

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

Working Party No. 3 on Co-operation and Enforcement

The standard of review by courts in competition cases – Note by Costa Rica

4 June 2019

This document reproduces a written contribution from Costa Rica submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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Costa Rica

1. Institutional design and Costa Rican legal framework

1. The Commission to Promote Competition (COPROCOM), which is the national authority, and the Telecommunications Regulatory Authority (SUTEL), as the sectorial authority, are administrative entities that are responsible for the application of competition regulations in the country. In the case of COPROCOM, the administrative instance is mandatory before resorting to judicial remedies.¹

1.1. Administrative Procedure

2. The procedure followed through the administrative channel to investigate, and if appropriate, sanction anticompetitive conduct, is established in Book Two of the Public Administration Law, No. 6227. It is a procedure that brings together all the elements of due process, which are summarized in: a) notification to the interested party of the nature and purposes of the procedure; b) the right to be heard and the opportunity to present arguments and produce relevant evidence; c) opportunity to prepare its defense, which necessarily includes access to the file and information related to the issue in question; d) the right to be represented and advised by lawyers, technical experts, and other qualified persons; e) adequate notification of the decisions issued by the administration and the reasons on which they are based; and f) the right to appeal.²

3. Once the competition authority agrees to initiate a procedure, it appoints a group of staff members as the process's instruction body (director of the procedure), which is responsible for preparing it, conducting the oral and private hearing, and preparing a report to be used by the highest authority (COPROCOM or the Council from SUTEL) to make its final decision.

4. In the course of the administrative procedure, the following decisions may be challenged through the administrative channels: a) the decision to initiate a procedure, b) the one that denies any evidence, and c) the final decision, as established in article 345 of the Public Administration Law. However, the constitutional jurisprudence as well as the provisions of the Procedural Administrative Code have established that all procedural acts having their own effects are also challengeable,³ that is, when these actions by themselves

¹ As indicated in the last paragraph of article 21 of the Law on Promotion of Competition and Effective Defense of the Consumer, Law No. 7472.

² According to Vote No. 15-90 at 16:45 hours of the 5 January 1990 of the Constitutional Chamber

³ In legal doctrine, it is explained that: *"The effects of the administrative act must be direct or immediate, must arise "per se" -from the act itself-, and are not subordinated to a subsequent act. The act must produce and project its legal effects with respect to the administered party. Consequently, judgements, expert reports, reports, opinions, projects, etc., do not constitute administrative acts but preparatory acts (also called procedural steps) or simple acts of the Administration, which are dictated to make the main and final act possible. This type of acts have an indirect or mediate effect. For example, the report may give rise to a disciplinary sanction, and the judgement may cause another act. (...) Obviously, when the preparatory or procedural act produces its own effects, that is, direct or immediate effects, inasmuch as it is suspended indefinitely,*

may generate consequences to the parties. Within this category, the Constitutional Chamber, in its vote 13283-2001, has specifically included as an action, with its own effect, the request for information to economic agents, and therefore, it is a challengeable decision.

1.2. Administrative review of decisions by competition authorities

5. The administrative decisions may be challenged before the body that issued it. Thus, when it is issued by the director of the procedure, recourses for reconsideration and appeal may be filed jointly (it is also possible to file only one of these recourses). When the decision is issued by the superior body, it is only allowed to file a recourse for reconsideration, which exhausts the administrative procedure (articles 342 to 352 of the Public Administration Law).

6. Annulment requests may be filed through the administrative channels pursuant to the provisions of article 175 of the Public Administration Law.

1.3. Judicial review

7. In Costa Rica, only the authorities or the courts of justice can review and, if appropriate, annul all or part of the acts issued by the competition authorities.⁴ The Contentious-Administrative Jurisdiction are competent to protect the legal rights of any person, and to guarantee or re-establish the legality of any behaviour that is subject to Administrative Law, as well as to decide on any aspect of the relationship governed by Administrative Law.

8. The country does not have a specialized court in Competition Law, so the cases are assigned to the different sections of the Contentious-Administrative Court in accordance with the parameters established by the Judicial Power. Thus, practically all the sections that comprise said jurisdiction have known challenges to rulings or acts issued by the competition authorities, which evidently is a weakness of the system.

9. The following are entitled to sue⁵ before the courts:

1. Those who invoke the affectation of legitimate interests or subjective rights.
2. Entities, corporations, and public law institutions, and any that hold the representation and defense of interests or rights of a general, professional, or collective nature, as far as such interests or rights are affected, and groups governed by a statute, as long as they defend collective interests.
3. Those who invoke the defense of diffuse and collective interests.
4. All persons by popular action, when expressly provided by law.

it makes impossible the continuation of the course of the procedure or terminates it, directly or indirectly, and must be included in the category of administrative acts (...) ". JINESTA LOBO (Ernesto). Tratado de Derecho Administrativo. Editorial Biblioteca Jurídica Dike, Volume I, pages 299 and 300.

⁴In the past, a very controversial case was presented in which it was considered that the Minister of the sector could annul a COPROCOM ruling **only when it was an obvious and express nullity, after a binding opinion issued by the Attorney General of the Republic.**

⁵ Article 10 of the Administrative Procedural Code.

