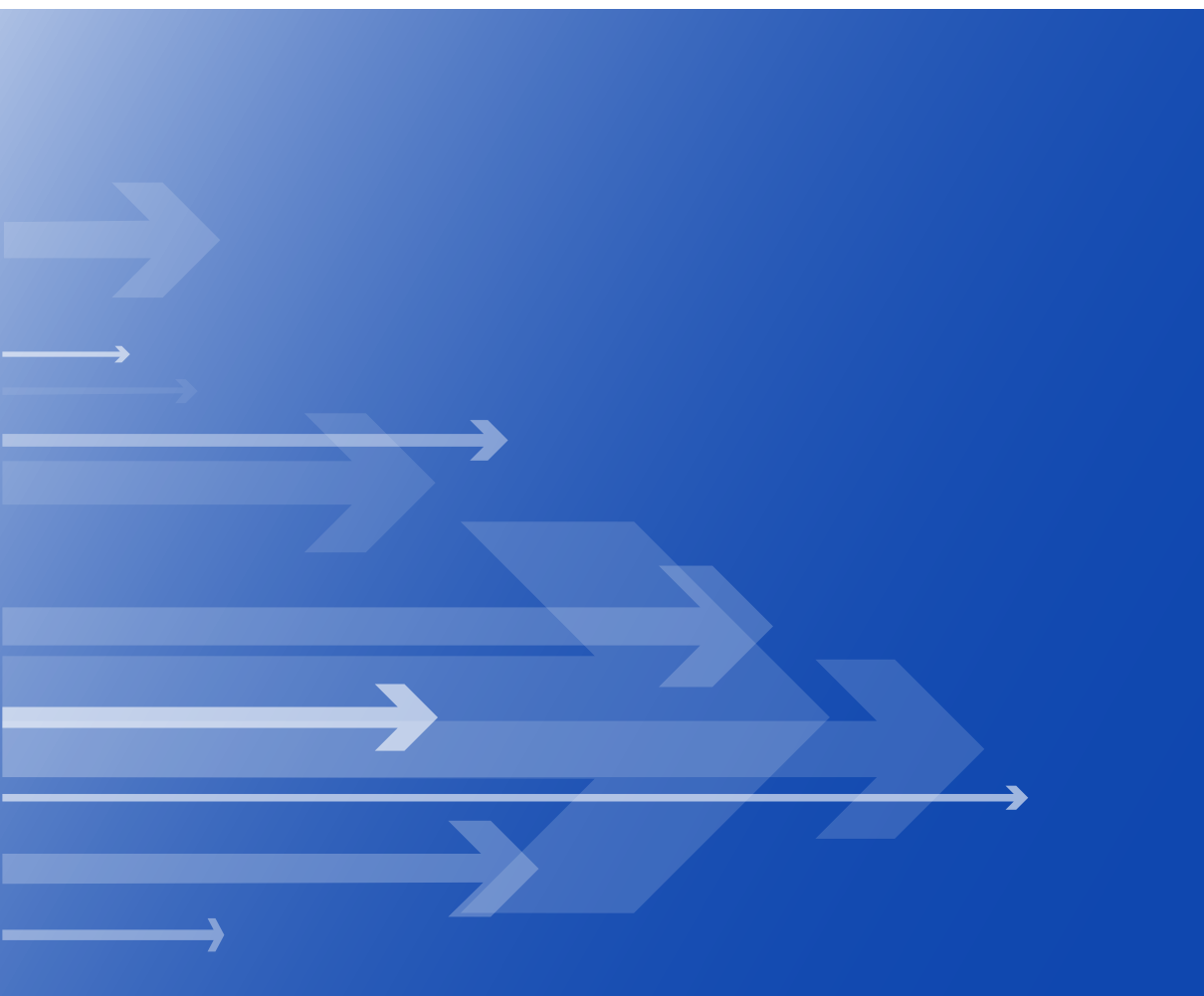


OECD-IDB Peer Reviews of Competition Law and Policy

EL SALVADOR

2020



**OECD-IDB PEER REVIEWS OF
COMPETITION LAW AND POLICY:
EL SALVADOR**



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Foreword

The OECD has been active in promoting competition policy in countries across Latin America and the Caribbean (LAC) for many years. The partnership between the OECD and the Inter-American Development Bank (IDB) has advanced these efforts. The annual Latin American and Caribbean Competition Forum (LACCF) has been a cornerstone of this collaboration on competition matters. It is a unique forum, which brings together senior officials from countries in the region, to promote and support the identification and dissemination of best practices in competition law and policy. Seventeen meetings have been held to date.

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance. Peer reviews are a core element of the OECD's activities. They are founded upon the willingness of a country to submit its laws and policies to substantive review by other members of the international community. This process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all. There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an essential part of this process. They are also an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

The OECD and the IDB therefore include peer reviews as a regular part of the joint Latin American and Caribbean Competition Forum. In 2007, the Forum assessed the impact of the first four peer reviews conducted at the LACCF (Brazil, Chile, Peru and Argentina) and the peer review of Mexico, which was conducted at the OECD's Competition Committee. The Forum reviewed El Salvador in 2008, Colombia in 2009, Panama in 2010 and Honduras in 2011. A follow-up of the nine peer reviews was conducted in 2012 as part of the 10th Anniversary of the LAACF. In 2014, Costa Rica became the 10th country to have its competition regime peer reviewed and in 2018 Peru, the 11th country. In 2019, El Salvador underwent its peer review examination at the LACCF meeting in Honduras, the latest country to be reviewed. The OECD and the IDB, through its Integration and Trade Sector (INT), are delighted that this successful partnership contributes to the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations: supporting procompetitive policy and regulatory reforms, which will promote economic growth in LAC markets.

Both organisations would like to thank the government of El Salvador for volunteering to be peer reviewed at the seventeenth LACCF meeting held in Honduras on 24 – 25 September 2019. We would like to thank Diego Petrecolla, the author of the report, and Pedro Caro de Sousa of the OECD Secretariat. We would also like to thank the lead examiners, Juan Pablo Herrera Saavedra, Colombia; Honduras Alberto Lozano Ferrera, Honduras; and Jesus Espinoza, Peru. We are grateful to Alberto Lozano Ferrera and his team at the Honduras Comisión para la Defensa y Promoción de la Competencia (CDPC) for hosting the LACCF and the many competition officials whose written and oral submissions to the Forum contributed to its success. We and the author would also like to specifically thank Gerardo Henríquez Angulo, Rebeca Hernandez, Regina Vargas, Evelyn Olmedo and Jeannette Portillo for their valuable input, availability to answer queries, and support in facilitating interviews, Lynn Robertson of the OECD,

for overseeing the peer review and planning the discussion at the LACCF, together with Erica Agostinho and Angélique Servin for assisting in both of these activities.

This report was undertaken at the request of the El Salvadorian government. We want to thank the government of El Salvador for volunteering to be peer reviewed, and to all the participants who were kind enough to accept to participate in the meetings that took place during the fact-finding mission and that were held in San Salvador from the week of 25 March 2019.

Table of contents

Foreword	3
Executive summary	9
1. Context and foundations	13
1.1. The economic and political context	13
1.2. The introduction of competition policy	15
1.3. Policy goals	17
2. Institutional setting	18
2.1. Competition policy institutions	18
2.1.1. The Superintendency	18
2.1.2. Other public bodies	25
2.2. The substantive legal framework	26
2.2.1. Scope of competition law	26
2.2.2. Substantive competition provisions	26
2.3. Enforcement powers and procedures	29
2.3.1. Investigation powers	29
2.3.2. Dawn Raids and leniency	29
2.3.3. Investigation procedure	30
2.4. Sanctions and remedies	34
2.4.1. Fines	34
2.4.2. Remedies	36
2.4.3. Interim remedies	37
2.5. Judicial review	37
2.6. Private enforcement	39
2.7. International co-operation	40
3. Application of competition law in El Salvador	42
3.1. Horizontal agreements	42
3.1.1. The wheat flour cartel	43
3.1.2. Bid rigging in the provision of pension insurance services	44
3.1.3. The rice cartel	45
3.2. Anticompetitive practices among non-competitors	46
3.3. Abuse of dominance	47
3.3.1. The motor fuels case	47
3.3.2. The sugar case	48
3.3.3. The telecommunications case	49
3.4. Merger control	50
3.4.1. Notification thresholds	50
3.4.2. Merger control procedure	51
3.4.3. Examples of merger control cases	53
3.4.4. Failure to comply with merger control rules	55
4. Unfair competition, consumer protection and sectoral regulation	56

4.1. Unfair competition.....	56
4.2. Consumer protection.....	56
4.3. Regulated sectors.....	57
4.3.1. Electricity.....	57
4.3.2. Telecommunications.....	58
4.3.3. Fuel.....	59
4.3.4. Banking.....	59
4.3.5. Agriculture.....	60
5. Advocacy and promotion of a competition culture.....	61
5.1. Competition advocacy for courts and legislators.....	62
5.1.1. Judiciary.....	62
5.1.2. Legislature.....	63
5.1.3. General public.....	63
5.2. Public procurement.....	65
5.3. Inter-institutional agreements.....	66
5.3.1. Agreements with other El Salvador public institutions.....	66
5.3.2. Agreements with academic institutions.....	67
5.3.3. Agreements with other competition authorities.....	67
5.3.4. Agreements with consumer associations.....	68
5.4. Opinions, market studies and market monitoring.....	68
5.4.1. Market studies.....	69
5.4.2. Market monitoring.....	75
5.4.3. Opinions.....	76
5.5. Ex-ante and ex-post impact assessments.....	77
6. Conclusions and recommendations.....	79
6.1. Institutional Design.....	80
6.1.1. Enhance the Superintendency’s independence and autonomy.....	80
6.1.2. Ensure that clear and transparent rules set out the conditions of appointment and dismissal of the Board.....	80
6.1.3. Ensure that Board members are employed full time to ensure the Superintendency’s effectiveness and the absence of conflicts of interest.....	81
6.1.4. Clearly separate investigative from decision-making roles.....	81
6.2. Antitrust Enforcement.....	81
6.2.1. Implement an effective strategy to combat cartels.....	81
6.2.2. Consider redirecting resources towards cartel from abuses investigations, without ignoring the latter.....	81
6.2.3. Focus on fighting bid rigging in public procurement.....	82
6.2.4. Consider blacklisting companies involved in bid-rigging.....	82
6.2.5. Reform the leniency regime to bring it line with international standards.....	82
6.2.6. Adopt market definition, market power and anticompetitive analysis tools in line with international practices.....	82
6.2.7. Remove the requirement of dominance for antitrust enforcement against vertical arrangements, and clarify the legal framework for abusive practices.....	83
6.2.8. Prepare and publish guidelines where appropriate.....	83
6.3. Sanctions and Remedies.....	83
6.3.1. Impose Deterrent Fines.....	83
6.3.2. Provide guidance on how penalties are imposed and calculated, in order to grant greater transparency and predictability.....	83

6.3.3. Ensure that penalties are swiftly collected.	84
6.4. Procedural matters	84
6.4.1. Ensure that Superintendency is entitled to prioritise its investigations	84
6.4.2. Consider extending investigations deadlines	84
6.4.3. Use inspections and dawn raids more effectively, including by ensuring that an investigated party is only notified after such inspections and dawn raids have taken place	84
6.4.4. Protect commercially sensitive information obtained by the Superintendency, and provide guidance on which information is sensitive	85
6.4.5. Adopt both commitment and settlement procedures.	85
6.4.6. Ensure due process by:	85
6.4.7. Adopt measures to make judicial review swifter	85
6.5. Merger Control	86
6.5.1. Amend merger control thresholds	86
6.5.2. Consider charging appropriate and reasonable notification fees for notifiable mergers	86
6.5.3. Amend merger control process, in line with international practices	86
6.5.4. Consider increasing the severity of sanctions for failure to comply with merger control requirements	87
6.6. Private Enforcement.....	87
6.6.1. Ensure that it is possible for private enforcement to occur before the courts	87
6.6.2. Ensure that private enforcement supports public enforcement.	87
6.7. Advocacy	87
6.8. Promote the adoption of compliance programs	88

Tables

Table 1. Budget of El Salvador’s autonomous Public Bodies.....	22
Table 2. Merger notifications thresholds	28
Table 3. Complaints concerning anticompetitive practices (2008-2018).....	31
Table 4. Complaints and “ex- officio” investigation procedures for anticompetitive practices (2013-2018).....	31
Table 5. Amount and total of fines (January 2006-March 2019)	35
Table 6. Status of fines imposed (January 2006-March 2019).....	36
Table 7. Administrative appeals before the superintendence’s board against decisions concerning anticompetitive practices (2013-2018)	38
Table 8. Judicial appeals against antitrust infringement decisions (2006-2018).....	38
Table 9. Average number of months of judicial processes finalised by type of process and infraction	39
Table 10. Horizontal agreements sanctions (2013-2018).....	42
Table 11. Sanctions for abuse of dominance (2013-2018).....	47
Table 12. Mergers in the Financial Sector.....	59
Table 13. Implementation of recommendations for the insurance sector.....	60
Table 14. Competition advocacy (Economic Intendency and Competition Advocacy Intendency) and staff training budget (2014-2018).....	61
Table 15. Competition advocacy share of total Superintendency budget (2014-2018).....	62
Table 16. Ongoing Inter-institutional Agreements.....	66
Table 17. Market studies	70
Table 18. Current implementation status of recommendations made in the 2011 market study on the credit and debit card sector in El Salvador	72
Table 19. Monitoring exercises carried out by the Superintendency	76

Table 20. Superintendency opinions (2006-2018)	77
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Figures

Figure 1. Structure of El Salvador's Superintendency of competition.....	18
Figure 2. Number of fines for anticompetitive practices, per economic agent, 2007-2018	35
Figure 3. Judicial review – Wheat flour cartel	44

Executive summary

El Salvador's competition law covers the three typical areas of anticompetitive conduct – restrictive agreements, abuse of dominance and anticompetitive mergers – and employs the commonly used substantive tests for each of these three types of conduct. In effect, the basic pillars of competition law in El Salvador are in line with good international best practices. Recent reform proposals show the efforts of El Salvador to increase the effectiveness of the competition law.

El Salvador's competition agency, the Superintendency of Competition (the 'Superintendency') has a mandate to promote and protect competition in order to increase economic efficiency and consumer welfare. This is a serious competition authority with the typical limitations of a small competition authority in Latin America. At the same time, all institutions and public entities in El Salvador have the responsibility to promote and protect competition.

The Superintendency's staff is committed and professional, and the fundamental tenets of competition enforcement are followed. The agency has historically been serious about enforcement – from 2006 to 2018, the Superintendency issued sanctioning resolutions in more than 57 formal investigations for anticompetitive practices, and has imposed fines that exceed USD 16.6 million for breaches of competition law. However, the number of decisions has diminished substantially over the last five years. The Superintendency is also very good at engaging with other state bodies and competition authorities, particularly in the region.

The current mechanism for appointing the members of the Board of the Superintendency could be improved. In particular, the Superintendent resigns every time a new administration comes into power – a practice that is hardly adequate for an independent, technical body. The Superintendent and the other Board members are also chosen directly by the President without any formal selection mechanism to ensure they have the expertise and qualities necessary for their role. In addition, their simultaneous appointment creates risks of sudden loss of experience and perceptions of politicisation of the Superintendency.

In line with Central American practice, the authority has few resources when compared to other economic regulators in El Salvador. The budget of the superintendence is among the lowest of the institutions dealing with economic affairs. Board members other than the Superintendent are appointed part-time, while the Superintendent works full-time and is responsible for virtually every aspect of competition enforcement. One concern this raises is that the Superintendent is, formally at least, involved both in investigating and deciding cases. Improving independence and institutional design will alleviate risks concerning the impartiality of decisions, the lack separation of investigative and decision-making roles, and conflicts of interest arising from the part-time role of some Board members.

The Superintendency's advocacy efforts are very relevant in El Salvador, since they seek to generate a cultural and institutional change in society, ensuring that the value of healthy competition is internalised. The great efforts of the Superintendency in this regard are evident variables such as the number of pro-competitive regulatory recommendations, as well as the agreements entered by the Superintendency with educational entities to carry out academic and promotional activities on competition law and related matters.

Since its creation, the Superintendency signed cooperation agreements with other competition agencies and international competition policy organisations. Cooperation agreements with competition agencies in Latin America seek to strengthen the technical capacities of competition agencies at the regional and sub-regional levels.

In addition, the Superintendency has entered into inter-institutional agreements with other public institutions in El Salvador, academic bodies and consumer associations. These intend to allow and promote cooperation and collaboration in matters of common interest to each party.

Further, the Superintendency interacts with the public in several ways, including regular communications through press releases, press conferences, informational meetings and articles written by staff members.

Regarding competition enforcement, although all economic agents are subject to competition law, the scope of competition law does not extend to the economic activities that are exclusively reserved to the State or municipalities when they are the direct providers of the services.

A challenge for the Superintendency's enforcement efforts, common in the region, is that whenever the applicable legal requirements are fulfilled it must investigate every complaint received, which prevents the Superintendency from prioritising its enforcement efforts. This prevents the Superintendency from optimising the deployment of its resources. Similarly to other countries in the region, the mechanism developed by the Superintendency to address this is to introduce a 'preliminary investigation' stage prior to opening formal investigations. In practice, a substantial amount of resources is devoted to trying to review, and mostly reject complaints.

Another challenge regarding effective enforcement concerns remedies and sanctions. Although the Superintendency's fining powers are substantial, the penalties imposed are rather small, relying as they do on a multiple of minimum salaries. While the Superintendency can impose penalties based on turnover for 'very severe infringements', but this has been used very sparsely – on two occasions at most – and there are currently no guidelines on whether an offence is particularly serious. The main problem with low fines such as these is that they fail to dissuade economic agents from committing anti-competitive practices.

In addition, El Salvador faces very significant issues in collecting fines. Competition law establishes that all fines must be paid within eight days of the issuance of the Board's final resolution. Nonetheless, 42% of all fines have not been paid. The payment of 34% of all fine amounts have been suspended by appeals admitted in the Supreme Court of Justice, and 32 fines are pending collection by the General Prosecutor of the Republic (FGR) despite these penalties no longer being subject to appeal. An important concern in this respect is that the General Prosecutor of the Republic has been slow to open procedures to collect outstanding fines. To date, the FGR has only collected 36 fines. To address this, reforms have been proposed that seek to increase the effectiveness of competition law. Reforms include a proposed reform bill setting out a compulsory enforcement procedure for the collection of fines. These proposals have not yet been adopted, though.

With respect to judicial appeals, in 2006-2018 only two infringement decisions were overturned by the courts, while 32 appeals were dismissed. Although the Superintendency is very successful in upholding its decisions in court, delays in the issuing of judicial decisions have been one of the main obstacles to the effective application of competition law. Reaching a final decision can take many years from the date an appeal is filed, despite there being a single instance of appeal. Recent reforms to the Administrative Procedure Law set forth deadlines that must be met with the objective of ensuring that judicial appeals reach quicker conclusions, but it is as of yet unclear how effective these reforms will be.

In addition to fines, the Superintendency can issue cease and desist orders against unlawful practices, or impose remedies or other conditions or obligations, both behavioural and structural. However, it is unclear how well the Superintendency monitors the remedies it imposes.

The original version of the Competition Law included a provision permitting a party to 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 – i.e. a commitment procedure. This possibility is not open for anticompetitive agreements among competitors – despite El Salvador’s law not foreseeing any settlement procedure for such anticompetitive practices. Subsequent reforms substituted the benefit of receiving no penalty in exchange for a guarantee for the non-application of penalties for particularly serious infringements – which are very rare and seem not to encompass even all types of hard-core cartels. This means that while the Superintendency can accept guarantees in non-cartel cases, such a commitment does not prevent the imposition of penalties, as is common in other jurisdictions. As such, it is unclear when such a procedure will be available, or when parties may have incentives to avail themselves of it. Furthermore, currently there are no procedures in place regarding guarantees.

Concerning enforcement against horizontal practices, one important challenge arises from the design of the leniency regime. In El Salvador, leniency can only lead to a reduction of the administrative fine, at the discretion of the Superintendency, for the first applicant. Leniency applications are unable to lead to the immunity of the first applicant, and subsequent applicants will not benefit from any reduction in fines. Given this weak set of incentives, particularly when coupled with the low deterrent effect of fines, it is unsurprising that there has never been a leniency application in the 12 years since the leniency regime was introduced. Furthermore, the Superintendency has not yet formally developed a procedure for leniency applications.

With respect to vertical agreements, like other countries of the region, the law contains the requirement that they will only be prohibited when one of the parties enjoys a dominant position. This sets a very high threshold for antitrust enforcement against vertical arrangements and leads to an overlap with unilateral abuses of a dominant position. It seems that, as a result, there have been no sanctioned vertical agreements, while some abuse cases sanctioned by the Superintendency could potentially be characterised as vertical arrangements. In effects, during its early years, most antitrust investigations and decisions concerned instances of abuses of dominance.

With respect to procedure, the law endows the Superintendency with the typical investigative powers available to competition authorities. Although these powers are not unusual for competition agencies, they are not common in El Salvador for other administrative regulators. These powers include the power to request information, conduct inspections and conduct dawn raids, among others. However, it is unclear how effective the use of these powers has been in practice. For example, while the Superintendency is formally endowed with the power to conduct dawn raids, to date, the Superintendency has investigated a single one case in which evidence was collected using this method.

As regards merger control, merger control thresholds are currently set at levels that appear to be too high for an economy the size of El Salvador. This has led to very few mergers being reviewed by the Superintendency.

Unlike what is standard international practice, there is a single procedure applicable to all notified mergers. This means that there is no simplified notification or review system, and that all mergers undergo the same type of standard analysis without consideration for their potential to be anticompetitive.

In addition, the Superintendency cannot communicate with the notifying parties during the review – either to communicate concerns about the competition, or to discuss possible solutions – until the Board reaches a decision. This means that merger remedies are usually imposed by the Board without any prior

commitments being proposed by the parties – even if the parties have a very short deadline during which they can accept or refuse these conditions. This is very different from standard international practice.

Lastly, the Superintendency can carry out market studies, market monitoring and issue opinions. These tools have been actively employed by the Superintendence. Between 2006 and August 2018, the Superintendence issued 184 opinions on market regulations, occasionally leading to pro-competitive reforms and increased cooperation between the Superintendency and the relevant regulators.

1. Context and foundations

1.1. The economic and political context

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, two earthquakes in 2001, hurricane in 2013, as well as evacuations from volcanic activity. Most of the population lives in a central plateau in which the capital, San Salvador, is located. A narrow coastal plain border the Pacific Ocean. El Salvador's climate is tropical, with temperatures varying according to altitude². Its population is approximately 6 375 000, making it the third most populous country in Central America excluding Mexico³.

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.

In the 19th and early 20th centuries, social and political developments led to the dissemination of democracy and the modernisation of the economy in the region. In El Salvador, the military governments played an important role in promoting economic and social reforms. A particularly important moment was the Revolution of 1948, where sectors of the military and civil society took over from the previous dictatorship, and initiated a series of quick and radical changes to El Salvador's political and economic structures.

The 1950's became known as the "Golden Age" because of the economic boom that occurred at the time. El Salvador had an agriculture-dependent economy and, with the international rise in the price of coffee, its national income increased with exports of that product. Cotton and sugarcane contributed to the national income in smaller amounts.

At this time, the government launched a number of infrastructure projects dependent upon financing generated from the export of agricultural products. When the international prices of these products weakened, these projects were halted. Nonetheless, the fall in prices of the agricultural products that generated most of the country's national income (e.g. coffee, cotton and sugarcane) led to the promotion of industrialisation efforts by the government.

In 1976, triggered by the launch of agrarian reform, the incipient democratic institutions deteriorated quickly. The reform sought to redress imbalances in land ownership to the benefit of labourers, which led to widespread protests. Attempts at repression failed to control the growing opposition to the government, and, instead, accelerated the deterioration of the democratic landscape.

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

² See <http://countrystudies.us/el-salvador/19.htm>.

³ See <http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=1&idioma=e>.

These disturbances eventually resulted in a civil war that grew in intensity and scope throughout the 1980s. In 1984, President José Napoleón Duarte (1984-1989) came to power through popular elections. His administration carried out an agrarian reform that expropriated landowners, adopted an import substitution strategy to promote national industry, and began talks to end the ongoing armed conflict. In 1989, Alfredo Felix Cristiani Burkard (1989-1994) won the presidential elections. His administration formalised dialogues between the government and the guerrilla movement, an initiative started by the previous administration, which eventually led to the Peace Agreements known as the Chapultepec agreement.⁴

The United States 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 – Dominican Republic and United States of America Free Trade Agreement (CAFTA- DR)⁵, 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 one of the most open in Latin America.⁶

Since the restoration of peace in 1992, democratic processes have been in place that have ensured that different administrations have been elected and the peaceful transfer of power between a number of political parties. These parties include ARENA, who was in power until 2009; FMLN, the ruling party from 2009-2019; and the Gran Alianza por la Unidad Nacional (GANA), whose candidate Mr Nayib Bukele won the presidential elections in 2019.

At present, 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.

El Salvador's economy has been based mainly on agriculture, although in recent times, has become more diversified. Real GDP growth in El Salvador reached 2.3 percent in 2017. Agriculture, livestock, forestry and fisheries, manufacturing and mining, and commerce, restaurants and hotels accounted for about two-thirds of the observed growth. The country also benefited from an improvement in the current account thanks to the strong flows of workers' remittances.

