time, SUTEL was widely perceived to be an autonomous institution with legal and budgetary independence, as well as technical and administrative autonomy, which is not subject to the Executive branch's legal framework.

As in 2016, at the time of the present review COPROCOM's board is still composed of five regular and five substitute members designated by the Minister of Economy, Industry and Commerce (the “Minister”), and approved by the President of Costa Rica. Commissioners do not work full-time, and they meet in regular weekly sessions for which they are paid for their attendance – around USD 50 per session. As such, Commissioners have a main job elsewhere, which has a number of consequences.

Commissioners do not always have the time to develop in-depth knowledge of the cases they are assessing. This is compounded by a lack of competition expertise by a significant number of Commissioners prior to their appointment, even though it must be remarked that their diligence and commitment is beyond reproach.

Furthermore, the Commissioners' professional activities can place them in a situation of conflict of interests. While in 2016 the main challenge identified by the Committee was that COPROCOM's institutional framework had allowed political intervention in a number of ongoing cases, since then the main challenges have concerned conflicts of interest in individual cases, as noted elsewhere in this Report. The extent of these conflicts of interest is such that it seems to have interfered, on occasion, with the effective enforcement of competition law and merger control.

Furthermore, concerns regarding the instrumentalisation of the technical support unit (TSU) – i.e. COPROCOM's staff – were noted both in the Peer Reviews of Costa Rica's Competition Law and Policy the OECD pursued in 2014 and in 2016. In between these two Peer Reviews, the TSU was restructured by the Ministry. The restructuring created, as a ministerial office under the Ministry's direct authority, a Directorate of Competition (Dirección de Competencia), and moved to it 10 out of the 15 officials that until then worked in the TSU. The TSU was left with only five officials, and left solely with the responsibility to instruct the cases previously investigated by the newly created Directorate of Competition, and to review merger notifications. The restructuring also attributed to the Directorate of Competition some of the functions that were previously performed by the TSU. In particular, the Directorate was given competence over all preliminary investigations regarding the existence of anticompetitive practices and illegal mergers, as well as all competition advocacy tasks. The Ministry also ordered investigations to be started regarding certain sectors without input from the competition agency, and information requests unrelated to the enforcement of competition law were sent as if they were information requests for competition law purposes.

This intervention was ultimately reversed before the 2016 accession review took place – following opposition from chambers of commerce, legislators and even Commissioners, which expressed their opposition and a number of whom resigned. The Attorney General also declared that the Ministry could

not have pursued the reorganisation as it did, and the Ministry of National Planning and Economic Policy, which was responsible for approving the restructuring prior to its implementation, opposed it and ordered that the restructuring be reversed.

However, despite proposals announced since 2016 to grant administrative autonomy to the Technical Unit from the Ministry of Economy, the situation remains in practice as it was before all these problems arose – and on all administrative and resource-related matters, the Technical Unit has remained subject to the Ministry. In effect, in 2018 members of the Technical Unit attended meetings regarding an ongoing investigation of anticompetitive conduct with the complainants at the request of the Vice-Minister of Economy – a meeting which the Commission refused to attend. Even if that staff member did not otherwise participate in this case, and MEIC later accepted that this was not an appropriate course of conduct and that measures should be adopted to prevent this occurring again in the future, this speaks to the need to adopt formal barriers between competition agencies and the executive.

The 2019 Competition Law Act now sets such barriers. As noted throughout this report, this legal reform can endow COPROCOM with technical, administrative, political and financial independence. COPROCOM's Board will comprise members employed on a full-time basis, selected on the basis of criteria related to their expertise and character – including a minimum 8-years of expertise on competition matters – and recruited through a public procedure.

Regarding the TSU, it will now fall under the administrative umbrella of COPROCOM, and its staff will henceforth be subject to a labour regime and benefit from compensation packages in line with other economic regulators, while being selected, hired and appointed by COPROCOM. Furthermore, given COPROCOM's new resourcing, which will be discussed below, COPROCOM will now be able to be staffed to the requisite level to adequately fulfil all its competences.

At the same time, these reforms are at the moment still being implemented, as per the implementation Roadmap discussed in chapter 9. It seems consensual in Costa Rica that the success of this reform will hinge on the appointment procedure set forth in the regulatory instruments implementing the 2019 Competition Reform Act, and on the character of the first batch of commissioners. – and in particular, on their expertise and independence.

