Competition Law and Policy in Honduras

A Peer Review

2011

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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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 Competition Forum (LACF) is the cornerstone of this collaboration on competition matters. It is a unique forum which brings together senior officials from countries in the region, to promote the identification and dissemination of best practices in competition law and policy. Nine 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 important 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 Competition Forum. In 2007, the Forum assessed the impact of the first four peer reviews conducted at the LACF (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 and Panama in 2010. The peer review of Honduras was conducted in 2011. The OECD and the IDB, though 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 pro-competitive policy and regulatory reforms which will promote economic growth in LAC markets.

Both organisations would like to thank the Government of Honduras for volunteering to be peer reviewed at the ninth LACF meeting, held in Colombia, on 13-14 September 2011. Finally, we would like to thank Mr. Enrique Vergara, the author of the report, Hilary Jennings, its editor, the Examiners (Regina Vargas, El Salvador; Eduardo Pérez Motta, Mexico and Pedro Meilan, Panama), Colombia's competition authority for hosting the LACF and the many competition officials whose written and oral submissions to the Forum contributed to its success.

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1. Summary

The Law for the Defence and Promotion of Competition in Honduras (hereinafter referred to as "the Law" or LDPC), developed out of structural reforms initiated in the 1990s, which aimed to liberalise the economy, deregulate markets, privatise some public enterprises and open the economy to foreign trade. This process has not been trouble-free, due to a strong tradition of state intervention in the economy. Such intervention has been particularly common in sensitive agricultural markets, where the government has sometimes set prices.

The LDPC follows on from the Free Trade Agreement that Honduras and other countries in the region signed with the United States in 2005, which facilitated the Law's passage through the National Congress with solid backing from the private sector. The LDPC was finally passed in late 2005 and entered into force on 6 February 2006, creating the Commission for the Defence and Promotion of Free Competition (hereinafter referred to as "the Commission" or CDPC) as its implementing authority.

The Law is inspired by the UNCTAD Model Competition Law. It addresses the usual types of anticompetitive activity: horizontal and vertical restrictive agreements, unilateral conduct and economic concentrations. In addition to these standard provisions, the LDPC contains a chapter defining some basic concepts of competition policy, including competition, consumer, relevant market and so forth. Institutionally, the CDPC is an autonomous authority with the Ministry of Industry and Commerce (*Secretaria de Industria y Comercio)* as its line Ministry. The Commission's plenary is composed of three members appointed by the Congress on the basis of recommendations from various representative bodies. Notable features of the Law are, first, the autonomy of members of the Commission plenary, which ensures a strict technical approach to decision-making, and second, the Law's explicit statement of its objective of achieving economic efficiency and consumer welfare.

Over the course of its five years of existence the Commission has done excellent work in circumstances that have not always been favourable. Although the draft Law had been strongly supported by the business sector, this did not stem from a conviction of the need for competition policy but from requirements arising from the Free Trade Agreement with the United States. When the Commission began to exercise its functions it encountered strong opposition from business and a lack of awareness and understanding of competition policy within the public sector. Further, the government had been accustomed to intervening frequently in markets — particularly those involving essential goods — to fix prices or, worse still, to order enterprises to agree on prices. Moreover, the Directorate General of Consumer

Protection (DGPC) also has price setting authority in certain circumstances, which presents another challenge to the Commission.

Thus, the Commission has operated against this backdrop of ambivalence about a market economy and state intervention in the market, and it has done so relatively successfully. Much of its work in the first few years entailed drafting the Regulations to the Law (Acuerdo 001-2007, hereinafter referred to as the "Regulations" or "the Implementing Regulation"), defining the notification thresholds for economic concentrations and conducting sector studies. It has also carried out a number of advocacy activities to promote the Law and explain the principles of free competition in a country that is largely unaware of them.