However, El Salvador continues to suffer from persistent low levels of growth. Between 2010 and 2016, real GDP growth averaged 2.6 percent, making the country one of those with the lowest growth in the Central American region. The low growth of the country has resulted in a modest reduction of poverty but rural poverty remaining high.⁷

⁴ See https://www.mined.gob.sv/descarga/cipotes/historia_ESA_TomoI_0_.pdf.

⁵ See http://www.sice.oas.org/tpd/usa_cafta/usa_cafta_s.asp.

⁶ See <https://www.bcr.gob.sv/bcrsite/uploaded/content/category/2016875237.pdf>.

⁷ World Bank <http://www.worldbank.org/en/country/elsalvador/overview>.

1.2. The introduction of competition policy

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.⁸ While the criminal code was applicable to some types of anticompetitive conduct, in particular, abuses of a dominant position, such as resale price maintenance, discriminatory practices and market sharing, among others –⁹, there were no prosecutions under criminal law.

At the same time, the authorities began to consider a Competition Law, but these efforts took much longer than the consumer protection law to come to fruition. A first draft of a Competition Law was presented to the Legislative Assembly in 1994, but was not enacted. Various proposals were made in the ensuing ten years, but none became law.

In 2004, a new president, Elias Antonio Saca, was elected, and introduced in his government plan the enactment of the competition law. Experts conducted a study of international experiences with Competition Law enforcement in other jurisdictions, including Spain, Mexico, Brazil and the European Union. A broad consensus, which included the business community and the major political parties, developed in favour of enacting a law¹⁰.

The new law (referred to hereafter as the “Competition Law”) was enacted in November of 2004, to take effect on 1 January 2006. The law has since been amended twice, in 2007 to provide for new powers for the Superintendency and for higher maximum fines for especially harmful conduct¹¹, and in 2017 to make it coherent with the Contentious Administrative Law that was adopted in that year.

The Superintendency started operating in January 2006, with a mandate to promote and protect competition in order to increase economic efficiency and consumer welfare. In more than a decade of operation, the Superintendency has undertaken 28 market studies into the competition conditions in different markets such as electricity, medicines and motor fuels. Such analysis, plus the issuance of opinions – mainly regarding draft bills, regulations and public procurement processes,¹² or following preliminary or formal investigations,¹³ or in the context of advocacy activities, produced approximately 500 recommendations aimed at promoting more efficiency and transparency in markets.

From 2006 to 2018, the Superintendency has issued sanctioning resolutions in more than 57 formal investigations for anticompetitive practices, and has imposed fines that exceed USD 16.6 million (United States dollar) for breaches of competition law. However, only 49% of all fine amounts have been paid. This means that 51% of all fine amounts have not been paid. The payment of 27% of fines has been suspended by appeals admitted in the Supreme Court of Justice (including ‘recursos de amparo’ to the Constitutional chamber), while the remaining 24% are pending collection processes at the General

⁸ The 1992 law was replaced by a new law in 1996, again in 2005 (Legislative Decree no. 776), 2013 (Legislative Decree no. 286), 2018 (Legislative Decree no. 51) and 2019 (Legislative Decree no. 282).

⁹ Article 232 “Monopoly” of the Criminal Code. This provision was revoked in 2004.

¹⁰ CAFTA was undergoing ratification 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.

¹¹ Legislative Decree no. 436.

¹² See Article 14 (l) and (m) of El Salvador’s Competition Law.

¹³ See Article 14 (h) of El Salvador’s Competition Law.

Prosecutor of the Republic (FGR) despite the appeals having been dismissed or not being subject to precautionary measures.

Issues around fine collection may go some way towards explaining why, on its website, the Superintendency affirms that a legal reform is necessary to overcome the existing regulatory deficiencies, as well as the need for a new vision on the national competition policy¹⁴. The most recent attempt at reforming the law dates from 2015, when the Superintendency opened a transparent and participatory public consultation process to formulate a reform proposal. The goal of this consultation was to take into account the contributions of consumers, business associations and chambers, law firms, public sector, academia and any party interested in participating in the process. In the first trimester of 2018, the Superintendency sent a reform proposal to the Secretariat of Legislative and Legal Matters of the Presidency of the Republic. As of February 2019, this proposed law is undergoing modifications to align it with Administrative Procedure Law that entered into force at that time.

The 2018 proposal includes reforms considered necessary for a more effective Competition Law. They include:

- Reformulating and clarifying certain descriptions of anticompetitive practices and sanctions;
- Improving the development of the leniency program;
- Improving the efficiency of merger control and enforcement procedures. Regarding merger control, the proposal seeks to clarify the definition of economic concentration, and that control can be achieved through various mechanisms of fact or law.
- Regarding antitrust enforcement, the proposal focuses on preliminary investigations (*actuaciones previas*) that are actions carried out by Superintendency officials to determine if there may be competition problems or violations to the Competition Law prior to opening a formal investigation leading to a potential sanctioning procedure.¹⁵
- Accelerating procedures for the initiation of studies and investigations.
- Adapting thresholds for merger control by reducing them in light of an analysis and assessment of current thresholds by the Superintendency. The relatively small size of the national economy meant that most transactions with the potential to impact competition in the El Salvador market fell below the current thresholds established in the Competition Law.
- Establishing a staggered renewal of the Superintendency's board of directors.
- Strengthening the Superintendency by regulating the circumstances in which members of the board of directors of the Superintendency, including the superintendent, may be replaced, and establishing the procedure that such a replacement must follow.
- Introducing a specific article outlining the content of competition advocacy activities as a specific competence of the Superintendency. The current legal provisions on competition advocacy describe specific attributions of the superintendent and board of directors in the pursuit of their competences.

¹⁴ See <https://www.sc.gob.sv/index.php/historia/>.

¹⁵ Preliminary investigations includes the set of actions made by the Superintendency previous to a formal investigation towards compiling the elements that sustain the hypothesis of the existence of one or several anticompetitive practices.

1.3. Policy goals

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 forbids the establishment of monopolies other than those on behalf of the States or municipalities, and even these can only be established when social interest makes this practice absolutely essential. Article 110 further prohibits monopolistic practices to guarantee entrepreneurial freedom and the protection of consumer interests.

The Competition Law is grounded in what are now universally accepted objectives of 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.

A number of complementary regulatory regimes promote similar and related goals in their respective sectors. They are reviewed in section 4 below.

2. Institutional setting

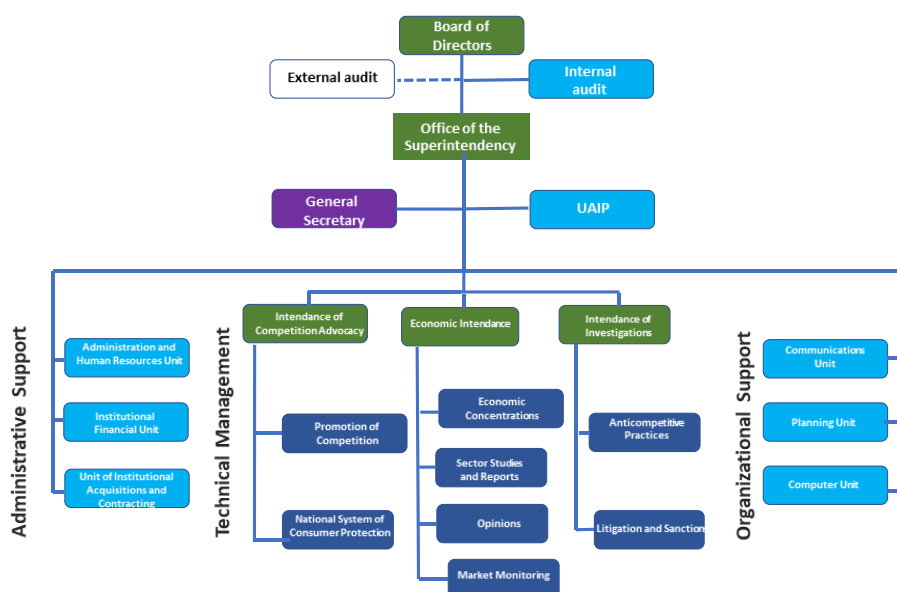
2.1. Competition policy institutions

2.1.1. The Superintendency

The Superintendency of Competition is one of several independent superintendencies in El Salvador¹⁶. Some sector regulators take the form of ‘Superintendency’. The Superintendency is part of the executive branch; it has a separate budget approved by the board of directors, and submitted through the ministry of the economy to the ministry of finance.

The figure below contains an organigram of the structure of the Superintendency.

Figure 1. Structure of El Salvador’s Superintendency of competition



Source: Superintendency

As of the time of publication, the institution has 52 public servants, distributed across the following organisational units: superintendent (1) intendencias (30), support units (6), administrative units (11), internal audit (1), public information access (1) and Secretary General (1). For the year 2018, the budget of the institution was USD 2 558 808, financed in its entirety by the General Fund of the Nation (i.e. the Government’s budget).

¹⁶ 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.”

The superintendent and the board of directors

The superintendent delegates the pursuit (*instrucción*) of the investigation process to the Investigation Intendent to expedite the process, while reserving the possibility to take over control of the investigation directly, if necessary. The intendente, with the assistance of the staff, prepares and submits the investigation file to the board of directors.

The functions of the board of directors include:

- Deciding cases following under its competence;
- Imposing sanctions in accordance with the law;
- Ordering and contracting the carrying out of market studies and specific consultancies on technical aspects;
- Instructing the superintendent to initiate investigations *ex officio*;
- Adopting cease-and-desist orders regarding anticompetitive practices;
- Pursuing merger control;
- Reviewing appeals filed against the Superintendency’s resolutions;
- Informing regulatory entities when the investigation of an anticompetitive practice determines that the cause or problem has its origin in the regulatory framework falling under the competence of such entities, so that they take the corresponding measures;
- Issuing, “upon request or *ex officio*” opinions on ordinances or regulations which may limit, restrict or significantly impede competition;
- Issuing, upon request or *ex officio*, opinions regarding whether public contracting and procurement procedures may limit, restrict or significantly impede competition;
- Studying and submitting for consideration proposals for amendments to the competition law and its regulation;
- Issuing a glossary of terms used for the application of the Competition Law; and
- Approving the Annual Operating Expenses Budget.

The board of directors comprises the superintendent and two directors. In addition to the three voting members of the board, three alternate directors are also appointed, to serve when a voting member cannot. These alternate directors can express their opinion, but they cannot vote in the decision-making process.

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 honourability, 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.

The superintendent and all board members are appointed by the El Salvadoran President for terms of five years, and may be reappointed. The El Salvadoran President is not required to follow any formal procedure to select the members of the Superintendency’s board of directors, nor is this decision subject to any external control (e.g. by Congress).

The terms of all the board members would theoretically expire at the same time, but there is currently one board member which was appointed to replace a previous board member and his mandate will end three years after that of the rest of the board member¹⁷

Despite this, the current appointment mechanism could create challenges when the members of the board of directors are replaced. From a technical standpoint, such an appointment mechanism could lead to a sudden loss of expertise and continuity on the part of the board. Furthermore, the opportunity to appoint an entire new board could create a perception of politicisation of the Superintendency and invite political interference in the Superintendency's work¹⁸.

Directors serve part time, and only the superintendent works for the Superintendency full time. Given this, board members have other full-time employment. To date, board members have come either from the academic community or from other government agencies. In a single case, a board member hailed from the private sector, but it was ensured that he complied with the provisions regarding impediments to act as a board member set out in the Competition Law.¹⁹

The fact that board members could come from another branch of government where they remain in employment has the potential to compromise the board's independence and to introduce regulatory considerations into competition assessments, even if there is no indication that this has occurred in the past or that the board's decisions were affected by external interference.

A related issue that this situation creates concerns potential conflicts of interest. While the law regulates excuse and recusal by board members,²⁰ it is nonetheless the case that a case or investigation could involve a matter that is also before a ministry or agency for which a board member works full time.

Board members are paid by reference to the meetings they attend.²¹ Their compensation is set in the Salary Law contained in El Salvador's yearly budget. The superintendent, who works full time, is paid a salary. This salary is set out in the Superintendency's budget, which in turn is part of El Salvador's yearly budget approved by Congress following a proposal by the Executive branch.

The board is required by law to meet at least once a month. In practice, it meets more often, usually once a week. The board members are only paid a maximum of 4 sessions per month. Meetings typically take three to four hours. Directors often must spend extra time preparing for meetings – reviewing files, and so forth. Moreover, while under the law the superintendent is in charge of managing and overseeing the Superintendency activities on a daily basis, the board of directors has a comprehensive role in the operation of the agency.

¹⁷ When a board member resigns, his/her successor, in most the cases, is appointed to complete the original member's term. Only in one case has a successor been appointed to serve a full five years term.

¹⁸ 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 2020, except one that expires in 2023. The president's term expires in 2024.

¹⁹ In particular, Article 10.

²⁰ Article 12 of the Competition Law sets out that when the member has a conflict of interest because the matter being investigated concerns a ministry or agency where the board member works fulltime, the board member will have to refuse himself mandatorily. This means that this board member cannot be present at the board meeting where the relevant matter is discussed and decided. Administrative Procedure Law (LPA) adds other considerations for recusals.

²¹ The alternate members are also paid for each meeting they attend, even though they may not vote.

Members of the board of directors can only be removed for cause – i.e. for one of the causes identified in Article 11 of El Salvador’s Competition Law – or at the end of their term. Removal for reasonable can be ordered by the President of the Republic, ex officio or at the request of any interested party, after hearing the affected party, and following due process in accordance with Article 11 of the Constitution.

Nonetheless, it is custom for the heads of public bodies to put their position at the disposal of the president when new administrations come into power, even if the term has not yet ended nor is coming to an end. This is also the case with the Superintendency for Competition, where the superintendent has routinely placed his position at the disposal of the president. The President who came into power in 2014 kept the Superintendence in office then, while during the elaboration of this report the new President accepted the resignation of the incumbent superintendent.

On the other hand, the board of directors have concluded their term despite changes in who is the President of El Salvador since 2006.

The Superintendency’s staff and resources

Contacts during the fact-finding mission noted that the Superintendency’s budget is substantially less than that of comparable Salvadoran agencies. The most recent data indicates that in the last five years (2015-2019) the amount approved in the budget law for the Superintendency has remained constant. The Superintendency’s budget is the seventh lowest of the 41 to 43 autonomous public bodies classified annually as "Decentralised Institutions not Businesses" (which cover a number of public bodies enjoying degrees of autonomy from the central government).²² In 2019, only six institutions had a smaller budget than the Superintendency, three of which concern economic matters (National Energy Council, Surveillance Council of the Public Accounting and Audit Profession, Salvadoran Institute for Co-operative Development). Thus means that the 2019 budget of the Superintendency is the fourth lowest of the 11 institutions dealing with economic matters.

²² This excludes 30 national hospitals, all with a budget higher than the Superintendency.

Table 1. Budget of El Salvador's autonomous Public Bodies

Budget Item	Type of State Body	Institution	Approved Budget (Budget Law, USD million)					
			2019	2018	2017	2016	2015	
1	Presidencia	Autonomy	Fondo de Inversión Social para el Desarrollo Local (FISDL)	USD 70 778 480	USD 74 058 445	USD 67 275 145	USD 66 667 825	USD 87 106 530
2	Economía	Own Estate administered by FISDL	Fondo de Inversión Nacional en Electricidad y Telefonía (FINET)	USD 64 207 930	USD 50 207 460	USD 147 065	USD 463 785	USD 795 195
3	Economía	Autonomy	Centro Nacional de Registros (CNR)	USD 49 946 315	USD 61 333 475	USD 59 729 930	USD 55 624 870	USD 48 104 830
4	Economía	Regulator	Superintendencia General de Electricidad y Telecomunicaciones (SIGET)	USD 24 499 975	USD 23 500 000	USD 19 833 105	USD 15 522 615	USD 14 324 900
5	Tribunal Supremo Electoral	Autonomy	Registro Nacional de las Personas Naturales (RNPN)	USD 19 264 545	USD 31 156 495	USD 15 634 155	USD 15 634 155	USD 15 442 600
6	Turismo	Autonomous Body	Corporación Salvadoreña de Turismo (CORSATUR)	USD 14 284 398	USD 13 949 290	USD 15 864 130	USD 15 228 510	USD 13 697 505
7	Presidencia	Sport Governing Body	Instituto Nacional de los Deportes (INDES)	USD 13 058 125	USD 12 186 195	USD 12 331 945	USD 12 451 945	USD 12 839 165
8	Economía	Autonomy	Centro Internacional de Ferias y Convenciones (CIFCO)	USD 10 200 000	USD 10 074 930	USD 8 710 035	USD 7 754 045	USD 6 263 915
9	Salud	Autonomy	Dirección Nacional de Medicamentos (DNM)	USD 7 201 425	USD 7 882 480	USD 6 803 545	USD 7 204 855	USD 7 204 855
10	Economía	Autonomy	Comisión Nacional de la Micro y Pequeña Empresa (CONAMYPE)	USD 7 054 935	USD 8 375 095.77 *	N/A	N/A	N/A
11	Turismo	Autonomy	Instituto Salvadoreño de Turismo (ISTU)	USD 6 189 129	USD 6 026 335	USD 6 120 900	USD 6 143 505	USD 5 028 795
12	Economía	Autonomy	Defensoría del Consumidor (DC)	USD 5 972 020	USD 5 670 330	USD 5 650 840	USD 5 650 840	USD 5 647 100
13	Obras Públicas, Transporte, vivienda y Desarrollo Urbano	Regulator	Autoridad Marítima Portuaria (AMP)	USD 4 619 700	USD 4 564 700	USD 3 818 300	USD 3 161 010	USD 2 950 890
14	Obras Públicas, Transporte, vivienda y Desarrollo Urbano	Regulator	Autoridad de Aviación Civil (AAC)	USD 3 800 000	USD 3 762 160	USD 3 435 255	USD 3 612 855	USD 3 008 450
15	Presidencia	Autonomy	Organismo Promotor de Exportaciones e Inversiones de El Salvador (PROESA)	USD 3 156 670	USD 4 459 320	USD 6 302 810	USD 5 993 235	USD 7 452 550

Budget Item	Type of State Body	Institution	Approved Budget (Budget Law, USD million)					
			2019	2018	2017	2016	2015	
16	Economía	Autonomy	Consejo Nacional de Calidad (CNC)	USD 2 841 898	USD 2 877 798	USD 3 091 190	USD 2 854 565	USD 2 649 325
17	Economía	Technical body, autonomous	Superintendencia de Competencia (SC)	USD 2 661 308	USD 2 561 308	USD 2 557 540	USD 2 557 540	USD 2 556 810
18	Salud	Autonomy (function and decision-making) Regulatory functions	Consejo Superior de Salud Pública (CSSP)	USD 2 357 595	USD 2 247 045	USD 2 200 000	USD 2 133 090	USD 2 289 555
19	Agricultura y Ganadería, Economía (2015)	Autonomy	Consejo Salvadoreño del Café	USD 1 575 263	USD 1 562 721	USD 1 524 475	USD 1 553 220	USD 1 593 415
20	Economía	Autonomy	Consejo Nacional de Energía (CNE)	USD 1 496 646	USD 1 471 376	USD 1 468 260	USD 1 468 260	USD 1 467 660
21	Economía	Autonomy	Instituto Salvadoreño de Fomento Cooperativo (INSAFOCOOP)	USD 1 330 240	USD 1 329 590	USD 1 322 055	USD 1 322 055	USD 1 320 600
22	Economía	Technical body, administratively autonomous autónomo en lo administrativo	Consejo de Vigilancia de la Profesión de Contaduría Pública y Auditoría	USD 564 515	USD 300 880	USD 299 865	USD 299 865	USD 290 870
Superintendencia's budget compared to other autonomous public bodies in El Salvador's budget*				36 \ 43	35 \ 42	34 \ 42	33 \ 41	33 \ 41

Note: * This comparison excludes 30 public hospitals who enjoy this status

Source: El Salvador

The Superintendency salary structure has remain constant since 2006 when it began operations. The current Superintendency's salary structure is set out in an "Acuerdo de Superintendente" dated 4 November 2016, which entered into force in January 2017. The 52 positions of the Superintendency are classified into 16 categories. The main modifications since 2006 merely reflect the opening of new positions during this period.

The Superintendency has developed a preliminary proposal for updating its salary policy, which is currently still under analysis. This policy develops a salary structure for the Superintendency²³ that builds on the intersection of two key variables. A first variable is internal equity, i.e. the ratio of salaries compared to other positions within the Institution: functions, competences, requirements and attributions. A second variable is External Equity, i.e. the ratio of wages compared to similar positions in sister or related institutions in the labour market, represented by the percentile table of market wages. External Equity is established through a market study of salaries of comparable institutions.

²³ Draft Manual: Policy of remunerations and compensations of the Superintendency of competition. Superintendencia of Competition El Salvador.

The salary structure of the Superintendency has eight occupational groups, in which similar positions are grouped:

1. Superintendency
2. Intendency
3. Co-ordinations
4. Heads of organisational units
5. Analyst
6. Expert technicians
7. Support technicians
8. Operational staff

The Superintendency defines an equitable and fair salary structure with a market percentile of 50 for the occupational groups of Intendency, Co-ordinations and Head of Organisational Units. The Occupational Groups of Analysts, Technicians (experts), Technicians (support) and Operatives is defined as falling within the 75th percentile.

Within has seven levels. The defined levels are a function of the average time that a person stays in the same position and mobility of the position within the Superintendency. The Superintendency defines a differential percentage of 6% between one level and another, for the salary bands of the Occupational Groups of coordination, head of organisational Units and technicians (support); 8% for the salary band of the occupational group of analysts, technicians (experts) and Operatives; and 5% for the Occupational Intendency Group.

Prioritisation and operational monitoring

One of the Superintendency's first tasks in 2006 was to prepare a five- year plan for the period 2006-2011. This plan articulated strategic objectives for the agency during this period. It set out specific, numerical goals for various types of activities, e.g. "number of cases on anticompetitive practices resolved" or "reports containing recommendations on laws and regulations." This original plan emphasised competition advocacy, especially that relating to educating the public about competition policy, while also focusing on beginning to pursue competition enforcement actions.

The current general framework for the Superintendency's Institutional Strategic Planning, which covers the 2017-2020, includes three framework elements, applicable to different organisational units:

- Institutional Strategic Plan (IEP), for a period of four years, which establishes the main strategic lines of the Superintendency's actions during this period. It defines the Strategic Actions and Objectives, as well as the results necessary to achieve them, and the Indicators and goals that will demonstrate their achievement. The current IEP covers the period 2017-2020.
- Annual Operating Plans (AOP), which identify the global activities that will guide the work of the different strategic units of the Superintendency in order to ensure they comply with the programmed institutional objectives.
- Monitoring and evaluation of AOP and IEP: the performance of each organisational unit is evaluated quarterly at the AOP level and every six months at the AOP and -IEP level.

A number of institutional performance indicators allow the Superintendency to monitor the execution of the activities programmed in the respective Plans and the fulfilment of the goals set out in them. Additionally, during the former presidential administration, the Superintendency monitored its progress regarding the achievement of the goals programmed in the matrix of strategic indicators based on the lines of action of the Five-Year Development Plan 2014-2019 adopted by the former Salvadoran government.

Complementarily, the Superintendency registers key operational information that allows it to know and monitor its efficiency in the performance of specific processes, for internal purposes. These historical records on the execution of specific tasks, which are translated into additional operational indicators, are not public and are included in the Information System for the Management of Institutional Cases (SIGCI) created in 2014.

Finally, within the framework of the recent approval in December 2018 of the Law on Regulatory Improvement, taking advantage of the agreement signed between the Organismo de Mejora Regulatoria (OMR) and the Superintendency, the Superintendency has agreed to join a pilot plan for regulatory improvement proposed by the OMR. This pilot's exploratory stage is scheduled for 2019.

Media and public perceptions

In 2018, the Superintendency carried out a perception study focusing mainly on its institutional image by hiring a consulting firm to study the perceptions of the key stakeholders of the Superintendency. Specifically, the study examined the Superintendency's actions according to the objectives of its Strategic Plan.

The average rating of the Superintendency (from 0 to 100%, with 100% being the best result) was 82%. At a more granular level, the Superintendency's average results were: Knowledge 92%, Image and Perception 83%, Performance 91% and Communication 62%. The study recognised that the Superintendency makes efforts to communicate in the media and that the communication of emblematic cases has been effective, particularly in social media.

Nonetheless, 38% of the interviewees perceived the Superintendency's publication and communication efforts as being scarce or had no opinion. In this regard, the Superintendency has undertaken actions to address the findings regarding its Communication efforts in the study. A strategy on media and digital communication to advertise its activities more aggressively was proposed. This has led to the adoption of more comprehensive and transversal communication tools, covering all projects and initiatives of the institution.

Another important aspect of this strategy has been the creation of an information monitoring system based on media intelligence, which allows the Superintendency to interact strategically and proactively with the media.

2.1.2. Other public bodies

All institutions and public entities in El Salvador are subject to the Competition Law. Therefore, in a general sense, and within the limits of their own attributions, such bodies also have the responsibility to promote and protect competition.

2.2. The substantive legal framework

2.2.1. *Scope of competition law*

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, co-operatives associations, and any other organisation 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.