It is recommended that Costa Rica implement its Roadmap in a way that ensures the expertise, independence and autonomy of COPROCOM and its Board members.

Resources

At the time of the 2016 accession review, it was noted that COPROCOM's financial resources were conspicuously lower than those of other economic regulators in Costa Rica or those of other comparable competition agencies in the region.

As regards staff, and in addition to the Commissioners, there were then only 15 people devoted full time to competition in the TSU and MEIC's Directorate of Competition – 12 professionals and 3 administrative staff. Although in 2012 COPROCOM had added *ex-ante* merger control to its duties, the level of staffing in 2016 was the same as in 2011, and one fewer than in previous years. At the time, there were only six people working on competition with SUTEL.

COPROCOM also faced serious issues with respect to the retention of experienced personnel and the maintenance of institutional memory. Only a minority of TSU staff had experience in competition law, with many having been recently appointed from other positions as civil servants. It was widely accepted, including by members of the TSU and the Competition Directorate, that available resourcing and staffing was insufficient.

To address this, the Committee recommended that Costa Rica adopt the necessary measures to deal with these issues – particularly regarding which staff to hire, when to hire them and what their employment

conditions should be. Costa Rica should grant COPROCOM financial autonomy to prepare its own budget and obtain funding. Furthermore, it was recommended that the competition agency build up its personnel and expertise, to be able to cover competition issues across Costa Rica's economy effectively.

As we have seen elsewhere, these recommendations have been adopted by the 2019 Competition Reform Act. COPROCOM's budget will increase exponentially, and is protected from political interference by law. At the same time, the exact budget of COPROCOM remains to be assigned, even if it will now be substantial – around USD four million.

On the other hand, COPROCOM's and SUTEL's staff remain as limited now as they were in 2016 – 16 people in COPROCOM and still six people in SUTEL –, and problems related to retaining personnel and building up expertise subsist.

Costa Rica presented an implementation plan to build up its staff – in numbers and expertise -, and financial resources are to be assigned shortly. It is recommended that Costa Rica faithfully adopt its implementation plan, with a focus on ensuring its independence and autonomy from other decision-makers – both formally, via implementing regulations and acts, and in practice, e.g. by moving to its own premises away from those of MEIC – and the effectiveness of its actions.

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- OECD (2015), *Costa Rica: Good Governance, from Process to Results*, OECD Public Governance Reviews, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264246997-en>. [2]

Notes

¹ Instituto Nacional de Estadísticas y Censos (2018) ‘Costa Rica en Cifras’, available at <http://inec.cr/sites/default/files/documentos-biblioteca-virtual/recostaricaencifras2018.pdf>.

² Costa Rica, World Development Indicators, World Bank. Available at: <https://www.worldbank.org/en/country/costarica>.

³ Note that the 1949 Constitution entrusted the state with key tasks such as the fulfilment of social and economic rights while retaining important areas of the economy – such as banking, electricity and telecommunications – as state monopolies. The state was also entrusted the administration of health, education and housing issues.

⁴ Central Bank of Costa Rica, Macroeconomic Program 2019-2020. Available at: https://activos.bccr.fi.cr/sitios/bccr/publicaciones/DocPolticaMonetarialInflacin/Programa_Macroeconomico_2019-2020.pdf

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¹⁰ ENAHO, INEC Costa Rica. Available at: <http://www.inec.go.cr/>.

¹¹ World Development Indicators, World Bank. Available at: <http://data.worldbank.org/indicator/SI.POV.GINI>.

¹² Law 9635 of 3 December 2018 “Reform to Strengthen the Public Finances”.

¹³ Law 9670, amending subsections a), b) and c) of article 17 of Organic Law on the Central Bank of Costa Rica.

¹⁴ Law 7210.

¹⁵ Law 9694 on the National Statistics System.

¹⁶ Law 9699 Liability of legal persons for committing domestic bribery, transnational bribery and other crimes.

¹⁷ Both the Free Trade Agreement with Mexico (which was signed in 1994 and came into force in January 1995) and the structural adjustment program negotiated with the International Monetary Fund (PAE III, which was approved by The Legislative Assembly in 1995) obliged Costa Rica, among other things, to adopt a competition law framework.

¹⁸ In 2002, the Fiscal Contingency Law (Law 8343 of 2002) created the Regulatory Improvement Commission with powers to co-ordinate and lead all initiatives and efforts related to regulatory improvement. As a result, COPROCOM was relieved of its regulatory improvement obligations.