In the early stages after enactment of the Law the Commission took a strong stand by launching, *ex officio*, a number of cartel investigations. Since 2007, and despite the difficulties noted above, it has investigated and sanctioned some of the country's largest cartels, in the cement, pharmacies, and sugar sectors, despite not having a leniency program. In these proceedings it did not use direct evidence for the most part, but relied on circumstantial evidence, for which its Regulations provide a series of criteria. Honduras has adopted the *per se* rule to sanction hard-core cartels. Another highly positive aspect is that these investigations and cases have occurred in high-impact markets.

Although the Law does not explicitly address abuse of dominance there is little doubt that the Commission has the power to sanction such conduct. The general language in Article 7 of the Law encompasses single firm conduct that could constitute an abuse, and the Law also provides that sanctions can be imposed only if the enterprise engaging in the conduct holds a significant market share. Thus far two cases of major public interest have been sanctioned in this area, one involving, a cable television firm and the second the leading brewery in Honduras.

The Law and Regulations governing merger (M&A) transactions raise two concerns. First, the requirement for compulsory notification of all M&A operations, and second, the utilization of a market share test as a part of the notification thresholds. As would be expected, the Commission has heard numerous M&A cases, but it has opposed none, although it has set conditions in 13 of them.

The Law sets out a procedural framework for conduct investigations and it provides the Commission with most of the essential investigative tools for this purpose. To date, however, the Commission has not used all of them, in particular its authority to conduct searches of business premises pursuant to a court order (dawn raids). As noted above, the Law does not provide for a leniency programme. Although the Commission has imposed some significant fines, is too early to know

if those fines have been sufficiently high to create a deterrent to future anticompetitive conduct. Other apparent shortcomings in the law are the overly short deadlines for completing conduct investigations and M&A analysis, and the lack of a settlement mechanism.

Judicial review of the Commission's decisions raises several specific issues. The existence of various levels of review (Administrative Disputes Tribunal, the Court of Appeals and Supreme Court) can lengthen the overall process, but a countervailing factor is the requirement that a sanctioned party must pay fines that are imposed before proceeding to the judicial review phase, which creates an incentive for a quicker final resolution. This requirement, however, is strongly criticized by the business community on due process grounds. Finally, new civil procedure rules were recently adopted in Honduras, which will help to shorten the judicial review process, particularly at the first instance

Regarding competition advocacy, the Commission has conducted a series of activities to promote competition principles to various audiences, notably government, Congress, business, media and consumers. Much more effort in this area is required, however.

This report ends with a number of recommendations, which are organised into two parts: those addressed to government agencies, other than the CDPC, and the Congress, and those addressed to the CDPC.

The Recommendations to the other government agencies and the Congress highlight that:

- The government should intervene less into the unregulated sectors of the Honduran economy – indeed that it do so only when absolutely necessary;
- The price setting powers of the Honduran consumer protection agency should be restricted to cases of market failure in clearly defined and limited instances;
- A structured mechanism should be introduced for undertaking competition assessment of proposed decisions by other parts of government and draft legislation;
- Regulated sectors should be liberalized further, notably in mobile telephony and privatization plans introduced in others, such as electricity;
- The procedures for the appointment of CDPC commissioners should be changed to allow for staggered terms;

- The deadlines for completion of both conduct and M&A investigations be lengthened;
- The merger notification rules be amended to eliminate the obligation to notify all M&A transactions regardless of size;
- Consideration should be given to the introduction of a leniency programme to be used in anti-cartel enforcement and of a case settlement mechanism;
- The fining rules should be amended to remove the provision that fines can be based on the quantification of the unlawful gain;
- The judicial review process should be reformed to consolidate appeals against the same CDPC decisions into one case.