In accordance with this provision, all economic agents are subject to competition law, be they natural persons, legal entities, state or municipal entities, state-owned companies, co-operative associations or any other body that has participation in economic activities. There are no special rules or exemptions for small and medium enterprises.

However, the scope of competition law does not extend to the economic activities that the Constitution and the laws exclusively reserve to the State or municipalities when they are the direct providers of the services, even though a private contractor performing those same services is subject to the law. In what does not concern those activities, however, the institutions and dependencies of the State and the municipalities are obliged to abide by the competition law.

Among the public services provided exclusively by the State or by the municipalities are, for example: sewage, provision of street cleaning and sweeping services, local transport, and others whose provision is the responsibility of the municipalities (according to the Municipal Code) or to the State, in accordance with national legislation.

In particular, the Municipal Code reserves to municipalities the right to operate and regulate local markets such as traces, slaughterhouses, solid waste collection, cemeteries, funeral services and lotteries. If a municipality executes these services it is not subject to the Competition Law, while a private contractor that provides these services is subject to competition rules.

2.2.2. *Substantive competition provisions*

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 such as horizontal and vertical agreements, abuse of dominant position and anti-competitive mergers.

Anticompetitive agreements

Article 25 of the competition law prohibits agreements between competitors, and lists four traditional types of cartel conduct: fixing prices or other terms of sale, fixing output, bid rigging and market sharing. While this is not set out explicitly in the law, the Superintendency has adopted a *per se* prohibition regarding these practices, which has been confirmed by the Supreme Court of Justice.

While the list of anticompetitive horizontal agreements is restricted to practices, which are prohibited *per se*, Article 12 of the implementing regulation (hereafter “Regulation”)²⁴ provides a lengthy, non-exhaustive list of factors that should be taken into account when assessing whether an anticompetitive horizontal agreement took place.²⁵ This includes parallel pricing that cannot be attributed to market conditions, evidence of meetings or communications, instructions or recommendations by industry associations, evidence of enforcement mechanisms for the anticompetitive agreement, 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.

Articles 26 and 27 of the Competition Law also prohibit “anticompetitive practices among non-competitors”, including both vertical agreements and unilateral conduct. Article 27 sets out such practices will only be prohibited if the undertakings “acting individually or jointly, hold a dominant position in the relevant market.” Article 27 further sets out that a rule of reason applies to anticompetitive practices among non-competitors. Furthermore, Article 14 of the Regulation provides for an efficiency defence in the context of agreements among non-competitors that is not available for horizontal agreements.

Article 26 mentions particular types of anticompetitive practices among non-competitors: tie-ins and exclusive selling agreements. Nonetheless, the list is not exhaustive. As with horizontal agreements, the Regulation lists in its Article 13 some indicators that should be taken into account when determining when a vertical practice is anticompetitive. These include whether the restrictions result in exclusion from the market for a longer time than would result from a “legitimate economic explanation”, whether there are laws or regulations that facilitate anticompetitive practices, and whether parties benefitting from exclusivity conditions benefit from favourable commercialisation conditions that are not justified by efficiency gains.²⁶

In case of an anticompetitive agreement, the Superintendency can impose up to 5 000 minimum monthly wages in the industrial sector (around USD 1 520 850),²⁷ or, if the infringement is of extreme gravity: (i) up to 6% of a firm’s total annual sales in El Salvador; (ii) up to 6% of a firm’s total assets in El Salvador; (iii) between two times and ten times the estimated gain resulting from the unlawful practice.

Abuse of a dominant position

Article 29 of the Competition Law lists a number of factors that are relevant to the determination of dominance, while Article 30 prohibits abusive conduct and describes some conducts that amount to an abuse of a dominant position. The Regulation further lists some indicators of dominance – such as market structure and barriers to entry – and 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.²⁸

While neither Articles 29 nor 30 refer to joint dominance, it can be said that the Superintendency has implicitly accepted that the concept applies to dominance cases as well, as discussed in greater detail below.²⁹ On the other hand, this concept has never been expressly adopted by the Superintendency.

²⁴ Presidential Decree No. 126, 5 December 2006, as amended in 2008 and 2013.

²⁵ Article 12.

²⁶ Article 13 of the Regulation.

²⁷ Currently, the monthly minimum wage for the industrial sector is USD 304.17.

²⁸ Articles 16 (on indicators of dominance) and 17 (on indicators of abuse of dominance) of the Regulation.

²⁹ In its analysis in the motor fuel case, which is still under judicial review.

In the case of abusive conduct, the Superintendency can impose a sanction of up to 5,000 minimum monthly wages in the industrial sector (around USD 1 520 850),³⁰ or the greater of: (i) up to 6% of a firm's total annual sales in El Salvador; (ii) up to 6% of a firm's total assets in El Salvador; (iii) between two times and ten times the estimated gain resulting from the unlawful practice.

Merger control

A number of transactions exceeding certain thresholds are subject to merger control, and must be notified to the Superintendency and approved by it before they can be implemented. The merger control provisions extend to mergers in regulated sectors. The Superintendency's decision is binding upon sector regulators, though the regulator may also have the power to prevent a merger on regulatory grounds.

According to Article 31 of the Competition Law, a merger occurs when independent economic agents enter into legal arrangements leading to the fusion, acquisition, consolidation, integration or combination of all or part of their businesses; or when one or more economic agents that already control at least another economic agent acquire direct or indirect control, by any means, of another economic agent.

Article 33, which sets forth the applicable notification thresholds, states that: 'Mergers 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 authorisation.'

The table below shows thresholds in US dollars. At current rates, the assets' based threshold is equal to USD 182.5 million (total assets exceeding 50 000 minimum annual urban wages in the industrial sector), while the income based threshold amounts to USD 219 million (total income exceeding 60 000 annual urban minimum wages in industry). If a transaction meets this threshold, it may be prohibited if it significantly limits competition.³¹

Table 2. Merger notifications thresholds

		Threshold (in smai)	Monetary equivalent (USD, million)
Type	Assets	50 000	182.5
	Income	60 000	219

Note: Smai: Minimum annual salary in the industry³²

Source: Superintendency

If a notifiable merger is implemented without being notified, the Superintendency can impose a sanction equivalent to that of an infringement of the antitrust rules – i.e. 5 000 minimum monthly wages in the industrial sector (around USD 1,520,850),³³ or the greater of: (i) up to 6% of a firm's total annual sales in El Salvador; (ii) up to 6% of a firm's total assets in El Salvador; (iii) between two times and ten times the estimated gain resulting from the unlawful practice.

³⁰ Currently, the monthly minimum wage for the industrial sector is USD 304.17.

³¹ Article 34.

³² The current minimum salary was established by Executive Decree No. 104, of 21 December 2017 and published in the Official Journal number 240, volume number 417, of 22 December 2017. This amount corresponds to the minimum salary as of July 2019. Please note that minimum wages are subject to periodic revision.

³³ Currently, the monthly minimum wage for the industrial sector is USD 304.17.

Furthermore, in a merger case when a party does not comply with a condition established in a final resolution of the board, that economic agent can be fined up to 5 000 minimum monthly urban wages (around USD 1 520 850)³⁴ for each day that it is in non-compliance.

2.3. Enforcement powers and procedures

The procedures relating to merger notification and review are described in section 3.4.2 below. This section will focus mainly on antitrust procedures and investigation powers. These are set forth in Articles 40-49 of the Competition Law and Articles 24-77 of the Regulation.

2.3.1. Investigation powers

The Superintendency has all the investigation powers that are normally given to a competition agency³⁵. While these powers are not unusual for competition agencies, they are not common in El Salvador. These powers include:

- The power to request any party, including any government agency or body, to provide information and documents.
- The power to issue summons for witnesses.
- The power to carry out inspections in the premises of an economic agent, examining documents and taking statements. It should be noted that these inspections, require the Superintendency to give 3 days - advance notice.
- Power to conduct dawn raids.

2.3.2. Dawn Raids and leniency

As noted above, the 2007 amendments granted the Superintendency two important new tools for its anti-cartel effort: the powers to conduct dawn raids and to create a leniency programme.³⁶

As regards dawn raids, the Superintendency must obtain authorisation from a court of law prior to the inspection. The petition requesting this authorisation must comply with the requirements set out in the Competition Law. It must describe, among other things, the conduct that is the subject of the investigation, the parties involved, 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.

To date, the Superintendency has only investigated a single case where evidence was collected through dawn raids, namely in the wheat flour case that will be discussed in detail below at section 3.1.1.

In 2017, the Competition Law was amended to clarify in which judicial courts the Superintendency must solicit authorisation to conduct a dawn raid. This was done to maintain coherence with the enactment in 2017 of the Contentious Administrative Law.

The amendment to the law in 2007 also provided that leniency can be granted by the Superintendency. However, leniency may be granted only to the first applicant, who must furnish enough evidence of the existence of a cartel and of the applicant's participation in it. This applicant must also fully co-operate with the Superintendency's investigation. Furthermore, the law does not exempt a successful

³⁴ Id.

³⁵ These are set forth in Article 44 of the Competition Law and Article 47 of the Regulation.

³⁶ Amended Articles 39 (leniency) and 44 (dawn raids) of the Competition Law.

applicant from fines and other sanctions; instead, it merely grants the Superintendency discretion to reduce the fine.

The Superintendency has not yet formally developed a procedure for leniency application in addition to what the law dictates.

2.3.3. Investigation procedure

Starting an investigation

Antitrust investigations can be initiated either by means of a formal complaint filed with the Superintendency by a private party or a public body, or *ex officio* by the Superintendency.

If the Superintendency determines that a complaint does not comply with the information requirements set forth in the Competition Law, its regulation and the Administrative Procedure Law, it must warn the complainant of that fact within five business days of the filing of the complaint. The complainant has ten business days to remedy the problem. If the complainant does not provide the information required, the complaint will be rejected.

Within this five business day period, the Superintendency can also determine that the complaint does not describe facts that amount to a possible violation of the Competition Law. If it so concludes, the Superintendency has to warn the complainant that the description of the facts in the complaint does not amount to an anticompetitive practice. The complainant then has 10 business day to rectify the complaint (i.e. provide a better justification of the complaint). If such a rectification is not made, the complaint will be rejected.

The superintendent needs to provide a reasoned justification of why it decided to reject a complaint, and this decision is appealable before the board of directors. The Superintendency does not have the possibility to consider whether to investigate a complaint by reference to its priorities and use of resources. This means that, if the legal requirements are fulfilled, the Superintendency must investigate all conducts that were the subject of a complaint.

If a complaint is accepted, a formal investigation must be undertaken. However, the Superintendency may conduct a preliminary investigation even when a complaint has been rejected, as long as that complaint contains indicia of an infringement or competition issues.

Preliminary investigations were introduced by the 2007 amendment of the competition law. They comprise a set of actions that have the objective of gathering information to determine if there may be competition problems or violations to the Competition Law. Depending on the findings of a preliminary investigation, the Superintendency may begin an “*ex officio*” formal investigation or the board of directors may dictate public policy recommendations to foster or increase competition in the market that was investigated.

It is important to clarify that preliminary investigations are diligences in which the investigation focuses on how the market is operating and not on the conduct of a specific economic agent. To date, the Superintendency has undertaken 38 preliminary investigations, five of which led to formal investigations because it was concluded that there were enough indications that there was a competition problem in the market under study.

If the preliminary investigation indicates that there is enough evidence of a possible anticompetitive practice, the Superintendency initiates a formal investigation.³⁷ The Superintendency can also proceed directly to an “*ex officio*” formal investigation if the facts so warrant, and must do so if a complaint is accepted.

In any event, the findings of a preliminary investigation results cannot be used in evidence in a formal investigation, which means that the Superintendency has to pursue the same evidentiary diligences it pursued in a preliminary investigation again in the context of a formal investigation.³⁸

Eighty one point twenty-five percent of investigation procedures have started due to complaints. At the same time, most complaints have not complied with the requirements of the law, and have been rejected as inadmissible or improper.

Table 3. Complaints concerning anticompetitive practices (2008-2018)

Year	Received	Rejected	Proceeded to Formal Investigation	Conclusion Procedure
2008	5*	4	-	-
2009	4	4	-	-
2010	5*	1	3	1 sanctioned 2 not sanctioned
2011	3	1	2	Dismissal
2012	5	5	-	-
2013	6	4	2	1 sanctioned and 2 not sanctioned
2014	3	3	-	-
2015	1	1	-	-
2016	6	6	-	-
2017	7	6	1	Pending
2018	3	3	-	-
Total	48	38	8	

* In each of 2008 and 2010, one complaint was retracted.

Source: Superintendency.

A number of procedures have been initiated *ex officio*. However, the investigations carried out *ex officio* by the Superintendency are scarce, and have remained so over time.

Table 4. Complaints and “*ex-officio*” investigation procedures for anticompetitive practices (2013-2018)

	2013	2014	2015	2016	2017	2018	Total
Investigation procedure	7	3	2	7	9	4	32
Complaint	6	3	1	6	7	3	26
Ex officio	1	-	1	1	2	1	6

Source: Superintendency.

Investigation timeline and structure

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 according to the Competition Law. For example, in the motor fuels case (described below in Box 4), the 12-month period was extended for an additional seven months.

³⁷ Formal investigation includes the investigation and the deliberation by the board of its decision that ends with a final resolution.

³⁸ Article 41 of the Competition Law.

The party or parties subject of the complaint are given formal written notice of the investigation when the formal investigation procedure begins. If a dawn raid is deemed necessary, the parties are notified immediately before it takes place. The notice includes a summary of the relevant facts; the type of infraction that may have occurred and the type of sanctions that could be imposed.

The notification triggers a 30-business day period within which the respondent may provide any allegation, document and data deemed necessary and shall propose the evidence to be of use and shall indicate the facts to be proven. Following that, the superintendent opens a 20-business day's period so the parties and the Superintendency can submit their witnesses, additional evidence and arguments. At this stage, all proceedings are in writing.

The Investigation Intendency then prepares and presents a report that contains all the evidence collected during the investigation. Before the presentation of the report to the board, the superintendent grants the alleged infringer the opportunity to present his final arguments.

After deliberation, the board makes its decision and instructs the Investigation Intendency to draft its resolution. The resolution describes fully the relevant facts and the board's analysis.³⁹ This resolution is made public after all the confidential information is removed.

The respondent has a period of ten business days to request a review by the board of its decision.⁴⁰ If such a review is requested, the board then has one month within which to review its decision. Depending on the sums of fines imposed, the appeals can then be appealed before the first instance (for fines up to USD 500 000) or second instance Tribunal (for fines above USD 500 000).

A criticism of the decision-making process has been voiced: that the Superintendency's prosecutorial and adjudicative functions are insufficiently separated, because the superintendent supervises the preparation of cases and is also one of three voting members of the board (unless he or she is disqualified because of a personal conflict).

The risk that has been identified here is that, since the superintendent was responsible for the investigation, he/she may not be an impartial decision-maker. This risk, is compounded since he/she is the only full-time member of the board, and may have disproportionate influence on other board members.

The Superintendency considers that such a risk does not exist because the formal investigation is a single-instance procedure comprising two stages: an investigation stage and a decision making stage. To expedite the investigation process, the superintendent delegates the investigation process to the Investigation Intendent at the beginning of the investigation stage, even though the superintendent still has the powers inherent to the investigation stage and reserves the right to exercise those delegated powers. During this investigation stage, there is no evaluation by a decision-maker of whether there has been an infringement of competition law.

The decision-making stage is undertaken solely by the board that, while comprising the superintendent, must adopt a decision by a majority of votes. It follows that the delegation of the investigation to the Investigation Intendent at the beginning of the investigation stage, which was adopted to expedite the investigation, indirectly eliminates or at least mitigates concerns regarding any potential lack of impartiality in decision-making.

³⁹ For example, the resolution in the motor fuels case was 152 pages long.

⁴⁰ If there is a third party involved in the case, for example a private complainant, Article 128 of the Administrative Procedure Law provides that, when there is an administrative review by the board, that third party will be granted no less than 10 nor more than 15 business days to provide a written submission to the board.

Internal guidelines

In December 2015, the superintendent approved a manual for internal procedures regarding investigations, which was subsequently modified in December 2017. The manual provides internal guidelines (the “Internal Guidelines”) for the pursuit of the main tasks of the Superintendency’s investigation personnel and includes guidance on the stages and terms under which the preliminary investigation and the formal investigation, which includes the sanctioning procedures, must occur.

This manual was prepared as part of the Institutional Strategic Plan of the Superintendency for the period 2012-15, and is not available to the public. The guidelines are for the exclusive and internal use of the Intendency of Investigations. It establishes stages for both preliminary investigations and formal investigation. It also establishes deadlines for formal investigations, set based on its expected duration, i.e. one year.⁴¹

The manual contains thirteen guidelines that capture the essential functions carried out by the Investigations Intendency. Three guidelines relate to personnel functions and the identification of markets to be investigated – they can be found in Title II. Title III contains five guidelines concerning activities related to preliminary investigations and formal investigations. Title IV contains two guidelines related to the management, custody and safekeeping of administrative procedures files. Title V contains two guidelines regarding the preparation of resolutions and enforcement proceedings. Finally, Title VI contains guidelines related to court proceedings.

In short, these guidelines detail the stages and steps of the investigation, who is responsible for and whose purpose it is to ensure the execution of certain steps. The guidelines also set out quality and compliance standards for the Investigation Intendency in connection to its two main areas of practice: a) investigating anti-competitive practices, and b) jurisdictional litigation, fines and notifications.

Confidentiality

The Competition Law and its Regulations regulate the protection of confidential information, the requirements and the process to declare it as such, the conservation, management and access to it and its custody. Further, in 2011 the Access to Public Information Law entered into force. This law contains provisions regarding what type of information is confidential and creates a category of reserved information.⁴²

The superintendent has the agency to classify as confidential the information or documents that the Superintendency has obtained, and to restrict access to that information in line with the legal framework for confidentiality. It is the superintendent’s attribution to protect the confidential information (business, commercial and official information) kept in the file of the Superintendence. The infringement of this provision by the superintendent or the Superintendency staff can carry criminal liability and removal from office.⁴³

During the formal investigation, all information in the Superintendency’s files is reserved information. Further, any party providing information can make a confidentiality request. The Superintendency will hold an audience with the economic agent that provided information in order to classify it.⁴⁴

⁴¹ Article 45, section 4 of the Competition Law.

⁴² Art. 6, e) of the Access to Public Information Law defines what is reserved information.

⁴³ Article 18 of the Competition Law.

⁴⁴ Art 52 of the Regulation.

Nonetheless, a respondent will have access to the Superintendency’s evidentiary file when the confidential information is related to the objective of the investigation and may affect his defence. In order to exercise their right of defence, a party may access specific confidential evidence – but not the whole confidential information file or to the Superintendency’s report to the board.

A potential issue in this regards is that the provision for the treatment of confidential information in the legislations may not be well known to the private sector, which makes it difficult to develop confidence, coherence and predictability in access to information and protection of confidential information.

2.4. Sanctions and remedies

2.4.1. Fines

Legal framework

The Superintendency’s fining powers are significant.⁴⁵ Before the 2007 amendments, the Superintendency could only impose a maximum fine of 5 000 minimum monthly urban wages in the industrial sector (around USD 1 520 850).⁴⁶ The 2007 amendments added higher fines for “particularly serious” offences, such as hard-core cartels.

The determination of whether an offence is particularly serious is in the discretion of the Superintendence, which exercise must be duly reasoned. There are current no guidelines on whether an offence is particularly serious, other than the reasons provided in a case discussed below at section 3.1.2. For particularly serious 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 and ten times the estimated gain resulting from the unlawful practice.

These same fines applies to the parties of a merger that should have been notified but consummated their merger without having notified it. In a merger approved subject to conditions, if a party does not comply with a final resolution of the board it can be fined up to 5 000 minimum monthly urban wages (around USD 1 520 850)⁴⁷ for each day that it is in non-compliance.

A fine subject to these maxima can also be imposed when a complainant files a complaint containing false information “with the purpose to limit, restrict or impede competition.”

A party who fails to supply information requested by the Superintendency, or intentionally or negligently provides false or incomplete information or does not comply with a precautionary remedy can be fined up to ten minimum monthly urban wages (around USD 3 040) for each day that it is non-compliance.

In calculating fines, like in other countries in the region⁴⁸, the Superintendency must consider the severity of the infringement, the damage caused to third parties, the duration of the anticompetitive

⁴⁵ As provided in articles 37-39 of the Competition Law.

⁴⁶ Currently, the monthly minimum wage for the industrial sector is USD 304.17.

⁴⁷ Currently, the monthly minimum wage for the industrial sector is USD 304.17.

⁴⁸ See for example: Argentina: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/60016/texact.htm>.

practice, the size of the market, and whether it is dealing with a repeat offender⁴⁹. In line with the case law of the administrative and constitutional courts, the Superintendency must take into account the principle of proportionality and the defendant's ability to pay when imposing a fine.

Fine imposition and collection in practice

As already noted above, the Superintendency imposed sanctions in 55 formal investigations for anticompetitive practices between 2006 and March 2019, in a total amount of USD 16.6 million in fines. The fines for anticompetitive practices represent 59% of the total number of processes and 85% of fine amounts. The remainder of fines were imposed for infringements other than anticompetitive practices.

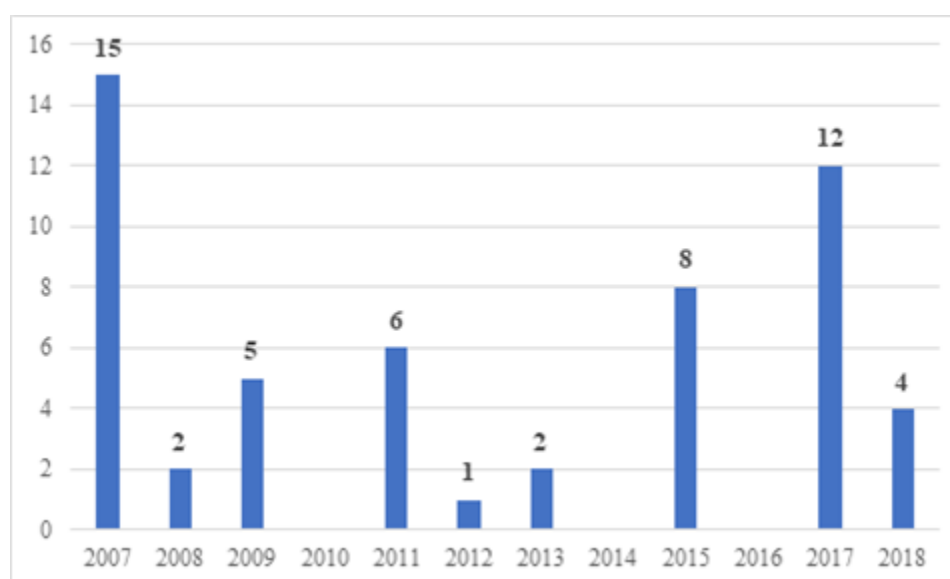
Table 5. Amount and total of fines (January 2006-March 2019)

Type of infraction	No. fines		Total fines (USD)	
Anti-competitive practices	55	57%	14 059 067	85%
Other Infractions (failure to provide information and failure to notify mergers)	43	43%	2 570 083.87.	15%
Total	98		16 629 150.87	

Source: Superintendency.

The number of fines has shown great variations over the years. The largest number of fines was imposed in 2007, with 15 fines, followed by 2017 with 12.

Figure 2.2. Number of fines for anticompetitive practices, per economic agent, 2007-2018



Source: Superintendency.

⁴⁹ Article 37.

Since 2013, the fines imposed for anti-competitive practices applied have been, mostly, by reference to the ceiling of 5 000 minimum wages, established in Art. 38(1) of the Competition Law. The highest fine reached 2 500 minimum urban wages (approximately USD 600 000).⁵⁰ Only one case was sanctioned by reference to the companies' turnover, adopting a percentage equivalent to 1.2% of the total sales of the sanctioned companies.⁵¹ These low amounts may not deter economic agents from committing anticompetitive practices.

The law requires that all fines must be paid within eight days of the issuance of the board's final resolution. However, to date, only 58% of fines have been paid, amounting to 49% of all fine amounts due. The payment of nine percent of all fines, amounting to 34% of all fine amounts, has been suspended by appeals admitted in the Supreme Court of Justice (including 'recursos de amparo' to the Constitutional chamber).

Finally, 32 fines – corresponding to 33% of fines, amounting to 17% of all fine amounts due – are pending collection by General Prosecutor of the Republic (FGR), despite these penalties no longer being subject to appeal. An important challenge in this respect is that the General Prosecutor of the Republic has been slow to open procedures to collect outstanding fines. To date, the FGR has only collected 36 fines.

Table 6. Status of fines imposed (January 2006-March 2019)

Status	No. fines		Total fines (USD)	
Fully paid	56	58%	8 154 104.69	49%
In charge (FGR)	32	33%	2 792 695.28	17%
Suspended (CSJ)	8	9%	5 617 167.03	34%
Total	96		16 563 967.00	

Source: Superintendency.

The Superintendency's website affirmed that a legal reform is necessary to overcome the existing regulatory deficiencies concerning the collection of fines, which arise from uncertainty regarding which collection procedure to be followed, since the wording of the Regulation in this respect was not clear.