¹⁹ It should be noted that, prior to 2012 amendments to Law 7472, the exemptions were even broader. Indeed, until then all public service providers operating under a state concession were exempted from competition law, regardless of whether the concession had been granted by law. This was, for example, the case of airlines. The 2012 amendments, therefore, resulted in that the exemptions no longer applying to those public service providers which concession had not been granted by statute.

²⁰ The result of this is that the severity of the infraction will depend on the effects of the merger. In cases where there is only a violation of the formal duty to notify, the infringers will be penalised for a “severe” infringement. If, in addition, this non-notified merger generates anticompetitive effects, it will be penalised as a “very severe” infraction.

²¹ See Attorney General’s opinion dated 19 February 2015, under file number C-27-2015.

²² This is a literal translation of the relevant legal provision.

²³ Opinion C-176-2011 dated on July 27, 2011.

²⁴ Bill of Law N° 20861, “Addition of articles 36 *bis*, article 53 subparagraph g and h and reform of article 63 of Law N° 7472, on the Law for the Promotion of Competition and Effective Consumer Protection, of December 20, 1994, published in The Gazette N° 14 of January 19, 1995”.

²⁵ Opinion OP-007-19 in connection with Bill No. 21.177 to determine credit and debit card acquisition and exchange fees; and Opinion No. OP-19-19 on Bill No. 21.368 “Law to Promote Competition in the Drug Market”.

²⁶ Under Article 2 of Law 8642, SUTEL is required to pursue the following objectives: to protect individuals’ rights to telecommunications services; to ensure that telecommunications services are provided under principles of universality and solidarity; to promote effective competition in the telecommunications sector, as a mechanism to increase services’ availability, improve their quality and ensure accessible prices; to promote the usage and development of telecommunications services within frameworks of social information and knowledge, and as support to the health, security, education, culture, commerce and electronic governing sectors; to secure the effective and efficient assignment, use, exploitation, administration and control of the radio spectrum and other scarce resources; to encourage investment in the telecommunications sector, through a legal framework that contains mechanisms that guarantee the principles of transparency, non-discrimination, equity and legal certainty, and that does not encourage

taxation; to ensure that the country obtains the best benefits in terms of technological progress and convergence; to achieve similar telecommunication development indexes as those of developed countries.

²⁷ This was the case regarding a couple of actions brought against the Instituto Nacional de Seguros – e.g. agreement in vote No. 28-2014 of 12 August and vote No. 26-2016 of 24 May.

²⁸ See opinion No. 08-2018 of 2 May following a study of the Postal Communication Social Service; opinion 02-2018 of 13 February 2018 following a study into the alcohol sector.

²⁹ See opinions in the fourth article of the minutes of ordinary session No. 11-2011 of 15 March 15 and of the fifth article of ordinary session No. 15-2012 of 11 September regarding electricity generation.

³⁰ Including individuals, companies, domestic companies, foreign companies, private companies, publicity owned companies and public authorities.

³¹ A coffee processor is someone who is responsible for receiving coffee beans from producers and processing them into green coffee. Coffee exporters buy green coffee from benefitees and resell it to importing companies and/or toasters operating in other countries. Costa Rica exports most of its coffee production as green coffee. Coffee regulations set profit margins for both of these market players.

³² As noted above, COPROCOM is currently assessing the exemptions granted in the maritime sector and to professional associations.

³³ As regards sugar, COPROCOM has pointed out that the powers granted to Liga Agrícola Industrial de la Caña de Azúcar (LAICA) to fix sugar production quotas and sale prices amount to a legal monopoly / a state sponsored cartel. A new market study is pending – the last one was made in 2005. Concerning rice, COPROCOM issued a negative opinion concerning the award of powers to pursue anticompetitive acts (agreement in the seventh article of the minutes of ordinary session No. 17-2012 of 18 June), and has reiterated on several occasions that the fixing grain prices by MEIC is not appropriate – see, most recently, Opinion, NO. 02-2017 of 18 April. A recommendation against the possibility of professional associations fixing minimum prices was issued in Opinion No. 21-2016 of 4 October.

³⁴ The main differences between the regimes were procedural until the adoption of the Competition Reform Act. In particular, SUTEL did not have the power to conduct inspections, and undertakings in the telecommunications sector could not settle competition investigations through commitments.

