

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

LATIN AMERICAN COMPETITION FORUM

-- Session II: Competition Law and Policy in the Republic of El Salvador --

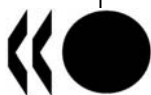
Note by the Secretariat

10-11 September 2008, Panama City

This document contains a peer review of the competition law and policy in El Salvador. It is submitted for DISCUSSION under session II of the Latin American Competition Forum to be held in Panama on 10-11 September 2008.

Please contact Ms. Hélène Chadzyska, Administrator, Competition Division, Directorate for Financial and Enterprise Affairs, OECD [Phone number: +33 1 45 24 91 05; Email: helene.chadzyska@oecd.org]

JT03249417





INTER-AMERICAN DEVELOPMENT BANK



LATIN AMERICAN COMPETITION FORUM
-- 10-11 September, Panama City --

Session II: Competition Law and Policy in the Republic of El Salvador

1. Foundations and context

1.1 *The economic and political context*

1. The Republic of El Salvador, situated on the Pacific Ocean and bordered by Guatemala and Honduras, is the smallest country in area in Central America¹. Much of the country is mountainous, featuring many volcanoes. The country is vulnerable to natural disasters, the most serious of which in recent times were a hurricane in 1998 and two earthquakes in 2001. Most of the population lives in a central plateau in which the capital, San Salvador, is located. A narrow coastal plain borders the Pacific Ocean. El Salvador's climate is tropical, with temperatures varying according to altitude. Its population is approximately 6,000,000, which is third largest in the region.

2. El Salvador, together with Costa Rica, Guatemala, Honduras and Nicaragua, achieved independence from Spain in 1821. The five countries briefly formed the United Central Provinces of Central America, but the federation dissolved in 1838, after which El Salvador became an independent republic. The country's economy coalesced around a coffee monoculture, which in turn resulted in the concentration of economic and political power in a landed elite. This inequality ultimately resulted in a destructive civil war that lasted from 1979 to 1991. Peace was restored in 1992 in the form of the Chapultepec Accords, and with it a democratic form of government.

3. El Salvador's economy is third largest in Central America. Once relying heavily on agriculture, the economy is now more diverse. Agriculture now accounts for about 10% of GDP, industry about 29% and services about 61%. The country's chief exports are coffee and the output of the maquila industry

1 Central America is considered to include the countries of Belize, Costa Rica, Guatemala, Honduras, Nicaragua, Panama and El Salvador.

(factories that import raw materials duty free and export assembled products, often to the originating country). Tourism is a nascent but growing industry. The economy has grown steadily if relatively slowly since 1996, averaging 2.8% annually. GDP grew slightly faster in 2006 and 2007, at 4.2% and 4.7%, respectively. Inflation has been relatively low, compared to other countries in the region. It was estimated to be 4.9% in 2007. Poverty has been reduced, but it is a continuing problem, with about 35% of Salvadorans living below the poverty line. A significant number of Salvadorans live and work abroad, most of them in the United States. Remittances from those workers to family in El Salvador constituted about 16% of the country's GDP in 2006.

4. The U. S. dollar is the country's official currency, having been made legal tender in 2001. In the years following the civil war the government introduced several market-based reforms. Price controls were eliminated and several sectors were privatised, including banking, telecommunications, parts of the electricity sector and pensions. Fiscal policy has been conservative; the country's tax burden is among the lowest in the region. El Salvador was the first country to implement the Central American Free Trade Agreement (CAFTA), whose parties are the United States, El Salvador, Costa Rica, Guatemala, Honduras, Nicaragua and the Dominican Republic, and it has entered into free trade agreements with other countries in the region. The Salvadoran economy is considered to be one of the most open in Latin America.

5. El Salvador is divided into 14 departments and 262 municipalities. Nationally, an executive branch is headed by a separately elected President. Legislative power is vested in the Legislative Assembly. The third branch, the judiciary, is independent. Since the restoration of peace in 1992 the presidency has been held by ARENA, the party on the right. FMLN, the leftist party, has slowly gained representation in the Legislative Assembly and in local governments. Currently it and ARENA have roughly equal representation in the legislature (some smaller parties also are represented there), but the FMLN is in effective control. Elections for both the presidency and the legislature will be held in early 2009, and the FMLN is considered to have a good chance to win the presidency for the first time.

1.2 *The introduction of competition policy*

6. The economic reforms that followed the Chapultepec Accords in 1992 included a commitment to competition and consumers. Within 60 days of the Accords the government presented to the Legislative Assembly a consumer protection law, which included some provisions relating to competition.² At the same time the authorities began to consider a competition law, but these efforts took much longer to come to fruition. The criminal code applied to some types of anticompetitive conduct, but there were no prosecutions under that law. A first draft of a competition law was presented to the Legislative Assembly in 1994, but it was not enacted. Various proposals were made in the ensuing ten years, but none became law.

7. In 2004 a new president, Antonio Saca, was elected, and he provided new impetus for a competition law. Experts conducted a study of experience with competition law enforcement in other countries, including Spain, Mexico, Brazil and the European Commission. There was a broad consensus, which included the business community and both major political parties, in favour of enacting a law.³ The new law was enacted in November of 2004, to take effect on January 1, 2006. The law was amended in

2 The 1992 law was replaced by a new law in 1996 and again in 2005 (Legislative Decree No. 776).

3 CAFTA was in negotiation at this same time. There was no requirement in the agreement for a competition law, but it seemed to provide an indirect boost for the law, as the country was implementing other legal reforms to conform to the treaty's requirements.

2007, providing for important new powers for the Superintendency and for higher maximum fines for especially harmful conduct.⁴

8. In less than three years El Salvador's competition agency, La Superintendencia de Competencia (Superintendency) has accomplished a great deal. A comprehensive regulation developing the competition law was issued in 2006. A five year operations plan was developed, as were an operations manual and a code of ethics. Guides describing procedures for presenting formal complaints to the Superintendency, for filing merger notifications and a glossary of technical terms have been published. Six sectoral studies, financed by outside sources, have been conducted. A comprehensive web site was created.⁵

9. Several comments and proposals have been submitted to sector regulators and government ministries, some of which have been implemented. The Superintendency has entered into several co-operation agreements with other Latin American competition agencies and with Salvadoran sector regulators. The Superintendency was assisted in some of these tasks by outside consultants, whose work was funded by outside sources, including the Inter-American Development Bank. Finally, the Superintendency is actively enforcing the law, having begun several investigations and cases, though this important aspect of its responsibilities is progressing more slowly. These developments are described further in the sections that follow.

1.3 Policy goals

10. Competition policy has its foundation in El Salvador's constitution, which was adopted in 1983. Article 101 requires that the State promote economic and social development by means of, among other things, increasing productivity, the rational use of resources and the defence of consumer interest. Article 102 guarantees economic freedom and Article 110 bans the establishment of private monopolies and monopolistic practices.

11. The competition law is grounded in what are now universally accepted purposes for competition policy: the enhancement of economic efficiency and consumer welfare. The opening article of the law states:

The objective of this law is to promote, protect and guarantee competition, by preventing and eliminating any anticompetitive practice, regardless of its nature, and that limits or restricts competition in any way, or that impedes the access of any economic agent to the market, in order to increase economic efficiency and consumers' welfare.

2. Substantive issues: content and application of the competition law

12. In most respects the law is structured like many other competition laws. It addresses the three common forms of anticompetitive conduct: restrictive agreements, abuse of dominance and anticompetitive mergers. It employs the commonly-used substantive tests for each of these three types of conduct. The law creates an independent enforcement agency, the Superintendency, possessing the usual investigatory and advocacy powers. Its recommendations are enforced by an autonomous three person Board of Directors.

4 Legislative Decree no. 436.

5 At: www.sc.gob.sv.

2.1 *Horizontal agreements*

13. Article 25 of the law applies to anticompetitive horizontal agreements. It states: “Anticompetitive agreements among competitors are prohibited. These practices include the following, among others. . . .” The article then lists four traditional types of cartel conduct: fixing prices or other terms of sale, fixing output, bid rigging and market division. Presumably Article 25 is not limited just to cartel conduct, however. The phrase “among others” in the law would encompass non-cartel restrictive agreements. The implementing regulation (hereafter “Regulation”)⁶ provides a lengthy list, not exclusive, of indicators of an anticompetitive agreement.⁷ They include such factors as parallel pricing that cannot be attributed to market conditions, evidence of meetings or communications, anticompetitive practices or recommendations by industry associations, evidence of enforcement mechanisms, a small number of competitors, laws or regulations that facilitate anticompetitive agreements, unexplained differences in domestic and international prices and, in the case of bid rigging, unusually similar offers that cannot be explained by market forces.

14. By its terms Article 25 appears to apply the per se rule to cartel conduct.⁸ There is some ambiguity as to the standard that is to be applied to other types of horizontal agreements, however. Specifically, it is not clear in the law that the rule of reason would apply to non-cartel conduct.⁹ While the Superintendency has not yet initiated a non-cartel horizontal case, it concludes that the rule of reason is the operative standard in such cases.