5. The Administration, in addition to the cases mentioned above, when damage or harm has been done to public interests, to the Public Treasury, and to demand contractual and non-contractual liability.
10. Pursuant to Article 36 of the Administrative Procedural Code, a wide range of acts, including omissions by the Administration may be subject to a judicial claim, since they include claims regarding:
 1. Relations subject to the juridical-administrative order, as well as to its existence, non-existence, or content.
 2. The control of the exercise of administrative power.
 3. Administrative acts, whether final, definitive, or procedural with their own effect.
 4. Material actions of the Public Administration.
 5. Behaviours entailing omissions by Public Administration.
 6. Any other behaviour subject to Administrative Law.
11. The plaintiff can make as many claims as necessary, according to the purpose of the process. Among other claims, you can request: a) The declaration of disagreement of the administrative behaviour with the legal system and of all acts or related actions, b) The total or partial cancellation of the administrative behaviour, c) The modification or, should the case be, the adaptation of the administrative behaviour, g) That the Administration is convicted to carry out any specific administrative behaviour imposed by Law, j) The judgement to pay for damages and losses.
12. It is important to highlight that natural or legal persons can also challenge decisions of the competition authorities through the Constitutional Jurisdiction when they consider that an action violates the fundamental rights and freedoms enshrined in the Law of Constitutional Jurisdiction or in any constitutional rule or principle (Articles 29 and 73 of Law N° 7135). This mechanism is frequently used in the procedures carried out by competition authorities through an amparo⁶ or an action of unconstitutionality.⁷

⁶An amparo is applicable against any provision, agreement, or ruling, and in general, against any action, omission, or simple material action not based on an effective administrative act, carried out by the servers and public bodies, that has violated, violates, or threatens to violate any freedom and fundamental right. The amparo will be applicable not only against arbitrary acts, but also against actions or omissions based on erroneously interpreted or improperly applied standards. (Art. 29 Constitutional Jurisdiction Law).

⁷An action of unconstitutionality is applicable against laws and other general provisions, including those originated in acts by private subjects, that violate, by action or omission, a rule or constitutional principle, or against the subjective acts of public authorities, when they violate, by action or omission, a rule or constitutional principle, if they are not susceptible to writs of habeas corpus or amparo (Article 73 Law of Constitutional Jurisdiction).

2. Evolution of the rulings issued by the competition authorities and their challenge in court.

13. Costa Rican legislation for competition⁸ authorizes the imposition of sanctions of an administrative nature upon verification of an anti-competitive behaviour. Throughout more than two decades, it is possible to envisage the evolution in the use of sanctioning power by the authorities, as well as the review of this faculty in court.

14. The starting point of punitive rulings on competition matters was November 1995, the month in which COPROCOM sanctioned two cases of anti-competitive practices.⁹ Thus, for the first time in Costa Rica, a sanctioning ruling was issued for an anti-competitive practice, and since then the number has increased to 32 cases.¹⁰

15. The review of the initial data reveals that the first sanctioning rulings imposed by COPROCOM, with one exception¹¹, were of a symbolic or educational nature towards a recently enacted law, this situation has varied over time because the wider dissemination of competition regulations. First sanctions imposed by COPROCOM included corrective measures and the obligation to annul anti-competitive agreements, as well as the payment of fines that ranged between 0 and 100 minimum wages (this limit was equivalent to 11,120,100 Costa Rican colones or US\$54,749)^{12 13 14}. ***None of these administrative rulings was challenged in court.***

16. Later in 1999, a defiant ruling arrived for the hardcore bean traders cartel¹⁵, which included suspending and refraining in the future from carrying out any act that violates Law 7472, as well as the payment of a fine equivalent to **637 minimum wages** (which at that time amounted to 76,535,550 Costa Rican colones or US\$273,253). This judgement represents a transition, not only because of the greater severity of the sanction imposed by the authority; but also, for being the ***first decision that was questioned before the***

⁸ Law 7472 and Law 8642.

⁹ COPROCOM determined in Article Four of Session 09-95 that the company Bticino incurred in the imposition of resale and exclusive treatment prices, applying a fine of **100 minimum wages**. In addition, at the same time, it sanctioned, in Article Six of Session 09-95, several ice makers, due to the existence of a price agreement, and fined the five involved with **3 minimum wages**.

¹⁰The closing of the registers is year 2018. It includes sanction cases for anti-competitive practices, prohibited and denied concentrations, carried out by COPROCOM and SUTEL. It does not include summary proceedings for non-delivery of information.

¹¹ Bean traders cartel.

¹² Article Four, Session 39-96 of COPROCOM.

¹³ Even the Ministry of Economy, Industry, and Trade endorsed an anticompetitive behaviour via executive decree.

¹⁴In Article Eight, Session 09-99, the president of the National Chamber of Pharmacies (CANAFAR) ***was sentenced to pay 3 minimum wages*** due to vertical boycott. By means of Article Four, Session 20-99, radio broadcasters were sanctioned with **3 minimum wages** due to a price agreement among them.