³⁵ The Guidelines are available at https://sutel.go.cr/sites/default/files/2015_sutel_guia_analisis.pdf

³⁶ Article 39 of the secondary regulations of Law 7472.

³⁷ In more detail, a merger will be presumed not to pose competition issues if: (a) the parties involved do not participate in the same relevant or related markets, horizontally or vertically; (b) Parties are active in the same relevant market, where: (i) the joint market share is less than 25%, (ii) the joint market share is between 25% and 40%, and the delta variation is less than 2%, or (iii) when the parties do not reach a 30% market share in a vertically related market where one of them has operations; (c) When a party acquires exclusive control over one or more companies of the target where the acquirer already holds an interest; and (d) When the entity created does not have and will not have business in the local territory.

³⁸ To be more precise, Cases: 33-15-CE, 35-15-CE and 32-15-CE were cleared tacitly because the appointment of one of the members of the Commission took longer than expected, so the commission did not have enough quorum to vote the cases.

³⁹ ARESEP is an autonomous institution that, in accordance to Article 1 of Law 7593, is not subject to the Executive Branch's legal framework.

⁴⁰ These are available at https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf.

⁴¹ The monthly minimum wage for the first half of 2019 is 309 143.36 collones (approximately USD 530).

⁴² See Sittenfeld, P. (2007) "Ventajas y limitaciones de la experiencia de Costa Rica en materia de políticas de competencia: un punto de referencia para la región centroamericana", Serie Estudios y Perspectiva N°69, Comisión Económica para América Latina, México D.F.

⁴³ See Article 117 (d) of Law 9736.

⁴⁴ Article 70 of Law 8642.

⁴⁵ See Article 117 (d) of Law 9736.

⁴⁶ The Competition Reform Act also allows COPROCOM to take into account the adoption of a compliance program prior to the infringement that meets the requirements to be established in the forthcoming regulation of this new law.

⁴⁷ The result of this is that the severity of the infraction will depend on the effects of the merger. In cases where there is only a violation of the formal duty to notify, the infringers will be penalised for a "severe" infringement. If, in addition, this non-notified merger generates anticompetitive effects, it will be penalised as a "very severe" infraction.

⁴⁸ Article 119(h) of Law 9736.

⁴⁹ Transitory XII.

⁵⁰ Article 1 of Law 7593.

⁵¹ SUTEL's agreement 013-043-2014.

⁵² Article 23 of Law 7472.

⁵³ Law 6227.

⁵⁴ Law 6227.

⁵⁵ See https://www.meic.go.cr/meic/documentos/g3p3m8yyx/Informe_Ejecucion_Presupuesto_2018.pdf.

⁵⁶ Acta Ordinaria 14-2018, pages 189-193.

⁵⁷ Acta Ordinaria 32-2018, pages 448-450.

⁵⁸ Acta Ordinaria 21-2018, pages 375.

⁵⁹ Acta Ordinaria 21-2018, pages 373-375.

⁶⁰ Decision adopted at Acta Ordinaria 47-2018 of December 2018, point 6-7. This was Decision 91-2018, against CEFA Central Farmacéutica S.A. and other three economic agents from the same group.

⁶¹ Acta Ordinaria 21-2018, pages 374-375; Acta Ordinaria 23-2018, p. 392-393; Acta Ordinaria 33-2018, p. 460-461.

⁶² In its recent Opinion C-299-2018. See also Constitutional Chamber, judgment 2006-9563 of 16:06 on 5 July 2006.

⁶³ Otherwise, a complaint procedure can only be closed when a preliminary or formal investigation into potential competition infringements concludes.

⁶⁴ Ordinary administrative procedures do not provide for preliminary investigations. However, the relevant competition regulations provide for it. For example, the “Manual-Guía para el Desarrollo de los Procedimientos por parte de la COPROCOM” (Guide for Procedures Undertaken by COPROCOM), issued in 2010, refers to preliminary internal investigation competencies. SUTEL follows internal guidelines issued in 2015 on how to handle administrative procedures to investigate infractions to the Telecommunications Competition Law.

⁶⁵ The right against self-incrimination is set out in Article 36 of the Political Constitution of Costa Rica. The Constitutional Court of Costa Rica has identified, in Votes Numbers 5653-93 and 2945-94, the following due process rights: notification to the interested party of the nature and purposes of the procedure; right to be heard, and opportunity of the interested party to present the arguments and produce evidence the party deems relevant; opportunity for the investigated party to prepare its defence, which includes necessarily access to information and to administrative background; the right to be represented and advised by lawyers, technicians and other qualified persons; adequate notification of the decision and its justification adopted by the administration; and the right to appeal the decision.