The Recommendations for the CDPC note that:

- The CDPC should engage in strategic planning and prioritization to improve its internal capabilities and to better manage its external interactions with stakeholders;
- To enhance its anti-cartel enforcement activities, the CDPC should: make use of its powers to conduct dawn raids, clarify its analysis in cases where the government has intervened in the market, develop an approach to co-operation agreements between competitors, and focus more heavily on possible collusion in government tendering;
- It should improve its analysis of rule of reason cases, both conduct and M&A, in particular giving more attention to entry barriers and market definition;
- The CDPC should review its merger regulation establishing merger notification thresholds with the aim of harmonizing the merger notification thresholds and foreign firm notification requirement with accepted international practice;
- It should review the adequacy of the fines that have been imposed in its cases to date, especially cartel cases;
- Advocacy efforts to public and private sectors actors should be strengthen;
- Co-ordination with other regulatory agencies should be strengthened.

2. Political and economic context

Honduras has an area of roughly 112,492 km^2, and is located in the central part of Central America. It borders with the Atlantic Ocean to the north, Nicaragua and El Salvador to the south, the Atlantic Ocean and Nicaragua to the east, and Guatemala to the west. It is a geographically diverse country, with many mountains, planes and valleys, as well as long rivers, accounting for its rich biodiversity and a large number of animal and plant species.

Together with Costa Rica, Guatemala, El Salvador and Nicaragua, Honduras gained its independence from Spain in 1821. It now has a population of roughly 8 million inhabitants, consisting of various ethnic groups, the most important of which are mixed race (*mestizos)*, indigenous groups, *garífunos*, and English-speaking creoles. According to information provided by the Commission, 67% of the population live below the poverty line and of these 40% are in conditions of indigence.

Politically, the Republic of Honduras is a representative democracy, with two strong parties, the Liberal and National parties, which have alternated power in recent years. The executive is headed by the President of the Republic, while legislative power resides with the single-chamber National Congress (*Cámara de Diputados)*. The judiciary is headed by the Supreme Court. Administratively, the country is divided into 18 departments; its most important cities are its capital, Tegucigalpa, located in the centre-south of the country, with a population of about 1.5 million, and San Pedro Sula, in the north, with some 700,000 people.

Honduras' gross domestic product (GDP) in 2010 amounted to L.290,991 million (290,991 million lempiras), equivalent to US$ 15,400 million, giving a per capita income of L.30,246, or US$1,600. Like other countries in the region, the Honduran economy is based heavily on agriculture, specialising particularly in the production of coffee, sugar, bananas and maize. In recent years, it has also diversified into commerce, financial services and manufacturing. The agriculture sector accounts for 12.8% of GDP, manufacturing 22.7%, and services 55.5%. In 2010, annual inflation was 8.2%, while the GDP grew by 2.6%. The country's official currency is the lempira, which currently (as at August 2011) trades at around L.19 per dollar on the foreign exchange market.

An entrenched, protectionist and interventionist culture has made it difficult to move Honduras towards a market economy. Until the 1990s, the economy was heavily centralised and under State control, following the "import-substitution-industrialisation" model,[1] under which numerous protectionist measures were adopted. A large number of economic activities were undertaken directly by the

State, and the remainder, although implemented by the private sector, were subject to price control. Economic liberalisation reforms began to be introduced in the 1990s, including measures to open up the economy to external trade by lowering and eliminating tariffs and other nontariff measures, deregulation of most economic activities and the start of processes to privatise public enterprises.

The process of opening the economy to foreign trade included the following initiatives:

- The establishment of the Central American Bank for Economic Integration (CABEI) in 1960, which promotes and finances economic and social development projects in its 13 member countries.

- The establishment of the Central American Stock Exchange in 1993.

- The Free Trade Agreement with Mexico in 2000.

- The Puebla-Panama Plan in 2001. It seeks to strengthen regional integration and promote social and economic development projects in the states of southeast Mexico and the countries of the Central American isthmus.

- In 2004 at the 3rd EU-LAC Summit, the Heads of State and Government of the EU and LAC agreed to progress regional integration and multilateralism through a network of Association Agreements (including Free Trade Agreements) to strengthen economic integration in the LAC region and establish region-to-region co-operation.