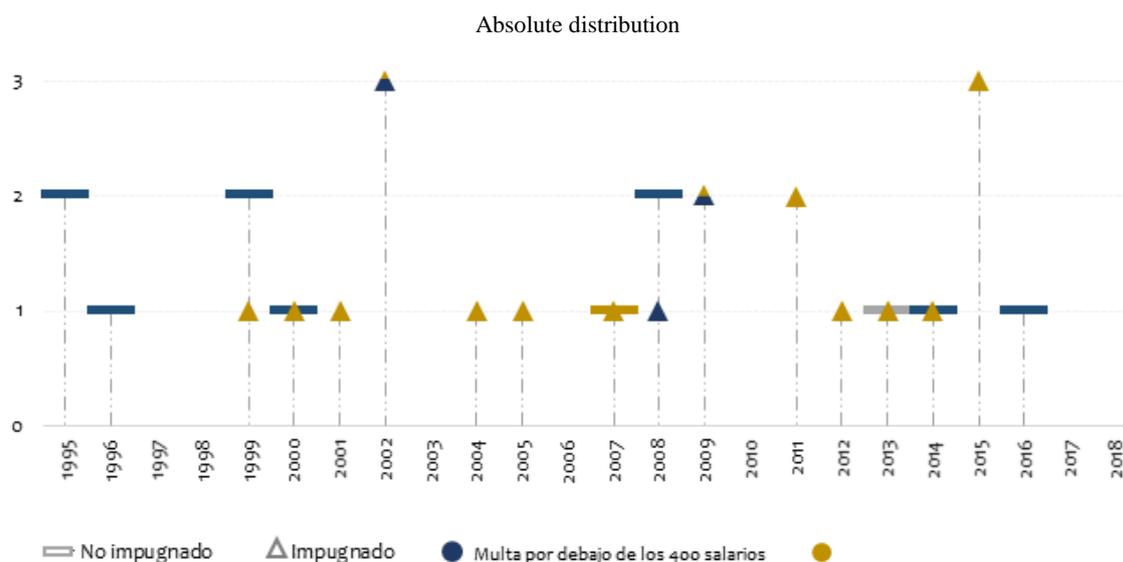
¹⁵ Article 5, Session 19-1999 of COPROCOM.

Administrative Contentious Court, which confirmed the ruling issued by COPROCOM

16 17.

17. From this point on, the challenge of rulings issued by the competition authority became a constant situation. By 2018, 63% of sanctions imposed by the competition authorities had been challenged before the courts of law¹⁸. The following figure shows the number of cases, the fine imposed, and their challenge in court.

Figure 1. Number of rulings issued by the competition authorities per year, their challenge in the judicial process, and their relation to the fine imposed. Period 1995-2018

*Notes:*

1/ The symbol, a rectangle or a triangle, indicates whether the case was challenged or not in court.

2/ The colour in the symbol indicates the level of the fine.

3/ It should be clarified that the case was not challenged in 2013, represented in the graph with the rectangular symbol in grey. Even though the party went to Court, the case was annulled by the administration.

4/ In 2002, of the three cases, only one generated a fine of less than 400 salaries

5/ In 2009, only one case generated a fine of less than 400 salaries. The other case is particularly serious.

Source: Prepared internally with information from COPROCOM and SUTEL.

¹⁶Judgement number 264-2010 at fourteen hours and thirty minutes of the eleventh of May of two thousand ten issued by the First Section. The court confirms the ruling by Coprocom.

¹⁷An appeal in second instance is partially reversed as indicated by the Administrative Contentious Court "since plaintiffs are responsible for paying each of them, proportionally, the corresponding amount for personal costs. "

¹⁸ Out of a total of 32 rulings.

18. Regarding the non-appealed judgments in court, cases in which the fines imposed were relatively low stand out, even including amounts of 0¹⁹ or of 1²⁰ minimum wage (which at that time amounted to 126,145 Costa Rican colones or US\$256), which possibly led to the generation of valuations regarding the cost of a legal process and the payment of monetary penalties²¹.

19. On the other hand, in all the cases²² in which a relatively important sanction was imposed, the economic agents resorted to judicial review. It can be noted since 2002 the fines filed by COPROCOM has been increased until reaching sums of several millions of dollars. Such are the cases of sanctions imposed in the following cases: 1) for the performance of a prohibited concentration; 2) by an agreement of the pension operators and 3) by vertical restrictions in the credit card market. The highest fine that COPROCOM has imposed was imposed in 2018 for the realization of relative monopolistic practices in the wholesale marketing of medicines and exceeds US \$ 18 million.

20. Particularly, of the 20 cases that have been taken to the Courts of Justice, 85% have already been resolved, and most of the resolutions issued by the competition authorities have been confirmed in all their extremes. See details in Table 1.

Table 1. Status of the rulings challenged in judicial proceeding - Period 1995-2018.

Absolute and percentage distribution

Rulings challenged in the courts	Distribution	
	Absolute	Relative
Confirmed	10	50%
Annulled	5	25%
Partial nullity	2	10%
Pending	3	15%
Total	20	100%

Source: Prepared internally with information from COPROCOM and SUTEL

21. As for the cases already concluded in the courts, the standard had been that a final judgment required several years to be resolved, and the two instances therein needed to be exhausted. See detail in Figure 2.