⁶⁶ Article 361 of the Law 6227.

⁶⁷ A single file is prepared for the ordinary administrative procedure, including all documentation in chronological order and duly numbered pages. Confidential information is kept in a separate file, in chronological order of submission and duly numbered. When economic agents or third parties provide information they deem confidential, the competition authority will provisionally and temporarily place it in the confidential file. After examining the request for confidentiality, the information is reclassified and placed in the corresponding file. The confidential file may only be accessed by the provider of such documents, or by whomever such provider authorises in writing.

⁶⁸ For the crime of disclosure of secrets (Article 203 of Criminal Code).

⁶⁹ Articles 343 and 345 of Law 6227

⁷⁰ Only the parties, their representatives and their lawyers may be present at the hearing. The parties may also be accompanied at the hearing by a technical consultant or expert to assist in matters under his/her purview.

⁷¹ Decision 29-2015.

⁷² Decision 59-2015.

⁷³ Decision 46-2015.

⁷⁴ Article 9 of the Law 7729 on Alternate Dispute Settlement and Promotion of Social Peace.

⁷⁵ Article 36 of Law 8508 Administrative Contentious Procedural Code.

⁷⁶ Articles 9 and 10 of Law 8508.

⁷⁷ Article 36 of the Contentious Administrative Procedural Code (CPCA), Law N° 8508.

⁷⁸ Resolution No. 2007-15001 of the Constitutional Court explains that '*Although not expressly provided in our Political Constitution, constitutional jurisprudence has derived the right to due process and the principle of defence [which] are applicable not only in jurisdictional proceedings but in administrative proceedings*'.

⁷⁹ On a sanction imposed on the Public Services Company of Heredia (ESPH) in 2011.

⁸⁰ For fines imposed by COPROCOM, see Vote No. 070 -2015 of the Administrative Contentious Court, Fourth Section, San José; Ruling of the Contentious Administrative Court 100-2009-SVII, ruling in Second Instance 31-2010-VIII; and ruling 250-F-SI-2011 of Cassation; Resolution 000250-F-S1-2011 of the First Chamber of the Supreme Court of Justice.

⁸¹ Vote 112-18-2018-IV of the Administrative Contentious Court, Fourth Section, Second Judicial Circuit of San José, annulling COPROCOM infringement decision against the Association of Importers of Vehicles and Machinery (AIVEMA). See also , for the annulment of a decision by SUTEL against the Costa Rican Electricity Institute, Judgment 108-2017-VIII at eleven hours of 10 November 2017 issued by the Administrative Contentious and Civil Court of Finance, Section Eight, corrected by means of ruling 108-2017-VIII-BIS at 15 hours of 17 November 2017; upheld by Court of Appeals for Administrative Contentious Matters, in resolution 000008-F-TC-2019. The infringement decision was annulled because the administrative act had two procedural issues that affected the exercise of the right of defence. The first one regarded the failure to set out in the statement of objections the conduct for which the company was eventually sanctioned (margin squeeze). The second issue was that the investigated party not granted an opportunity to rebut the "as efficient as operator" test prior to the adoption of the final decision.

⁸² Ruling 53-2015-I of the Administrative Procedural Court, First Section of the Second Judicial Circuit of San José.

⁸³ Vote No. 050-IV-2016 of the Administrative Contentious Court, Fourth Section, San José.

⁸⁴ Resolution 000063-F-TC-2013 of the Administrative Contentious Court of "Casación" of the Ministry of Treasury.

⁸⁵ Please see note 81 above.

⁸⁶ A number of observers, including representatives from the Attorney General, expressed the view that this needs to be assessed on a case-by-case basis.

⁸⁷ Articles 121 and 123 of Law 9736 (the 'Competition Reform Act').

⁸⁸ Articles 66-70 of Law 9736 (the 'Competition Reform Act').

⁸⁹ These commitments were accepted in the context of investigations into alleged price fixing agreement between hotels in the Tortuguero area (archived by Decision 29-2015), alleged bid rigging agreement between printing companies (archived by Decision 59-2015) and alleged price fixing agreement between various pork meat producers (archived by Decision 46-2015).