- The 2005 Free Trade Agreement with the United States, which was a direct precursor of the Competition Law, as noted above.

- The Bolivarian Alternative for the Peoples of our America (ALBA) signed in 2004, which joined Honduras in 2008. It is a trade treaty signed between the Bolivarian Republic of Venezuela, Cuba, Bolivia, Honduras and the Dominican Republic.

At the present time, the State participates directly in the energy industry, except in the power generation segment in which it has a 30% stake, and in fixed telephony and health services. There are no short-term projects to privatise these activities, since their current expansion plans and the strength of labour unions would make that very difficult to accomplish. Although fuel supply is in private-sector hands,

prices are set by the State on the grounds that it is a strategic activity, as is also the case in the road transport sector (both passenger and freight services). The State, through the Consumer Inspectorate attached to the Directorate-General of Consumer Protection (*Dirección General de Protección del Consumidor* – DGPC), also has a very broad remit to set the prices of mass consumption products included in the basic consumer basket of goods in times of crisis, and in cases of an absence of competition in the market, as determined by the CDPC

As noted above, the most important economic activities are in commodity markets — coffee, bananas, sugar, seafood, fruit and vegetables. There is also a sizable textile industry. The public sector accounted for some 13.1% of GDP in 2008.[2] This figure includes the operations of state-owned enterprises, such as ENEE, SANAA, HONDUTEL, ENP, EDUCREDITO, BANADESA and BANHPROVI.

Small and medium-sized enterprises (SMEs) provide a major source of employment and are the economy's powerhouse. The SME classification does not depend on annual sales but on the number of workers employed. Many microenterprises operate informally. There is no precise data regarding the informal sector. Estimates, taking into account the number of legal entities the Income Executive Direction considers to be big taxpayers, suggest that most enterprises in Honduras, up to 99% of existing firms at the national level, are classified as Micro, Small or Medium enterprises.

2.1 Development of the Competition Law

Although free competition is enshrined in the 1982 Political Constitution[3] in the section that addresses economic principles, it was not until the early 1990s that legislation to defend and promote free competition began to be discussed and debated, in the context of the economic reforms being implemented in the country. The latter included three structural adjustment programmes: the Law on the Structural Organisation of the Economy in 1990 [*Ley de Ordenamiento Estructural de la Economía*]; the Law to Restructure Income Mechanisms, Reduce Public Expenditure, and Promote Production and Social Compensation in 1994 [*Ley de Reestructuración de los Mecanismos de Ingresos y la Reducción del Gasto Público, el Fomento de la Producción y la Compensación Social*]; and the Law to Stimulate Production, Competitiveness and Human Development in 1998 [*Ley de Estímulo a la Producción, la Competitividad y el Desarrollo Humano*].

Starting in the 1990s, Honduras embarked upon a general process of reforms to its economic system, with measures ranging from structural adjustments to the privatisation of public enterprises, and including processes of liberalisation and openness to foreign trade. Among other measures, the exchange rate and interest

rates were deregulated, the prices of a number of goods that had been controlled were liberalised, tariffs were reduced and nontariff barriers were eliminated. On competition issues, the private sector invited a member of Peru's INDECOPI[4] to attend the national entrepreneurs' meeting in 1992, highlighting that competitiveness was an issue of concern for economic actors.

Against this backdrop, discussion began on the need for a competition policy and legislation to implement it. Critically important were the reports prepared by the Economic Policies and Analysis Unit (UDAPE) and the United States Agency for International Development (USAID), which, in 1994 and 1997 respectively, published documents entitled *Lineamientos para la Formulación e Implementación de una Ley de Competencia Económica* (Guidelines for Formulating and Implementing an Economic Competition Policy) and *La Promoción de la Competencia Empresarial en Honduras* (The Promotion of Business Competition in Honduras).