To address this uncertainty, the proposed reform bill presented to the Secretariat of Legislative and Legal Affairs in March 2018 set out that the collection of fines must be achieved through a forced execution procedure. In February 2019, the Administrative Procedures Law came into force. This law is consistent with the proposal for reform made by the Superintendency to the Competition Law, in that it sets out that the only procedure for collecting fines is through forced execution procedure. The proposed reforms presented to the Legal Affairs Secretariat in March 2018 are under review to ensure that they are coherent with the Administrative Procedure Law.

2.4.2. Remedies

The Superintendency can issue remedies – which are called 'conditions' or 'obligations' – requiring that unlawful practices cease or imposing other condition or obligations, both behavioural and structural.

The original version of the Competition Law included a provision permitting a party to guaranteeing 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. The 2007 reform limited this possibility to anticompetitive practices other than horizontal agreements (i.e.

⁵⁰ This was calculated by reference to the minimum urban wage in 2014, which was USD 237.

⁵¹ In case SC-012-O/PS/R-2013, regarding bid rigging in the insurance / pension market.

agreements among competitor), and substituted the benefit of receiving no penalty for the non-application of penalties for particularly serious infringements.

Currently, there are no procedures in place regarding guarantees. Even though the board can take voluntary modifications of conduct by a respondent into account in assessing fines, the Superintendency is not able to accept a settlement in cartel cases. It can accept guarantees⁵² in non-cartel cases even though this will not stop the sanctioning process, as is common in other jurisdictions. Such mechanisms can save resources for the agency, remedy competition issues and obviate judicial proceedings on appeal.

2.4.3. *Interim remedies*

Since 2007, the superintendent has had the power to issue interim remedies of a precautionary nature. Such interim remedies suspend an activity or impose other conditions, when an imminent risk exists to the market. Such risks may limit competition, the access of an economic agent to the market, the movement of an economic agent, or result in damages to third parties in infringement of public or collective interests.⁵³

This order can be reviewed by the Contentious Administrative Tribunal, but the rights of appeal are limited because the interim order is not final. In any event, no interim order has been issued to date.

2.5. Judicial review

The Superintendency is represented by its own attorneys in judicial appeals. However, in all judicial cases brought against a government institution, the Attorney General also participate as the representative of the state and of the public.

There are four levels in the 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 Contentious Administrative. There are 15 justices (Magistrates) on the Supreme Court, each assigned to one of the chambers. The Supreme Court can also meet in plenary session. Supreme Court magistrates are appointed by the Legislative Assembly for terms of nine years, with one-third of the justices being appointed every three years.

Before February 2018, the appeals of decisions of the Superintendency, and of all administrative bodies, were made directly to the Administrative Chamber of the Supreme Court (*Sala de lo Contencioso Administrativo*), comprising four justices. Appeals concerning infringements of constitutional rights were heard by the Constitutional chamber of the Supreme Court.

The Administrative Contentious Law, which went into effect in 2018, created the Administrative Contentious Tribunals (courts of first and second instance). As a result, decisions of the Superintendency are now heard before these Administrative Contentious Tribunals. This new Administrative Contentious Law expedites judicial proceedings compared to the current situation.

Appeals are heard by the first or second instance Tribunal depending on the amount of the fine imposed by the Superintendency (fines below USD 500 000 are heard at first instance,⁵⁴ while fines above

⁵² For Example: The Law on the Defense of Competition in Argentina, Law 27442, in its Article 45 establishes that the commitment will be subject to the approval of the Court of Defense of Competition for the purposes of producing the suspension of the procedure.

⁵³ Article 41(A), as amended.

⁵⁴ At first instance, there are two possible procedures: an abbreviated procedure if the fine is below USD 250 000, and the common procedure for fines between USD 250 000 and USD 500 000.

USD 500 000 go directly to the second instance Tribunal). Appeals concerning infringements of constitutional rights will still be heard by the Constitutional chamber of the Supreme Court.

If a decision falls under the competence of the first instance Tribunal, and the economic agent is not satisfied with the judgment, that agent can appeal solely to the second instance Tribunal. Decisions of the second instance tribunal can only be appealed before the Administrative Contentious Chamber of the Supreme Court. All instances will review whether the Superintendency applied due process established by law.

In general, the Administrative Contentious procedures are as follows. Upon receipt of an appeal petition, the judges conduct a preliminary study to determine if the appeal satisfies the requisite procedural requirements. Upon admitting the case, the judge can issue an interim or preliminary order if necessary. Following this preliminary stage, the judge will consider the legality of the procedure followed by the Superintendency, including whether the law was correctly applied, but not necessarily the content of the Superintendency's decisions. This will include pleadings from both sides and, if necessary, the gathering of new evidence. The judge then reaches its decision.

Prior to judicial review, it is possible to ask for a voluntary revision of the administrative decision before the board of directors. In practice, a significant percentage of Superintendency decisions are not appealed before the board of directors of the Superintendency and are appealed directly to the judicial sector. This maybe because most cases that are subject to appeal to the board have been declared unfounded and are resolved in favour of the Superintendency.

Table 7. Administrative appeals before the superintendence's board against decisions concerning anticompetitive practices (2013-2018)

Year	2013	2014	2015	2016	2017	2018	Total
Procedures completed	5	3	5	6	7	5	31
No appeal were filed	3	3	3	4	5	4	22
Appeal were filed	2	0	2	2	2	1	9

Source: Superintendency.

As regards judicial appeals, of the appeals against the Superintendency's decisions regarding anticompetitive practices between 2006 and 2018, only two decisions were overturned by the courts, while 32 appeals were decided in favour of the Superintendency's original decision and two were withdrawn. In addition, there are currently 20 appeals pending.

Table 8. Judicial appeals against antitrust infringement decisions (2006-2018)

Court	Number of Appeals	Judgments	Result
(2nd Tribunal of the Administrative Contentious)	1	0	0
Constitutional Chamber	5	5	In favor: 4 Against: 1
Administrative Contentious Chamber	51	31	In favour: 28 Withdrawals: 2 Against: 1 In process: 20

Source: Superintendency.

While the Superintendency is mostly successful in upholding its decisions in court, delays at the Supreme Court judicial level have constituted one of the major and main obstacles to the application of competition law. The resolution of the appeal process is slow. Reaching a final decision can take many years from the date of presentation of the appeal when it was presented directly to the Supreme Court, including constitutional “amparos”.⁵⁵

Nowadays, the Administrative Procedure Law sets out deadlines terms that have to be met, thereby imposing a more expedite process. As can be seen from the above, of the 56 appeals for anticompetitive procedures filed since 2006, 20 remained unsolved as of December 2018. This number had decreased to 18 unsolved appeals in May 2019. Part of the reason for this is that it can take a year or more for the Court to accept a case at the preliminary stage.

The table below provides data about the months elapsed in the finalised judicial processes. Cases of abuse of dominant position have an average duration of 56 months (4.5 years), while cases concerning anticompetitive agreements last practically the same amount of time.

Some appeals from Superintendency decisions to the Administrative Contentious Chamber of the Supreme Court have remained unsolved for more than a decade, such as the motor fuels case discussed at section below.

Table 9. Average number of months of judicial processes finalised by type of process and infraction

Process type	Infringement	Average of Total months
Amparo	Other infractions	10
Administrative Litigation	Abuse of dominant position	56
	Anti-competitive agreement	55
	Other infractions	41

Source: Superintendency.

Furthermore, of all 58 cases that have been appealed between 2006 and 2019, a suspensory injunction has been granted in five cases. Such injunctions suspend the effects of the decisions and sanctions imposed by the Superintendency, with the consequence that the addressed economic agents can continue to commit the anti-competitive infringement for which they have been sanctioned until the Chamber issues a ruling.

Finally, in many cases, fines have not been suspended, but neither have they been paid. As noted above, the issue seems to be that the General Prosecutor of the Republic has open procedures to collect the fines that is slow, despite the Superintendency’s requests, and the Superintendency has no mechanism to compel him to do so. To date, the FGR has collected 36 fines equivalent to USD 7 005 918.28.

2.6. Private enforcement

Private enforcement is neither foreseen nor proscribed by the competition law. No private enforcement case seems to have been brought before El Salvador’s courts, and the Superintendency is unaware of any private enforcement actions, despite the law on extra-contractual liability allowing parties to claim damages suffered because of illicit acts. At the same, the only entity with powers to establish an

⁵⁵ Amparos are the name given to the complaints based on violation of constitutional rights when such rights cannot be equally and promptly protected by other procedural means, and it’s done before the Constitutional Chamber. Not all appeals before the Supreme Court are called amparos.

anticompetitive practice is the Superintendency. As such, the Superintendency considers that stand-alone competition claims cannot be brought before the tribunals because the sole entity capable of applying competition law is the Superintendency.⁵⁶

In February 2019, the Law of Administrative Procedures adopted Article 155. This Article establishes a mechanism for compensation, under which administrative authorities, including the Superintendency, could declare, "*compensation for damages caused. If it could not be determined in the same file, the corresponding judicial procedure will be expedited.*" In this sense, this specific private action would depend on a prior pronouncement by the Superintendency.

2.7. International co-operation

As a small economy, and one whose markets are relatively open, competition in El Salvador is inevitably affected by international forces. The Superintendency has no role in the implementation of trade policy, including anti-dumping measures. The superintendent has the power to participate in the negotiation or discussion of international trade agreements or treaty as regards competition policy chapters. The superintendent is also empowered to represent El Salvador before international organisations related to competition policy.⁵⁷

The Superintendency has been active since its inception 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, Ecuador, Honduras, Mexico, Nicaragua, Panama and Peru. A number of these agreements – with Chile and Mexico – focus on technical assistance, and include provisions on the exchange of personnel and sponsorship of conferences and seminars. Other agreements cover these elements, but in addition also address co-operation and public information exchanges in enforcement / merger cases.

The Superintendency regularly communicates with its counterparts within the region on specific matters, even when there is no formal co-operation agreement in place. For example, the 2008 Peer Review already noted that Brazil and Chile have provided technical assistance to El Salvador on conducting dawn raids, and Chile has provided technical assistance in two of the Superintendency's cases. Using funding provided by the U.S. Agency for International Development, the US FTC and Department of Justice (DOJ) conducted an extensive program of technical assistance, including several seminars and workshops for case handlers, a resident advisor, and bringing an case handler from El Salvador to the United States for an internship with the FTC." Furthermore, magistrates participated in the Judicial Forum on Competition with Mexican and Puerto Rican judges in 2016, as a result of the technical assistance of the US FTC and the Spanish Supreme Court.

The Superintendency is adept at attracting funding from outside sources for special projects. The agency participates, for example, in COMPAL, a project that provides technical assistance in competition and consumer protection matters to 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 the Swiss Competition Agency (COMCO) and done capacity building activities and market studies. The Superintendency also participates in the technical assistance programme offered by Spain and Portugal through the Ibero-American Competition Forum.

Moreover, El Salvador is a Party to the Association Agreement between Central America and the European Union, which contains a section on trade and competition. This agreement commits El Salvador, and the other parties, to maintain in force comprehensive competition laws effectively to address anti-

⁵⁶ Art. 3 Competition Law.

⁵⁷ See Article 13 m) and p) of the Competition Law.

competitive practices (cartels and abuse of dominance) and mergers; and to establish or maintain designated and adequately equipped competition authorities for the transparent and effective implementation of competition laws. In addition, the Association Agreement contains competitive neutrality provisions such as provisions on public enterprises, and enterprises entrusted with special or exclusive rights, including designated monopolies. The Association Agreement provides for the exchange of non-confidential information for the application of competition law, and sets out to promote technical assistance initiatives related to competition policy and enforcement activities. It also contains a provision that commits the Central American parties to adopt a regional competition law and regional competition body.

In the context of international agreements promoting Central American economic integration, there are a number of provisions regarding competition policy. The Protocol of the General Treaty of the Central American Economic Integration (known as *Protocolo de Guatemala*)⁵⁸ contains a general provision for competition in article 25 whereby the signatory parties commit to adopt common provisions to prevent monopolist practices and promote free competition in the signatory states. Article 21 of the Framework for the establishment of the Central American Union also sets forth that the Parties will develop a regional norm on competition policy.

El Salvador is a founding member of the Central American National Competition Authorities Network (RECAC). The purposes of the RECAC are:

- to promote the joint work of the national authorities in charge of competition issues;
- to create mechanisms to strengthen the defence and protection of competition in the Central American markets;
- to develop relations between the national authorities in charge of competition issues of the Central American region through co-operation and mutual assistance for the effective protection of competition in the markets of the region;
- to contribute to the processes of economic and social integration in the region.

The RECAC member countries have signed a Constitution Treaty of the Network, and subscribed to an Operating Regulation that sets out the attributions and obligations of the network members and how the network is organised and operates.

RECAC proposed a Regional Competition regulation to the Ministerial Counsel of the Central American Economic Integration, with a view to assisting their compliance with the commitments assumed in the Association Agreement between Central America and the European Union. It has pursued sectorial Studies on regional competition conditions, and annually celebrates a Central American Competition Forum in which relevant issues of the member countries are discussed and experiences exchanged.

Lastly, the Superintendency also participates actively in international competition organisations, including the OECD (through its Global Forum on Competition), the International Competition Network (ICN), the Interamerican Competition Alliance, the Regional Competition Centre, the Working Group on Trade and Competition UNCTAD-Economic Secretary for Latin America (SELA) and UNCTAD (Intergovernmental Group of Experts). In its history, the Superintendency has already acted as host of the fourth meeting of the OECD-IDB Latin American and Caribbean Competition Forum (LACCF) and of an ICN cartel workshop, to several Central American Competition Forums and to a Trade and Competition working group meeting.

⁵⁸ Signed on 29 October 1993 by Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panamá.

3. Application of competition law in El Salvador

3.1. Horizontal agreements

As noted above, Article 25 of the Competition Law prohibits agreements between competitors. The Superintendency has subjected traditional forms of cartel activity (fixing prices or other terms of sale, fixing output, bid rigging and market sharing) to a *per se* prohibition. The *per se* rule has been confirmed by the Supreme Court as a valid rule for analysing horizontal agreements

In any event, the Competition Law and the regulation provides a lengthy, non-exhaustive of factors that should be taken into account when assessing whether an anticompetitive agreement took place.⁵⁹ On the other hand, no efficiencies can be taken into account as regards horizontal agreements since they are prohibited *per se*. Article 14 of the Regulation. This Article regulates efficiency defences, defining that such defences are only available for anticompetitive practices that do not involve agreement among competitors.

The table below list all the horizontal agreement cases sanctioned during 2013-18. As it is shown, there have been only five cases in the last five years, averaging only one decision per year.

Table 10. Horizontal agreements sanctions (2013-2018)

Case reference	Year	Legal basis	Sector	Economic agents	Total sanction amount (USD)	Number of sanctioned entities
SC-037-O/PI/NR-2017	2018	Art. 25 c)	Construction	Constructora Gaitán, S.A. de C.V.; Perforaciones Vivas, S.A. de C.V.	9 864	2
SC-001-O/PA/NR-2009	2018	Art. 25 c)	Travel agency	U-TRAVEL SERVICE, S.A. DE C.V.	6 093.00	1
SC-031-O/PI/NR-2015	2017	Art. 25 a)	Agroindustry	Gumarsal, Sociedad Anónima de Capital Variable; Arrocería Omoa, Sociedad Anónima de Capital Variable; Arrocería San Francisco, Sociedad Anónima de Capital Variable; Agroindustrias Centroamericana, Sociedad Anónima de Capital Variable; Arrocería Jerusalén, Sociedad Anónima de Capital Variable; Arrocería San Pablo, Sociedad Anónima de Capital Variable; Beneficio de Arroz Los Ángeles, Sociedad Anónima de Capital Variable; Industrias Arroceras Guevara Landaverde y Asociados, Sociedad Anónima de Capital Variable; La Nueva Espiga, Sociedad Anónima de Capital Variable; Arrocería San Mauricio, Sociedad Anónima de Capital Variable; y las personas Romeo Armando Ruiz Águila; y Héctor Ricardo Rodríguez Ramírez	147 960	12
SC-012-O/PS/R-2013	2015	Art. 25 c) y d)	Insurance	AIG Vida, S.A. Seguros De Personas.; Asesuisa Vida, S.A. Seguros De Personas; SISA Vida, S.A. Seguros de Personas	3 425 833.23	3
SC-014-O/PS/NR-2012	2013	Art. 25 c)	Construction	Agua Y Tecnología, S.A. de C.V.; Suministro Industrial De Equipo y Ferrería, S.A. de C.V.	6 141.80	2

Source: Superintendency.

⁵⁹ Article 12 of the Regulation.

The three more important cartel cases the Superintendency has prosecuted are described below.

3.1.1. *The wheat flour cartel*⁶⁰

On 5 September 2008, the Superintendency's board of directors announced that it had discovered and sanctioned an agreement between the two major producers of wheat flour⁶¹ (used in the production of bread and bakery products) to share total sales in the market 55%-45%.⁶² Pursuant to the agreement, the parties periodically exchanged sensitive, confidential information on sales and their participation in the market. They also devised a mechanism to compensate one another in situations in which a party did not achieve its allocated share.

The board imposed fines on the two parties totalling slightly more than USD 4 million. The fines, the highest imposed thus far by the Superintendency, were the first calculated under a legal provision added by the 2007 amendments authorising higher fines in "particularly serious" offences, such as hard-core cartels. The fines were calculated as 3% of the respondents' total sales in 2007. The board also issued a remedy requiring the respondents:

- to cease the illegal practices;
- to refrain from exchanging information relating to production, sales, prices and customers;
- to report to the Superintendency monthly data on imports of wheat, flour production, installed capacity and flour sales for a period of two years.

The board of directors emphasised the importance of the case to consumers. Bread being a staple for all consumers. The decision cited statistics showing that in El Salvador, food and non-alcoholic drinks constitute about 43% of the average household's total consumption, and bread in particular accounts for 24% of average household consumption. The average household spends about USD 31 per month on bread.

The case is also notable as the first, and to date only case in which the Superintendency conducted a dawn raid. In this case, there were two premises to be searched, located in different judicial districts, requiring the Superintendency to file two petitions with civil and mercantile courts of first instance. Both were granted, and the Superintendency conducted searches of the two premises simultaneously.

Both economic agents appealed the final decision before the board of directors, but the board confirmed its decision.

Subsequently, the sanctioned parties appealed to the Administrative Contentious Chamber of the Supreme Court of Justice. This chamber judged that the judicial authorisation for the dawn raid did not comply with the relevant rules, including those of the criminal code, and that as a result the infringement decision was invalid.

The Superintendency presented an "amparo" before the Constitutional Chamber, alleging that Administrative Contentious Chamber did not have competence to review the legality of a judicial search warrant issued by a judicial court during an administrative sanctioning procedure. Such a warrant is a purely judicial act, while the Administrative Contentious Chamber of the Supreme Court of Justice has jurisdiction only over administrative acts. The Superintendency further argued that the Administrative

⁶⁰ See <https://www.sc.gob.sv/index.php/sc-cierra-caso-mas-emblematico-de-practica-anticompetitiva-entre-harineras/>.

⁶¹ The two firms controlled 98% of the market for this product in El Salvador.

⁶² Press release, 5 September 2008, available on the Superintendency's web site.

Contentious Chamber of the Supreme Court of Justice failed to provide sufficient reasons for its conclusions.

The Constitutional Chamber upheld the Superintendency's appeal, and ordered the Administrative Contentious Chamber to revise its decision in the light of this. In this subsequent judgment, the Administrative Contentious Chamber of the Supreme Court concluded that the Superintendency's actions were legal and upheld the original infringement decision.

The judicial review process took eight years in total. The case law flowing from this case is very relevant for the Superintendency, since it provides support, in the form of Supreme Court jurisprudence, for the use of dawn raids.

Once the judicial process was over, the General Attorney Office collected the fines imposed by the Superintendency.

Figure 3. Judicial review – Wheat flour cartel



Source: Superintendency

3.1.2. Bid rigging in the provision of pension insurance services

On April 2013, the superintendent of Competition ordered the *ex officio* investigation of a number of insurance companies for alleged breaches of competition law. Two years later, in April 2015, the Superintendency's board of directors adopted a decision that Asesuisa Vida, S.A. Seguros de Personas, Sisa Vida, S. A. Seguros de Personas, and AIG Vida, S.A. Seguros de Personas infringed Article 25 c) and d) of the Competition Law by having agreed to manipulate and share public bids I-2008, I-2009, I-2010 and I-2011 tendered by two 'Administradoras de Fondos de Pensión' ('AFP' - private pension administrators), AFP Crecer and AFP Confía. The bids were for the contract of the Seguro de Invalidez y Sobrevivencia SIS (pension insurance for disability and survivors) of the affiliates of the private pension system.

In particular, the infringing companies were found to have engaged in price fixing of bids for the provision of pension insurance for disability and survivors from April 2008 to April 2012. The anticompetitive agreement consisted of the manipulation and suppression of offers to tenders for the provision of pension insurance for disability and survivors, so that the tenders were awarded to the insurer belonging to the same economic group as the relevant private pension administrator.

The companies were subject to a fine reflecting the particularly serious nature of the infringement. The beneficiaries of pension insurance for disability and survivors had contracted their policies at higher rates because of the manipulation of the tenders. In turn, this damaged the economic efficiency of the market and the optimal use of resources in the provision of a public and compulsory service that while delegated by the state to private pension administrators, is a constitutionally protected interest.⁶³

In the light of these, the infringement companies were subject to a fine corresponding to 1.2% of their total sales in tax year 2014. This amounted to fines of: (a) USD 1.36 million for Asesuisa Vida, S.A. Seguros de Personas; (b) USD 1.47 million for Sisa Vida, S. A. Seguros de Personas; (c) USD 590 000 for AIG Vida, S.A. Seguros de Personas.

In addition to the fines, the aforementioned insurers were instructed to refrain to act in an anticompetitive matter in subsequent public tenders in which private pension administrators bid for contracts regarding pension insurance for disability and survivors.

3.1.3. *The rice cartel*

In April of 2017, the Superintendency's board of directors sanctioned twelve rice businesses for entering into an anti-competitive agreement for setting the prices of drying and threshing of rice.⁶⁴ Drying and threshing are necessary for the transformation of rice pellets to gold rice.

Each company was sanctioned USD 12 330.00, an amount equivalent to 50 monthly minimum urban wages in the industry at the beginning of the sanctioning procedure (September 2015). The amount of the fine reflects the assessment criteria set out in the relevant competition regulations. The decision concluded, among other things, that the size of the affected market was small and contained, the duration of the practice was limited to the period of harvest 2014/15, and that the damage to the market and adverse impacts on third parties was only potential since the agreement was never fully implemented. All these considerations were taken into account when calculating the fine.

In addition, the decision ordered the sanctioned entities to abstain from: (a) committing anti-competitive practices, (b) using a joint marketing agreement as a tool to implement an anti-competitive arrangement, and (c) employing the business association as a means to co-ordinate or act anticompetitively, in these case Asociación Salvadoreña de Beneficiadores de Arroz (ASALBAR).

Further, the Superintendency required ASALBAR to refrain from continuing to be a platform for anti-competitive agreements among its associates. The prices for transforming rice pellets into gold rice through methods such as drying and threshing must be determined freely and independently by the market. Likewise, ASALBAR was required to refrain from issuing any trade advertising containing recommendations on pricing or other commercial conditions, as this would limit the individual decisions of its members and prevent healthy competition in the market.

⁶³ Article 50 of the Constitution.

⁶⁴ The rice businesses were: Arrocera Omoa S.A. de C.V., Arrocera San Francisco S.A. de C.V., Agroindustria Centroamericana S.A. de C.V., Arrocera Jerusalén S.A. de C.V., Agroindustrias Gumarsal S.A. de C.V., Arrocera San Pablo S.A. de C.V., Beneficio de Arroz Los Ángeles S.A. de C.V., Industrias Arroceras Guevara Landaverde y Asociados S.A. de C.V. (Inagla), La Nueva Espiga S.A. de C.V., Arrocera San Mauricio S.A. de C.V., Beneficio de Arroz El Pueblo, y Beneficio de Arroz Rodriguez Inversiones.

Eight of the twelve economic agents sanctioned appealed the Superintendency decision before the Administrative Contentious Chamber.

3.2. Anticompetitive practices among non-competitors

As noted above, Article 26 of the Competition Law prohibits “anticompetitive practices among non-competitors.” These practices can be performed unilaterally by a single agent, or amount to an arrangement among non-competitors. Two specific types of practices between non-competitors are referenced in Article 26: tie-ins and exclusive selling agreements. However, a variety of other conducts can fall within the scope of this provision.

According to Article 27, these conducts are subject to an effects-based assessment, so that these business practices are only prohibited if they “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.”

As with horizontal agreements, the Regulation lists – in its Article 13 – some indicators that should be taken into account when determining when a vertical practice is anticompetitive. These include whether the practices result in exclusion from the market for a longer time than would result from a “legitimate economic explanation”, whether there are laws or regulations that facilitate anticompetitive practices, and whether parties benefitting from exclusivity conditions benefit from favourable commercialisation conditions that are not justified by efficiency gains.

On the other hand, Article 14 of the Regulation allows parties to invoke an efficiency defence as regards practices among non-competitors. This provision requires the Superintendency to consider whether the conduct 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.” The Regulation also contains a non-exclusive list of cognisable efficiencies, which generally refer to production efficiencies of various types.