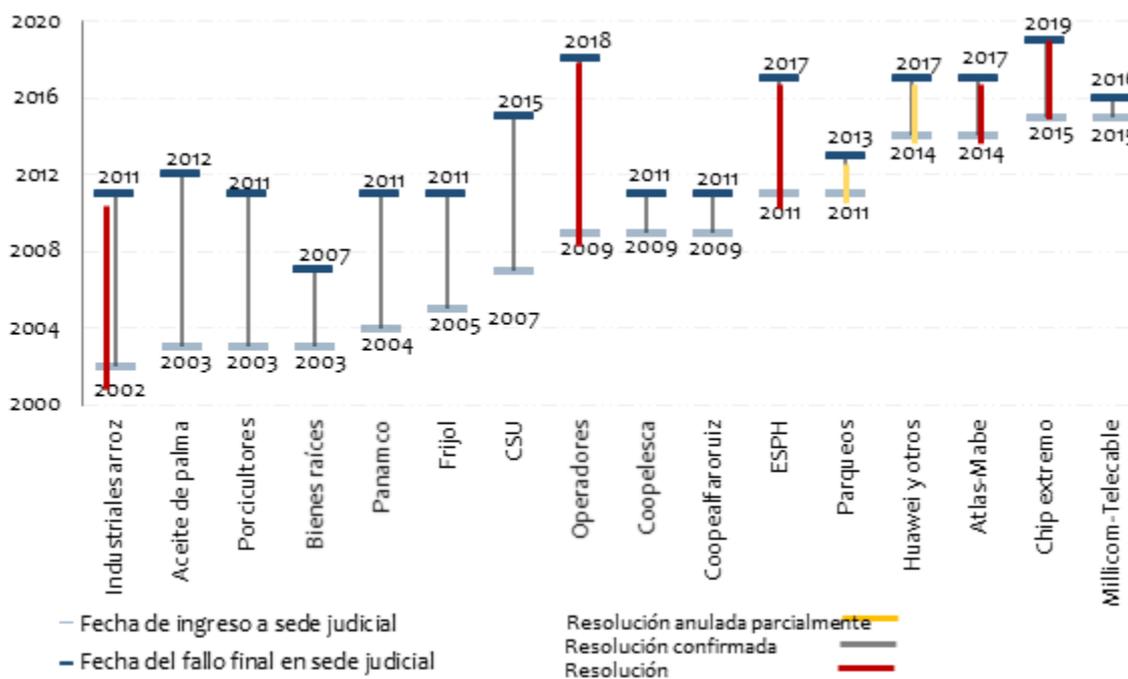
¹⁹ Article 6, Session 11-2008, of COPROCOM, since the repeal of tariffs used as reference by the customs agents was imposed as a sanction.

²⁰ Vote 40-2016, of COPROCOM, for an omission of compulsory prior notification of concentration, considering that the negative control was not sufficiently developed by law, regulations, and notification guidelines.

²¹ The opposite happens with sectorial legislation. Law 8642 establishes that very serious infractions will be fined from 0.5% and up to 1% of the gross income of the operator or supplier obtained during the fiscal period. In the case of serious infractions, the fine will be between 0.025% and up to 0.5% of the gross income of the operator or supplier obtained during the previous fiscal period.

²² With the exception of the case against the company Abonos Agro that was in a sale process.

Figure 2. Duration of the judgements of the Courts of Justice of the contested rulings on competition and final result - Period 1995-2018



Note: * There is no information about the legal process of the ruling in the case of containers, Article 6, Session 33-00.

Source: Prepared internally with information from COPROCOM and SUTEL

22. However, the time required to decide on the cases has decreased since 2009, -see **Error! Reference source not found.** This decrease coincides with the implementation, as of 2008, of a reform to the Administrative Procedural Code (APC). This reform included several mechanisms that improve the processing of cases, such as the preferred procedure in cases of urgency (Article 60); direct ruling without the need to get evidence, without conciliation, and without holding hearings (Article 69); or for matters of strict Law or in which no evidence needs to be cleared, as well as that in which before terminating the preliminary hearing, the parties may formulate their conclusions, and immediately afterwards, it is passed to the Court to issue a judgement (Article 98, Clause 2).

23. There is a case in which one of the mechanisms was implemented to streamline and avoid long-term proceedings, in which the judicial ruling²³ kept the rejection of Millicom and Telecable concentration²⁴ by SUTEL.

24. In this case, the Contentious Administrative Court resolved the petition presented by the parties in **6 months**. The distinctive feature of the case is that, unlike any other, it was resolved with a *direct judgement*²⁵, which is considered of exceptional nature, "as it implies that for the sake of speed, other fundamental principles of the contentious-administrative process must be overlooked, such as contradiction, verification of real truth,

²³ Judgement 53-2016-VI of the Administrative Contentious Court.

²⁴ RCS-149-2015 of SUTEL.

²⁵ Included in number 69 of the Code of Administrative Litigation.

immediacy, concentration, and others, and even alters the oral nature of the process, by virtue of its compulsory conversion to a written process by dispensing with the oral stages. Therefore, given the implications involved, the determination of this abbreviated procedure and the assessment of the conditions or budgets necessary to accommodate such a procedure should be restrictive and not allow matters that according to the purpose of the process or the cause to request merit to be submitted to the oral contradictory, be ruled without further debate, to the detriment of the real truth, the jurisdictional control of legality of the administrative function, the subjective rights and legitimate interests of the administrator, and even the fundamental procedural rights of the parties²⁶." This particular case demonstrates the existence of an expedited procedure, as long as all parties agree to follow it.

3. Classification of judgments of the contentious-administrative courts in cases of rulings issued by the competition authorities

25. As for judicial decisions that have annulled rulings by competition authorities (7), either in whole or in part, it is possible to group them into two categories: in form and substance.

26. **Regarding cancellation by a substantive issue**, they highlight the judgments that in the courtroom determined the absence of aspects that, in their opinion, are not optional in the analysis of anti-competitive practices, but are of a mandatory nature under competition law, which leads to the annulment of the resolution issued by the authority. Such is the case of prohibited concentration²⁷ between ATLAS and MABE²⁸, in which it was determined that *"... the base resolution of the sanction imposed on the plaintiff must be annulled by defects in the content element of the administrative act, which lacks analysis and is biased in terms of the conclusions reached by omitting the study of the costs of distribution of goods, of the costs for the consumers of having to go to other markets and if there are regulatory restrictions that limit to the consumer access to the alternative sources of supply.²⁹"*

27. Although the competition authority conducted an extensive analysis to determine the relevant market, the Court's ruling established that the competition authority **should analyse each and every one of the criteria established in Article 14 of Law 7472 to define the relevant market³⁰**. Thus, in resolution 53-2015, the Administrative Procedural

²⁶ Contentious Administrative Court, Sixth Section, resolution at 9:30 hours of 14 December 2009.