⁹⁰ www.coprocom.go.cr/publicaciones/GUIA-CONTRATACION.html

⁹¹ The cases concerned alleged a price-fixing agreement concerning subscription television services (archived by decision RCS-089-2014), alleged bid rigging in tenders for a project launched by the National

Telecommunications Fund (Fondo Nacional de Telecomunicaciones) (archived by Decision RCS-149-2016), and an alleged market sharing agreement (archived by Decision RCS-148-19).

⁹² This included investigations into exclusive arrangements between BN Corredora de Seguros S.A. and Instituto Nacional de Seguros (archived by Decision 22-2015), between Logística Recreativa Navegación Satelital de Costa Rica S.A. (archived by Decision 57-2015), between Construcciones Roque S.A. and Holcim Costa Rica S.A. (archived by Decision 32-2016), between Automercado del Norte de Heredia S.A. and Distribuciones Efectivas PH S.A. (archived by Decision 46-2016) and Sologud SRL and Instituto Costarricense del Deporte y Recreación (archived by Decision 08-2017).

⁹³ This includes an agreement between British American Tobacco C.A. and Tabacalera Costarricense S.A. (archived by Decision 62-2015) and the already mentioned investigation into between Automercado del Norte de Heredia S.A. and Distribuciones Efectivas PH S.A. (archived by Decision 46-2016).

⁹⁴ Such as the investigations archived by Decisions 47-2015, 55-2015 and 09-2019.

⁹⁵ E.g. investigations archived by Decisions 55-2015, 62-2015, 15-2016, 35-2017 and 70-2018.

⁹⁶ As in the case of the investigation archived by Decision 42-2019.

⁹⁷ File 038-16-D.

⁹⁸ This includes a number of arrangements entered into by Televisora de Costa Rica S.A. (archived by Decisions RCS-266-2016, RCS-240-2017, RCS-282-2017, RCS-011-2018, RCS-367-2018, RCS-168-2019) and the Instituto Costarricense de Electricidad (archived by Decision RCS-055-2018). There was also an investigation into tying by Televisora de Costa Rica S.A. (archived by Decision RCS-154-2015).

⁹⁹ See the investigations archived by Decisions RCS-017-2015, RCS-221-2015 and RCS-208-2017.

¹⁰⁰ See the investigations archived by Decisions RCS-221-2015, RCS-093-2016 and RCS-144-2015.

¹⁰¹ See the investigations archived by Decisions 010-058-2016, RCS-196-2017 and RCS-234-2018.

¹⁰² See the investigations archived by Decisions RCS-088-2015, RCS-195-2016 and RCS-144-2015.

¹⁰³ Decision RCS-088-2015. The amount of the fine was USD 4 010 829.37 (€2 157 826 200.00). The infringement decision was annulled because the administrative act had two procedural issues that affected the exercise of the right of defence. The first one regarded the failure to set out in the statement of objections the conduct for which the company was eventually sanctioned (margin squeeze). The second issue was that the investigated party not granted an opportunity to rebut the “as efficient as operator” test prior to the adoption of the final decision.

¹⁰⁴ Article 39 of the secondary regulations of Law 7472.

¹⁰⁵ This includes situations where: (1) horizontal overlap is below 25% of the market; (2) horizontal overlap is between 25% and 40% of the market, but the transaction does not increase individual market shares by more than 2%; (3) vertical overlaps where no party has a market share exceeding 30%.

¹⁰⁶ It is considered that this requirement does not collide with the local nexus requirement that both parties need to be active in Costa Rica because, while two companies may be active in Costa Rica – and hence be under a duty to notify – there is no *de minimis* threshold for such operations in Costa Rica, and it may be that the merger entities’ activities will only take place in Costa Rica. In such circumstances, there is a duty to notify but there is also a presumption of legality.

¹⁰⁷ Article 56 of Law 8642.

¹⁰⁸ Calculated at the end-of-2016 exchange rate of ₡ 532.136 to USD 1.

¹⁰⁹ RCS-149-2015

¹¹⁰ Millicom Cable Costa Rica S.A. and Cable Zarcero S.A. (RCS-285-2018); Millicom Cable Costa Rica S.A. and Cable Televisión Doble R S.A. (RCS-284-2018); Telecable S.A. and Cable Costa S.A. (RCS-406-2018). All conditions imposed reductions in the duration of non-compete clauses to three years/

¹¹¹ Millicom Cable Costa Rica S.A. and Telecable Económico TVE S.A.