Article 27 imposes an additional, but crucial condition for a finding of illegality of a practice among non-competitors: the relevant entity must “acting individually or jointly, hold a dominant position in the relevant market.” This is an unusual requirement from a comparative perspective. Even if economic theory and competition practice indicate that some market power is usually required for a vertical restraint to have anticompetitive effects, market power need not amount to dominance.

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 – e.g. when a number of parties engaging in similar vertical arrangements could be said, together, to have market power. However, this is not a common meaning of joint dominance.

Joint dominance is a concept that is used in some jurisdictions to identify situations where companies, without agreeing with each other, act in a manner akin to a single enterprise in a manner that, if adopted by a dominant company, would be prohibited. It is unclear whether Article 27 refers to joint dominance, which only occurs when a number of stringent conditions are met. In effect, it is even unclear whether, by mentioning that dominance can occur “acting individually or jointly” requires an agreement between the jointly dominant companies.

The Superintendency has not yet brought a vertical case as such, though a couple of abuse of dominance cases described below – in particular, the motor fuels and sugar cases – could have been so characterised. In the sugar case, Article 26 (b) of the Competition Law was one of the initial basis for assessing the investigated practices. Nevertheless, as stated in the final Resolution, the Superintendency

did not gather sufficient element to prove the existence of an anticompetitive practice among non-competitors. Instead, it sanctioned the conduct as an abuse of dominant position.

3.3. Abuse of dominance

Article 30 of the Competition Law, which should be read in conjunction with Article 29, prohibits abuses of a dominant position.

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

As with the Competition Law’s other substantive provisions, Article 30 enumerates certain types of conduct that could violate competition law, which are elaborated on Article 17 of the Regulation. The law refers to practices that inhibit the entry or expansion of competitors, to predatory pricing and to price discrimination by territory. The Regulation further lists some indicators of abusive conduct, including increasing costs of entry or exit, creating difficulty of access to production inputs, cross-subsidisation and price discrimination not apparently justified by cost differences.

Joint dominance is a concept that is only referred to by Article 27, which regulates vertical restraints; neither Articles 29 or 30, or their corresponding regulations, refer to joint dominance. Joint dominance requires more than mere parallel conduct to occur; it requires the (jointly-) dominant firms to be joined by some specific link that makes them act as a single entity in the market. While the Superintendency has never expressly applied the concept of joint dominance as such, the concept could be said to be implicit in the Superintendency’s analysis in the motor fuel case, described in section 3.3.1 below.

The majority of investigations and cases brought by the Superintendency during its first years of operation were dominance cases. Before 2013, there were some cases where the Superintendency’s investigations led to a finding of abuse, some of which will be discussed below.

However, and as shown in the table below, in the last five years only one abuse case has been sanctioned, even as there is currently an ongoing investigation in the telecommunications sector.

Table 11. Sanctions for abuse of dominance (2013-2018)

Case reference	Year	Infringement	Sector	Fine	Sanctioned agents
Total	1				
SC-047-D/PS/R/20132	2015	Art. 30 a)	Telecommunications	USD 2 251 500	Telefonica Moviles El Salvador, S.A. de C.V.; CTE Telecom Personal, S.A. de C.V.; Compañía De Telecomunicaciones de El Salvador, S.A. de C.V.; Telemovil El Salvador, S.A. de C.V.; Digicel, S.A. de C.V.

Source: Superintendency.

3.3.1. The motor fuels case

This case was already extensively discussed in El Salvador’s Peer Review of 2008. 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), which accounted for more than 90% of wholesale

distribution of motor fuels in the country and a large share of the retail market via their branded gasoline stations.

The central practice in this case was the creation by each of these companies of geographic pricing zones. Prices varied between zones, but within each zone, the distribution prices of motor fuel were almost identical.

In a decision issue in October 2007, the Superintendency's board of directors identified 15 relevant geographic markets, comprising seven largest metropolitan areas and eight highway corridors linking the major cities. These geographic markets were 'linked'. While many buyers in an area or neighbourhood found it convenient to purchase their fuel only from local stations, other buyers, because of commuting or personal driving patterns, might also find convenient sources of supply in an adjacent area. Further, 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.

Given that there was a single oil refinery in El Salvador, which was jointly owned by Esso and Shell, the Superintendency concluded that these companies could be treated as a single entity for purposes of the dominance analysis – and that, given their high retail market shares and barriers to entry, among other things, these companies were dominant. Texaco, on the other hand, imported and distributed refined products separately from Esso and Shell. As such, Texaco could not be considered dominant.

While the Superintendency was unable to find an agreement between these companies regarding the setting of prices charged to or by station operators, it concluded that Esso and Shell's zoning practices amounted to an abuse of their dominant position. Since the zones that the companies established were much smaller than the relevant geographic markets identified by the board, the effect of setting those zones was that retail gasoline stations could not respond to price changes within individual geographic markets because of Esso's and Shell's control over distribution prices. The board also concluded that the zoning system had the effect of raising barriers to entry in the retail market.

The board of directors fined each of the two firms the maximum fine then available – i.e. 5 000 monthly minimum monthly salaries in the industrial sector in the previous tax year, which translated into USD 852 000 at the minimum wage and exchange rate applicable at the time. 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. In an interim decision rendered a few weeks after the appeal, the Court suspended the remedy. However, the Supreme Court did not suspend the fines and the Attorney General has collected the fines. Despite the Superintendency having requested that the Supreme Court adopt a decision, this case is still pending.

3.3.2. *The sugar case*

On 29 April 2010, the superintendent launched an *ex officio* investigation against the company Distribuidora de Azúcar y Derivados, Sociedad Anónima de Capital Variable (Dizucar).

Sugar production quotas are set by law. Dizucar is a sugar distributor created by the sugar producers to facilitate control over compliance with legally set quotas. Only Dizucar receives the sugar from the plants for distribution. However, sugar distribution is subject to competition law and is not covered by the law that regulates sugar production quotas.

On 24 April 2012, the Superintendency's board of directors found that Dizucar had abused its dominant position by limiting the sale of white sugar in bulk and establishing different prices to the detriment of those economic agents engaged in the wholesale distribution of sugar and of potential sugar packers when compared to companies who use sugar for their production.

These practices increased barriers to the entry faced by competitors, and directly impacted competitors in the relevant market by putting them at a disadvantage by making them pay higher average

prices than those charged to industrialists who use sugar for their production. In its decision, the board of directors estimated that the overcharge paid by consumers because of this abuse amounted around USD 12 million in 2010.

Therefore, the board of directors imposed a fine on the company amounting to 50 000 minimum wages, equivalent to USD 1.1 million at the minimum wage and exchange rate applicable at the time. On 3 January 2013, this amount was recalculated to USD 1.02 million to comply with the valid minimum wage at the time.

In addition, the Superintendency imposed a remedies requiring Dizucar: (a) not to discriminate between clients as regards its sugar prices; (b) to provide sugar to whoever requires it, independently of the order's destination, presentation or volume, (c) to provide the Superintendency for three years with i. sales volume to each of its clients, ii. details of its sugar sale price policy; (d) to make sugar prices publicly available in a clear manner in Dizucar's office, distributions centres and website; and (e) to publish in a number of nationally distributed newspapers a whole page announcement advertising its pricing policy and that they are obliged to sell sugar without any restriction to any natural or legal person who requires it.

This case was appealed in the Administrative Contentious Chamber of the Supreme Court, who ordered precautionary measures (i.e. suspended) the payment of the fines but not for the remedial obligations imposed by the Superintendency's board of directors. The case is still pending before the Supreme Court.

Since Dizucar has not informed the Superintendency that they were complying with its decision, the Superintendency has requested the Attorney General to initiate a forced execution procedure as regards its remedial obligations, which have not been suspended by the Supreme Court. As such, it is possible that the parties are continuing to engage in practices that infringe on the Superintendency's decision many years after this decision was adopted.

3.3.3. The telecommunications case

In 24 October 2013, the Superintendency received a complaint from Platinum Enterprises against five large telecom operators⁶⁵ for alleged anti-competitive practices related to the provision of intermediate services for international call termination on the networks of certain operators. On 9 January 2014, the Superintendency initiated a formal investigation of these operators.

In October 2015, the board of directors found that these companies had abused their dominant positions by creating obstacles to the entry of competitors or the expansion of existing ones. The abusive practices consisted of delaying the initiation of negotiations for the subscription of the respective interconnection contract, or, after negotiations having started, delaying entering into the interconnection agreement in order to hinder competitor the access to the essential facility. The board considered that the five telecommunication operators were subject to a special responsibility as dominant companies. As a result, the operators are required to act with great care and diligence when facing requests from their competitors concerning the provision of intermediate services for interconnection to their networks.

In light of this, the Superintendency imposed the following fines: USD 592 000 to each of Digicel and Telefónica Móviles El Salvador; USD 355,000 to CTE; USD 237 000 to CTE Telecom Personal; and USD 474 000 to Telemóvil El Salvador.

In addition to pecuniary penalties, the board of directors imposed a number of remedies, including a cease and desist order as well as several remedial obligations. First, the telecommunication operators shall refrain from engaging in delaying tactics when negotiating requests for interconnection access by any

⁶⁵ Namely, Telemóvil El Salvador, CTE Telecom Personal, Compañía de Telecomunicaciones de El Salvador (CTE), Telefónica Móviles El Salvador and Digicel.

applicant, and will negotiate in good faith and with due care. Secondly, the operators shall immediately respond to all interconnection requests addressed to them, and indicate any outstanding elements to entering into an interconnection agreement in line with the regulatory framework and the operators' internal policies. Thirdly, provide any applicant who is not registered with the General Superintendency of Electricity and Telecommunications (SIGET) with all information relevant to their Basic Interconnection Offer (OBI), Basic Access Offer (OBA), Fundamental Technical Plans (PTF), as well as the last interconnection contract signed by the operator, in order to ensure that applicants can adequately complete their applications. Finally, the operators must publish on their website the list of documents that must be attached to interconnection requests, and the internal procedure that each operator carries out for processing such requests.

The Superintendency's board also made recommendations to certain governmental bodies in order to encourage and ensure interoperability among different telecommunication operators.

3.4. Merger control

Salvadoran law provides for the “*ex ante*” control of mergers meeting certain thresholds, pursuant Articles 31-36 of the Competition Law. The Regulation, as previously discussed, contains several articles expanding on various substantive and procedural aspects of the merger review, such as the concept of merger⁶⁶, the notification thresholds and the authorisation procedure.⁶⁷

The relevant legal standard is that a merger may only be cleared if it does not “significantly limit competition”.⁶⁸ While the Superintendency has not yet published guidelines describing the methodology it relies on to analyse mergers, it employs a methodology like that used in many countries today: it begins by defining the market before assessing the probable competitive effects of the proposed merger. Both the Competition 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.

3.4.1. Notification thresholds

El Salvador requires companies to notify mergers that exceed certain established thresholds. These mergers are subject to the Superintendency's approval prior to closing. The relevant provisions regarding merger control in El Salvador – including the definition of notifiable merger and the notification thresholds – were reviewed in detail above at section 2.2.2.

In particular, we saw there that mergers whose combined total assets exceed 50 000 minimum urban annual wages (around USD 182.5 million) or whose total income exceeds 60 000 urban annual wages (around 219 million) must be notified to the Superintendency for merger control. These thresholds are relatively high for a small economy like El Salvador. The assets and income threshold amounts correspond to 0.74% and 0.88% of El Salvador's gross domestic product of 2017 respectively.⁶⁹ In comparison, in countries such as Costa Rica, the established threshold is 30 000 minimum wages (USD 15.5 million), which represents 0.03% of the gross domestic product⁷⁰.

⁶⁶ The term in Spanish used in the Competition Law is “concentración”; “merger” is the approved translation to English.

⁶⁷ Articles 18-32.

⁶⁸ Article 34.

⁶⁹ See <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

⁷⁰ See <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.
https://www.coprocom.go.cr/concentraciones/notificacion_obligatoria_de_concentraciones.html.

The Competition Law and the Regulation do not require that the relevant assets or revenues to be located in or obtained in El Salvador. Nonetheless, jurisprudence has developed a jurisdictional nexus requirement, according to which the presence of the parties and the effects of the transaction in national territory must be considered when determining whether a merger is notifiable.⁷¹

Thus, the Superintendence only examines mergers if both of the previously independent parties have direct or indirect presence in the country, and it will only consider assets and revenues located or obtained in the country in its assessment of whether any of the notifications thresholds are met.

3.4.2. Merger control procedure

A merger control notification can be submitted by any of the economic agents that participate in the transaction. The notification must be submitted in writing to the Superintendence's board of directors. The notification must include the names of the parties, identify their legal representative, contain the articles of incorporation, outline the structure of the capital stock and the shareholding of each direct or indirect shareholder, and describe the structure of the merging parties' corporate groups. The notification must also explain the nature of the transaction, and include the financial statements of the merging parties for the last tax year and all additional data necessary for the Superintendence to understand the transaction.

Currently, the Superintendence does not charge a fee for merger notification, nor does it have the power to do so.

The law states that the Superintendence has 90 business days after notification to issue a decision. If no decision is issued within that period, the merger is considered as approved.

In other countries of the region, the term is shorter, but this may be misleading given the broader possibilities that these authorities have to stop the clock compared to El Salvador.⁷² At the same time, El Salvador does not provide for the possibility of shorter periods of review for simple merger control procedures, which may be extended to allow for an in-depth investigation if there are indications that the transaction potentially raises competition issues.

The Competition Law and its Regulation do not contemplate merger investigations by phases. Instead, once a merger notification is filed, there is a single 90-business-day phase for any merger, after which the merger will be considered as approved. However, the Superintendence seeks to fit the depth of its analysis to the characteristics of the case, with the objective of issuing a resolution more quickly, particularly when it is possible to determine that the merger does not present a threat for a significant limitation to competition.

Once a merger notification is received, the Superintendence will verify whether the formal requirements are met, i.e., if the operation constitutes a merger according to the definition of the Law and whether the transaction meets with the established thresholds. If the Superintendence requires additional information about the transaction, or considers that the notification is deficient in some respect, it must make its request to the parties to perfect their submissions within 15 days from the day the merger was notified.

The 90 business day period does not begin until the agency has received all the necessary information set out in the relevant legal instruments. Therefore, if the Superintendence makes a request

⁷¹ An example can be found in resolution SC-027-S / C / R-2009, which is available online at: https://www.sc.gob.sv/site/uploads/SC-027-S-C-R-2009_101109_0930.pdf.

⁷² In Costa Rica, the term is up to 30 days, while in Argentina it is up to 45 days. However, in Argentina the authority may extend its 45-business day term by 120 additional business days, while the authority in Costa Rica may be able to extend the period of review by up to 60 days.

for corrections to the initial notification or for additional information, as described in the paragraph above, the 90-business day deadline will begin only once all the requested information has been received. Further, if additional information is needed to bring the notification, in line with the requirements set out in the relevant legal instruments, the Superintendency is also allowed to issue a second request to the parties.⁷³ Only after all the information needed to complete notification is submitted will the Superintendency formally admit the request for authorisation and will the 90-day period begin to run.

Once the analysis has started, the Superintendency typically issues requests of information to economic agents participating in the relevant markets, including the parties, in order to assess the effects of the merger. Since 2019, such requests suspend the 90-business day deadline until all the information is provided or until the deadlines set by law are met, at which point the clock starts running from the point at which it was suspended.

From 2013 to 2017, 55 merger notifications were filed. Only nine notifications (i.e. 16.36% of the number of notifications) were ultimately admitted. They were all resolved within the legal 90 days deadline.

Based on 2013-18 data (i.e. before the entry into force of the Administrative Procedures law), on average 162 days elapsed between the initial date of notification of a transaction and the issuance of a final decision. This includes the period during which the parties corrected formal defects and provided additional information necessary to complete the merger notification.⁷⁴ The average number of calendar days between receipt of the completed application and the issuance of a final resolution was 54.

The current legislation does not allow the Superintendency to require merging parties to propose remedies. Instead, the parties may submit commitments, and the Superintendency is allowed to receive them.

On the other hand, the Superintendency is not allowed to inform the merging parties about the existence of competition concerns, nor communicate with them on whether the commitments alleviate any competition concerns. Instead, it is solely for the board of directors to reach a decision on whether to authorise a merger, block it, or approve it subject to conditions. Therefore, even though the parties are free to submit commitments, the Superintendency is unable to communicate or negotiate with them on whether the proposed commitments are enough to alleviate competition concerns.

Since there is no communication or negotiation process, whenever the board of directors imposes conditions, it usually does so without any prior proposed commitments from the parties. As a result, some mergers have been approved subject to conditions imposed by the board of directors. To date, no infringement of such conditions has been found when the parties have accepted them and a merger has been approved on that basis. As a result, the Superintendency has never applied a sanction for failure to comply with conditions imposed on mergers.

If the parties are unwilling to comply with the conditions imposed by the Superintendency, they have three options: abandon the transaction; appeal the decision; or attempt to file a new notification for the same transaction with or without a new set of alternative commitments. On occasion, the board has conditioned its approval of a merger on the merging parties presenting a remedy plan, as was the case in the *AB InBev/SABMiller* transaction described below.

In the last five years, only one remedy proposal was received on the initiative of the merging parties. As an international transaction, this merger triggered multiple merger review procedures in different jurisdictions. The proposed remedies would operate worldwide and were not specific to the Salvadoran market. The board of directors determined that the worldwide remedies were not sufficient to address the

⁷³ Article 26 of Regulation of the Competition Law.

⁷⁴ The dataset used to calculate the average number of days for issuance of a final resolution includes merger requests that were ultimately refused for not complying with the legal requirements for notification.

effects the operation would have on the El Salvadorian market, and decided to impose conditions on the merger.

The Superintendency cannot refuse to authorise a merger if the parties can demonstrate significant efficiencies gains resulting in in direct cost saving and benefits for consumers, and if these efficiencies could not be possibly achieved by any other means and will not cause a reduction in market supply.

3.4.3. *Examples of merger control cases*

Examples of mergers reviewed by the Superintendency are provided below.

Acquisition of Digicel by América Móvil (telecommunications)

It was noted above that, in practice, the board of directors could impose conditions on mergers. When faced with such conditions, the parties can either accept them, abandon the transaction, or file a new merger notification. The acquisition of Digicel by America Móvil exemplifies how this may occur.

On 6 June 2011, América Móvil and AMOV IV notified the acquisition by América Móvil of 100% of the shares of Digicel, a provider of mobile and fixed telephony services.

The Superintendency found that the transaction could facilitate collusion and enable the stability of anti-competitive agreements by reducing the number of competitors in the market and eliminating Digicel as the driving agent of the competition. This decision was based on findings related to the existence of barriers to entry that would limit potential competition, high market concentration with few competitors in the relevant markets, the high market shares and share of available radio spectrum enjoyed by the merged entity, and the disappearance of Digicel as a driver of the competition.

In order to prevent competitive harm, the board of directors imposed conditions on the transaction on 30 August 2011. These conditions included a requirement for the merged entity to divest its right to exploit part of the radioelectric spectrum.

The parties were unwilling to accept those conditions. After failing to reverse them through an appeal, they seemingly decided to abandon the transaction. Nevertheless, they eventually decided to file a new merger notification for the same transaction on 27 March 2012, triggering a new merger review procedure.

The superintendence conducted a new analysis and assessed the validity of additional efficiency claims brought forward by the parties. Ultimately, the board of directors decided to prohibit the merger on 25 September 2012. The board based its decision on findings similar to those of the previous filing, but also took into account that the parties had acquired the right to exploit a higher percentage of the radioelectric spectrum than what was necessary for them to achieve the quality increase they had claimed as an efficiency gain. Furthermore, the parties failed to prove that the merger was necessary to achieve their claimed efficiency gains on service quality.

AB InBev and SABMiller (beer)

AB InBev acquired SABMiller (Industria la Constancia in El Salvador) for USD 104 billion. Amid various merger control notifications around the world, AB InBev filed a merger notification with the Superintendency in February 2016. The notification was perfected in May 2016, when AB InBev presented the additional information requested by the board of directors.

The Superintendency then pursued an in-depth merger analysis, compiling information and conducting interviews with various economic agents active in the Salvadoran beer market.

In August 2016, the board of directors issued a final decision in August 2016 whereby it required, among other things, AB InBev to submit a divestiture plan with a view to divest a set of assets. Since the

divestiture plan had to be approved by the board of directors, such a scheme essentially allowed the Superintendency to receive, assess and approve remedies proposals after a final decision had been issued. In November 2016, AB InBev proposed the divestiture of the Regia and Suprema brands, and the board of directors approved that divestiture plan the following month.

Between September 2017 and April 2018, Duff & Phelps was selected as the monitoring agent in charge of verifying that AB InBev complied with all of the conditions imposed by the board of directors, including those relating to the divestiture process. In June 2018, the board of directors approved the merging parties' proposal for the sale of the divested business (the Regia and Suprema brands) to a third party (Cerveceria Salvadoreña).

Telemóvil and Grupo Caribeña

On 2 December 2016, Telemóvil – a provider of subscription television services, fixed and mobile broadband internet, and fixed and mobile telephony services nationwide – notified the acquisition of a portfolio of television and internet subscription clients from Grupo Caribeña. Grupo Caribeña was a provider of subscription television and internet services in 15 municipalities in the east of El Salvador (out of 262 municipalities in the country).

The technical analysis by the Superintendency concluded that the transaction raised competition risks. Notably, regarding unilateral effects in the markets for subscription television, because of the exit of a major competitor from the relevant product and geographic markets and the reinforcement of Telemóvil's dominant position in 15 municipalities on the east part of El Salvador.

In addition, the Superintendency found that there are high barriers to entry in these markets and that, therefore, the entry of new competitors that could exert effective competitive pressures was unlikely. Telemóvil therefore would acquire the capacity to raise prices or damage the availability, variety and quality of subscription television services offered in the relevant geographical market.

However, the board of directors also considered that the transaction could allow Telemóvil to reinforce its capacity to compete in other telecommunications services in the area – where the market leader was another company – by incentivising its television services subscribers to acquire also other services, such as telephony or internet, from Telemóvil.

Furthermore, there were elements that could be expected to temper Telemóvil's dominant position in the subscription television market. These included the existence of another strong competitor with nationwide presence that could offer complementary telecom services; competitive pressure exerted by open broadcast television on subscription television services; and the possibility to promote investment in a new generation network in municipalities with less population density.

Consequently, the board of directors concluded that, although the operation reinforces Telemóvil's dominant position in the relevant subscription television markets, there were elements linked to the general competitive dynamics of telecommunications that would compensate, in the medium and long term, the costs of having a company with a temporary dominant position in that product market.

As such, the Superintendency approved the transaction subject to a number of conditions. These conditions related to the subscription of television market services in the geographical relevant market. The main conditions were:

- For Telemóvil to publicise the transaction by communicating it directly to the current clients of the Grupo Caribeña and the population in the relevant geographic markets;
- Not to unduly increase prices, or unjustifiably decrease the supply and quality of service in the relevant geographical market, and to adopt a uniform commercial policy of

subscription television services that is in line with the marketing plans used in the rest of the national territory;

- Not to market the subscription television service in a tied manner, by imposing the purchase of services or products unnecessary to improve the quality or good use of the subscription television service;
- Not to engage in practices that would hinder the ability of its users/customers to change service providers;
- To deploy a cable network based on hybrid wireline technology (HFC), such as the one that Telemóvil has in other areas of the country, in order to bring benefits to this region in terms of greater channel offerings and better signal reception quality, faster internet and expansion of the telecom offers.

While these conditions were all based on competition concerns, they seem to contain some regulatory conditions. The connection between the regulatory conditions and the elimination of any competition concerns created by the transaction [such as the requirement to deploy a cable network based on hybrid wireline technology (HFC)] is not clear. Furthermore, it seems that some of the conditions could potentially prevent competition in service's bundles and the materialisation of associated efficiencies.

3.4.4. Failure to comply with merger control rules

If a notifiable merger is not duly notified, or it is implemented without being previously approved, the Superintendency can impose a fine of up to 5 000 minimum monthly wages in the industrial sector (around USD 1 520 850).⁷⁵ If it is a particularly serious infringement, up to the greater of: (i) up to 6% of a firm's total annual sales in El Salvador; (ii) up to 6% of a firm's total assets in El Salvador; (iii) between two times and ten times the estimated gain resulting from the unlawful practice.

Furthermore, in a merger case when a party does not comply with a condition established in a final resolution of the board, that economic agent can be fined up to 5 000 minimum monthly urban wages (around USD 1 520 850)⁷⁶ for each day that it is in non-compliance.

Any economic agent who fails to supply information requested by the Superintendency, or intentionally or negligently provides false or incomplete information, can be fined up to 10 minimum monthly urban wages (around USD 3 041.7)⁷⁷ for each day that it is non-compliance.

Since 2013, the Superintendency sanctioned two economic agents for failure to notify an implemented merger – one transaction took place in the petroleum-based liquid fuel industry, and the other in the sugar market.

Moreover, the competition agency in recent years sanctioned one economic agent that was not part of the transaction, for failure to provide information in the context of its analysis of the possible effects of a merger in the brewing industry. In this same period, the Superintendency sanctioned three economic agents for failing to provide information in a procedure concerning whether there had been a prior failure to notify a notifiable merger.⁷⁸

⁷⁵ Currently, the monthly minimum wage for the industrial sector is USD 304.17.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ The rules on failure to provide information can also be used in different contexts, including market studies.

4. Unfair competition, consumer protection and sectoral regulation

4.1. Unfair competition

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.