²⁷ Article 16, Law 7472.

²⁸ Vote 7-2011 of COPROCOM.

²⁹ Ruling 53-2015-I.

³⁰ Article 14 of Law No. 7472 establishes that to determine the relevant market, the following criteria shall be considered:

a) The possibilities of replacing the good or service by another one of national or foreign origin, considering the technological possibilities, the extent to which consumers have substitute products or services available, and the time required to make such substitution.

b) The costs of distributing the good itself, its relevant inputs, its complements and replacements, from other places in the national territory and abroad. For this, freight, insurance, tariffs, and

Court, First Section of the Second Judicial Circuit of San José, at fifteen hours of May 25, 2015, ruled as follows:

*"In this regard, the petitioner expresses, as an essential argument of nullity, that the Commission for the Promotion of Competition did not consider all the criteria present in the Law, in its four clauses of point 14, to define the concept of relevant market; only one was assessed, and subsections b), c) and d) were not analysed. Indeed, the plaintiff is right. From the careful study of vote number 07-2011 at twenty hours of 13 July 2011 (proven fact 20), and vote number 29-2013 at 18:25 hours of 5 November 2013, of the Commission for the Promotion of Competition, it is observed that criteria b), c), and d) are not analysed in order to determine the relevant market, as expressed in point 14 of Law 7472. The criterion of "a) The possibilities of replacing the good or the service, by another one of national or foreign origin, considering the technological possibilities, the degree to which the consumers have substitutes, and the time required to carry out such substitution. b) The costs of distribution of the good itself, its relevant inputs, any complements and substitutes, from other places in the national territory and abroad, shall take into account freight, insurance, tariffs, and restrictions that are not tariffs, as well as the limitations imposed by economic agents or their organizations and the time required to supply the market from other sites. c) The costs and possibilities of consumers to go to other markets. d) Regulatory restrictions, national or international, that limit the access of consumers to alternative sources of supply, or that of suppliers to alternative customers." **Criteria that are not optional in their analysis, but that the aforementioned law requires the Administration to develop when indicating that they should be considered to determine the relevant market**".*

28. Judgements on cartels stand out. In some, the need of a greater specialization in Competition Regulations on the part of those who gives justice becomes evident. In this regard, Vote No. 050-IV-2016 of the Contentious Administrative Court, Fourth Section, San José, at sixteen hours of 31 May 2016, supported the defense arguments by pension fund operators, who alleged a leader-follower behaviour, and the extensive analysis carried out by the competition authority which omitted to state the reasons for which this argument was rejected. In the aforementioned vote, the following was indicated:

*"The resignation of the leader to seek any competition due to economic issues **generated a domino effect on the remaining market participants** who chose to follow the same procedure, which is to take the upper limit of the band, while up to that moment they were generating losses, as was already mentioned. It is clear that it was the operator of Banco Nacional de Costa Rica, as that banking entity is one of the stronger (or perhaps the strongest) in the market, with greater security, number of branches, and infrastructure. Due to all these factors, most Costa Ricans opted for it; hence, its status as the leader. **The fact that the other companies followed in a "shoal effect" is normal in the economic field.** This situation, as it was explained to us, is a logical and normal rule within an oligopoly like the one*

restrictions that are not tariffs will be taken into account, as well as the limitations imposed by the economic agents or their organizations and the time required to supply the market from other places.

c) The costs and possibilities of consumers to go to other markets.

d) Regulatory restrictions, national or international, that limit access of consumers to alternative sources of supply, or that of suppliers to alternative customers.

that prevailed for that moment. As a behaviour, we could even speak of an attitude or tacit agreement, but of a market behaviour. In that framework, the behaviour is not punishable, as it is a logical behaviour of competitors facing such a situation. From this behaviour, the Commission interprets the existence of an agreement, but fails to consider which are the technical rules of the economy that could be applied." (The highlighting is intentional).

29. Also, to be considered is the decision as to the participation of an economic agent in a meeting in which a collusive agreement was reached, without the agent subsequently executing the agreements reached. This is punishable behaviour, as in the case of a public parking facilities cartel. Thus, in resolution 000063-F-TC-2013, the Contentious Administrative Court of Cassation of the Ministry of Treasury, at nine hours fifty-two minutes of 4 July 2013, established the following:

"Regarding the first allegation, the Court had as an uncontested fact that on 6 June 2006, a meeting was held with the participation of the owners and/or representatives of various public parking facilities located in the area of the "Centro Colón" building in San José. In addition, among the attendees was the plaintiff's proxy, and in that meeting the prices charged for the different parking lots were discussed, although later Parqueo Talum did not modify its prices (facts held as demonstrated, 2, 3, and 4)... It is also of importance that the parking lot operated by the plaintiff had not modified its prices, so that, in view of sound criticism, their attendance at the meeting could not be accepted-without other objective and impartial elements to support it, as a proof against that. Thus, there is no sufficient evidence to conclude that the plaintiff's representative participated in the agreement. In this specific case, evidence provided was not conclusive in terms of the consent of the plaintiff to "... fix, elevate, arrange, or manipulate the price..." of services provided by public parking lots in the area around Centro Colón. Especially, in the parking lot owned by the plaintiff, no modification was made. Furthermore, in accordance with the provision, it is not the sole participation of the representative in the meeting that typifies the conduct that violates market rules, but the agreement in order to establish a price or rate. Thus, it would not be enough to sanction the monopolistic behaviour with the existing certainty regarding its presence in the aforementioned meeting, which has been recognized by the representative (folio 382 of the administrative file), since for that purpose, agreement or consent are required to modify the rates."