Nonetheless, it was not until 2002 that work effectively began on a regulatory proposal that took account of the recommendations contained in the two documents. A major impetus came from the negotiations for the Free Trade Agreement that Honduras and other Central American countries had signed with the United States in 2005. This external stimulus was decisive for preparing the draft Law for the Promotion of Competition and Consumer Protection, on which work began in 2003 in close co-ordination with the Chamber of Production (*Consejo Hondureño de la Empresa Privada)* and Parliamentarians (*Congreso Nacional)* on the Congressional Competitiveness Commission. The interest of the private sector – opponents of earlier proposals – stemmed from their concerns that the Free Trade Agreement could be at risk without this legislation being put in place.

Another driving force was the external aid Honduras obtained through the World Bank, which granted a loan of US$15 million to enhance the country's competitiveness programme. From this loan, US$385,000 were allocated to the implementation of some aspects of the LDPC, such as the promotion of the Competition Law, office lease, financing three sectoral studies and hiring an international consultant during the first few months of the Commission's operation.

The legislative process took just over a year to complete. Its content, which was debated in Congress and on which the private sector was consulted, was inspired by the UNCTAD Model Law. All trade and business associations included in the Chamber of Industry were consulted on the final draft of the project that eventually became the Law. The Law was promulgated on 29 December 2005 and entered into force following its publication in the Official Journal (*Diario Oficial*) on 6 February 2006.

The Law for the Defence and Promotion of Competition (LDPC) has 65 Articles divided into the following titles: Title I: Objectives of the Law; Title II: Concepts and definitions; Title III: Geographic scope of implementation of the Law; Title IV: On competition; Title V: On the Commission for the Defence and Promotion of Competition; Title VI: Sanctions and other measures; Title VII: Administrative procedures; and Title VIII: Final provisions.

An important part of the CDPC's work in these early years has focused on negotiating the institutional budget, hiring its staff, developing the institutional website and issuing the Regulations to the Law. In addition to its competition investigations and merger reviews, 19 sector studies have been conducted in highly sensitive markets, and three public policy recommendations have been issued.

3. The competition regime

3.1 The Law for the Defence and Promotion of Competition

Objective: As noted above, the Political Constitution explicitly stresses the importance of competition for the Honduran economy. The first chapter of the sixth title contains regulations on fundamental principles of the economic system, which include the following: (a) efficiency in production; (b) economic development planning; (c) economic freedom; (d) economic activity exercised basically by the private sector; and (e) protection of small and medium-sized enterprises. Article 339 explicitly prohibits monopolies, monopsonies, oligopolies, division of the market, and similar practices in industrial and commercial activity.

These constitutional principles provide a frame of reference for the LDPC, which, in Article 1 defines its objective as promoting and protecting the exercise of free competition, in pursuit of efficiently functioning markets and consumer welfare. Thus, Honduras adopted competition policy objectives in line with international best practices.

Both this objective and the definition of free competition given in Article 2 paragraph 2 of the LDPC, explicitly consider free competition as a means of achieving the goals of efficiency and consumer welfare, but not as an end in itself. It is therefore possible for situations to exist in which the competitive process might be formally affected, but as consumer welfare and efficiency are not harmed, the practices in question would not be sanctionable.

The Law is clear in defining aims that are strictly related to efficient resource allocation, thus maximising consumer welfare, without leaving room for

interpretations that pursue other objectives such as protection of SMEs, promotion of investment, or the development of national champions.

Scope of application: The Law is wide-ranging. It makes no distinction in terms of the economic activities to which it applies, but covers all areas of economic activity, including those regulated by special laws or other regulations.[5] The Law is also applicable to all agents that engage in an economic activity or whose actions have effects on markets, including both private economic agents and government agencies or entities.[6] There is also an explicit provision applicable to professional and business associations, a topic that has been addressed in various international forums.