Unfair competition laws are enforced in civil courts. The Superintendency has no enforcement responsibility for unfair competition.

4.2. Consumer protection

El Salvador adopted a consumer protection law well before the Competition Law. The current consumer protection law, enacted in 2005 and last reformed in 2019, is a lengthy and comprehensive document. It addresses a wide range of practices, including the sale of unhealthy or dangerous products, toxic substances, various contractual provisions, the sale of defective goods, providing false and misleading information, deceptive advertisements and other advertising practices. Very serious infractions will be sanctioned with a fine of up to 500 minimum monthly salaries in the industry.

The law is enforced by an independent consumer protection agency, La Defensoría del Consumidor (Defensoría). The Superintendency has no enforcement responsibility for consumer protection.

The 2005 law also created a National System for Consumer Protection, comprising the Defensoría and representatives of the executive branch and other government institutions, which includes the Competition Superintendency. The National System has responsibility for strategic planning and other coordinating activities in the field.

The 2005 consumer protection law also created a Consultative Council to advise the Defensoría's President (Consejo Consultivo de la Defensoría del Consumidor). The superintendent of Competition is a member of this council, together with representatives of Salvadoran consumers, NGOs and business chambers.

Despite the absence of consumer protection competences on the part of the competition Superintendency, the consumer protection agency and the Superintendency signed a co-operation and co-ordination agreement on 15 July 2009. The agreement established a technical co-operation mechanism to assist in the collection, processing, analysis and exchange of information related to the different market sectors; and to facilitate the timely fulfilment of activities of common interest within the scope of their respective competences.

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 numerous and can be resolved quickly.

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 proceedings to require the respondents to provide the information; this was under another legal instrument, as the Competition Law does not specifically provide for such a procedure. The five companies ultimately provided information, 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 appealed.

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 Centre for the Defence of the Consumer.

4.3. Regulated sectors

As noted above, the scope of El Salvador's competition law extends to all economic activities pursued by an economic agent and to all economic activities that the Constitution and laws does not reserve to the State and municipalities.

In a number of economic sectors, economic agents are not only subject to competition law but also to sectoral regulation and regulators.

Regarding defence of competition (that is, enforcement against anticompetitive practices and merger control), the Superintendency has exclusive legal attributions for enforcement in all economic sectors, regardless of whether they are regulated or not. Additionally, the Superintendency's opinions are binding as regards mergers.

However, there are sectoral legal provisions that require regulators to interact with the Superintendency as regards the promotion of competition. This includes, for instance, legal mandates for the Superintendency to provide the regulator with technical opinions or to pursue studies – sometimes binding – to guide the regulator's decision-making.⁷⁹

4.3.1. Electricity

The electricity sector, like other network sectors, was privatised in the 1990s. Electricity transmission is a state monopoly, pursued by a state owned company. Competition exists both upstream – as regards electricity generation – and downstream – as regards electricity distribution and commercialisation – from this state monopoly.

The generation of electricity is carried out in generating plants operated by various economic agents. The main operators in this market are: (i) LaGeo, a state-owned company that operates geothermal power plants; (ii) the Comisión Ejecutiva Hidroeléctrica del Río Lempa (CEL), a state-owned company that operates hydroelectric power plants; (iii) Duke Energy International El Salvador (Duke Energy), a thermal plant private operator; and (iv) Termopuerto, another thermal plant operator. In 2015, CEL concentrates the largest amount of installed capacity at 31.5% of the market, followed by Duke Energy with 23% of installed capacity.

Electricity distributors own and operate facilities whose purpose is the delivery of electrical power in low and middle voltage networks. Distributors currently active in El Salvador include Distribuidora Eléctrica Del Sur, Compañía de Alumbrado Eléctrico de El Salvador (CAESS), Compañía Eléctrica de Santa Ana (AES CLESA), Empresa Eléctrica de Oriente (EEO), Distribuidora Eléctrica de Usulután, B & D Servicios Técnicos (B & D), Abruzzo and Empresa Distribuidora Eléctrica Salvadoreña (EDESAL).

The sector regulator is the General Superintendency for Electricity and Telecommunications (SIGET). As its name indicates, SIGET also has responsibility for the telecommunications sector. SIGET shall “ensure the defence of competition” under the terms set forth in the Electricity Law, and ensure the

⁷⁹ See, for example, the Electricity Law (Ley General de Electricidad), the law governing civil aviation (Ley Orgánica de Aviación Civil) or the law on maritime ports (Ley Marítimo Portuaria), among others.

existence of conditions that guarantee healthy competition on the prices offered in the Market Regulated System (MRS).⁸⁰

Among the provisions regulating how SIGET will defend competition in this sector is one setting out that SIGET and the Superintendency must define together the conditions for competition in the Regulatory Market System.⁸¹ The lack of competitive conditions will justify the adoption of a regulation that encourages bidding behaviours resembling those in a competitive market.

In complement to existing legal provisions, SIGET and the Superintendency adopted a joint document on promoting competition in the electricity generation market in 2007.

The Superintendency pursued a study of the electricity sector in 2007, which found a lack of competition between generators in the wholesale electricity market that was not due to an infringement of competition law. Independently of the Superintendency, SIGET had conducted a similar study and came to similar conclusions. As a result, the two agencies adopted a joint position in 2007 in which they agreed on the need to promote the approval of a regulation for the dispatch of energy based on marginal production costs. This eventually led to the adoption of the Regulation on the Operation of the Transmission System and of the Wholesale Market Based on Production Costs, in August of 2011.

The Superintendency has also issued 49 non-binding opinions to SIGET concerning draft regulations of the Electricity sector and auctions for long-term contracts for the sale of electricity.

4.3.2. Telecommunications

As noted above, SIGET is both the electricity and telecommunications' regulator. In the context of its regulatory competences, SIGET sets maximum values for the basic rates applicable to some fixed and mobile telephone services.

The Telecommunications Law was amended in 2016 in order to grant SIGET with discretionary powers to request opinions from the Superintendency regarding transactions in the secondary market for the exploitation of radioelectric spectrum rights, and regarding the participation of certain agents in process for the award of spectrum. In both instances, the Superintendency's opinion will be binding on SIGET if requested.

In the context of these provisions, in 2018 SIGET requested an opinion about the participation of certain agents in process to award 140 MHz for mobile telephone spectrum. The Superintendency determined that there were no justifications for excluding any of the incumbents, since no company was found to be dominant nor was there a risk of the spectrum award creating a dominant position.

Furthermore, the Superintendency also engages in advocacy as regards competition in the telecommunications' market under the scope of its competences. In a market study into television broadcasting published in 2015, the Superintendency found that a dominant market player had a market share of 66% in terms of ratings and of 77% in terms of advertising revenues. Under both measures, the relevant market was found to be highly concentrated. During public discussion sessions with the Legislative Assembly in the context of reforms to the Telecommunications Law, the Superintendency strongly advocated for the implementation of the policy recommendations made in this market study. Ultimately, the 2016 reform incorporated some but not all of the Superintendency's recommendations.

⁸⁰ Articles 3(a) and (c) of the Electricity Law.

⁸¹ Article 112 (e) of the Electricity Law.

4.3.3. Fuel

Fuel prices in El Salvador were regulated until 1994, when an import parity system was introduced. Prices for liquid petroleum gas, the most important fuel for households, are still regulated through a price cap and benefit from partial subsidies for low-income households. Retail distribution prices of gasoline and diesel are not regulated, but they are subject to a surveillance system based in reference prices.

El Salvador is a net importer of petroleum and its main incumbents operate both in wholesale and retail distribution. According to a recent monitoring by the Superintendency, three suppliers concentrated 75% of the market for national sales from service stations (retail distribution) in 2018.

The Ministry of the Economy has regulatory responsibility for this sector. The Superintendency is competent for the enforcement of generic competition law and for merger control in this sector, as in others.

4.3.4. Banking

In 1980, the banking sector was nationalised. However, in the early and mid-1990s, the financial sector was re-privatised and entry by foreign banks was encouraged. Today there are 14 banks in the country; most of them are foreign.

There have been several mergers in the sector. From 2006 until May 2019, the Superintendency evaluated 12 mergers, as outlined in the table below. Furthermore, in 2011, the Superintendency pursued a market study into competition in the credit and debit card markets.

Table 12. Mergers in the Financial Sector

Year	Parties	Outcome
2006	Citibank acquired Grupo Financiero	Authorised
2007	Bancolombia acquired Banagricola	Authorised
	Citibank acquired Inversiones Financieras Cuscatlán	Authorised
	Bancolombia acquired Bienes y Servicios (a provider of office supplies and other services)	Authorised
	Banco de América Central acquired a loans portfolio from FUSADES	Authorised
2009	Inversiones Financieras Citibank acquired Citi Info Centroamérica (call-center)	Authorised
2012	Seguros Sura acquired Aseguradora Suiza Salvadoreña	Authorised, subject to conditions
2016	Inversiones Financieras Imperia Cuscatlán acquired Banco Citibank El Salvador	Authorised
	ASSA acquired AIG	Authorised
2017	Inversiones Atlántida acquired Procredit Holding	Authorised
2018	–Inversiones Atlántida acquired Davivienda Vida Seguro	Authorised
2019	Perinversiones acquired Banco Azteca	Authorised

Source: Superintendency.

Oversight of the industry is provided by the Superintendency of the Financial System, while the Central Reserve Bank (BCR) is responsible for approving the regulatory framework for the financial sector.

The BCR has in the past requested comments by the Superintendency on a number of regulatory proposals. In 2017 and 2018, the BCR pursued regulatory projects regarding "Technical Rules for the Transparency of Information on Financial Services" and "Norms for the Credit Card System". These regulatory projects took in account some of the public policy recommendations made in the Superintendency's study on competition conditions in the credit and debit card sector in El Salvador, the

two opinions issued by the Superintendency on the subject in 2012, and some recommendations made in a preliminary investigation in the sector.

In addition, technical discussions were held in 2016 between the BCR, the Superintendency of the Financial System and the Superintendency for Competition regarding the recommendations made by the Superintendency in its decision concerning bid rigging in the insurance sector adopted in 2015 discussed at section 3.1.2 above. A number of recommendations were made as a result, as outlined in the table below. Following a monitoring exercise by the Superintendency, it seems that only one out of four recommendations had been adopted.

Table 13. Implementation of recommendations for the insurance sector

Recommendation	Status
In compliance with Article 56 of the Competition Law and in order to avoid conflicts in terms of promotion, protection and defence of competition which are exclusive powers of the Superintendency of Competition it is recommended to promote the repeal of the article 46 of the Law on Insurance Companies.	Not implemented
It is recommended to promote the reform of article 127 of the Pensions Savings System Law, and eliminate the rule that insurance companies that offer disability and survivorship insurance contracts to pension fund administrators must operate exclusively in the insurance of persons, so that all insurance companies authorised to operate in the country can offer such contracts.	Not implemented
It is recommended to promote the reform of article 16 of the Law on the Pension Savings System, and gradually lower the ceiling on the insurance rates that the pension fund administrators charge on behalf of their members under the insurance contract. The decrease must be regulated according to the knowledge of the accident rate and the operational efficiencies of the insurance companies, in order to transfer the savings thus obtained to the individual savings account for each member's pensions.	Implemented.
It is recommended to promote the reform of articles 124 and 130 of the Pensions Savings System Law, with the aim of splitting tenders for the acquisition of disability and survival insurance in several blocks, so that all insurance companies duly authorised to operate in the country, can offer freely, as well as so that no economic agent can directly or indirectly cover all the blocks of the same AFP.	Not implemented.

Source: Superintendency.

4.3.5. Agriculture

As in many countries, several government regulations restrict competition in the agricultural sector. Nonetheless, markets for most products are reasonably competitive. Tariffs generally are low, and CAFTA will result in the complete elimination of agricultural tariffs as between its member countries.

Sugar, one of El Salvador's principal crops, is an exception. While tariffs are high in El Salvador – 40% –, other economies, including the United States of America and Europe, also substantially restrict sugar imports in various ways. Furthermore, by law domestic sales and preferential markets for exports are subject to a quota system, which limits price competition and has led to calls to apply competition law.

However, given that these restrictions to competition in the sugar industry result from state acts not falling under the scope of competition law, the Superintendency has complemented enforcement with vigorous advocacy efforts for pro-competition policies in this sector. The Superintendency has calculated *ex-ante* estimates regarding the potential impact of Superintendency decisions concerning anticompetitive practices and merger control in the sugar sector. In the period 2015-17, it also carried out three monitoring exercises concerning the evolution of sugar prices and exports.

5. Advocacy and promotion of a competition culture

The Superintendency could be said to have a number of roles in promoting a competition culture in El Salvador. These roles include competition advocacy, advice and education.

The Competition Law provides the Superintendency, through its board of directors, with the power to pursue an advocacy role before other public bodies.⁸² The relevant provisions empower the Superintendency to conduct market studies, inform sector regulators when a formal investigation of an anticompetitive practice concludes that an anticompetitive practice has its origin in their regulation, issue opinions on the competitive effects of legislation proposals, and issue opinions on procedures for public procurement.⁸³

The Superintendency also has a general advocacy role in the context of competition advocacy beyond the advocacy role granted to the board of directors, which seeks to prevent anticompetitive practices and create opportunities to promote competition and the application of competitive principles in economic activity. The Superintendency's advocacy efforts aim to catalyse a cultural and institutional change in El Salvador's society, by creating an understanding and the internalisation of the value of healthy competition, which will generate a commitment to the promotion, and protection of competition. These efforts include attempts at strengthening inter-institutional relations to promote the adoption of pro-competitive public policies and the Superintendency's recommendations by other government entities.

Furthermore, the Superintendency was assigned educational responsibilities. In this context, the Superintendency interacts with the public in various ways to foster an understanding of competition policy and support the agency's agenda, including implementing public education programs to promote a competition culture in El Salvador.

As outlined in the tables below, the Superintendency devotes significant resources to competition advocacy.

Table 14. Competition advocacy (Economic Intendency and Competition Advocacy Intendency) and staff training budget (2014-2018)

Budget	2014	2015	2016	2017	2018
Economic Intendency and Competition Advocacy Intendency including staff training	101 627	199 725	243 560	114 496	186 756
Amount for staff training	30 364	66 391	52 487	38 702	39 036

Note: This budget covers, the following items: training for Superintendency staff (national and international), official missions abroad, studies on conditions of competition, publications, and training for specific audiences. It also includes the Documentation Centre (CENDOC) material, competition law events (including Competition Week, "Superintendency of Competition Tour", interuniversity competitions, the organisation and logistics of other events), promotional and informative material about the Superintendency, internship programs, and external consultancy work.

Source: Superintendencia

⁸² Article 14 b), h), l) and m)

⁸³ The last two functions, providing opinions on legislation and on public procurement procedures, were added by the 2007 amendments.

Table 15. Competition advocacy share of total Superintendency budget (2014-2018)

Year	Economic Intendancy and Competition Advocacy Intendance budget	Superintendency Budget	Competition advocacy Share %
2014	101 627	2 035 567	5%
2015	199 725	2 554 310	8%
2016	243 561	2 555 033	10%
2017	114 497	2 455 040	5%
2018	186 757	2 558 808	7%

Note: Includes budge for staff training.

Source: Superintendency

The Superintendency establishes different co-operation and co-ordination mechanisms with other entities through institutional agreements to promote, prevent and battle anti-competitive practices. These are discussed in more detail in the section below. One example of such arrangements are co-operation and coordination agreements with national public entities, which aim to create effective inter-institutional co-operation mechanisms that facilitate and promote agile and timely communication. Another example are agreements with higher education institutions, with a view to establish lines of co-operation between the Superintendency and these centres in order to carry out academic and promotion activities on Competition Law and related matters.

Finally, as part of its international co-operation efforts discussed in section 2.7, the Superintendency participates in activities to strengthen the technical capacities of competition agencies at the regional and sub-regional levels. Advocacy work and competition education

The Superintendency has pursued a large number of advocacy and educational initiatives over the years.

The Superintendency has been especially active at universities with the goal of engaging future professionals in a culture of competition. Representatives of the Superintendency regularly conduct lectures and seminars at universities and schools.

As discussed in detail in section 5.3.2 below, the Superintendency has entered into co-operation agreements with six universities and provided internships at the Superintendency for students, especially for those in law and economics.

In December 2018, the Superintendency held the third Inter-University Contest on Competition. Participants assumed the role of the Superintendency's technical staff, to explain and defend a proposed case resolution to a jury panel that represented the board of directors. Jury panels in such events usually comprise former superintendents or competition experts.

5.1. Competition advocacy for courts and legislators

The Superintendency has carried out training on competition for judiciary and for the legislature.

5.1.1. Judiciary

Regarding the judiciary, the Superintendency acted as liaison with UNCTAD to co-ordinate training with the Supreme Court of Justice, within the framework of the COMPAL II Program (2009-2013). The Superintendency facilitated the co-ordination of training provided by the US Federal Trade Commission (FTC), Spanish Supreme Court and the Judicial Forum with Magistrates of Mexico and Puerto Rico in 2016, under the technical assistance of the FTC.

The Superintendency has also been working with judges. It participates in the School of Judicial Training of the Nacional Judicature Council (CNJ), which is the country's judicial training centre, where it offers workshops on competition topics. The Superintendency has provided training to civil, commercial and contentious administrative judges and their staff, including staff of the Supreme Court chambers (in 2008, 2009 and 2016). In addition, the Superintendency organised diploma degrees for the School of Fiscal Training in 2011.

In 2017, the Superintendency signed an Interinstitutional Co-operation Agreement for the Accreditation of Legal Practice with the Supreme Court of Justice, which will allow undergraduate students in Legal Sciences to carry out in the Superintendency the necessary work to be accredited as lawyers.

During the fact-finding mission, we found that judges welcome such training opportunities. However, these advocacy efforts have scope for improvement given that delays by the Supreme Court chambers are one of the main obstacles to competition enforcement.

5.1.2. Legislature

In 2010, the Superintendency organised a training program on competition for the Institutional Technical Advisory Unit of the Legislative Assembly. The Superintendency has also held several events, including a training session for members of congress who are also members of the Economic Commission. The Superintendency has also organised events with between visiting international competition experts and members of congress.

5.1.3. General public

The Superintendency interacts with the public in a variety of ways. It communicates regularly with the press through press releases, press conferences, briefings and articles written by staff members. The superintendent and its staff members often appear before stakeholders to explain and discuss the Competition Law. There have been meetings with representatives of various business associations, individual businesses, law firms, government agencies and other regulators.

The Superintendency has also maintained a comprehensive web site since the agency's inception. The Superintendency's current website is one output of the institution's digital transformation strategy, which was first implemented in 2013.

All interim and final decisions are published and posted on the website. In addition to the Competition Law, the Regulation and the agency's decisions, the web site contains, amongst other resources, articles, guidelines, market studies, press releases, co-operation agreements as well as a glossary of terminology. The average number of visits in the first quarter of 2019 was 1 769 users per month.

Despite this level of activity by the Superintendency, evidence suggests that the public is mostly uninformed about the Competition Law and the activities of the Superintendency. In the perception study pursued regarding the institutional image and performance of the Superintendency, the Superintendency obtained a low classification (62%) as regards its communication efforts.⁸⁴

This low level of information regarding competition law and the Superintendency's activities seems to prevail in the business community as well, except possibly at the level of the largest companies.

⁸⁴ In the context of this perception study, 'communication efforts' concerned social media and other means by which the population became aware of the work of the superintendency, as well as the frequency that the public obtained information.

As the Superintendency becomes more active in case work, the legal community is correspondingly becoming more active in the competition field, but at present this is confined to a few large law firms. Counselling by lawyers of their business clients about their responsibilities under competition law still does not occur regularly, nor is there a general culture of competition.

The competition agency has addressed recent advocacy and education activities to the legal and business communities, as well as to the public and the media. Examples of recent activities include:

- A public education program to promote competition. Since 2016, the Superintendency has grouped under this program a number of initiatives that were previously scattered across different organisational units of the Superintendency. These initiatives include:
 - “Superintendency fair markets, opportunities for all tour” which consists of dissemination tools aimed at young audiences or for use in events with a flexible protocol. From August 2016 and throughout 2017, 53 activities took place, including visits to schools, universities, SMEs, consumer associations, communities and others reaching 4 184 people.
 - The promotion of competition in specific sectors. The Superintendency prepares summaries and technical fact sheets with key information concerning its sectoral studies, in order to facilitate the understanding of its analysis to members of the public that, while not expert in the matter, are interested in knowing the conditions of competition in the sector.
 - Competition courses: in 2010, the Superintendency organised courses in competition law for professionals in economics, law and related careers. The Superintendency organised two courses with the Central American University “José Simeon Cañas”: Introduction to Competition (2015) and Merger Analysis (2016). The Superintendency also organised a competition course in 2013 for consumer associations facilitated by the Superintendency’s staff.
- CENDOC: the Documentation Centre of the Superintendency (CENDOC), launched officially in November 2013. The CENDOC contains more than 900 titles on competition law and related subjects. It is the first and only documentation centre specialising in competition in El Salvador. Books, magazines, digital documents, laws and other national and international institutional publications are available for consultation. CENDOC’s content can be accessed through a digital platform available on the Superintendency’s website.
- Relations with the private sector (companies): at the end of 2015 and throughout 2016, the Superintendency consulted publically with the private sector on the proposal to amend to the Competition Law. The Superintendency provides training and guidance regarding competition issues, such as on how to file a complaint or present a merger control request.
- An annual Competition Week.
- "AppSC" digital application: In December 2013, the Superintendency launched its application, initially known as "Online Cases". Since 2015, this application has collected both anti-competitive cases and market studies (<http://app.sc.gob.sv/>). "AppSC" is the first digital app created in the world for the promotion of competition and won the ICN-World Bank Advocacy Contest in 2015.

5.2. Public procurement

Public procurement is an important topic in El Salvador, as elsewhere in Latin America. Public procurement law requires, amongst other things, the use of set tender procedures, the publication of tenders and its results, and the opening of tenders to all qualified bidders. El Salvador is in the process of implementing digital tender procedures where the registration of bidders will be mandatory.

The country's criminal laws apply to bid rigging in public procurement, as does, of course, competition law. Nonetheless, and as discussed in section 3.1, few bid rigging cases have been prosecuted.

An organisational unit in the Ministry of Finance (UNAC – Unidad Normativa de Adquisiciones y Contrataciones de la Administración Pública) oversees the procurement policies of some 384 public agencies and NGOs in the country. It establishes the rules that apply to the procurement process, in accordance with the standards set out in a procurement law. In August 2018, UNAC established a formal relationship with the Superintendency by subscribing to a co-operation agreement that provides for exchanges information between the two institutions and the creation of a permanent institutional working group.

The Superintendency has provided some training to UNAC officials on detecting bid rigging. The Superintendency also provides training to the public procurement and contracting units and bodies of various public institutions (UACIs) with a view to preventing and detecting collusion in public procurement, and implementing competition principles in government procurement. Among the training provided to UACIs, it is worth remarking that the Superintendency has delivered training programs on competition and government procurement to the “Corte de Cuentas de República”, the institution in charge of overseeing the administration of public resources in order to contribute to transparency and improve governance.

Additionally, the Superintendency conducts screening projects to foster competition principles in public procurement. The first of these projects began with the signing of a letter of understanding between the Salvadoran Social Security Institute (ISSS) and the Superintendency in June 2016. The aims of the agreement are to entrench competition principles in the design and implementation of contracting processes, to help procurement officers identify signs of possible situations of collusion in public procurement processes, and to deepen the competition culture within the ISSS.

Under this programme, an inter-institutional technical team was formed, with members of the Procurement and Contracting Unit (UACI) of the ISSS and of the Advocacy Intendency of the Superintendency. This inter-institutional team held regular meetings to discuss the progress of the project and engaged in training on fighting bid rigging.

In December 2018, the Superintendency shared with the ISSS' UACI a project results report that included 20 recommendations related to the pro-competitive design of ISSS tendering instruments. The recommendations resulted from the analysis of public procurement bid files covering a 5-year period in light of best practices and international experiences in public procurement and competition. The Superintendency has since monitored the implementation of the report's recommendations. It concluded that 17 out of the 20 recommendations (85%) had seen progress in implementation leaving only three (i.e. 15%) of the 20 recommendations which had not.

Personnel from government institutions who received public procurement training have started contacting the Superintendency to warn of possible collusion, to consult on possible indicators of bid rigging, and to request opinions regarding procurement or public procurement procedures.

The effectiveness of these advocacy efforts can be demonstrated by a case that led to the Superintendency sanctioning two economic agents for bid rigging in 2018.⁸⁵ This investigation was triggered *ex officio* following on a report concerning certain anomalies in a public tender submitted to the Superintendency by the Director of Procurement and Contracting of the Ministry of Justice and Public Security.

5.3. Inter-institutional agreements

The Superintendency has entered into inter-institutional agreements of with a number of bodies. There are four types of agreements: 1) agreements signed with national public institutions (including regulators); 2) agreements signed with academic bodies; 3) agreements signed with competition authorities of other countries; 4) agreements with consumer associations. Each type of inter-institutional agreement will be reviewed below.

5.3.1. Agreements with other El Salvador public institutions

Agreements with national public institutions seek to allow and promote co-operation and collaboration on issues of common interest to each party. The Superintendency has entered into co-operation agreements with several regulators and government agencies, such as the ones identified in the table below.