¹¹² Millicom Cable Costa Rica S.A. and Cable Zarcero S.A. (RCS-285-2018).

¹¹³ Aditi S.A. and La Nación S.A..

¹¹⁴ The interim measure was issued in an investigation of a relative monopolistic practice. More specifically, it involved a case where the owner of pole infrastructure denied access to its infrastructure to a cable TV company wanting to expand its business. In that case, and as a result that during the investigation, the owner of the infrastructure in question decided to terminate an existing agreement with the cable TV company as a pre-emptive measure. COPROCOM ordered it to keep the agreement in place during the investigation and until final resolution of the matter.

¹¹⁵ Decision RCS-088-2015.

¹¹⁶ Judgment 108-2017-VIII issued by the Administrative Contentious and Civil Court of Finance, Section Eight, corrected by means of ruling 108-2017-VIII-BIS, upheld by the Court of Appeals for Administrative Contentious Matters, in resolution 000008-F-TC-2019 at nine hours of 6 February 2019.

¹¹⁷ The studies looked at: retail broadband residential access (RCS-258-2016); retail international roaming (RCS-259-2016); wholesale call origination (RCS-260-2016); retail fixed telephony (RCS-261-2016); retail international calls (RCS-262-2016); wholesale mobile call termination (RCS-264-2016); wholesale fixed call termination (RCS-263-2016); wholesale call transit (RCS-266-2016); wholesale local loop unbundling (RCS-191-2017); retail mobile telecommunications (RCS-248-2017); wholesale access to mobile networks (RCS-040-2018); retail business telecommunications solutions (RCS-266-2018); wholesale broadband access (RCS-297-2018); and wholesale leased lines market (RCS-339-2018). They can be found at http://www.sutel.go.cr/sutel/resoluciones?field_tipo_documento_tid=All&=Aplicar.

¹¹⁸ Agreement 08-051-2019.

¹¹⁹ Agreement 021-053- 2019 of 22 August 2019.

¹²⁰ Agreement 013-062-2019 of 3 October 2019.

¹²¹ Article 27 subsection f) of Law 7472.

¹²² Examples of opinions issued by COPROCOM as a result of requests from the Legislative Assembly include: Opinion OP-025-16 on bill of law N° 19752 on pharmaceutical recommendations and establishing a general classification of medicines; Opinion OP-03-17 regarding bill of law N° 20144 "Law to regulate the acquisition of medicines and vaccines of high financial impact to the Costa Rican Social Security System (CCSS); Opinion OP-024-18 on a bill of law to lower the price of rice"; Opinion OP-025-18 on bill of law N°. 20404, "Law to

regulate the National Statistics System”; Opinion OP-007-19 in connection with Bill No. 21.177 to determine credit and debit card acquisition and exchange fees; Opinion OP-013-19 on bill of law N° 21228 “General reform to the system of remunerated transportation of people and regulation of transportation service platforms; and Opinion OP-19-19 on Bill No. 21.368 “Law to Promote Competition in the Drug Market”.

¹²³ Examples of opinions issued by COPROCOM on its own initiative include: Opinion OP-021-16 on bill of law N° 20025 “Law to protect users against arbitrary establishment of service fees by Professional Boards”; Opinion OP-001-17 on bill of law N° 17338 “Control of Medicine Prices”; Opinion No. 07-2019 on bill of law N° 21228 “General reform to the system of remunerated transportation of people and regulation of transportation service platforms”. COPROCOM started preparing an opinion in connection with Bill No. 21.177 to determine credit and debit card acquisition and exchange fees being prepared, and on bill of law N° 17338 “Control of Medicine Prices”. However, when these opinions were being prepared requests from the Legislative Assembly were submitted, so these opinions are listed in the preceding footnote.

¹²⁴ Opinion 026-034-2018, concerning Central American Competition Regulation, requested by Foreign Trade Ministry (COMEX); and Opinion 001-035-2018, concerning Bill of law N° 19932 “Modification of Law 8642” (Mobile calls blocking in correctional facilities), consulted by Legislative Assembly.

¹²⁵ See, for example Opinion 016-061-2018, regarding a request submitted by a telecommunications operator on vertical restrictions in paid television services and advertising markets; and Opinion 005-084-2018, concerning a consultation submitted by a private practitioner on mergers in broadcasting services.