The scope of this Law is unusual in that competition laws often exempt certain sectors. The LDPC does not give special treatment to SMEs, although certain actions by the CDPC have encouraged such firms to form partnerships to strengthen their negotiating power in relation to large-scale buyers.[7] There are also no explicit *de minimis* rules. However, for abuse of dominance cases, the Law requires the CDPC to set market share thresholds above which a given conduct can be declared prohibited.[8] Importantly, the LDPC is also applicable to government entities when their actions affect markets, although it remains to be seen how this will be put into practice.

In terms of geographical application, the Law applies not only to private individuals and corporate entities, whether public or private, domiciled in Honduras, but to all foreign-based entities whose actions may impact on the local market.

In relation to prohibitions, the Law distinguishes between practices that restrict competition due to their form, and those that restrict competition due to their effect. The former includes illegal horizontal agreements, while the latter relates both to vertical restrictions and abuses of dominance. The Law also contains a special chapter regulating the procedure for notification and review of M&A transactions, the details of which are analysed below.

Definitions: A major innovation in the Law, following the UNCTAD Model Law, are the definitions contained in Article 2, which clearly represent value added both for the CDPC and for economic agents, especially in a country whose inhabitants are unaware of competition concepts and principles. Defined in this article, for example, are terms such as "free competition," "economic agent," "market" and "relevant market."

3.2 Institutional issues

Establishment of the Competition Authority: As noted above, the Competition Law entered into force on 6 February 2006. Nonetheless, the members of the CDPC were not selected until August of that year, despite the fact that the Law requires them to be appointed within 30 days of its entry into force. The authority's budget was negotiated between August and November 2006; the first staff member was hired in November, and it received its first cases in late 2006.

In institutional terms, the Law defines the CDPC as an autonomous institution with its own legal status and capital, with functional, administrative, technical and financial autonomy in its internal regime, and independence in fulfilling its functions.[9] Consequently, it is independent from government ministries, although it has to report to the Ministry of Industry and Trade for budget purposes, and it is also accountable to a supervisory body, the Supreme Audit Department (*Tribunal Superior de Cuentas* –TSC). The CDPC's internal auditor is by law the representative of the TSC providing on-going reporting on budgetary execution and on the management and use of CDPC resources, including those obtained from non-public financing (external funding, for example). The Commission consists of three members, one of whom serves as the chair; and it has a staff of 21.

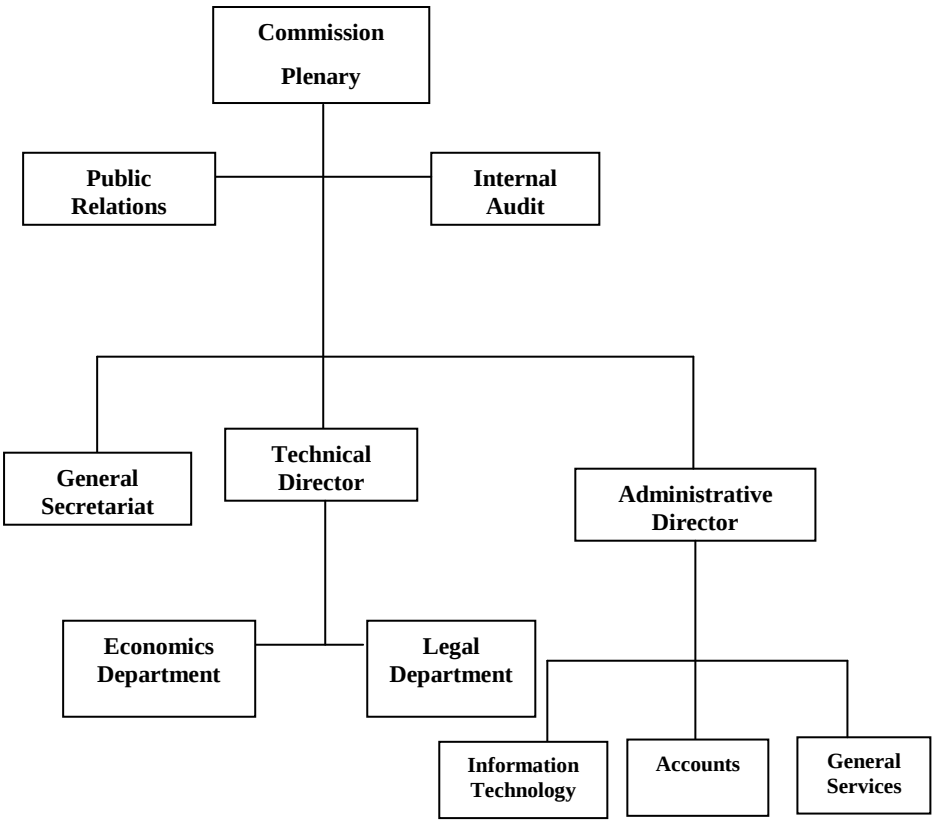
Commission plenary: The competent authority for adopting the Commission's decisions is the Commission plenary, consisting of three members who, among other requirements, must be lawyers, economists or business professionals. They are chosen by a two-thirds majority of the National Congress from candidates put forward by various institutions: The Honduran Private Enterprise Council (COHEP), the National Convergence Forum (FONAC), the National Competitiveness Commission, the government, and the Honduran Federation of Associations of University Professionals (FECOPRUCH). Plenary members work full-time and serve a seven-year term. Currently these three terms are set to expire at the same time, which creates the potential for disruption of the Commission's work at during the hand-over period. The Law sets out standard grounds for the removal of members from office, such as gross negligence, physical or mental disability and death.