15. To date the Superintendency has prosecuted one cartel case. It was what is sometimes called a naive cartel – when the participants may be unaware that their conduct is not unlawful and do not attempt to conceal it. In this case, a group of six brokers operating on the country’s agricultural products exchange jointly published a notice that they were increasing their commissions for transactions conducted on the exchange. The publication was clear evidence of the agreement, and the Superintendency obtained other evidence, including emails and minutes of meetings, that confirmed it. In their defence the brokers claimed that the agreement had never been put into effect. The Superintendency developed evidence to the contrary, however. The brokers also claimed that the increase was necessary because the existing commissions, especially those paid by large customers, were very small. The Board of Directors rejected these defences and fined each of the brokers approximately USD 5,000. Three of the respondents appealed their fines to the Supreme Court, which has not yet made a decision.

16. The Superintendency recently conducted its first dawn raid in a cartel investigation. The power to conduct dawn raids was provided in the 2007 amendments to the competition law.¹⁰ The law requires the Superintendent (the head of the agency) to apply to a court of first instance for permission to conduct a raid. The petition must describe, among other things, the conduct that is the subject of the investigation, the parties involved and the location of the premises to be searched, the evidence that is expected to exist at the site and the reasons justifying the need for a search. The court must give its decision within 24 hours after the petition is presented.

6 Presidential Decree No. 126, 5 December 2006. The Regulation has not yet been revised to reflect the 2007 amendments, but that revision is in progress.

7 Article 12.

8 The per se rule holds that it is necessary only to prove that there was an agreement of the requisite type among competitors and not that it resulted in a harmful effect, because it is considered that cartel agreements are always harmful.

9 The rule of reason requires a showing of anticompetitive effect.

10 Amended Article 38.

17. In this case there were two premises to be searched, located in different judicial districts, requiring the Superintendency to file two petitions. Both were granted, and the Superintendency conducted searches of the two premises simultaneously. The case is nearing completion in the Superintendency.

18. The 2007 amendments authorised the creation of a leniency programme.¹¹ Leniency can be granted by the Superintendency only to the first applicant, who must furnish sufficient evidence of a cartel and of the applicant's participation in it and fully co-operate with the Superintendency's investigation. The law exempts a successful applicant from the application of the most severe fines for violating the law, but not from fines altogether. The Superintendency's Board of Directors, which imposes fines, would have the discretion to reduce the fine, however. The Superintendency has not yet formally created a leniency programme.

2.2 Vertical agreements

19. Articles 26 and 27 of the law apply to "anticompetitive agreements among non-competitors." Two specific types of agreements are referenced in Article 26: tie-ins and exclusive selling agreements.¹² As with Article 25, horizontal agreements, the list of prohibited agreements is not exclusive. Again like horizontal agreements, the Regulation¹³ lists some indicators of an unlawful agreement, including: the restrictions result in exclusion from the market for a longer time than would result from a "legitimate economic explanation;" laws or regulations that facilitate anticompetitive agreements; and exclusive arrangements that cannot be justified by efficiency gains. The rule of reason applies to vertical restraints under the law. The standard is articulated in Article 27: the practices "... have or could produce the effect of limiting competition, impeding or limiting the access or displacing competitors from the market, and in any case, that the interest of consumers has been harmed."

20. Resale price maintenance is not explicitly noted in either the law or the Regulation. The practice would no doubt be encompassed in the "among others" category in Article 26 if anticompetitive, but it would seem that the rule of reason would apply to RPM, as to all other types of vertical restraints.

21. Article 27 imposes an additional, important condition for a finding of illegality of a vertical restraint: the practitioner or practitioners, "... acting individually or jointly, hold a dominant position in the relevant market." Many competition laws do not explicitly require a finding of dominance as a prerequisite to a finding of an unlawful vertical restraint. The rule of reason analysis, however, usually requires a finding that the practitioner has some market power, if not dominance. Also, the language "acting individually or jointly" in Article 27 might permit the application of the law to a situation in which there is no single firm dominance. It is generally accepted that vertical restraints could be anticompetitive when most sellers in a market engage in a practice having the effect of restricting entry or facilitating collusion.¹⁴

22. Article 28 addresses the concept of relevant market. It focuses on the generally-accepted test for defining a relevant market: substitutability of products or services (product market) or sources of supply

11 Amended Art. 39 of the competition law.

12 A third type of agreement is included in Article 26, but the language describing it is not clear. It seems to apply to situations in which more than one party engage in a particular form of conduct by agreement.

13 Article 13.

14 It is not clear, however, whether the "acting individually or jointly" language would require an agreement, whether express or implied.

(geographic market) for buyers. The Regulation elaborates on this concept.¹⁵ It does not employ the SSNIP test (small but significant and non-transitory increase in price) that some other jurisdictions use, listing instead various qualitative factors, including “the time required for the substitution, prices, characteristics, uses and applications, consumption alternatives, goals, availability, substitution costs, as well as accessibility of the goods or services in question, perceptions of substitution, and market trends.” (The Superintendency does use the SSNIP test, however, in its analysis.) Included as a relevant criterion in the Regulation is the possibility that a supplier not currently serving a market could begin to do so “without significant costs and in a short time period.”

23. Importantly, Article 14 of the Regulation adds an efficiency defence to these agreements among non-competitors (but not to horizontal agreements prohibited by Article 25). It requires the Superintendency to consider whether the agreement in question allows the participants to “achieve greater efficiency . . . or promote innovation or foster productive investment, which translates into benefits to consumers in the respective activity.” There follows in the Regulation a non-exclusive list of cognisable efficiencies. In general they refer to production efficiencies of various types.

24. The Superintendency has not yet brought a vertical case as such, though the motor fuels case, described below as a dominance case, could have been characterised in that manner.

2.3 *Abuse of dominance*

25. Article 30 of the competition law prohibits abuse of dominance. As in the law’s other substantive provisions, this article enumerates certain types of conduct that could constitute violations, including inhibiting entry or expansion, predatory pricing and various forms of price discrimination. The Regulation¹⁶ lists some indicators of abusive conduct, including increasing costs of entry or exit, creating difficulty of access to inputs, cross-subsidisation and price discrimination not apparently justified by cost differences.

26. Article 29 of the law lists factors relevant to a determination of dominance. They include the ability of a firm unilaterally to raise prices or restrict output, the “existence of competitors” (presumably, market structure), the existence of entry barriers and conditions of access to necessary inputs by a firm and its competitors. The Regulation elaborates on these provisions, describing factors relevant to market structure and entry barriers.

27. Neither Articles 29 and 30 nor their corresponding regulations specifically refer to joint dominance. As noted above, that reference is in Article 27, which refers to vertical restraints. Still, the Superintendency has concluded that the concept applies to dominance cases as well. There must be more than mere parallel conduct between jointly dominant firms, however. They must be joined by some specific link. This concept is relevant to the motor fuel case, described below.

28. The bulk of the investigations and cases instituted by the Superintendency so far have been dominance cases. This is often the case in countries in the initial stages of enforcing a competition law. Three of the investigations have led to a finding of abuse, with fines having been assessed. The three are described below.

15 Article 15.

16 Article 17.

Cable television

In El Salvador home builders sometimes undertake to construct new communities of many homes; in the process they build in infrastructure for such services as electricity, telephone and cable television. In one case, a builder formed an affiliate company that would provide cable TV service in a community that it was building. Competing cable providers also desired to provide service in the community, but the construction company physically prevented the competitors from entering the premises to install equipment. In some instances the builder destroyed competitive equipment that had already been installed.

The respondent claimed that if it were to permit other entities to enter the construction zone it could cause damage to the properties. Another defence was that security was an important consideration to homeowners in the community, and that it would compromise security to permit others to enter. The Board of Directors rejected these arguments. Regarding the security argument, the Superintendency showed that the competing providers had specific permission of property owners to enter. The Board fined the builder and its affiliate a total of approximately USD 34,000 and ordered them to cease the offending practices. The fines have been paid.

Electricity distribution

B&D, an electricity distributor attempted to enter an industrial zone in San Bartolo, in southern El Salvador, by constructing a new distribution network. The incumbent, CAESS, a member of a group of companies that controls close to 70% of electricity distribution nationwide, held a 100% share in this area. For B&D to construct its facilities it was necessary for CAESS to provide some minimal co-ordination, such as cutting power at agreed times to permit B&D to complete its network. CAESS refused to do so, despite receiving proposals from B&D for procedures to facilitate the process. In addition, CAESS obstructed B&D's entry by erecting utility poles at points at which B&D intended to erect its own.

CAESS offered various justifications for its refusal to cut service, including safety considerations. The Superintendency showed, however, that CAESS had cut service for others at their request, without objecting. B&D even tried to conduct its work at times when CAESS was planning to cut service for other reasons, but in these instances CAESS cancelled the cut at the last minute. Regarding its blocking of locations for utility poles, CAESS argued that B&D had other options for its network, including underground installations. With the help of an expert witness, an employee of SIGET, the electricity regulator, the Superintendency showed that these alternatives were more expensive for B&D. Finally, CAESS argued that it had no duty to deal with a competitor as demanded by B&D.

The Board rejected CAESS' arguments and found that it had abused its dominant position. It fined CAESS USD 170,000 and ordered it to cease its obstruction and to co-ordinate with B&D. CAESS has appealed the result to the Supreme Court, and has neither paid the fine nor begun co-operating with B&D. Recently the Superintendency asked the Attorney General to institute a criminal action against CAESS for its failure to comply.