Table 16. Ongoing Inter-institutional Agreements

Institution	Agreement date	Term of validity	Status
Autoridad de Aviación Civil (AAC)	Jun 2014	Undefined	Valid
Superintendencia General de Electricidad y Telecomunicaciones (SIGET)	Aug 2006	Undefined	Valid
Autoridad Marítima Portuaria (AMP)	Sep 2006	Undefined	Valid
Superintendencia de Sistema Financiero (SSF)	Mar 2007	Undefined	Valid
Consejo Nacional de Ciencia y Tecnología (CONACYT)	Apr 2007	Undefined	Valid
Ministerio de Economía (MINEC)	Jan 2008	Undefined	Valid
Defensoría del Consumidor	Jul 2009	Undefined	Valid
Ministerio de Salud (MINSAL)	Jan 2012	Undefined	Valid
Secretaría de Asuntos Legislativos y Jurídicos de la Presidencia de la República (SALJ)	Nov 2012	Undefined	Valid
Secretaría Técnica de la Presidencia de la República	Apr 2013	Undefined	Valid
Ministerio de Relaciones Exteriores	Apr 2013	Undefined	Valid
Organismo Salvadoreño de Reglamentación Técnica (OSARTEC)	May 2014	Undefined	Valid
Centro Nacional de Registros (CNR)	May 2016	1 year automatically extendable	Valid
Banco Central de Reserva de El Salvador (BCR)	Jun 2016	Undefined	Valid
Corte Suprema de Justicia (CSJ)	Oct 2017	Undefined	Valid
Unidad Normativa de Adquisiciones y Contrataciones de la Administración Pública	Jul 2018	Undefined	Valid
Organismo de Mejora Regulatoria (OMR)	Dec 2018	Undefined	Valid

Source: Superintendency

⁸⁵ Case reference SC-037-O / PI / NR-2017 / RES.: 09/12/2018, mentioned in Table 10. Horizontal agreements sanctions (2013-2018).

These agreements provide for the exchange of non-confidential information, for technical assistance and for co-operation in various forms in the execution of the agencies' missions. They have been useful as mechanisms that facilitate communication and exchange of non-confidential information, as well as the reciprocal training of staff, the establishment of working groups on topics of mutual interest and on the development and implementation of opinions and recommendations issued by the Superintendency.

A successful example of co-operation between competition policy and other public policy bodies occurred with the National Commission for Micro and Small Enterprises (CONAMYPE). In El Salvador, micro and small enterprises represent "more than 99% of the business park in the country and nearly 70% are led by women".⁸⁶ The economic and social importance of MSE's led to inter-institutional efforts to reduce barriers to entry in government procurement procedures, such as the joint project that CONAMYPE and the Superintendency pursued from September 2014 to December 2018.

Among the numerous agreements with other public bodies, the arrangements between the Superintendency, the Secretariat of Legislative and Legal Affairs of the Presidency of the Republic (SALJ) and the Ministry of Foreign Affairs deserve special mention. In November 2012 and April 2013, agreements were signed between the Superintendency and these institutions to support and promote the formulation of legal regulations that favour competition.

Since then, both entities have facilitated the participation of the Superintendency in the evaluation of normative projects. Of the 84 opinions issued by the Superintendency on normative projects between 2013 and 2018, half (42) were requested by said institutions.

5.3.2. Agreements with academic institutions

Agreements with academic institutions such as the Escuela Superior de Economía y Negocios (ESEN), the Universidad Centroamericana "José Simeón Cañas" (UCA), the Universidad José Matías Delgado (UJMD), the Universidad Francisco Gavidía (UFG) and the University of El Salvador (UES), provide opportunities for university students to perform internships at the Superintendency. Between 2006 and 2018, the Superintendency organised 141 internships for university students.

In addition, the Superintendency has organised activities with some universities, such as cineforums, academic talks and guest lectures, as well as an Inter-University Contest on Competition, as discussed in section 5. However, there is no record of co-operation between academics and the Superintendency.

5.3.3. Agreements with other competition authorities

The Superintendency's agreements with other competition authorities have the purpose of laying the general bases of institutional co-ordination and to establish permanent mechanisms aimed, among other purposes, to promote co-operation and co-ordination between the parties, develop joint activities of competition advocacy, and exchange information on matters such as institutional policy, prior experiences, knowledge, best practices and case law.

The Superintendency currently has agreements with the following competition authorities: the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual de Perú (INDECOPI); the Autoridad de Protección al Consumidor y Defensa de la Competencia de Panamá; the Superintendencia de Control del Poder de Mercado de Ecuador; and the Comisión Federal de Competencia de México. The Superintendency is also a signatory to Central American National Competition Authorities Network (RECAC) together with Honduras, Nicaragua, Costa Rica, Panamá and the Dominican Republic (and Guatemala as an observer).

⁸⁶ See <https://www.conamype.gob.sv/blog/2018/07/04/celebramos-el-dia-internacional-de-las-mype/>.

These agreements allow the superintendence to receive technical assistance regarding anticompetitive practices and economic concentrations that homologous authorities have addressed in the same sectors or where the same economic agents were involved. Additionally there have been exchanges of experience in advocacy matters.

At the same time, these agreements do not allow the agencies to undertake joint sanctioning processes or to exchange confidential information. The regulatory framework would not, in any event, allow this. However, and despite its limited scope, co-operation between competition agencies has been useful in the context of capacity building.

5.3.4. Agreements with consumer associations

While the Superintendency does not have any consumer competences, it works with the consumer associations to promote competition and respect for consumer rights.

Agreements between the Superintendency and consumer associations allow consumer association members to benefit from training on competition matters, and to achieve a greater understanding of the Superintendency's work and the benefits of competition. It has also allowed these associations to pass on this knowledge to their communities.

5.4. Opinions, market studies and market monitoring

The Superintendency can pursue market studies, market monitoring and issue opinions.

Market studies are a diagnostic tool of an exploratory and flexible nature, which allows the Superintendency to identify competitive restrictions or market failures, their causes, and the most appropriate way to address such restrictions or market failures.

Market monitorings are brief documents that aim to provide short-term analyses that increase knowledge about key market variables and identify possible risks or effects on competition in relevant sectors of the economy. In addition, market monitorings can both provide follow-up information on sectors previously analysed by the Superintendency and initial analyses of markets not yet addressed by the Superintendency. Thus, market monitorings may provide inputs for the initiation of sector studies or other actions to promote competition.

The Superintendency also issues opinions on draft laws, ordinances or regulations, and public procurement procedures. In these cases, the analysis seeks to identify limitations or restrictions on business rivalry created by these instruments, and to recommend appropriate measures to remove these obstacles, thus helping to achieve economic efficiency in the markets and/or increase the competitive nature of bidding processes.

The analyses underpinning the Superintendency's market studies, market monitoring and opinions are carried out by the economic intendency, a technical-administrative unit directed by an intendent appointed by the superintendent of competition. The economic intendency also drafts or co-operates with consultants contracted by the Superintendency's for market studies, opinions and related resolutions. These documents contain both the economic intendency's technical assessments and concomitant public policy recommendations.

The opinions and studies proposed by the Economic Intendency must be approved by the board of directors, who are ultimately responsible for their issuance. Furthermore, the board of directors enjoys the power to define the scope and content of the issued studies and opinions. It should be noted that the superintendent of competition appoints the intendent responsible for the economic intendency, and also presides the board of directors.

5.4.1. Market studies

The selection of the subject of a market study rests with the superintendent.⁸⁷ However, the superintendent does not enjoy untrammelled discretion. The "Guide for the Selection of Studies to Conduct on Competition Conditions" of January 2015 sets out several non-exhaustive criteria that the Superintendency must take into account when selecting which markets to study. The Superintendency uses different sources to identify the possible sector in which to engage in a market study. These sources include:

- Evidence from questions, claims and suggestions that the Superintendency receives from consumers, consumer groups, companies, group of companies and associations;
- Suggestions from other national institutions;
- Experience from other competition agencies;
- Internal analysis of the Superintendency;
- Information from the media, economic bulletins and opinions.

These criteria are, in practice, directed at the Economic Intendancy unit that proposes to the superintendent a list of potential markets to be studied.

The Economic Intendancy is responsible for the development of market studies. These studies are reports whose content focuses on the analysis of a particular sector of the economy, with the main objective of describing and analysing its performance, structure, size, market participants, regulatory framework and other relevant aspects. This, in turn, allows the Superintendency to diagnose issues and propose the necessary measures to strengthen and improve the conditions of competition in the studied markets.

The Superintendency has pursued a significant number of market studies to date, as is made clear in the table below.

⁸⁷ Article 13, section c) of the Competition Law.

Table 17. Market studies⁸⁸

	Year
Ground transportation of cargo	2006
Motor fuels	2006
Electricity	2007
Medicines I	2007
Poultry (chickens and eggs)	2008
Petroleum liquid gas	2008
Telecommunications	2008
Medicines II (for gastrointestinal, cardiovascular and respiratory diseases)	2008
Sugar agribusiness	2008
Rice agribusiness	2009
Milk industry	2009
Agroindustry of cheeses	2010
Iron and steel	2010
Credit and debit cards	2011
Insurance	2011
Air transport of passengers	2013
Edible oils and shortenings	2014
Retail Distribution of Consumer Products Periodic	2015
Port maritime services	2015
Telecommunications: telephony, Internet and subscription TV	2015
Bean	2015
Open television (broadcasting)	2015
Distribution and commercialisation of electrical energy	2016
Barriers to the entry of the MSE in public procurement processes	2016
Characterisation of the financial Services Market at the MSE	2016
Wholesale electricity market	2017
Distribution of bovine meat	2018

Note: Superintendency

Market studies have a two-fold purpose: to identify structural and regulatory features that could benefit from advocacy by the Superintendency, and possible anticompetitive practices that could be the subject of competition enforcement action by the Superintendency. Of the two objectives, the first has been more fruitful; market studies have supported several comments and recommendations by the Superintendency to the relevant entities.

For example, following a market study into the electricity market in 2007, pro-competitive reforms in Electricity regulations were achieved thanks to a legislative reform that allowed the establishment of a joint agreement between the sectoral regulator and the Superintendency to promote competition in the wholesale electricity market. Through this agreement, the Superintendency was able to translate the market study's recommendations into action in the context of a 'Regulation on the Operation of the Transmission System and of the Wholesale Market Based on Costs of Production' (ROBCP). This regulation has been successful in promoting competition in the market for electricity generation, as confirmed by the Superintendency's 2017 Market Study into the Wholesale Electricity Market.

⁸⁸ Market studies are available on the superintendency's website.

At the same time, public policy recommendations issued by the Superintendency, including those adopted following market studies, are not binding. The bodies to whom such recommendations are addressed do not have to adopt these recommendations, nor do they have the obligation to justify such a decision not to follow a recommendation by the Superintendency.

Having recognised that it has struggled to implement its public policy recommendations, the Superintendency adopted a follow-up plan for the adoption of these recommendations. This plan consists in the use of various mechanisms (e.g. inter-institutional working groups and meetings, committees of the National Consumer Protection System or others) to discuss the feasibility and obtain feedback of the Superintendency's recommendations, in the light of the public policy objectives of the addressee entities. In addition, the Superintendency implemented an internal monitoring process, which assesses whether recommendations made in the context of market studies have been adopted.

While the Superintendency's recommendations are not binding, there are institutions that have understood their relevance to improve the conditions of competition in their sectors. Such bodies have relied on the Superintendency as an advisory body, and have promoted the reform of their respective laws to include mandatory consultations or interactions with the Superintendency as regards specific issues.

There are a number of examples of this. Following a reform promoted by the electricity regulator, Article 112-E of the Electricity Law requires that the regulator and the Superintendency must define together the conditions for competition in the regulatory market system. The lack of competitive conditions will justify the adoption of a regulation that encourages bidding behaviours resembling those in a competitive market. Articles 21 and 22 of the Civil Aviation Law require that the Superintendency issue an opinion of the expediency of setting maximum and minimum rates depending on the degree of competition in the market. Articles 33 and 38 of the Public and Private Partnership Law requires the Superintendency's opinion on public tenders for the adjudication of public-private partnerships. Articles 10 and 194 of the Maritime Ports Law requires that the Superintendency issue an opinion regarding maritime transport services with monopolist and dominance characteristics. Specific examples will be discussed in detail below in the section 5.3.3 devoted to opinions.

A number of examples of market studies are provided below.

Example: Energy and telecommunications market studies

The Superintendency's study of the electricity sector of 2007 identified a lack of competition between electricity generators in the wholesale electricity market. SIGET, the electricity and telecommunications regulator, conducted a similar study independently of the Superintendency's study and came to similar conclusions. As a result, the two agencies jointly authored a lengthy document on the lack of competition in this market, and SIGET devised a new method for determining wholesale prices that would limit the ability of generators to manage capacity strategically. This eventually led to the adoption of the Regulation of Operation of the Transmission System and the Regulation of Operation Based on Costs of Production in August of 2011.

The Superintendency's study of the telecommunications market of 2007 also prompted several recommendations to SIGET concerning this sector. These included that SIGET adopt a regulation establishing a framework for interconnection containing principles and rules for negotiations between private parties; that SIGET take measures to enhance transparency in interconnection agreements between operators; that SIGET address the inequality of termination charges as between fixed-to-mobile and mobile-to-mobile calls; that SIGET improve conditions for number portability between mobile providers; and that SIGET consider issuing a regulation governing service quality in mobile services.

The Superintendency has also made recommendations to SIGET on cable television, especially regarding the relationships between the programming provider and the cable operator.

Example: Credit and debit card market study

As a result of the 2011 “Study on conditions of competition of the credit and debit card sector in El Salvador”, the board of directors issued a number of public policy recommendations. However, most of these recommendations were not implemented because they did not align with government policy regarding the financial table at the time

The following table summarises the recommendations made by the Superintendency’s market study and their implementation status.

Table 18. Current implementation status of recommendations made in the 2011 market study on the credit and debit card sector in El Salvador

Recommendation	Institution	Development
Promote the respective reforms in the Law of Supervision and Regulation of the Financial System and the Organic Law of the Central Reserve Bank of El Salvador, with the objective of establishing mechanisms for greater accountability of said public authorities that are related to the sector of Credit and debit cards.	MINEC/SSF/BCR	Not implemented
Promote the repeal of letter d) of article 35 of the Law of the Credit Card System that prohibits affiliated businesses from discriminating retail prices based on the means of payment used. “””””		Not implemented
Obligations of affiliated businesses Art. 35.- The obligations of the businesses affiliated to the system are: ... Do not increase the price of the good or service for purchases with the credit card, nor differentiate these goods or services for purchases in cash. “””””		
Promote the opening of a high-level discussion about an interest rate that reconciles the public interest avoiding excessive credit costs and the eventual occurrence of abusive practices, supported by comparative studies of international experience.		This recommendation could be deemed to have been addressed by the enactment of the Usury Law. However, this law has not yet generated significant effects.
Promote the express incorporation of monitoring functions related to credit and debit card payment systems between the faculties of public entities that have responsibility for their operation, both the Central Reserve Bank and the Superintendence of the Financial System, to ensure that These payment systems are managed by network operators, issuers and acquirers considering the interests of all different types of participants, so that efficient and reliable payments are offered to their customers and that an open, flexible and competitive system is maintained. .		Recommendation valued positively. A Bill of Payment Systems Law for better surveillance of this infrastructure is expected to be presented to the Legal Secretariat for review.
Promote a regulation, both legal and regulatory, which seeks to reach a new tariff structure for exchange rates based primarily on licensing costs, processing costs and fraud risks. The above taking into account the convenience of:		Not implemented

Recommendation	Institution	Development
<p>The establishment of tariffs on the basis of combining percentage rates with fixed commissions per transaction; and</p> <p>The differentiation in the exchange rates between credit and debit card transactions, favoring the application of fixed and lower commissions for the latter, based on the cost differences between both types of card.</p>		
<p>Promote measures that tend to reduce exchange costs for financial consumers, such as establishing a protocol for closing a current account, creating a collection and transfer system between banks that allows liquidation and compensation of account, credit or account payments, customer service and make available to the client a statement of compliance with their financial obligations.</p>		Not implemented
<p>Promote the reforms to the law of the Credit Card System in which the inalienable right of affiliated merchants is granted to differentiate prices to the final consumer based on the payment method used by the consumer, and to be able to contract separately the acceptance of Credit cards and the acceptance of debit cards according to the trade deemed appropriate to their interests.</p>	MINEC/DC/SSF	Positively valued, with legal modification being projected. A proposal to reform art. 35 of the Law is currently under review by the Office of the President of the Republic.
<p>Promote greater transparency in the market for credit and debit cards through the publication of statistics on their transactions, specifically on their number, amount and costs. Expand the consumer-oriented financial education program, with special emphasis on micro and small businesses.</p>	BCR/SSF/DC	Partially implemented. Between 2017 and 2018, the project “Technical Standards for the Credit Card System” was discussed at the inter-institutional table formed between BCR and SC, and it was agreed to include obligations to publish this type of information. The Standard, which entered into force in December 2008, includes information on exchange rates, not including data on transactions.
<p>Promote greater transparency in the market for credit and debit cards through the publication of statistics on their transactions, specifically on their number, amount and costs. Expand the consumer-oriented financial education program, with special emphasis on micro and small businesses.</p>		Implemented Recommendation adopted. The BCR and board of directors partnered last year (2016) with BANDESAL and training sessions were held for CENTROMYPE and CONAMYPE.

Source: Superintendency.

Example: Health sector market studies

Studies⁸⁹ have shown that pharmaceutical prices in El Salvador are higher than in neighbouring countries. Since medicines are a major cost for the country’s public health providers, the Superintendency has looked at the pharmaceuticals sector.

After the conclusion of a first study in 2007, the Superintendency carried out a second study in 2008. In their conclusion, the studies found that differences in average prices between three categories of products – original, first brand generics and second brand generics – adversely affected competition. Additional concerns arose from insufficient economies of scale and the existence of important barriers to entry into the sector.

A short list of the public policy recommendations made by these market studies included:

⁸⁹ See <https://www.sc.gob.sv/index.php/project/informe-resultados-estudios-medicamentos-2a-etapa/>, https://www.sc.gob.sv/index.php/sala_multimedia/estudiosc-estudio-medicamentos-i/.

- Prohibiting pharmaceutical laboratories, drugstores and pharmacies from providing gifts, incentives or any other type of royalties for the prescription, dispensation or sale of drugs to the public on a preferential basis;
- Studying the feasibility of appointing an ad-hoc committee for removing unnecessary barriers to entry into this sector;
- Applying industrial policy tools to generate incentives to increase the quality of the pharmaceutical offer;
- Promoting the elimination of unnecessary barriers that may limit the importation of medicines that comply with national quality guarantees.

In 2011, when discussions regarding the reform and adoption of the Law on Pharmaceuticals took place, The Superintendency built on its earlier market studies and opinions to provide an opinion in which it recommended, in order to eliminate or avoid barriers to entry into the medicine sector and promote competition:

- The prohibition of commercial practices that are contrary to medical practice;
- To reform intellectual property laws in order to authorise parallel imports and reforming the rules on compulsory licenses in more favourable terms for competition;
- To avoid the introduction of new barriers to the entry of new competitors, such as preventing the direct importation of medicines by the owners of pharmacies and other authorised health establishments;
- To eliminate laboratory and drug store practices amounting to the financing, granting or delivering seminars, privileges or other royalties to physicians, in any form that such inducements may take;
- To promote competition through the implementation of proactive generic replacement policies, such as the adoption of rules that promote the prescription and use of generics; the implementation of monitoring mechanisms that ensure the efficacy and safety of generic drugs; and the pursuit of information campaigns to professionals and the public.

The only recommendations that have not yet been implemented are the one related to IP rights (i.e. parallel imports and compulsory license), which are still being discussed in an inter-institutional working group. At the same time, the National Pharmaceutical Direction that was created to implement the Pharmaceutical Law has made great efforts to improve pharmaceutical imports and to eliminate entry barriers.

Example: Wholesale electricity market

In 2017, the Superintendency carried out a market study of the Wholesale Electricity Market, which concluded that this market was highly concentrated in El Salvador.

Nonetheless, this study also found that prices were close to the marginal cost of the system, which is a result consistent with economic efficiency. Underpinning this efficiency were market conditions and the regulatory framework. These results were explained, in particular, by the application of systematic procedures for cost auditing including analyses of technical efficiency of the machines, the adjustment of fuel costs, and control of unscheduled exits. Furthermore, the rules governing payment were based on past availability, creating a disincentive to use the withdrawal of machines as a mechanism to raise market prices. In addition, the study found that there were no significant legal or regulatory barriers in the El Salvador Wholesale Electricity Market.

Based on the study conducted, the board of directors made a series of recommendations that include:

- To evaluate whether to reform the General Electricity Law, to address the reasons for and consequences of the reluctance of electricity generators to participate in competitive contracting procedures.
- That the economic intendency perform a periodic analysis of relevant variables such as contract prices, unavailability rate and fuel prices.

Example: Other sectors

The Superintendency has also issued many other recommendations to public entities on various topics following market studies. Examples include recommendations:

- to the Ministry of the Economy regarding liquid petroleum gas, particularly on rules for cylinder exchange and on access to maritime storage facilities;
- to the Ministry of the Economy regarding liquid fuels (gasoline, diesel, kerosene), particular regarding the conduct of studies relating to competition in these markets, reducing regulatory barriers to entry, and promoting imports of these products);
- to two municipalities and the public hospital sector concerning their procurement practices;
- to the Ministry for Agriculture and Livestock on the development of rules for standardising poultry products and eggs;
- to the consumer protection agent 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.

5.4.2. Market monitoring

The Superintendency also draws up reports or market monitoring bulletins. These reports are analytical documents that provide an overview of the main economic variables of certain markets or specific economic activities.

This work is carried out under the "Manual of Procedures for the Preparation of Monitoring Bulletins", approved by the Superintendent of Competition in 2015. The manual of Procedures for the Development of Monitoring Bulletins (2015), identifies three mechanisms through which monitoring exercises may begin: (i) following an instruction by the superintendent to the economic intendent; (ii) following an *ex officio* instruction by the superintendent to the co-ordinator of the market monitoring unit; and (iii) following a suggestion of the co-ordinator of the market monitoring unit to the economic intendent.

In the context of the third mechanism for the selection of monitorings, the Superintendency has a market monitoring unit comprising three people who work in three prioritised sectors per year. The selection of these sectors results from discussions by the technical team validated by the superintendent. In addition, as a complementary action, the databases of earlier monitoring exercises are regularly updated.

Monitoring efforts do not involve an exhaustive analysis of competition in the markets. Instead, these bulletins seek to provide a general overview of the dynamics of the main economic variables of monitored markets. In doing so, monitoring bulletins seek to obtain inputs to assess whether more in-depth studies or other types of institutional actions are required.

Monitoring bulletins are motivated by specific circumstances, which are thought to require surveillance due to their potential impact on competition. Often, monitoring reports seek to give continuity to the analysis of market developments pursued in earlier market studies or that been the subject of earlier enforcement actions, in order to identify whether the relevant problems or behaviours persist. On other occasions, monitoring exercises are pursued as preliminary studies of markets where the Superintendency has indications that there may be problems requiring in-depth analysis.

The table below lists the monitoring exercises carried out by the Superintendency since 2015.

Table 19. Monitoring exercises carried out by the Superintendency

	Year	Year
Monitoring of bean trimester II-2015;		2015
Evolution of prices and exports of sugar;		2015
Monitoring of bean Trimester III-2015;		2015
Evolution of prices and exports of sugar-II		2015
Evolution of prices and exports of sugar-III;		2016
Monitoring of beans quarter IV-2015;		2016
Evolution of prices and consumption of bovine meat in El Salvador;		2016
Prices of electric power service in El Salvador		2017
Regional perspective of the wheat flour market		2017
Situation analysis and price evolution of wheat flour		2017
Food dependency in El Salvador: The import transcendence for national consumption		2018
Analysis of egg and chicken markets in El Salvador		2018
Prices of liquid fuels in El Salvador		2018
Price of credits, competition in credit markets and levels of banking in El Salvador		2018

Source: Superintendency

5.4.3. Opinions

Opinions can be issued following work on market studies and monitoring bulletins. In addition to recommendations following market studies, the Superintendency can also issue opinions upon request by other public entities or *ex officio*. This section is devoted to opinions issued in these latter circumstances.

The Superintendency has the power to issue its opinions on draft bills and regulations, and on public contracting and procurement procedures in which competition may be significantly limited, restricted or impeded.

Opinions issued pursuant to the competition law are not binding. Hence, the addressee's of the Superintendency's opinions are not obliged to comply with them. On the other hand, the fact that the Superintendency's opinions are not binding means that they are not susceptible to challenge or any judicial appeal.

However, the Superintendency also has other attributions that allow it to evaluate special situations related to regulated sectors, where sectoral regulation grants binding effect to the Superintendency's opinions. For example, the Superintendency can issue binding opinions as a result of: (i) 33 and 38 of Public Private Partnership, (ii) Articles 9-A and 115-A of the Telecommunications Law, (iii) Article 7 section 13, Article 14 section 47, and Articles 21 and 22 of the Law on Civil Aviation, and (iv) Article. 10 and 194 of the Maritime Ports Law⁹⁰.

⁹⁰ In some instances, such as those discussed in the [paragraph above](#), the Superintendency's opinions were granted binding effect as a result of reforms to sectoral regulation promoted by regulators that recognised the value of competition and of the Superintendency's opinions.