30. **The procedural issues in the rulings of competition authorities** have been the cause that has generated the greater number of annulments.

31. In this regard, it is important to mention the sanction imposed in 2011 on the Public Services Company of Heredia (ESPH) by COPROCOM for the performance of a relative monopolistic practice. In this case, the Court of First Instance confirmed the resolution of COPROCOM; however, the First Chamber, as a second instance, annulled the decision adopted, considering that the resolution was void due to lack of jurisdiction. The difference in assessment between the first and second instances was based on the effects of COPROCOM's actions prior to the notification of the initiation of proceedings. The First Chamber established that such acts only had internal effects, and by the time in which the procedure was formally initiated, the national authority had to declare itself as lacking

jurisdiction and transferred it to the sectorial authority, even though it had not yet been constituted.³¹

32. However, from the analysis of the judicial decisions, it appears that one of the recurring topics in relation to the form is related to the **absence of criteria for setting fines**. An example of this is the court ruling that partially annulled COPROCOM ruling in a case involving several telecommunications companies in a state tender³², Vote No. 070 -2015 of the Administrative Contentious Court, Fourth Section, San José, at eight o'clock on 13 July 2015, which states:

"The motivation of the resolutions issued within the field of sanctioning law as a result of administrative procedures by COPROCOM requires a careful and detailed analysis of all arguments and evidence, with express indication of the parameters or objective criteria used to impose the sanction in each particular case, which is not fulfilled with the simple description of the evaluation criteria and a generalized analysis, in light of what is ordered by the standard under analysis in relation to paragraphs one hundred thirty-three and one hundred thirty six of the Public Administration Law. This requirement is missing in the resolution issued by the Commission for the Promotion of Competition reviewed here " (The highlighting is intentional).

33. Another reference to this is the judicial ruling of 2009 in relation to the cartel of the industrial rice sector³³. The COPROCOM ruling was annulled³⁴ because it considered that there was a lack of individualized basis and reasoning of the fines imposed on each of the sanctioned companies, as well as that there was non-existence of objective criteria and parameters used by the Administration to impose said amounts on the subjects investigated due to the same behaviour. Therefore, the court determined that the parties were rendered defenseless by preventing them from knowing the reasons for the quantification of the behaviour, as the sanctioned party has the right to know this information. Thus, in Resolution 000250-F-S1-2011 of the First Chamber of the Supreme Court of Justice at nine hours and five minutes of 10 March 2011, the following was determined:

"On the other hand, if the sanctioned monopolistic practice comes from consensus, in which, it can be said that everyone had the same intervention, it is not allowed to sustain, as intended, that the joint analysis of the illegal conduct makes the individualized examination of the imposed fine unnecessary, since within the parameters that must be weighted for each of them is the ability to pay, which is not necessarily uniform; therefore, as a requirement derived from the duty of substantiation as part of due process, the imposition of the fine, in an individualized way, becomes essential... Hence, a punctual analysis is essential to allow the sanctioned agent to understand and review the parameters from which the sanction was imposed, to be able to exercise technical defense." (The highlighting is intentional).

³¹ This was a conduct carried out by a telecommunications network operator prior to the issuance of the General Telecommunications Law, of which COPROCOM was informed in the days prior to the issuance of said regulations.

³² Vote 13-2012 of COPROCOM.

³³ Ruling of the Contentious Administrative Court 100-2009-SVII, ruling in Second Instance 31-2010-VIII, and ruling 250-F-SI-2011 of Cassation.

³⁴ Article 8 Session 22-2001 of COPROCOM.

34. Another case is related to the procedure carried out against the Costa Rican Electricity Institute sanctioned by SUTEL due to relative monopolistic practices. In this case, the Contentious Administrative Court annulled the sanction imposed by SUTEL based on the fact that the administrative act had two procedural defects. The first one was according to the Court's observations regarding the accusation, inasmuch as the company is sanctioned for conduct that was not expressly imputed to it at the beginning of the process (margin squeeze). The Authority apportioned the conduct established in subsection j) of article 54 of Law 8642, corresponding to any deliberate act that has the sole purpose of seeking the exit of operators or suppliers from the market or intending an obstacle to their entry. However, the Court considered that the party under investigation was not specifically told what conduct was being attributed to it, thus violating the party's right of defense. The second procedural vice considered by the Court is that ICE was not granted a hearing of the "as efficient as operator" test prior to the final judgement, prepared by SUTEL as evidence to prove the anti-competitive practice. The judge's consideration violates the right of defense. (Refer to judgement number 108-2017-VIII at eleven hours of 10 November 2017 issued by the Contentious Administrative and Civil Court of Finance, Section Eight, corrected by means of ruling 108-2017-VIII-BIS at 15 hours of 17 November 2017 and notified to the parties on 21 November 2017).