Motor Fuels

This is the most important and the most publicised case brought by the Superintendency to date. It was initiated in April 2006 by a complaint lodged with the Superintendency by an association of gasoline dealers. The Superintendency issued its decision in October 2007. The respondents in the case were three multinational oil companies, Exxon (doing business in El Salvador as Esso), Shell and Chevron (doing business in El Salvador as Texaco). The central element of the case was the practice, in which all three engaged, of creating geographic zones within which the retail prices of motor fuel were almost identical. Prices varied as between zones, however.¹⁷

There is one oil refinery in El Salvador, which is jointly owned by Esso and Shell. This same entity also imports refined oil products and stores them at the facility. Texaco separately imports and distributes refined products, as does a fourth entity. Esso, Shell and Texaco account for more than 90% of wholesale distribution of motor fuels; their branded gasoline stations also have large shares of the retail sector.

In a long and carefully written decision, the Superintendency's Board of Directors determined that there were three separate product markets: premium gasoline, regular gasoline and diesel fuel. The Board concluded that there were 15 relevant geographic markets, consisting of the seven largest cities and metropolitan areas (of which the San Salvador metro area was by far the largest) and eight highway corridors linking the major cities. The theory behind this construction was that of "linked markets." While many buyers in an area or neighbourhood find it convenient to purchase their fuel only from local stations, other buyers, because of commuting or personal driving patterns, may also find convenient sources of supply in an adjacent area, and some buyers in the second area also shop in a third, and so on. In this way, sellers in one area may be influenced by pricing decisions of sellers located some distance away.

Esso and Shell together had retail sales exceeding 50% in several of these markets. Because they jointly owned and operated the refinery and storage facility, the Board concluded that it could consider them as a single entity for purposes of the dominance analysis. The Board concluded that Esso and Shell were dominant, given their large joint market share and high entry barriers, among other things. Texaco, on the other hand, operated separately from the other two, and for that reason the Board concluded that Texaco could not be considered dominant.

Esso and Shell could effectively control the retail prices charged by their station operators by adjusting, in various ways, the dealers' wholesale prices. The pricing systems were not identical, however, and there was no evidence that the two firms had colluded in setting these prices. The same was true of the zoning systems of the two firms; while they both engaged in the practice, the zones that they created were not coterminous, and there was no evidence of collusion in this regard. Thus, the Board concluded that it could not find an unlawful horizontal agreement between the two.

It did conclude that the firms' zoning practices were an abuse of their dominant position, however. The zones that the companies established were much smaller than the relevant geographic markets determined by the Board. (Esso had 15-20 zones in the San Salvador metropolitan area, for example, and Shell had even more.) The effect, said the Board, was to inhibit price competition. A station could not respond to a lower price charged by stations in an adjacent zone by lowering its price, because of its supplier's control over its prices. In this way, concluded the Board, competition offered by a discounter in one zone "will not be transferred . . . to nearby zones, or to the rest of the relevant geographic market." The Board also concluded that the zoning system had the effect of raising barriers to entry in the retail market.

...

17 This practice of "zonification" in gasoline retailing is not limited to El Salvador. It has been the subject of study, and in some instances, of competition cases in other countries, which was noted in the Board's decision.

Motor Fuels (cont'd)

The Board of Directors fined each of the two firms the maximum fine then available, 5000 monthly minimum monthly salaries in the industrial sector, which translated into USD 852,000. It also ordered the firms to cease the pricing and zoning practices that were the subject of the case. Esso and Shell immediately appealed to the Salvadoran Supreme Court. (The relevant appellate procedures are described below in Section 3.3) In an interim decision rendered a few weeks after the appeal the Court suspended the remedial order. It did not suspend the fines, but the companies have not yet paid them. The Court has not ruled further on the case.

This case was the most visible and controversial of any brought by the Superintendency thus far. It received a significant amount of public attention, involving as it did a common consumer product, well known multinational companies and the imposition of large fines. There was criticism of the case in some quarters, however. The theory of the case was novel and complex, seeming to involve in some form the concept of joint dominance, though that term was not used by the Board. Also, the respondents voiced objections about certain procedures, which are discussed in Section 3.2 below. Finally, the case highlighted issues relating to the judicial appeals process, which are discussed below.

2.4 *Mergers*

29. The Salvadoran law, unlike those of some of its Latin American neighbours, includes merger control. The relevant legal standard is “significantly limit competition.”¹⁸ The Regulation contains several articles expanding on various substantive and procedural aspects of the merger review.¹⁹ The Superintendency has not yet published guidelines describing its method of analysis of mergers, but the Superintendency states that it employs a methodology like that used in many countries today. It begins with market definition and an assessment of concentration. Conditions of entry are then determined, after which the probable competitive effects of the proposed merger are considered. The law and the Regulation require that the Superintendency consider, among other things, possible efficiencies generated by the proposed transaction. The fact that a party may be insolvent or in danger of failing is also relevant.

30. Importantly, the merger control provisions extend to mergers in regulated sectors. The Superintendency’s decision is binding upon the sector regulator, though the regulator may also have the power to prevent a merger on regulatory grounds.

2.4.1 *Notification and review procedures*

31. El Salvador requires pre-merger notification. Article 33 states:

Concentrations whose combined total assets exceed fifty thousand minimum urban annual wages in the industrial sector or whose total income exceeds sixty thousand minimum urban annual wages in the industrial sector should request [from] the Superintendency their prior authorization.

Currently these asset and revenue size thresholds translate into USD 112,860,000 and 135,432,000, respectively, relatively high for a small economy like El Salvador. Neither the law nor the Regulation state specifically that the relevant assets or revenues be located in or derived from El Salvador. The Superintendency has concluded that a requirement of “local nexus” does exist, however, and is operating on the assumption that the relevant assets or revenues must be local. Also, the terms of the law and Regulation require only that the combined assets or revenues of the merging parties reach the specified

18 Article 34.

19 Articles 18-32.

levels; there is no minimum requirement for one party, creating the possibility that a merger involving one very large entity and another of *de minimus* size would have to be notified, notwithstanding that such a transaction would be unlikely to have any significant anticompetitive effects.²⁰

32. The law provides that the Superintendency has 90 calendar days after notification to issue a decision. If no decision is issued within that period, the merger is deemed to have been approved. If the Superintendency requires additional information about the transaction or it considers that the notification is deficient in some respect, it must make its request to the parties within 15 days after notification. The running of the 90 day period is suspended by such a request, resuming when the information requested is supplied.

33. The Superintendency does not assess notification fees.

2.4.2 *Investigations and cases*

34. The Superintendency has not denied or conditioned any merger to date. It received 16 notifications through May of 2008, but nine of these were not required to be notified for various reasons. One was abandoned and the remaining six were approved. The Superintendency almost always exercised its option to request additional information within 15 days, but most of these requests had to do with deficiencies in the notification. Five of the six relevant notifications involved firms in the financial sector, perhaps not surprising given the high notification thresholds and the relatively large size of financial enterprises.²¹

35. It is obvious that the business community and the corporate bar have had little experience with the notification procedures thus far. The Superintendency has published a guide to merger control, but it is relatively general, and does not deal with the intricacies that inevitably arise in the merger notification context. The Regulation (Art. 78) created a procedure by which parties, including government agencies, could apply in writing to the Superintendency for a consultation or opinion. The procedure was employed a total of 15 times through the first quarter of 2008, five of which were for the purpose of determining whether a merger had to be notified. The consultation procedure can no longer be employed for this purpose, however, because the 2007 amendments limit its use to two circumstances: comments on proposed legislation and on procedures for public procurement.

36. It appears that so far the high thresholds established in the law have served their purpose – that of limiting the number of notifications that the new competition agency has to review. It can happen in countries just beginning merger control that the competition agency is swamped with merger notifications, most or all of which present no competitive problem but which divert the agency's scarce resources away from more important matters. Another useful provision in the law is that the thresholds are effectively

20 The International Competition Network's *Recommended Practices for Merger Notification Procedures*, Recommendation I.C. (2003), available on the ICN website at <www.internationalcompetitionnetwork.org/>, recommends that local nexus should be established on the basis of the activity of at least two parties to a transaction within the jurisdiction to be notified, or, in the alternative, on the activity of the party to be acquired. See also, OECD, *Recommendation of the Council concerning merger review* (2005), available on the OECD web site at <www.oecd.org/competition/>.

21 Interestingly, there was some merger activity in the country immediately before the competition law came into effect, including the merger of the only two cement manufacturers in the country.

indexed to inflation, by means of a link to a minimum annual wage. This obviates the problem of having to raise the thresholds in the future because inflation has rendered them too small.²²

37. Of course, it is possible that mergers that fall below the notification thresholds could still harm competition, and the Superintendency might want to control these, if necessary. It seems that the merger control provisions of the law would not apply to such mergers, but by their terms the articles prohibiting anticompetitive agreements and abuse of dominance could. The Superintendency has not yet had occasion to consider this question.

2.5 *Unfair competition and consumer protection*

38. The Superintendency has no enforcement responsibility for unfair competition or consumer protection. The Salvadoran commercial code has provisions prohibiting various types of unfair competition, including bribery, providing false information about the origin or quality of products or about a competitor and misuse of intellectual property. These laws are enforced in civil court.