Chairperson: The Commission's chair is the first member of the plenary appointed by Congress. He or she serves as the Commission's legal representative, and is authorised to convene meetings of the plenary, confer powers and generally co-ordinate the Commission's activities.

Departments and units: The General Secretariat, headed by a registrar (*secretario abogado*), receives complaints and consultations and assesses their

admissibility. It also handles the Commission's case files. The Technical Department, headed by a technical director, is responsible for conducting CDPC investigations and studies and for presenting them to the plenary. The Technical Director is assisted by the Legal Director and Economic Director and senior managers of the corresponding departments, consisting of three professionals in each. In terms of support units the CDPC has an Administration Department, which manages the budget and the human resource functions, together with a Public Relations Officer and an Internal Audit Unit.

The following diagram illustrates the organisational structure of the CDPC:



Source: CDPC.

The staff recruitment process began in November 2006 with the appointment of the Technical Director. All of the CDPC's technical staff have been hired through competitive selection processes and some of them have received training in Honduras and abroad. This training has included internships, mainly at the United States Federal Trade Commission, the Federal Competition Commission in Mexico and the National Competition Commission in Spain. The senior staff have master's degrees.

The Commission's annual budget for 2011 amounted to L.17,400,000, equivalent to approximately US$900,000. This forms part of the government's overall budget, for which the Ministry of Finance includes a special item requiring approval by Congress. With a view to attracting high-quality professional staff, the salaries paid to CDPC officials are not subject to the civil service pay scale. After a number of relocations, the CDPC eventually found modern headquarters in a central commercial district of Tegucigalpa. It does not have any regional offices.

Table 1. CDPC budget

Fiscal year	Budgetary expenses (lempiras)
2010	17,400,000.00
2009	17,000,000.00
2008	15,000,000.00
2007	15,000,000.00
2006	3,000,000.00

Source: CDPC.

Table 2. CDPC technical staff

Number of staff/year	2006	2007	2008	2009	2010	2011
Technical staff	5	9	10	9	14	14
ITCs	-	-	-	-	1	1
Support staff	4	9	10	9	6	6
Total	9	18	20	18	21	21

Source: Prepared by the authors on the basis of CDPC data.

3.3 Institutional principles

During its short existence, the CDPC has made major efforts to introduce and maintain principles such as independence, transparency, the primacy of technical criteria and respect for confidentiality.