35. SUTEL filed a cassation recourse against the decision adopted by the Contentious Administrative Court. The Court of Appeals for Contentious Administrative Matters, in resolution 000008-F-TC-2019 at nine hours of 6 February 2019, on the subject of the mandatum of charges indicated that **because of the specialized nature of the competition, the accusation made by the competition authority must be very precise:**

*"Two tests are used in the field of telecommunications to verify the existence of narrowing of margins: the one used by SUTEL, namely, the sufficiently efficient competitor test, which seeks to verify the narrowing of margins in the costs of the retail market of the hypothetical efficient competitor. Second, that of attribution of costs, which tends to verify the existence of cross subsidies between the wholesale and retail activities in the market. **These tests are highly technical methodologies, carried out by professionals in economic sciences, for which they reach the level of expertise and as such constitute a vital evidence in this type of procedure. Hence, contrary to what the appellant argued, such a method is not a way of assessing the evidence, but rather as the judges ordered it, it becomes a test by itself. Therefore, it must have been brought to the knowledge of ICE, prior the final judgement and not to include it in this, as SUTEL did without ICE having the opportunity to acknowledge the situation and present a rebuttal. That was the only way that the Institute could have refuted it by means of rebuttal, or it could have made the responses it deemed pertinent in order to denature it, if that were the case "** (The highlighting is intentional).*

36. On the assessment of evidence, the obligation for the competition authority to justify the reasons why it rejects the evidence offered by the parties has also been established by the Courts, and in Vote No. 050-IV-2016, Contentious Administrative Court, Fourth Section, San José, at sixteen hours of 31 May 2016, on the alleged cartel of pension operators resolved by COPROCOM, the Court indicated the following:

"It should be noted that the technical aspects explained here and that are a true reflection of what was contributed by the evidence received in the complementary hearing was exposed at the time of the disciplinary procedure; more interestingly, the plaintiff never analysed the issue, let alone explain the reason why it did not

have credibility. On other occasions, this Court has already pointed out that it is reasonable both for a jurisdictional body and for an administrative one to discard evidence that is contrary to reasoning, but at least it must explain the reason why it does not grant credibility or does not consider it conclusive. The fact that it is contrary to this reasoning is not a sufficient reason to reject it and much less to ignore it." (The highlighting is intentional.)

37. Finally, it is worth mentioning the case of the companies belonging to the Association of Importers of Vehicles and Machinery (AIVEMA), which was sanctioned in 2013 by COPROCOM. In this case, the Court declared the nullity of the rulings in favour of three of the more than 20 companies sanctioned³⁵ because it considered that there was no individualization of the conduct that would allow the investigated parties to exercise their right of defense. They were not accused of individualized acts, but in a generalized manner, thus violating due process³⁶. Also, the Court highlights a relevant element, which is that, in its opinion, **the authority should have granted in the accusation a deadline to those investigated to formally answer the attributed charges**. This circumstance is not expressly provided for in the procedure of the Public Administration Law.

38. Regarding the imputation of charges, in this case of AIVEMA, Vote 112-18-2018-IV of the Administrative Contentious Court, Fourth Section, Second Judicial Circuit of San José, at fifteen hours five minutes on 14 December 2018, the following was declared:

"According to the above, the imputation requirement is not satisfied with the simple description of the facts contained in the allegations presented by Supen and Truck Max nor with a generalized analysis of the facts... Although it is true, in Administrative Law, a wide degree of flexibility is admitted in the imputation of the transfer of charges and description of the facts; the extreme cannot be reached with a generic description... In addition to the above, despite the existence of an agreement that ordered the opening of the proceedings against the plaintiffs, at no time did the governing body or Coprocom notify the transfer of formal charges nor granted the defendants a deadline to answer the accusations made against them. Such an omission unquestionably undermines the Due Process Principle as it limits without justification the right of defense of the investigated parties..." (The highlighting is intentional.)

4. Classification of the judgements of the Constitutional Chamber regarding actions of the competition authorities

39. As already mentioned, the challenge mechanism before the Constitutional Chamber is also used by economic agents to challenge actions of competition authorities. It is common to use them to claim violations of rights of petition and prompt response and access to information, as well as the principles of due process in the procedure followed, and the principles of reasonableness and proportionality of the rules. In general, the rulings of this court have been favourable to the competition authorities.

40. It is interesting to highlight what was resolved by said Chamber in relation to a challenge to the powers to request information from the competition authority and the right

³⁵ The other companies were granted a deadline for the expiration of the action to submit to judicial review the administrative act questioned, so they did not get to know the details of their cases.

³⁶ It should be noted that the practice for which they were sanctioned was for a vertical boycott.

to privacy protected in Article 24 of the Political Constitution. In this regard, the high court noted: "(...) *Access to private documents is not whimsical in the context of commercial relations, but it is appropriate to combat, as in this case, monopolistic practices and to protect consumers in general. But not only is it adequate, it is also necessary. This Court considers that the State could not effectively defend consumers without having access to some private documents of the merchants involved. However, obviously no one can access just any document they want, and it is here that the restriction of Article 24 comes into play. Access is limited to the documents that the law indicates in relation to their competences. Unlike the case of the plaintiffs, this Court considers that it is not realistic to demand that law to dictate a restrictive list. Given the variegated and changing trade reality, to demand in our midst a list thus established by legal means would practically render all State powers ineffectual. This Court is inclined to think that the guarantee of the fifth paragraph of Article 24 is satisfied to the extent that the law defines what are the powers of the administrative body on the basis of which documents can be reviewed. This way, you can only review the documents required due to the corresponding functions. In each case, it is necessary to explain why such a document is necessary to fulfil its purposes. (...)*" (Judgement 01651 of 15 February 2002)