39. Consumer protection is robust in El Salvador. As noted above, a consumer protection law was enacted well before the competition law. The current consumer protection law, enacted in 2005, is a lengthy and comprehensive document. It addresses a wide range of practices, including the sale of unhealthful or dangerous products, toxic substances, various contractual provisions, the sale of defective goods, providing false and misleading information and other advertising practices. The law is enforced by an independent consumer protection agency, La Defensoría del Consumidor (Defensoría). The Defensoría has broad investigatory and enforcement powers. Through a three person tribunal it can impose fines of up to USD 940,500, depending upon the severity of the offence and the magnitude of its effect.

40. The 2005 law created what is called the National System for Consumer Protection, composed of the Defensoría and representatives of the executive branch and other government institutions. The Superintendency is not represented, in this body, apparently because it does not have a specific sectoral responsibility. Co-ordinated by the Defensoría, the National System has responsibility for strategic planning and other co-ordinating activities in the field. Further, the law created a Consultative Council to advise the Defensoría (Consejo Consultivo de la Defensoría del Consumidor). Members of the Council include the Superintendent of Competition and representatives of Salvadoran consumer NGOs.

41. Consumer protection is popular and has a high profile in El Salvador. The public understands the actions taken on its behalf by consumer agencies; such cases are relatively numerous and can be resolved quickly. The Defensoría is well funded; its budget is substantially larger than the Superintendency's. Consumer NGOs are also active in El Salvador, the largest of which is the Center for the Defence of the Consumer. The Superintendency could benefit from this good will by associating more closely with the Defensoría. Similarly, the Defensoría would benefit from the Superintendency's participation on the National System for Consumer Protection. The two agencies could also co-operate in appropriate cases, to good effect. The Superintendency has proposed to the Defensoría that the agencies enter into a co-operation agreement, much like those that the Superintendency has concluded with other government agencies (described further below in Section 4). Thus far the Defensoría has not responded, however. It has also been invited to participate in some of the Superintendency's cases, but it usually has not done so.

22 Recently the Superintendency has encountered a related problem, however. A government agency charged with registering corporate mergers (but not asset acquisitions) has required the applicants to obtain from the Superintendency a certificate that the transaction does not have to be notified, or that if notified, it was approved. In the case of non-notifiable mergers, this has placed upon the Superintendency a burden of examining mergers that it would not otherwise have had to look at. At the writing of this report, the Superintendency is in negotiations with the registry on this matter. Its position is that the burden of failure to notify should be on the parties to the transaction, not on the registry or the Superintendency.

3. Institutional issues: enforcement structure and practices

3.1 Competition policy institutions

42. The Superintendency of Competition is one of several independent superintendencies in El Salvador.²³ Some sector regulators take that form, as do other public institutions such as hospitals. The Superintendency is part of the executive branch; it has a separate budget, which is submitted through the Ministry of the Economy to the Ministry of Finance.

43. The Superintendent of Competition, currently Lic. Celina Escolán Suay, is the head of the agency. She directs a staff of lawyers, economists and administrative personnel. The professional members of the staff are organised into two “intendencies,” legal and economic. Other offices within the Superintendency include a Secretary General, internal and external auditors, and international, communications, information, financial and administration units.

44. The Superintendent, with the assistance of her staff, makes enforcement recommendations to a three person Board of Directors. The Board makes the final enforcement decisions and imposes sanctions, if any. Article 9 of the competition law sets out the necessary qualifications for a board member:

The Superintendent and the Directors should be Salvadorian nationals, over thirty years of age, with a diploma in economy, law, business administration or other related professions, well known for his or her honorability, notorious probity and knowledge and experience on issues related to his /her job, in full enjoyment of all citizen rights in the last five years before being appointed for the job.

45. The Superintendent is *ex officio* a member of the Board. The other directors serve part time. The Superintendent and the Board members are appointed by the Salvadoran President for terms of five years. They can be reappointed. In addition to the three voting members of the Board, three alternate members are also appointed, to serve when a voting member cannot. The alternate members also attend the meetings of the Board. The terms of all of the Board members expire at the same time.²⁴ This could create a problem at the time of the turnover. There would be a sudden loss of expertise and continuity, and the opportunity to appoint an entire new Board could invite political intervention into the Superintendency’s work.²⁵

46. The Board is required by law to meet at least once a month. In practice it meets more often, usually once a week. Meetings typically take three to four hours. Directors often have to spend extra time preparing for meetings – reviewing files, and so forth. The Ministry of Finance sets the compensation rates for the directors other than the Superintendent.²⁶ Here the fees seem quite low. In 2006 the directors’ fees

23 Article 3 of the competition law “Create[s] the Competition Superintendency, a ‘publici juris’ Institution, with a legal status and its own equity, as a technical institution with administrative and budgetary autonomy to exercise the attributions and duties set forth herein, as well as all other applicable provisions.”

24 One Board member resigned about one year after he was appointed, but his successor was appointed to complete the original member’s term, not to serve a full five years.

25 The directors’ terms are not conterminous with that of the country’s President, however, whose term is also five years. The current directors’ terms expire at the end of 2010. The President’s term expires in 2009.

26 The alternate members are also paid for each meeting they attend, even though they may not vote.

were set at \$45.72 per meeting, not to exceed \$182.88 per month (four meetings). In 2007 they were raised to \$75 per meeting, maximum \$300 per month.²⁷

47. These rates compare unfavourably with those in other superintendencies; board members of the financial system superintendency receive \$320 per meeting, for example; the Central Bank, \$250, and the securities industry, \$225. Moreover, the directors of the Competition Superintendency point out that they have a comprehensive role in the operation of the agency, approving all official actions of the agency. Some of the other superintendencies apparently have more of an oversight or appellate function, and consequently their work requires less time.

48. Because the directors serve part time, except for the Superintendent, they of course have other full time employment. To date the five directors have come either from the academic community or from other government agencies. Currently, one member is from a university, two from the Technical Secretariat, which performs oversight and advisory functions for the President, one is from the Central Bank and one is from the Ministry of Economy. This raises potential issues relating both to the independence of the agency and to possible conflicts of interest.

49. The fact that a majority of the Board could come from another branch of government could compromise the Board's independence. There is no indication that this has occurred, however; the Board's decisions seem to have been reached without any outside interference. The outside directors say that their agency has never attempted to exert any influence on them in a case. They point out that it can be an advantage for their agencies' perspective to be represented. Still, it would seem that in different circumstance outside influence might be exerted. A related issue is potential conflicts of interest. A case or investigation could involve a matter that is also before a ministry or agency for which a Board member works full time. This problem could probably be addressed by means of a rigorous set of rules governing disqualification from a given case.

3.2 *Enforcement processes and powers*

50. The procedures relating to merger notification and review are described in section 2.4.1 above. Procedures relating to conduct cases are set forth in articles 40-49 of the law and articles 24-77 of the Regulation.

51. Conduct investigations can be initiated either by a formal complaint filed with the Superintendency by a private party or by the Superintendency *ex officio*. If the Superintendency determines that a private complaint does not comply with the information requirements set forth in the law and Regulation it must notify the complainant of that fact within 15 days of the filing of the complaint. The complainant has five business days to remedy the problem. Also, within the 15 day period the Superintendency can determine that the complaint does not describe a possible violation of the law and declare it improper.

52. If the complaint is considered valid, the Superintendency may conduct a preliminary investigation to determine if a full investigation is warranted. If it is not, the complaint is dismissed. If the preliminary investigation indicates that there is sufficient evidence of a possible anticompetitive practice the Superintendency initiates a formal investigation. (A preliminary investigation is not required; the Superintendency can proceed directly to a full investigation if the facts warrant.) The party or parties that were the subject of the complaint are given formal written notice of the investigation; the notice includes a

27 In 2007 the Board met a total of 47 times, but they were not compensated for six of these meetings because they exceeded the four-per-month maximum.

summary of the relevant facts, the type of infraction that may have occurred and the sanctions that could be imposed.

53. This triggers the beginning of a 30 calendar day period within which the Superintendency and the respondent gather evidence. Following that, the respondent has a period of 20 business days within which to present its evidence and arguments to the Superintendency. At this stage all proceedings are in writing. The Superintendency then prepares its report and recommendation to the Board of Directors. The respondent also has the opportunity to present its arguments to the Board in writing.

54. After deliberation the Board makes its decision and directs the Superintendency to draft its resolution, which is made public. The resolution describes fully the relevant facts and the Board's analysis.²⁸ The respondent has a period of five working days within which to request a review by the Board of its decision.²⁹ The Board then has ten business days within which to make its decision on the review. The law requires the Board to issue a decision within 12 months from the date that a complaint was filed or an *ex officio* investigation was begun. This period can be extended once, for a maximum of 12 months. In only one case, the motor fuels case, has the 12 month period been extended, that for an additional seven months.

55. The Superintendent has the authority to classify information or documents that the Superintendency has obtained as confidential, and to restrict access to that information as she considers appropriate. Any party providing information can make such a request. A respondent has access to the Superintendency's evidentiary file but not to the Superintendency's report to the Board.

56. The motor fuels case generated some discussion about the procedures employed in the decision making process. The respondents in that case acknowledge that they had sufficient access to the Superintendency's evidentiary file and there were no restrictions on their ability to present evidence and arguments to the Board. They complain, however, that they were not fully aware of the Superintendency's theory of the case, and hence were not able to address it completely, until the Board issued its decision. Following that they had the opportunity to request a review by the Board of its decision, which they did, but they would have preferred to have been able to address the issues more specifically in the first stage.