Between 2006 and August 2018, the Superintendency issued 184 opinions on regulations. Of these, 42 of 84 opinions issued between 2013 and 2018 followed from requests the presidency’s secretary for legislative and legal affairs (Secretaría para Asuntos Legislativos y Jurídicos de la Presidencia de la República) and from the ministry of foreign affairs. Another 21 opinions concerned public tender procedures in a variety of sectors were issued by the board of directors.

Table 20. Superintendency opinions (2006-2018)

Activity	Number	Percentage
Electricity	49	26.63
Economic Activity of the State	28	15.22
Others	21	11.42
Air Transport	19	10.33
Financial	13	7.07
Hydrocarbons	10	5.44
Port maritime transport	10	5.44
Medicines	9	4.89
Telecommunications	7	3.8
Farming	4	2.17
Commerce	4	2.17
Investment promotion activities	3	1.63
International trade	3	1.63
Activities in economic platforms	1	0.54
Agroindustry	1	0.54
Transport	1	0.54
Agricultural supplies	1	0.54
Total	184	100

Source: Superintendency

5.5. Ex-ante and ex-post impact assessments

In 2016, after ten years of operation, the Superintendency considered it necessary to develop tools that would allow it to estimate the possible effects of its decisions. As a result, the agency has developed both an *ex ante* and *ex post* assessment guidance documents.

The “Ex-ante Impact Analysis Guide” sets out the parameters that the Superintendency will use to measure the expected effects of the Superintendency’s decisions or resolutions *ex ante*. The ex-ante analysis is done for advocacy reasons immediately after the decision or resolution is issued, but before it can take effect. It seeks to explain to the public the benefits that are expected to accrue due to the actions taken by the agency.

In the period 2017-18, *ex ante* estimates of anti-competitive practices and concentrations were calculated for the following sectors: flours, sugar (2017), beers, gasoline, public procurement in ports, construction and telecommunications (2018). The estimated economic benefits for consumers generated by the Superintendency’s actions in these sectors amounted to USD 236.9 million.

The “Ex-post Impact Analysis Guide” sets out the parameters for the assessment of the actual effect of the Superintendency’s activities. *Ex post* analysis are pursued a certain period after the issuance of the relevant resolution or decision - normally five or 10 years later. This analysis measures the real effects of a decision and determines if the expected effects were achieved.

These impact analyses facilitate an understanding of the decisions of the Superintendency. By focusing on potential benefits to the consumers, the public can better grasp the expected effects and savings that will be generated thanks to the decision.

6. Conclusions and recommendations

El Salvador has a competition regime that is broadly in line with international standards and practices. The Superintendency of Competition, El Salvador's competition agency, has a mandate to promote and protect competition in order to increase economic efficiency and consumer welfare. At the same time, all institutions and public entities in El Salvador have the responsibility to promote and protect competition. Nonetheless, this peer review identified a number of areas for improvement, which would benefit competition law and policy in El Salvador.

This peer review identified the need for certain structural adjustments to the Superintendency's institutional framework. 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. The support, for a sound, objective and independent competition policy free of political interference, must continue.

A first area for improvement relates to the Board of Directors. The current mechanism for appointing members of the Board can not only lead to sudden losses of experience and expertise when the members of the Board of Directors are all replaced at the same time, but also creates a risk – and, in all cases, a perception – that the Superintendency's actions can be subject to political interference. Furthermore, the fact that only the Superintendent is appointed full-time, with the other Board members being employed part-time, creates risks of conflicts of interest. A related risk, given the overarching role of the Superintendent in all aspects of the Superintendency's operation – including opening investigations and adopting decisions – concerns the potential for (perceptions of) lack of impartiality and of separation between investigative and decision-making roles.

A second area for improvement concerns resources. While the Superintendency's resource situation is not precarious, its budget is one of the lowest for institutions dealing with economic affairs in El Salvador.

Another challenge for the Superintendency is to enforce successfully competition law, particularly as regards cartels and abuses of dominance. A related issue is that the penalties imposed for those infringements that are sanctioned are rather small, relying as they do on a multiple of minimum salaries. Such penalties are unlikely to dissuade economic agents from engaging in anti-competitive practices.

An important area of concern that affects negatively enforcement is the delays that result from the judicial appeals of the Superintendency's infringement decisions. The appeal process is slow, and reaching a final judicial decision can take many years from the date the appeal was first submitted – even as there is a single instance of appeal, before the Supreme Court.

In addition, procedures should be refined to improve competition enforcement.

One of the Superintendency's challenges, which is a common one in the region, is its inability to prioritise enforcement activities because of its duty to investigate every complaint that fulfils the requisite legal requirements.

Another important challenge concerns El Salvador's leniency regime. In El Salvador, leniency amounts merely to a potential, indeterminate reduction of the administrative fine, without any possibility of the leniency applicant being exempt from sanctions. International experience demonstrates that such an approach is unlikely to be effective, something which is reflected in the lack of success of El Salvador's leniency regime.

With respect to vertical agreements, the absence of sanctioned practices is connected to the legal requirements set out in the law, which leads to their overlapping – and confusion – with cases of abuse of dominance. It is advisable that the legal framework be clarified in this regard.

Finally, as regards merger control, notification thresholds are at very high levels for an economy the size of El Salvador's. This is reflected in the limited number of transactions reviewed by the competition authority. It is thus suggested that the merger notification thresholds should be adjusted to reflect the size of El Salvador's economy and market players.

Focusing on advocacy, the great efforts of the Superintendency in this regard are observable in variables such as the number of pro-competitive regulatory recommendations, as well as in the agreements the Superintendency entered into with educational entities to carry out academic and promotional activities on competition law and related matters.

The recommendations below suggest ways to address the main challenges to competition El Salvador's competition law and policy identified in this peer review. As in all OECD Peer Reviews, the recommendations are directed at the country. This means that some of the recommendations outlined below require action by bodies other than the Superintendency – including, in some cases, the reform of the competition law. On the other hand, a number of challenges can be addressed by the Superintendency itself.

6.1. Institutional Design

6.1.1. Enhance the Superintendency's independence and autonomy

As noted above, an important test of the strength of competition policy in a country is its ability to withstand partisan political influence. Section 7.3 of the 2012 OECD Council Recommendation on Regulatory Policy and Governance recommends that the establishment of “independent regulatory agencies” should be considered where the agency's decisions “can have significant economic impacts on regulated parties and there is a need to protect the agency's impartiality.”

As it stands, the legal framework poses a number of risks to the autonomy and independence of the Superintendency and of its decision-making bodies. These should be addressed. Areas where intervention is advised in this respect are discussed below, but are not exhausted herein. Other examples include increasing the resources of the Superintendency to levels commensurate to the importance of an economy-wide regulator, in comparison with those of other economic regulators.

6.1.2. Ensure that clear and transparent rules set out the conditions of appointment and dismissal of the Board

It is necessary to ensure that the appointment of members of the Board follows a public selection procedure, and is made by bodies that ensure wide-political acceptance and remove the perception of political bias (such as by the appointment solely by the President of the Republic). This could take a variety of forms, such as the setting out of clear criteria for selection of Board members that reflect their good character and technical expertise; or the control of the appointment decision by non-political bodies (such as independent economic bodies) or widely representative bodies (such as the need for approval by a qualified majority of the legislative assembly).

Additionally, the removal of Board members other than at the end of their term should only occur for cause following transparent procedural rules, and be subject to judicial review. In this respect, the tradition of the Superintendency making its position available to new administration is likely to create a perception of politicisation of the role.

A last suggested reform is to introduce staggered appointment to the Board, in order to avoid loss of expertise and institutional memory, and increase the technical and apolitical role and perception of the Superintendency.

6.1.3. Ensure that Board members are employed full time to ensure the Superintendency's effectiveness and the absence of conflicts of interest.

Currently, Directors of the Board serve part time, and only the Superintendent works for the Superintendency full time. Given this, Board members have other full-time employment, which creates concerns potential conflicts of interest. While the law regulates excuse and recusal by Board members, it is nonetheless the case that a case or investigation could involve a matter that is also before a ministry or agency for which a Board member works full time.

Furthermore, part-time Board members are unlikely to devote the time and attention necessary to grapple with the complexity of competition law enforcement, endowing the Superintendent with a disproportionate role and influence within the Board. As such, it is recommended that all Board members be appointed full time, and that their ability to pursue other rules doing their mandate be severely restricted.

6.1.4. Clearly separate investigative from decision-making roles

The separation of investigative from decision-making roles within the Superintendency is only partial at the moment because the Superintendent supervises the preparation of cases and is also one of three voting members of the Board (unless he or she is disqualified because of a personal conflict). It is thus recommended that a formal procedure that clearly separates investigative from decision-making functions be adopted.

6.2. Antitrust Enforcement

6.2.1. Implement an effective strategy to combat cartels

As mentioned in the 2008 Peer Review, one of the main challenge for the Superintendency is to demonstrate success in its law enforcement function, especially against cartels.

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 a number of legal tools that it needs to implement a successful anti-cartel programme. However, to date the Superintendency has only investigated a single case where evidence was collected through dawn raids. It is suggested that the Superintendency should make better and more intensive use of its enforcement powers.

6.2.2. Consider redirecting resources towards cartel from abuses investigations, without ignoring the latter

In the past, the Superintendency's enforcement activities have focused on abusive conduct. This has been reflected in limited enforcement against cartels. Such a trend is common among young competition agencies – as they react to complaints instead of unearthing secret collusive practices. However, the effects of unilateral conducts are often ambiguous, while cartel activity invariably results in consumer harm.

As the Superintendency is now a more experience body, it is recommended that resources be redirected from fighting abusive conducts – without abandoning enforcement against such conducts where appropriate – to combatting cartels.

6.2.3. Focus on fighting bid rigging in public procurement

The country's criminal laws apply to bid rigging in public procurement, as does, competition law. However, few bid rigging cases have been prosecuted under competition law. Experience in other countries has shown 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, and are likely to increase the prominence and reputation of a competition authority before both the public and other public authorities.

6.2.4. Consider blacklisting companies involved in bid-rigging

A common sanction in many jurisdictions is to prevent companies convicted of bid-rigging from applying for public tenders for a certain period. If correctly used, this practice – known as ‘blacklisting’ – can increase the deterrent power of competition enforcement, an area where – as discussed above – El Salvador has struggled in recent years.

6.2.5. Reform the leniency regime to bring it line with international standards.

As already highlighted in the 2008 Peer Review, one important challenge for El Salvador concerns its leniency regime.

Many countries have leniency regimes, which has proved to be a highly useful tool in combatting cartels. However, the mere existence of a leniency regime does not ensure it will work – international experience demonstrates that the way such a regime is designed and implemented is key to its success. 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; and a clear path to avoiding such sanctions by cooperating in cartel enforcement.

As it currently stands, El Salvador's regime is unlikely to create the requisite incentives. First, sanctions may not be severe enough to incentivise companies to abandon anticompetitive practices or apply for leniency, as discussed below. Second, even if this were the case, the law does not exempt a successful applicant from fines and other sanctions; instead, it merely grants the Superintendency discretion to reduce the fine. This – when combined with the absence of a formal procedure for leniency applications developed and implemented by the Superintendency – means that companies and individual lack the requisite certainty to come forward and apply for leniency. International experience shows that guarantees of full immunity are required for companies to be sufficiently incentivised to come forward. Finally, leniency may be granted only to the first applicant, which unduly restricts the incentives of other companies to also come forward and cooperate in an investigation.

It is recommended that the current regime be reformed in line with international practices, so that leniency applications are sure of their immunity / the amount of sanction reduction and are able to determine how to apply successfully for leniency.

6.2.6. Adopt market definition, market power and anticompetitive analysis tools in line with international practices

The Superintendency's enforcement activities have been criticised because, while focusing on conducts that should be subject to effects' analysis, the Superintendency fails to engage in in-depth analyses in line with international practices.

It is thus recommended that El Salvador ensure that market definition, market power and anticompetitive analysis tools in line with international practices are not only used, but seen to be used in competition enforcement, particularly in the reasoning of decisions. One way to do this is by adopting and following guidelines in this respect, as per below.

6.2.7. Remove the requirement of dominance for antitrust enforcement against vertical arrangements, and clarify the legal framework for abusive practices

The law contains the requirement that vertical agreements can only be prohibited when one of the parties enjoys a dominant position. While it is true that vertical arrangements are unlikely to be problematic unless one of the parties has market power, dominance imposes a very high threshold that prevents effective enforcement. In effect, this requirement likely goes some way towards explaining why there have not been any infringement decisions as regards vertical agreements.

Furthermore, such a requirement leads to antitrust enforcement against vertical practices effectively overlapping with enforcement against abuses of dominance, which creates unnecessary confusion – as is apparent in a number of abuse cases – and restricts the possibilities for legitimate enforcement against anticompetitive vertical arrangements.

As such, it is recommended that: (i) competition enforcement against vertical arrangements not be limited to situations where there is dominance; (ii) clarify the legal framework for enforcement against abuses of dominance, so that it is in line with international best practices.

6.2.8. Prepare and publish guidelines where appropriate

In El Salvador, there are no official guidelines - for merger control, abuse of dominance, horizontal or vertical agreements, or sanctions. Instead, the Superintendency applies criteria on a case-by-case basis.

The publication – and elaboration – of guidelines contributes to increase legal certainty, facilitates compliance and can be used as an advocacy tool to promote competition.

6.3. Sanctions and Remedies

6.3.1. Impose Deterrent Fines

Since 2013, the fines imposed for anti-competitive practices applied have been, for the most part, under minimum wages, despite the Superintendency's power to impose sanctions based on affected turnover for particularly severe offences. Penalties based on company turnover or affected market turnover are used internationally as a better proxies for the economic impact of anticompetitive practices and the determination of deterrence penalties.

As a result, the amounts of fines imposed thus far have been low and are unlikely to achieving the required deterrent effect. It is thus suggested that El Salvador clarify that all anticompetitive practices amount to particularly severe offences, and impose higher fines on the basis of the relevant turnover.

6.3.2. Provide guidance on how penalties are imposed and calculated, in order to grant greater transparency and predictability

There are no published guidelines regarding procedures and methodology of the fixing of fines. As it stands, the sole guidance is provided in Articles 37 and 38 of the Competition Law, which set out the general rules and criteria to be taken into account when imposing a sanction.

As previously mentioned, guidelines contribute to increased legal certainty, facilitates compliance and can be used as a tool to promote competition. In the case of fines, it is also likely to contribute to deterrence by making it clear how severe will sanctions for competition infringements may be.

6.3.3. Ensure that penalties are swiftly collected.

El Salvador faces very significant issues in collecting fines. While competition law establishes that all fines must be paid within eight days of the issuance of the Board's final resolution, in practice many fines go unpaid for a long period – if they are paid at all. Reforms have been table in El Salvador setting out an enforcement procedure for the collection of fines, in order to increase the deterrence and effectiveness of competition law.

It is recommended that measures to this effect be adopted, so that the collection of fines is expedited – e.g. – by requiring their payment, or at least the provision of a bank guarantee, subject to reimbursement in the event of a successful appeal.

6.4. Procedural matters

6.4.1. Ensure that Superintendency is entitled to prioritise its investigations

The Superintendency does not have the possibility to consider whether to investigate a complaint by reference to its priorities and use of resources. This means that, if all legal requirements are fulfilled, the Superintendency must investigate all conducts that were the subject of a complaint. This is likely to result in a waste of resources, and the inability of the Superintendency to direct the use of these (limited) resources to areas where its action will have the greater impact.

It is recommended that El Salvador ensure that Superintendency is entitled to prioritise its investigations in order to optimise deployment of its resources – including, allowing the prioritisation of investigation and allowing the Superintendency to choose how to pursue initial investigations (e.g. preliminary investigations).

6.4.2. Consider extending investigations deadlines

Current deadlines seem to be rather short. In particular, a 30-day period to collect evidence is too short under international experiences. It is recommended that procedural deadlines be extended in line with international practices.

6.4.3. Use inspections and dawn raids more effectively, including by ensuring that an investigated party is only notified after such inspections and dawn raids have taken place

While the Superintendency has the power to conduct inspections without prior notice (records with prevention of search), it has not carried out any such inspections in the last five years.

As such, it is recommend that the Superintendency deploy dawn raid and other inspection powers more effectively in the future. One important recommendation in this respect is to allow for fulfilment of the duty to notify an investigated party until later in the process, so that the Superintendency can investigate and conduct dawn raids while still allowing enough time for the investigated entity to exercise its right of defence. It is also recommended that, when investigating potential infringements, the Superintendency rely on dawn raids instead of on its powers to inspect premises on short-notice. Finally, it is recommended that the Superintendency develops the competences and skills required for the effectiveness of dawn raids, such as those related to the use of IT forensics.

6.4.4. Protect commercially sensitive information obtained by the Superintendency, and provide guidance on which information is sensitive

In order to promote cooperation with competition enforcement proceedings, to protect the legitimate interests of investigated parties and to facilitate international cooperation, it is important that the information collected by the Superintendency be used solely for the purposes for which it was collected – i.e. an antitrust investigation. It is also crucial that commercially sensitive information, which has inherent commercial value, not be disclosed to third parties.

In this regard, it is suggested that the Superintendence prepare and publish guidance on how it will identify and deal with such information in the future.

6.4.5. Adopt both commitment and settlement procedures.

Terminating cases by reaching an 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.

There are two ways in which sanctions can be agreed between the parties – commitments (known as guarantees in El Salvador) or settlements. While commitments are allowed under El Salvadorian law, there are currently no procedures in place regarding guarantees, as was already the case at the time of the 2008 Peer Review. El Salvador should ensure that such a procedure is put in place, so that commitments are available for non-cartel offences.

At the same time, it is recommended that El Salvador do not allow cartels to be able to benefit from commitments or guarantees. At the same time, it is advisable that cartels are allowed to settle the investigation – i.e. to benefit from a set penalty reduction in addition to the imposition of cease-and-desist order in exchange for acknowledging liability and fault.

6.4.6. Ensure due process by:

- Providing access to the Report submitted by the Superintendency to the Board before the latter adopts its decision, so that parties can exercise right of defence by reference to it;
- Ensuring that defendants are able to present orally their defence to decision-makers;
- Clearly separating investigation and decision -making roles.

Due process and transparency regarding how competition law is enforced are important elements of any competition law system. While competition enforcement in El Salvador seeks to meet international standards of transparency and due process, there are a number of areas current practices in El Salvador can be improved, such as the ones outlined above.

By effectively separating the research and decision-making roles, greater transparency is achieved in the processes carried out by the Superintendency.

6.4.7. Adopt measures to make judicial review swifter

The duration of judicial reviews of infringement decisions is among the most serious obstacles to effective competition enforcement in El Salvador. This is a problem that requires serious engagement by all relevant parties in El Salvador.

At the same time, the Superintendency should strengthen the efforts that it has been making in this area, such as providing capacity-building to judges, working closely with the Attorney General who participates in Supreme Court cases and who enforces the Superintendency's orders, and submitting well-reasoned arguments and pleadings to the Court.

6.5. Merger Control

6.5.1. Amend merger control thresholds

By setting its merger notification thresholds high, El Salvador has so far avoided a number of problems that other countries confronted, such as reviewing too many mergers that are unlikely to pose any significant competition issues.

On the other hand, and as already noted in the 2008 Peer Review, it seems that merger notification thresholds have been set too high, leading to too few mergers being reviewed. A recent assessment of merger control thresholds by the Superintendency concluded that the relatively small size of the national economy meant that most transactions with the potential to impact competition in the El Salvador market fall below the current notification thresholds. In the light of this, a recent legislative proposal included a reduction of merger control thresholds in order to adapt them to the reality of El Salvador.

It is recommended that the merger control thresholds be reviewed along these lines, to ensure that transactions with the potential to impact competition in El Salvador are subject to review. At the same time, merger control thresholds need not be included in primary law. Instead, they may be set out in secondary legislation, which can be updated by, or upon recommendation of the Superintendency. This would permit better to balance the benefits of identifying anticompetitive transactions with the costs of merger control, and to adjust notification thresholds over time based on acquired experience.

6.5.2. Consider charging appropriate and reasonable notification fees for notifiable mergers

Competition agencies do not control how many mergers are submitted to them, or how complex they will be. To manage the costs of engaging in merger control, it is not unusual for competition agencies to charge appropriate and reasonable notification fees. This mechanism has the additional advantage of reinforcing a competition authority's budgetary autonomy.

On the other hand, it is crucial that such fees be appropriate and reasonable in light of the work that merger control is likely to require. Notification fees should not be used as an underhanded manner of funding the competition authority's overall activities, nor should they be disproportionate or extortionate. Clarify how the imposition of remedies on commitments offered by merging parties works.

6.5.3. Amend merger control process, in line with international practices

At present, there is a single merger control procedure, regardless of the complexity or likelihood of anticompetitive effects of the reviewed merger. It is suggested that El Salvador adopt a two-stage merger control procedure, in line with international practices, particularly if notification thresholds are lowered and the Superintendency is forced to review a greater number of mergers.

Such an approach would comprise one short initial period, during which most transactions – which traditional do not pose competition issues – would be cleared, and those transactions that may be problematic are identified; and a longer period for in-depth assessments of prima facie problematic transactions.

In addition, notifying parties should be able to propose remedies at all stages of the procedure, and mechanisms should be put in place to allow contact between the Superintendency and notifying mergers before and during merger control procedures regarding notification requirements, competition concerns and potential remedies. This should include allowing informal interactions between Superintendency and companies to identify issues and potential solutions.

Ensure that merger commitments are limited to the elimination of competition concerns created by a transaction, and reflect solely competition concerns.

In some instances, concerns have arisen regarding the use of merger control in El Salvador to address concerns that go beyond competition law. This goes beyond the competences of a competition authority, and is not in line with international practices – under which such concerns should be addressed by means of other regulatory tools. It is recommended that El Salvador ensure that merger control remedies are limited to the remedies necessary to address the anticompetitive harm brought about by the merger.

6.5.4. Consider increasing the severity of sanctions for failure to comply with merger control requirements

As with other sanctions under El Salvador’s competition law, the sanctions faced by companies that breach the merger control rules are very low, and unlikely to prove deterrent – as may be apparent from the high level of enforcement for such breaches by the Superintendency in recent years, particularly when compared with other infringements.

It is recommended that such penalties be increased, in line with what has been recommended for sanctions more generally.

6.6. Private Enforcement

6.6.1. Ensure that it is possible for private enforcement to occur before the courts

Private enforcement can play an important complementary role to public enforcement. First, private enforcement can be used to narrow the “enforcement gap” created by the inability of public enforcement authorities to deal effectively with all cases due to resource constraints. Furthermore, private enforcement is perceived by some to be more effective than public enforcement at detecting and prosecuting certain competition infringements, e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristics.

In addition, victims should be entitled to be compensated for their loss. Such compensation will typically be awarded by courts following private complaints.

6.6.2. Ensure that private enforcement supports public enforcement.

Promotion of private enforcement should not negatively affect public enforcement. Private enforcement should not be promoted at the expense of the public application, but as a necessary complement. El Salvador should seek to identify a balance of public and private enforcement that ensures that private enforcement: (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and that could discourage socially beneficial conduct.

An area of focus should be on ensuring that private enforcement complements the mechanism for voluntary compensation arrangements certified by the competition agency, which seems to be envisaged by Article 155 of the law. El Salvador should ensure that the two mechanisms are aligned and coherent to minimise judicial litigation and prevent double recovery, while not undermining the possibility of victims of anticompetitive conduct obtaining compensation.

6.7. Advocacy

Consider imposing a duty on public bodies to justify a decision not to follow a recommendation by the Superintendency (at least in the context of market studies)

The Superintendency has been quite active – and successful – in its pursuit of market studies, which are widely recognised as an important tool to open markets to competition. At the same time, there is no mechanism that requires public bodies to take into account the Superintendency’s recommendations.

As a golden mean between taking into account the Superintendency’s recommendations and preserving the regulatory and democratic autonomy of the addressees of the recommendations, it is suggested that El Salvador should consider, at least in the context of market studies, imposing a duty on public bodies to justify a decision not to follow a recommendation by the Superintendency.

6.8. Promote the adoption of compliance programs

One of the most important tools to develop a competition culture is to promote the adoption of compliance policies on the part of business. Compliance can play an important complementary role increased fines and stronger enforcement in combatting anticompetitive practices and in making businesses more aware of the importance – for them, and for society – of competition law.

The Superintendency can play an important role in this respect, by reaching out to businesses, explaining to them what El Salvador’s competition law requires of them, and in promoting the adoption of compliance programmes across the economy.

References

OECD. (2008). Competition Law and Policy in El Salvador - A Peer Review. OECD. www.oecd.org/daf/competition/elsalvador-competition.htm

OECD. (2012). Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries. OECD. http://www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_en.pdf

OECD. (2015). Relationship between Public and Private Enforcement. OECD, [https://one.oecd.org/document/DAF/COMP/WP3\(2015\)14/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2015)14/en/pdf)

OECD. (2016). Independence of Competition Authorities - From Designs to Practice DAF/COMP/GF(2016)5. OECD, <http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm>

OECD (2019). The standard of review by courts in competition cases, <http://www.oecd.org/fr/daf/concurrence/standard-of-review-by-courts-in-competition-cases.htm>

www.oecd.org/competition