¹²⁶ Opinion OP-009-14 on technical specifications for steel bars and wires used for concrete reinforcement; Opinion OP-007-14 on the Tourist Guide Regulation’s licensing and credential requirements for tourist guides; Opinion OP-012-14 on technical regulations as barriers to entry barriers; Opinion OP-023-16 on technical regulations RTCR 436:2009 and RTCA 11.03.64:11 imposing requirements and registry processes for food supplements and natural medicinal products; Opinion OP-02-2017 on Executive Decree N° 38884-MEIC fixing rice prices; Opinion OP-12-2017 regarding “Regulation for the granting of exemptions from the conformity assessment procedure”; Opinion OP-20-2017 regarding Executive Decree 39938 “General Regulation on the Allocation of Import Tariffs”.

¹²⁷ Opinion OP-014-14 on the participation of related enterprises in public tenders; Opinion OP-06-2015 regarding unjustified limitations on public purchases; Opinion 06-2015 on the use of framework agreements in public contracting.

¹²⁸ Mainly in the rice sector – see Opinions OP-005-14, OP-019-14, OP-08-2016 and OP-0217 – but also as regards fertilisers (see Opinion OP-10-14).

¹²⁹ Opinion OP-20-18 on the regulation of Vehicles Technical Revision Service (RITEVE); Opinion OP-21-18 in relation to the Regulation of Remunerated Transportation of Passengers Taxi and Similar Modalities, OP-21-18.

¹³⁰ Opinion OP-08-18 on the regulation of the Costa Rican postal sector.

¹³¹ Opinion OP-09-18 in relation to the gas stations’ market in Costa Rica.

¹³² Opinion OP-002-14 on the technical parameters for the reassignment of frequencies. The reason this was not dealt with by SUTEL is because the Vice Ministry of Telecommunication requested the opinion of COPROCOM. Specifically, the Vice Ministry asked whether the parameter established by SUTEL (i.e. the Herfindahl-Hirschman Index) is applicable when determining the existence of spectrum concentration in the market in which television and sound broadcasting dealers participate. In the event that such was not

applicable, or sufficient on its own to make this determination, the Vice Ministry requested instructions on what other parameters should be considered for that purpose.

¹³³ See Article 5 and 6 of Law 7472.

¹³⁴ Opinion OP-014-14 on the participation of related enterprises in public tenders; Opinion OP-06-2015 regarding unjustified limitations on public purchases; Opinion 06-2015 on the use of framework agreements in public contracting.

¹³⁵ On the other hand, SUTEL considers that it is empowered to undertake investigations when any operation or act executed or celebrated abroad may affect competition in the domestic telecommunication market.

¹³⁶ See, for example, Decision RCS-195-2016 by SUTEL, and Decision 36-2015 by COPROCOM.

¹³⁷ Guatemala is an observer of RECAC.

¹³⁸ In the case leading to decision no. RCS-195-2016, SUTEL consulted other Central American competition, and received formal answers from the Competition Superintendence of El Salvador and the Commission for the Defence and Promotion of Competition of Honduras. Both answers were included as part of the case analysis

¹³⁹ SUTEL received a proposal from Superintendencia de Competencia in July 2019. This agreement is currently under analysis by SUTEL's legal department.

¹⁴⁰ SUTEL received a proposal from COFECE in July 2010. This agreement is currently under analysis by SUTEL's legal department.

¹⁴¹ SUTEL received a proposal from IFT in July 2010. This agreement is currently under analysis by SUTEL's legal department.

¹⁴² The regulators of the financial system referred to in this provision are: the Regulatory Authority of Financial Entities (SUGEF), created in 1995, which function is to audit the operations and activities of financial entities; the Regulatory Authority of Stocks (SUGEVAL), created in 1998, which function is to regulate the stock market; the Pensions Regulatory Authority (SUPEN), created in 1996, which function is to regulate the national pensions system; and the Insurance Regulatory Authority (SUGESE), created in 2008, which is responsible for the regulation of the insurance industry.

¹⁴³ Article 65 of Law 7593.

¹⁴⁴ Law 6227.

¹⁴⁵ Law 6227.

¹⁴⁶ Agreement 008-003-2018 adopted by the SUTEL Council on 17 January 2018.

¹⁴⁷ These reports may be found at: <https://www.sutel.go.cr/sutel/informes-anuales>

¹⁴⁸ Articles 20, 24 and 25 of Law 9736.

¹⁴⁹ Article 22 of Law 9736.