57. Another criticism of the decision making process has been voiced: that the Superintendency's prosecutorial and adjudicative functions are insufficiently separated. The Superintendent supervises the preparation of cases and is also one of three voting members of the Board (unless she is disqualified because of a personal conflict). Critics say that the Superintendent would not be wholly impartial and that she might have undue influence on the Board. Competition agencies in many countries are structured similarly to El Salvador's, however, employing a system in which an independent commission both develops cases and is the decision maker of first instance. El Salvador's is somewhat unique in that there are only three voting members on the Board – most countries have five or more – and there are three additional members who participate fully in reviewing cases but who do not vote on them, unless one or more of the voting members is disqualified. Of course, the fact that the Board's decisions can be appealed to the courts is an important factor in securing due process.

58. Apart from these procedures that govern contested cases, there are currently no procedures in place through which the Superintendency could "settle" cases, that is, reach agreement with the parties on an appropriate remedy. Settling cases in some fashion would obviate the need for appeal to the courts. As

28 The resolution in the motor fuels case was 152 pages long.

29 If there is a third party involved in the case, for example a private complainant, Article 77 of the Regulation provides that when there is a review the Board will grant that person three days to provide a written submission to the Board.

discussed in Section 3.3 below, the appeals process is slow and uncertain, creating a significant impediment to final resolution of the Superintendency's cases. The original law included a provision permitting a party to provide a guarantee to the Superintendent that it would cease or modify the allegedly anticompetitive conduct sufficiently to restore competition in the relevant market, in exchange for which it would receive no penalty. There was one case in which this procedure was used successfully. The procedure was eliminated by the 2007 amendments, however. The Board can take any voluntary modification of conduct by a respondent into account in assessing fines.

59. There is no provision for private parties to pursue remedies for a violation of the competition law apart from their right to petition the Superintendency to conduct an investigation. Thus far it seems that the rules governing this procedure are appropriately balanced, avoiding the possible situation in which the Superintendency might have to devote too many resources to processing meritless private complaints. The Superintendent has the power, as described above, to summarily declare a complaint as inadmissible or improper. To date there have been 20 private complaints lodged with the Superintendency. Of the 18 that have been finally resolved, ten were summarily dismissed by the Superintendent. One complainant appealed that decision to the Board of Directors, which upheld the Superintendent.

60. The Superintendency has all of the investigatory powers that are normally given to a competition agency.³⁰ It can request any party, including any government agency or body, to provide information and documents. It can issue summons for witnesses. It can carry out inspections at the premises of a person, examining documents and taking statements. These inspections, which require the Superintendency to give advance notice of 24 hours, are apart from the power to conduct dawn raids, which must be authorised by a court. As noted above, the 2007 amendments provided the Superintendency with the power to conduct dawn raids and to implement a leniency programme. They also gave to the Superintendent the power to issue preliminary orders, temporarily suspending an activity or impose other conditions,

... when an imminent risk to the market exists which may limit competition, the access of an economic agent to the market, or the movement of an economic agent, or that the detected conduct may result in damages to third parties or in damages to public or collective interests.³¹

Such an order can be appealed to the Supreme Court, but appeal rights are limited because the order is not a final one. No such orders have yet been issued.

61. These powers collectively are not unusual for competition agencies, but they are not common in El Salvador. Perhaps no other superintendency has such an array.

62. The Superintendency's fining power is also significant.³² Before the 2007 amendments it could impose a maximum fine of 5,000 minimum monthly urban wages in the industrial sector, which currently translates to USD 940,500. The amendments added higher fines for "particularly grave" offences. The Superintendency can impose the greater of

- up to 6% of a firm's total annual sales in El Salvador;
- up to 6% of a firm's total assets in El Salvador;
- between two times and ten times the estimated gain resulting from the unlawful practice.

30 These are set forth in articles 13 and 14 of the competition law.

31 Article 41(A), as amended.

32 As provided in articles 37-39 of the law.

63. In calculating fines the Superintendency must take into account

. . . the severity of the infringement, and also the damage caused, the effect on third parties, the duration of the anticompetitive practice, the size of the market, and whether it is dealing with a repeat offender.³³

64. No fines for particularly grave offences have yet been assessed. The largest fines assessed to date were those in the motor fuels case, USD 852,000 to each of two companies. When assessing fines the law requires that all fines be paid within eight days of the issuance of the Board's final resolution. As described below in Section 3.3, however, most of the fines assessed to date have not been paid because of judicial appeals.

65. These same maximums, including the alternative higher fines, also apply to situations in which the parties to a merger that should have been notified consummate their merger without having notified, and in which a complainant files a complaint containing false information "with the purpose to limit, restrict or impede competition." Also, a party who does not comply with a final resolution of the Board in a merger case can be fined up to 5,000 minimum monthly urban wages for each day that it is in non-compliance, and a party who fails to supply information requested by the Superintendency or intentionally or negligently provides false or incomplete information can be fined up to ten minimum monthly urban wages for each day that it is non-compliance.

66. In one case the Superintendency imposed fines for failure to supply requested information. In connection with a study of the pharmaceutical industry the Superintendency requested information from several laboratories. Some of the respondents did not respond, while others claimed that the Superintendency did not have legal authority to request such information. To the latter the Superintendency responded with citations to the applicable provisions of the competition law. Five respondents persisted in not supplying the information, however, and the Superintendency initiated procedures under another law to require the respondents to provide the information.³⁴ The five ultimately did so, but the Board assessed fines based upon the length of time that the respondents were not in compliance totalling approximately USD 52,500. Three respondents have paid their fines; two have appealed.

67. In addition to its fining powers the Superintendency can issue remedial orders requiring the cessation of the unlawful practices and/or imposing other terms or obligations, both behavioural and structural. This ability to impose behavioural and structural remedies, in addition to simple prohibitions, was another addition provided by the 2007 amendments. To date, no such orders have been issued.

3.3 Judicial review

68. There are four levels in Salvadoran judicial system: justices of the peace, courts of first instance, intermediate appellate courts and the Supreme Court. The Supreme Court is structured into four chambers: Constitutional, Civil, Criminal and Administrative. There are 15 justices on the Supreme Court, each assigned to one of the chambers (they can also meet in plenary session). Justices are appointed by the Legislative Assembly for terms of nine years (one-third of the justices are appointed every three years).

69. Appeals of decisions of the Superintendency, and of all administrative bodies, are made directly to the Administrative Chamber of the Supreme Court (specifically, Sala de lo Contencioso Administrativo). There are four justices in this Chamber. In a case against a government institution, such

33 Article 37.

34 The competition law does not specifically provide for such a procedure.

as the Superintendency, the Attorney general participates as the representative of the state and of the public; the institution is represented by its own attorneys. In general the Chamber's procedures are as follows: upon receipt of the petition it conducts a preliminary study to determine if the appeal satisfies the requisite procedural requirements. Upon admitting the case, the Chamber can issue an interim or preliminary order if necessary. Then follows consideration of the merits of the case, which includes reports from both sides and, if necessary, the gathering of new evidence. The Chamber then reaches its decision.

70. The Chamber's decision cannot be appealed to the plenary Court, but if there is a constitutional issue raised in the case it could be appealed to the Constitutional Chamber, under a procedure known as amparo.

71. As noted above, the Superintendency has issued sanctions in only a few cases thus far, but in all but one, the television cable case, at least some of the respondents have appealed. None of those cases has been finally decided. Most of the cases have been accepted for review by the Court; in the others, acceptance is pending. In one case a petition to suspend the fine that was imposed, pending review, has been granted. In the others, however, including the motor fuels case, the fines have not been suspended, but they have not yet been paid. The Superintendency has requested the Attorney General to proceed against the parties to collect the fines. The Attorney General has not yet begun that process.

72. Thus, judicial appeals have thus far frustrated the Superintendency's efforts to finally resolve its cases. The appeals process is slow. It can take a year or more for the Court to accept a case. Reaching a final decision can take two years from the date of the appeal, sometimes longer, and then there is the possibility of an amparo appeal.³⁵

3.4 *International issues*

73. As a small economy and one whose markets are relatively open, competition in El Salvador is inevitably affected by international forces. The law and Regulation are silent on this topic, but there does not seem to exist any restriction on the Superintendency's ability to give full effect to foreign influences in its competitive analysis. So far the issue has not arisen directly in the Superintendency's cases.

74. The Superintendency has no role in the implementation of trade policy, including anti-dumping measures.

75. The Superintendency has been active since the beginning in building relations with other competition agencies and international competition policy organisations. It has signed co-operation agreements with competition agencies in Chile, Costa Rica, Honduras, Mexico, Panama, Peru and Spain. Three of the agreements – those with Chile, Mexico and Spain – focus on technical assistance – the exchange of personnel and sponsorship of conferences and seminars. The others also address co-operation and information exchanges. The Superintendency regularly communicates with its counterparts in other countries in the region on specific matters or issues. Brazil and Chile have provided technical assistance on conducting dawn raids, and Chile has provided technical assistance in two of the Superintendency's cases.

35 A similar amparo procedure exists in Mexico, and it has proven to be a significant problem for the competition agency there. Many of its cases were appealed under that process, causing delays and resulting in unfavourable rulings. More recently the competition agency has been having better success in amparo cases. See, the Mexico peer review report, *Competition Law and Policy in Mexico* (2004), and a follow-up report on the five Latin American peer reviews, *Competition Law and Policy in Latin America* (2007), both available on the OECD website.