41. On the other hand, the Constitutional Chamber also ruled on a challenge in which the proportionality of the particularly serious fine that could reach 10% of the alleged offender's sales was questioned. By means of resolution No. 2013-005692 of 24 April 2013, the action of unconstitutionality was rejected and in this respect one of the magistrates indicated: "*I have no doubt that the contested regulations comply with the principles of reasonability and proportionality in this case. Indeed, **technical reasonability is complied with since there is proportionality between the chosen medium (a significant and exemplary fine) and the end pursued (protect the basic rules of the market economy).** On the other hand, the intention of the fine does not offend the purposes foreseen in the Fundamental Charter; on the contrary, it seeks its realization, especially that they are constitutionally legitimate, as indicated above. Also, the ideal means has been chosen, because a fine of low amount is easily transferable to the costs of the company, and therefore, not suitable to adequately protect the Law of the Constitution. High fines are the best way to avoid practices that damage the fundamentals of the market economy because of the economic power of certain global economic agents that can wreak havoc in small markets, such as the Costa Rican market. Finally, the legal standard is a fair legislative act, since it not only conforms to the constitutional parameters, but also to the reality of the Costa Rican market. As it is small, it is more vulnerable to situations such as those sanctioned.*" (The highlighting is intentional.)

42. Finally, it should be noted that currently the Constitutional Chamber is analysing an action of unconstitutionality related to the participation of third parties in mandatory merger notification procedures; therefore, the objection alleges that Law No.7472 is unconstitutional since they should participate in the process, providing evidence, being notified of the final decision and having the possibility of appealing the decisions adopted by the competition authorities.³⁷

³⁷ The person who filed the action of unconstitutionality also presented a challenge to the Contentious Administrative Court for the approval by COPROCOM of a merger between companies that market medicines.

5. Future challenges

43. In the application of competition law, administrative decisions are determinant for the economic parties to know the way in which the authority applies competition rules. In this regard, judicial decisions define a series of parameters to the competition authority itself that should be taken into account in the processing and analysis of cases to avoid committing violations of the principles of due process, the right of defense, or the proper application of the principles of free competition.

44. As was seen in the previous section, in the case of Costa Rica, judicial reviews of the decisions of competition authorities, mainly the most recent cases, have established a series of relevant parameters to be taken into account in the processing of the different types of procedures, **the main elements of which are aspects of form that emphasize on the justification of the fine to be imposed, the imputation of charges, and the evaluation of evidence.**

45. Regarding the justification of fines, as reported to the Organization for Economic Cooperation and Development (OECD) in the "Annual Report on Competition Policy-Costa Rica 2018", **the national competition authority has been working on a methodology on the calculation of sanctions**, which aims to guarantee transparency and objectivity in the imposition of fines by COPROCOM.

46. Many of the other elements relating to form mentioned by the Court largely derive from the application of a general, non-specialized procedure for competition matters.

47. **The courts have recognized the special nature of the law of competition**, a specialty that leads to the need to have a procedure that reflects the particularities of this matter and that in turn allows the authorities to guarantee the principle of the right of defense in the best way.

48. By virtue of the foregoing, the Costa Rican competition authorities, COPROCOM and SUTEL, took on the task of **including on draft Law 21.303**, "Strengthening of the Competition Authorities of Costa Rica", **the different elements indicated by the courts to have a favourable procedure** for processing infringements to the competition law.

49. The proposed procedure, through the research stage, would allow competition authorities to collect all those elements necessary to carry out an accurate and detailed description of charges that allows the parties to know with precision what are the imputed prohibited behaviours.

50. Likewise, Article 44 of said bill details all the elements that must be included in the transfer of charges, including a "substantiation of the transfer of positions, with express reference to the existing evidence that motivates it. If it refers to a relative monopolistic practice or unlawful concentration, the rationale must necessarily include an identification of relevant markets or of allegedly affected markets, as well as the possible specific anti-competitive effects attributed to the behaviour under investigation." It **guarantees that the imputations of charges made by the competition authority are not only duly motivated**, but also contain all the essential elements for the parties to exercise their right of defense. Likewise, it allows authorities to construct at this stage the necessary evidence to demonstrate the behaviour that is attributed to the economic agent, thus being able to inform the investigated party of said evidentiary elements from the moment of the initial charges.

51. The stage of instruction contained in the project gives the defendant the **possibility of presenting in writing their defense arguments** within a period of 60 business days.

52. In addition, in the instruction stage, **an exclusive preparatory hearing to admit or reject the evidence** provided by the parties to the procedure is contemplated, which grants the defendant the possibility of knowing, prior to the final hearing, which evidence will be considered by the authority, and for the one that is not going to be considered, it is also granted the possibility to appeal the rejection.

53. The separation of the instruction and decision-making bodies provides a final opportunity for control of legality over the processing of the procedure, as well as ensuring independence in the final decision.

54. Finally, it is worth noting that the bill contemplates the **creation of a specialized court in the field of competition law**, which in turn would also favour a judicial review of the decisions of the authorities by judges with a greater knowledge of the competition. The foregoing would in turn require an important task of training the judges, so that they have the necessary tools to issue their decisions from the jurisdictional point of view. These elements are also contemplated in the future Work Plan designed jointly by both competition authorities.