76. The Superintendent is adept at attracting funding from outside sources for special projects.³⁶ The agency participates, for example, in COMPAL, a project that provides technical assistance in competition and consumer protection policies for the countries of Bolivia, Costa Rica, El Salvador, Nicaragua and Peru, financed by the government of Switzerland and administered by UNCTAD. Through COMPAL, Superintendency staff has participated in internships at competition agencies in other countries. The Superintendency also participates in the technical assistance programme offered by Spain and Portugal through the Ibero American Competition Forum.

77. The Superintendency also participates actively in international competition organisations, including the OECD (through its Global Forum on Competition), the ICN and UNCTAD. In its brief history it has already acted as host of the fourth meeting of the Latin American Competition Forum and of an ICN cartel workshop.

78. There is a broad diplomatic effort underway to integrate the economies in the region. Currently there are negotiations underway to create a Central American customs union. All countries in the region except Guatemala now have competition laws. In 2006 the Central American Competition Forum was created. El Salvador recently acted as host for the second meeting of that group.

3.5 *Resources and priorities*

79. One of the Superintendency's first tasks in 2006 was to prepare a five-year plan for the period 2006-11.³⁷ The plan articulated strategic objectives for the agency and it set out specific, numerical goals for various types of activities, for example, "number of cases on anticompetitive practices resolved," and "reports containing recommendations on laws and regulations." The shape of the plan was to emphasise competition advocacy, especially that relating to educating the public about competition policy, in the first years, while increasing the output of enforcement actions in the later years. The agency has followed this plan, though in some cases the numerical goals proved to be too ambitious.

80. The following table describes the output of the Superintendency in enforcement actions for the first 28 months of its existence.

	Horizontal Agreements	Vertical Agreements	Abuse of Dominance	Mergers	Failure to Supply Information
Files Opened	3	3	13	15	6
Orders or Sanctions Imposed	1	-	3	-	6
Fines Imposed (USD)	30,672	-	1,985,160	-	52,714

81. In the Superintendency's first two years its staff averaged 25 persons. Currently its staff numbers 30, including 6 lawyers and 7 economists. The agency's budget in 2006 and in 2007 was USD

36 The Inter-American Development Bank has been a principal source of outside funds for this purpose. The Bank is also funding this peer review report.

37 The plan is available on the Superintendency's website.

1,500,000.³⁸ It was increased to \$1,800,000 in 2008. Spending caps have prevented the agency from spending its full allotted amount, however. In 2006 only \$1,350,000 was actually spent. In 2008 there has been a government-wide 10% reduction in the amounts that can be spent on goods and services – non-salary expenses such as computers. A further restriction is that the Superintendency can spend only 65% of its budget on personnel, which has constrained its ability to hire staff, by far its most important input.³⁹ The Superintendency has been notified that its budget for 2009 will be reduced to approximately \$2,700,000.

82. The Superintendency's agenda is broad, and its leaders ambitious. Their accomplishments, especially in competition advocacy as described below in Sections 4 and 5, have been significant. They contend that more resources are required, however, as the agency becomes more intensively involved in case work. They note that the Superintendency's budget is substantially less than that of other Salvadoran agencies that it considers to be its peers. Compensation for the directors, as discussed above, is not adequate.

83. There are positive aspects to the Superintendency's resource situation, however. It seems to have adequate office space and equipment for the size of its current staff. Most important, its staff, while young, is widely considered to be capable and hard working. Its current Superintendent is highly respected, as is the Board of Directors. Salary levels for superintendencies are higher than those in the central government. The Superintendency attracts good people; university graduates consider it a good place to work. While there will be turnover of professionals from the agency to the private sector, as in many government agencies, it seems that turnover will not be a critical problem in the near term.

4. Limits of competition policy: exclusions and sectoral regimes

84. There are almost no exclusions from the competition law. It applies fully to the private sector, including regulated sectors, and to publicly owned enterprises. Article 2 of the competition law states:

The provisions herein are binding to every economic agent, be they natural or juristic person, state or local government, enterprises with state participation, cooperatives associations, and any other organization participating in economic activities. Notwithstanding the above, this law shall not be binding upon those economic activities that the Constitution and the laws reserve exclusively to the State and municipalities.

85. As noted above, there are regional (departmental) and municipal governments in El Salvador. These governments have no competition law enforcement responsibilities. The municipal code does reserve to municipalities the right to operate and regulate local markets, slaughterhouses, solid waste collection, cemeteries and funeral services and lotteries. If a municipality performs these services it is not subject to the competition law, but a private contractor performing the services is subject to the law. There are no special rules or exemptions for small and medium sized businesses.

86. Following are brief descriptions of regulatory regimes and market structures in selected sectors.

38 The Superintendency faced a budgetary crisis immediately after it began operation in 2006. The government cut its budget by 1/3, threatening all of the agency's programmes. The Superintendent intervened with vigour, and succeeded in having the cuts restored.

39 There is a government-wide rule restricting spending on personnel to 70% of an agency's budget, but the Superintendency is further restricted to 65%.

4.1 Electricity

87. The electricity sector, like other infrastructure sectors, was privatised in the mid and late 1990s. Competition exists in generation and distribution; the transmission company is a state owned monopoly. There are six generating companies operating a total of 12 plants. Hydroelectric is the leading source of power, with about 40% of total capacity. One entity controls all of the hydro facilities. Geothermal is a growing source, currently with about 14% of capacity. The remainder is thermal. In distribution there are several small players, and some generators are integrated into distribution, with minimal shares. One Group, AES, which includes CAESS, the respondent in the competition case described above, has a 68% share of sales nationwide. The sector regulator is General Superintendency for Electricity and Telecommunications (SIGET). As its name indicates, SIGET also has responsibility for the telecommunications sector.

4.2 Telecommunications

88. Fixed telephony remains highly concentrated after privatisation, but it is facing competition from other technologies, including mobile, Internet and cable TV. Long distance service is competitive, with 12 operators currently providing service. SIGET sets maximum rates in fixed local telephony. Mobile telephony has grown rapidly in recent years; usage increased about 450% between 2002 and 2007. There are currently five mobile telephone operators. Mobile rates are not regulated. A recent study showed that mobile rates in El Salvador are among the highest in Latin America, however, to which the Superintendency responded with some recommendations to SIGET, described in Section 5 below. Internet service has also grown rapidly in the past few years. That market appears to be competitive, and is unregulated. Cable TV service is likewise mostly unregulated. Two large providers serve most of the country, but several small competitors also exist. There are no regulatory barriers to entry in cable TV.

4.3 Petroleum

89. As noted above in the discussion of the motor fuels case, there is only one refinery in the country, which, together with imports stored on the same property, was for many years the source of most petroleum products in the country. Prices were regulated until 1994, when a wholesale price cap system was introduced. As imports grew, and particularly with the entry of Texaco as a major importer, most of the sector was fully deregulated in 2002. Prices for liquid petroleum gas, the most important fuel for households, are still regulated. The Ministry of the Economy has regulatory responsibility for this sector.

4.4 Banking

90. In 1980 the sector was nationalised, but in the early and mid-1990s it was again privatised. Entry by foreign banks was encouraged. Today there are 14 banks in the country; most of them are foreign. Citibank is the largest bank in the country, with market shares approaching 40%. There have been several mergers in the sector in recent years. Oversight of the industry is provided by the Superintendency of the Financial System.

4.5 Agriculture

91. As in most countries where agriculture is significant, competition in this sector is subject to some government-imposed distortions. Markets for most products are reasonably competitive, however. Tariffs generally are low, and CAFTA will result in the complete elimination of agricultural tariffs as between those countries. Sugar, one of El Salvador's principal crops, is an exception. Sugar is mostly excluded from CAFTA⁴⁰; tariffs are high in El Salvador – 40% – but other economies, including the United States

40 Corn was another.

and Europe, also substantially restrict sugar imports in various ways. Domestic production is subject to a quota system, which limits price competition, leading to a call from some to apply the competition law more vigorously to this sector.

5. Competition Advocacy

92. The Superintendency made a conscious effort at the beginning of its work to concentrate on this important function, and the results have been impressive. There are both advisory and educational aspects to competition advocacy. The advisory function involves providing comments and recommendations to other parts of government, especially sector regulators, on their policies that affect competition. In executing its educational responsibilities, the competition agency interacts with the public in various ways for the purpose of fostering an understanding of competition policy and support for the agency's agenda. The Superintendency has been active on both fronts. The agency continues to devote significant resources – currently about 40% – to competition advocacy.

5.1 *Intra-government advocacy*

93. The competition law provides the Superintendency, through the Board of Directors, with full power to conduct this activity.⁴¹ It can conduct market studies, advise sector regulators on the effects of their regulation on competition, issue opinions on the competitive effects of legislation and issue opinions on procedures for public procurement.⁴²

94. The Superintendency has entered into co-operation agreements with several regulators and government agencies: electricity and telecommunications, ports, civil aviation, financial system superintendency, pensions, securities, science and technology, Central Bank and Ministry of the Economy. The agreements provide for the exchange of information, for technical assistance and for co-operation in various forms in the execution of the agencies' missions.

95. The Superintendency has completed six in-depth studies of economic sectors in El Salvador: ground freight transportation; combustible liquids (gasoline, diesel fuel, kerosene and fuel oil), electricity, poultry and eggs, liquid petroleum gas and telecommunications. The first stage of a report on pharmaceuticals has been completed and a second stage is in progress. The studies had a two-fold purpose: to identify possible anticompetitive practices that could be the subject of enforcement action by the Superintendency, and to identify structural and regulatory features that could benefit from advocacy by the Superintendency. Of the two, the second has been more fruitful; the studies have supported several comments and recommendations by the Superintendency to the regulator involved.⁴³

96. The Superintendency has established an especially close relationship with SIGET, the electricity and telecommunications regulator. The Superintendency's study of the electricity sector found a lack of competition between generators in the wholesale electricity market, though it could not conclude that there had been a violation of the competition law. SIGET had conducted a similar study independently of the Superintendency's, and came to similar conclusions. As a result, the two agencies jointly authored a lengthy document in which they agreed on a new method for determining wholesale prices that would limit the ability of generators to manage capacity strategically. The Superintendency has also commented to

41 Article 14.

42 The last two functions, providing opinions on legislation and on public procurement procedures, were added by the 2007 amendments.

43 The studies are available on the Superintendency's website.

SIGET on draft regulations governing auctions for long term contracts for the sale of electricity, and on the terms of a proposed long term contract involving a large distributor.

97. The Superintendency's telecommunications study also prompted several recommendations to SIGET in this sector. Among other things, the Superintendency recommended that SIGET adopt a regulation establishing a framework for interconnection, containing principles and rules for negotiations between private parties for this purpose; that it take measures to enhance transparency in interconnection agreements between operators; that it address a problem of inequality of termination charges as between fixed to mobile and mobile to mobile calls; that it improve conditions for number portability as between mobile providers; and that it consider issuing a regulation governing service quality in mobile services. Finally, the Superintendency has also made recommendations to SIGET on cable television, especially regarding the relationships between the programming provider and the cable operator.

98. The Superintendency has issued many other recommendations to public entities on various topics:

- to the Ministry of the Economy on liquid petroleum gas (on rules for cylinder exchange and on access to maritime storage facilities);
- to the Ministry of the Economy on liquid fuels (gasoline, diesel, kerosene – on conducting studies relating to competition in these markets, on reducing regulatory barriers to entry and on promoting imports of these products);
- to two municipalities and the public hospital sector on their procurement practices;
- to the Ministry for Agriculture and Livestock on the development of rules for standardising poultry products and eggs;
- to the consumer defence authority on consumer education regarding poultry and eggs and on improving transparency in mobile telephone pricing;
- to the Finance Ministry on rules for tax exemptions that could affect competition; and
- to the stock exchange on improving transparency.

99. Public procurement is an important topic in El Salvador, as it is elsewhere in Latin America.⁴⁴ An agency in the Ministry of Finance (UNAC) oversees the procurement policies of some 384 public agencies and NGOs in the country. It establishes the rules that apply to the procurement process, according to standards set out in a procurement law. The law requires, among other things, the use of the tender process, the publication of tenders and of the results, the registration of bidders, and the opening of tenders to all qualified bidders. The agency has established a relationship with the Superintendency, with which it exchanges information. The Superintendency has provided some training for officials from the UNAC on detecting bid rigging. The country's criminal laws apply to bid rigging in public procurement, as does of course the competition law. Few bid rigging cases have been prosecuted, however.

100. The Superintendency is currently focusing on the pharmaceuticals sector, because medicines are a major input for the country's public health providers. Studies have shown that pharmaceutical prices in El Salvador are higher than in neighbouring countries. This has prompted the Superintendency's study of this sector noted above. So far the study has not resulted in the initiation of any investigations under the competition law, but it will certainly result in additional recommendations by the Superintendency to health care agencies and others on the topic.

44 That topic was the subject of a roundtable discussion in the 2007 Latin American Competition Forum. The documentation from that roundtable is available on the OECD website.

5.2 *Education: developing a competition culture*

101. The Superintendency encounters the public in a variety of ways. It regularly communicates to the press by means of press releases and articles written by staff members.⁴⁵ The Superintendent and her staff members often appear before groups of interested persons to explain and discuss the competition law. In any given month there are between two and eight such events.⁴⁶ There have been meetings with representatives of various business associations, individual businesses, law firms, government agencies and superintendencies. The Superintendency has been especially active in the university community. It has entered into co-operation agreements with three universities providing for internships at the Superintendency for students in law and economics. Representatives of the Superintendency regularly conduct lectures and seminars at universities and schools.

102. The Superintendency has also been working with judges. It participates in the country's judicial training centre, where it offers workshops on competition topics. The judges welcome such training opportunities. To date, however, there has been little opportunity for them to apply this training; as noted above, no competition case has been finally decided by a court.

103. The Superintendency publishes all interim and final decisions in a case, which are posted on the agency's web site. The web site is quite complete. In addition to the competition law, the Regulation and the agency's decisions, the web site contains speeches, articles, guidelines, a glossary of terms, a manual of operations, the sectoral studies described above, press releases, co-operation agreements and more. The Superintendency has not yet published easy-to-read written materials about the agency and the competition law, such as a pamphlet for consumption by the general public. Such a project is underway, however.

104. Still, despite this level of activity by the Superintendency, anecdotal evidence suggests that the public is mostly uninformed about the competition law and the activities of the Superintendency. This seems to be true in the business community as well, except possibly at the level of the largest companies. As the Superintendency becomes more active in case work the legal community is correspondingly becoming more active in the field, but at present this is confined to a few large law firms. Counselling by lawyers of their business clients about their responsibilities under the competition law is not yet being done regularly.

105. It is difficult to think of any aspect of the Superintendency's advocacy programme that is lacking. That knowledge about competition policy and the competition agency has not yet penetrated to a deeper level within Salvadoran society is probably a function of two things: time – the agency has been active for less than three years; and a lack of important cases instituted so far by the Superintendency. The second is also a function of time – with effort more cases will come – but it also points up an indisputable fact about competition advocacy: it cannot be fully successful in the absence of credible enforcement by the competition agency.

6. **Conclusions and recommendations**

106. Competition policy in El Salvador is off to a good – one might say excellent – start. El Salvador's experience can serve, in some ways at least, as an example of an effective way to begin to implement a competition policy. Those responsible for drafting the competition law took time to study the laws of other countries and to learn from their experience. They sought and received assistance from outside sources in this endeavour. Advocates for the law then built an effective political consensus for it,

45 Through May of 2008 the agency had issued more than 40 press releases announcing case decisions and competition policy events sponsored or attended by the Superintendency.

46 The Superintendency's calendar is posted on its web site.

which included the business community, and succeeded in enacting the law with strong support. Before the law had been in force even two years a consensus was again created for some amendments to it, providing the Superintendency with some important and necessary powers. The result is a law that is sound in most respects.

107. At the beginning of its work the Superintendency sought to arrange its priorities for its first few years. It initially focused on developing supporting regulations and guidelines to round out the structure provided by the law. It quickly developed an effective competition advocacy programme, both in providing advice to government agencies and regulators and in educating the public about the law. In these endeavours it was successful in enlisting outside assistance, both financial and substantive. In years two and three of its existence the Superintendency began shifting more resources to enforcement of the law – finding and prosecuting violations – but this aspect of its work took shape more slowly, which is to be expected. The Superintendency attracted qualified young professionals and it built a reputation for efficiency and hard work. The Superintendent proved to be aggressive and politically adept.

108. The main challenge now is for the Superintendency to demonstrate success in its law enforcement function, especially in anti-cartel enforcement. In addition, there are certain adjustments in procedures that it might consider in order to improve enforcement. It may also be useful to consider certain structural adjustments to the Board of Directors. The Superintendency's resource situation is not precarious, but there are improvements that could be made. It must address, to the extent that it can, the delays that result from appeals of its decisions to the courts. While it has been successful in competition advocacy, it should build on those efforts, especially for the purpose of strengthening the competition culture in the country.

109. Finally, an important test of the strength of competition policy in a country is its ability to withstand partisan political influence, especially at a time of political change. Thus far competition policy has enjoyed bipartisan support within the Salvadoran political establishment. That support, for a sound, objective and independent competition policy free of political interference, must continue.

110. Some of these issues are more fundamental than others, involving parties and conditions not fully within the control of the Superintendency and, in some cases, amendments to the competition law. Others can be addressed by the Superintendency itself. The following recommendations address these points.

6.1 Cartels

6.1.1 *Concentrate on developing an effective anti-cartel programme. Consider focusing on bid rigging in public procurement.*

111. The OECD has long held the position that fighting hard core cartels should have top priority in a competition agency. Quite probably there are unlawful cartels operating in El Salvador, harming Salvadoran citizens. For the Superintendency a successful anti-cartel programme would also have the salutary effect of strengthening the public's awareness and support for competition policy and the agency. The Superintendency has the legal tools that it needs to implement a successful anti-cartel programme: effective investigative powers, including dawn raids and the ability to create a leniency programme, and the ability to impose significant fines on cartel operators.

112. It is not easy to be pro-active in anti-cartel work. Experience in other countries has shown, however, that concentrating on bid rigging in public procurement can be fruitful. Such conduct is quite common; it almost certainly exists in El Salvador. Successful prosecutions of this conduct are visible and easily understood by the public.

6.1.2 *Implement a leniency programme.*

113. The 2007 amendments explicitly authorised the Superintendency to create a leniency programme. Many countries have one, and in some, especially those in which the programme has existed for a period of time, it has proved to be a highly useful tool in the anti-cartel fight. While a leniency programme should be created, however, one could not expect that it will have immediate results in El Salvador. There must exist the incentive for cartel operators to defect from the cartel and co-operate with the authorities. That incentive takes the form of a credible threat of very high fines or, in countries where cartel conduct is criminal, criminal prosecution. The threat will not be credible until the Superintendency, supported by the courts, begins to impose such fines.

114. There is one aspect of the law authorising a leniency programme that may limit its effectiveness. The law does not authorise the Superintendency to completely excuse a leniency applicant from paying fines. The incentive for defecting from the cartel must be strong. Experience in some countries has shown that completely excusing an applicant from sanctions can enhance the likelihood that someone will apply. Of course, the Superintendency could reduce an applicant's fine to as little as \$1, but a would-be applicant cannot be certain that that would happen. The certainty of avoidance of sanctions can be important. In any case, it may be necessary for the Superintendency to modify its leniency programme after it gains experience with it, something that has occurred in many countries.

6.2 *Mergers*

115. By setting its merger notification thresholds high, El Salvador has so far avoided a problem that has confronted other countries that have included merger control in their new laws: having to review too many notifications of mergers that are unlikely to pose any significant competition issues. There is an additional step that could be taken that might further reduce the burden, if only slightly.

6.2.1 *Change the notification thresholds so that they are assessed on the basis of the activity of at least two parties to a transaction within the jurisdiction to be notified, or, in the alternative, on the activity of the party to be acquired.*

116. This is consistent with the International Competition Network's *Recommended Practices for Merger Notification Procedures*.⁴⁷ It would eliminate the situation in which, because the thresholds are expressed only in terms of the combined assets or revenues of the merging parties, a proposed merger involving the acquisition by a very large business entity of one with a very small presence in El Salvador would have to be notified. Such a merger has a low probability of causing anticompetitive effects. Setting the threshold for the smaller entity would not be easy, of course; again it should be high enough to prevent capturing too many small acquisitions. Further, it might be necessary to amend the competition law in order to make such a change, although in another context the Superintendency has by interpretation injected a local nexus requirement into the thresholds that is not explicitly written in the law.

6.2.2 *Consider whether anticompetitive mergers that fall below the notification thresholds could be controlled as restrictive agreements or abuses of dominance, and if so, how the Superintendency might do so.*

117. El Salvador's economy is relatively small; the merger thresholds are high. It is conceivable that a merger that falls below the notification thresholds could be anticompetitive and harmful to consumers, for example in a market in which entry barriers are high. It seems that such a merger is not subject to the merger control provisions of the law, but it might be considered either an unlawful restrictive agreement

47 Supra, n. 20.

(Art. 25) or an abuse of dominance (i.e., if the acquiring firm is already dominant – Art. 30). The difficulty with employing these provisions, of course, is that the Superintendency could be confronted with a consummated merger, which could significantly interfere with its ability to impose an effective remedy. Still, there are ways to control mergers in the absence of a notification and waiting regime. Perhaps the best example of such a programme in Latin America is Chile.⁴⁸ An important concern with extending merger control to transactions smaller than the notification thresholds, however, is again to avoid committing resources to reviewing too many of these transactions.

6.3 Case procedures

6.3.1 *In cases in which the Superintendency is recommending that the Board impose sanctions, provide to respondents in advance of the initial decision of the Board of Directors a description of the Superintendency's theory of the case and the relevant evidence supporting it.*

118. The Superintendency's procedures are generally considered to be transparent. Its evidentiary file is available to respondents, and the decisions of the Board of Directors are carefully drafted and comprehensive. Still, respondents may not be sufficiently informed of the Superintendency's theory of the case in advance of the submission of the case to the Board to permit them to fully address the issues at that important stage. While the Superintendency would justifiably resist disclosing its report to the Board, it could provide the respondents with a separate statement containing its theories at the appropriate time.

6.4 Resources

6.4.1 *Provide the Superintendency with the resources that it requires to fulfil its broad responsibilities under the competition law.*

119. Considering what the Superintendency has accomplished in its less than three years of existence, it cannot be said that resources were a serious constraint. The Superintendency has demonstrated its efficiency in using the resources that it has. The agency must be adequately funded, however. It must have the capability to attract and retain qualified professionals and provide them with the support that they require. The Superintendency's portfolio is a broad one. The resources available to it should be no less than those available to other agencies like it, having commensurate responsibilities. In particular, there is concern that the Superintendency's budget will be reduced, if only slightly, in 2009, at a time at which the agency will be handling an increasing case load.

6.4.2 *Increase the compensation to the part time members of the Board of Directors.*

120. The compensation for the part time members of the Board is too low. It should be set at a level that is commensurate with that of board members of other superintendencies with a comparable workload.

6.5 Judicial appeals and final resolution of cases

121. Of the problems facing the Superintendency this seems to be both the most serious and the most intractable. Only one of the cases instituted by the Superintendency in which it imposed sanctions has been finally decided to date, that because it was not appealed to the courts. The others are suspended in some form in the Supreme Court. It does not appear that the delays can be traced to competition cases specifically or to the Superintendency. If a solution requires a reform or restructuring of the judiciary, that is beyond the scope of this study. The Superintendency must continue and strengthen the efforts that it is making in this area: education and training of judges, working closely with the Attorney General, who

48 See, OCED, *Peer Reviews of Competition Policy in Latin America: A Follow-up* (2007), at p.18.

participates in Supreme Court cases and who enforces the Superintendency's orders, and providing well reasoned arguments and pleadings to the Court. It should also consider any procedures that could reduce the likelihood that respondents will appeal to the Court.

6.5.1 Consider adopting procedures for settling cases.

122. Settling cases – reaching agreement with respondents on an appropriate remedy – has obvious appeal as an efficient way to resolve cases; it eliminates the possibility for judicial appeals. In some jurisdictions, notably the United States, most competition cases are resolved that way. The European Commission recently introduced a new procedure for settling cartel cases.⁴⁹ Of course, every country's law and jurisprudence is different; a settlement procedure in El Salvador, if one were possible at all, would have to conform to the country's legal norms. In any case it probably would not be an immediate solution to the problem in El Salvador. Respondents' incentives to settle depend at least in part on the perceived risk of proceeding to litigation in court. In El Salvador those risks are mostly unknown at this stage. Settlement would be a more attractive option to parties in merger cases, however, because of the need to consummate mergers quickly.

6.6 Competition advocacy and consumer protection

123. Despite a vigorous competition advocacy programme by the Superintendency a competition culture is not well established in El Salvador. One area that has not been fully developed in this regard is the interface between competition policy and consumer protection. Consumer protection is popular in El Salvador. Competition policy is another form of consumer protection, and the enforcement entities in both fields would benefit from working more closely together. The Superintendency has proposed to the Defensoría del Consumidor that the two develop a working relationship, but the Defensoría has not yet responded.

6.6.1 *The competition and consumer protection agencies should work more closely together; the Defensoría del Consumidor should be responsive to the Superintendency's proposals in this regard. Also, the Superintendency should be permitted to participate in the National System for Consumer Protection.*⁵⁰

6.7 Independence and impartiality of the Board of Directors

6.7.1 *Select part time Board members who do not hold full time positions in other government agencies or ministries. In any case, Board members should disqualify themselves from any matter in which another employer has a role or interest.*

124. The Board members except the Superintendent serve part time in their positions, and some work full time in other government positions. This has the potential to compromise the independence of the Board from other parts of government, though it has not yet happened. Presumably there are qualified people from elsewhere in the private and public sectors who could serve in these important positions.⁵¹ In

49 See, press release issued by the European Commission on June 30, 2008, available on the Commission's web site at <<http://ec.europa.eu/comm/competition>>.

50 It is not clear whether an amendment to the law is required for this purpose.

51 Article 10 of the competition law provides: "The following cannot be appointed as Board members: . . . (e) Directors, officials, administrators, empowered and legal representatives of the economic agents subject to the provisions herein." Interpreted most expansively, this provision would disqualify anyone with ties to a business, including lawyers who represent businesses. A more reasonable interpretation would apply the prohibition to those holding specific positions of authority in a business.

any case, Board members, whatever their full time position, should apply strict rules that would disqualify them from a case in which another employer has any involvement.

6.7.2 *Stagger the terms of the Board members so that not all are appointed at the same time.*

125. A complete turnover of the Board of Directors, including the Superintendent, at one time creates a significant risk of a loss of continuity and momentum every five years in the Superintendency, and it makes more possible the exercise of political influence on the agency. Staggering the terms of the directors would solve this problem. An amendment to the competition law is probably required to accomplish this.

6.7.3 *Consider expanding the number of voting members on the Board to five.*

126. The current Board members are hard working and independent. All six participate fully in a case (unless disqualified), except that only three vote on the decision. Expanding that number to five would diminish concerns about undue influence from the Superintendent in Board decisions and it would be costless, since all six are compensated whether or not they vote. Of course, such a change would require an amendment to the law.