In terms of independence, the CDPC has put into practice the robust declaration of independence proclaimed in the Law. There is no political interference in its actions; and most of the entities that interact with it explicitly value this attribute.

Transparency has become another hallmark of its work. Its website (www.cdpc.hn) publishes resolutions, sector studies, recommendations, M&A transactions and regulations. In addition, one week per year is devoted to publicising competition issues.

The CDPC's technical capacity has been increasingly valued in Honduras. The decisions it adopts are robust and consistent, and have been well received by the lawyers that habitually work on litigation at its headquarters. The Commission also takes considerable care to protect the confidentiality of documents submitted by parties during the course of investigations, for which it opens individual background files.

In terms of the types of conduct covered by the application of the Law, competition provisions in Honduras do not make the traditional distinction between collective actions (cartels and other restrictive agreements) and unilateral ones (abuses of dominance). Instead, it controls restrictive practices according to whether they are prohibited by form (*per se*) or on the basis of their effects. Moreover, provisions governing both types of practice make it possible to sanction both illegal horizontal agreements and abuses of dominance, as detailed below. The Law also contains an entire chapter on economic concentrations (M&A) establishing a system of mandatory prior notification for this purpose, for which the CDPC issued Resolution No. 32 specifying the thresholds above which a merger needs to be reviewed.

3.4 Procedural framework and investigative powers

The CDPC team, particularly the staff in its technical departments, is highly trained. Investigations and sector studies are initiated at the behest of the Commission Plenary, submitting background information to the Technical Department, which meets with the Legal Director, Economic Director and Technical Director. These appoint an investigating team and monitor the course of the investigation very closely, which is facilitated by the number of professional staff at the institution. All sector investigations and studies are conducted by a team comprising at least one lawyer and one economist. After trialling several different formats, it was decided to include both professionals from the outset of investigations, thereby generating a strong sense of interdisciplinary teamwork. The team's first task is to develop an investigation plan. More details of the procedural framework are provided in the following paragraphs.

3.4.1 Investigations

Investigations may be opened as a result of a complaint or ex officio by the Commission. In the first case, a review of admissibility is performed, and the complainant is required to provide background information in order to screen out baseless allegations. If the complaint is declared admissible, a preliminary investigation is opened, with a view to obtaining sufficient information to be able to open infringement proceedings and bring charges. In this preliminary stage nothing is required of the party under investigation. If there is sufficient evidence, infringement proceedings are opened and charges are brought, in response to which the defendant parties can file their defence and present the information and evidence they deem necessary. The procedure concludes with a ruling from the Technical Department, which is referred to the plenary for a final decision on the resolution to be adopted. The Law provides that an investigation must be completed within six months from the date of formulation of charges. It seems that this period could be excessively short, and a longer timeframe is being considered by the CDPC, although there are no specific initiatives yet.

During the preliminary investigation the CDPC is not authorised to request information or to call upon a party to answer charges. During this stage, the work of the CDPC basically involves verifying whether there is sufficient evidence to bring charges, drawing on public information and data submitted by the complainant.

Once infringement proceedings have been opened and charges brought, the CDPC has several powers to collect information and conduct its investigations. The defendants are notified of the charges and have 30 days to respond. The CDPC may subpoena witnesses and request any type of information. It may also carry out searches at the defendants' premises based on a court warrant, but, to date, it has not used this power, considering it sufficient to give prior notice to the defendant of the decision to obtain the information needed. Firms and individuals that do not provide the information requested by the CDPC are subject to fines of up to L.50,000 (about US$ 2,600). The Commission may also order interim measures during the investigation.

There is no immunity or leniency programme. However, if the parties accept the charges brought by the Commission, any fine imposed on them is subsequently reduced by one-third. To date no firm or person has made use of this procedure. There are also no mechanisms for reaching settlements with investigated parties on the dimensions of both the illegal activity and the appropriate penalties.

3.4.2 Decision-making process

Once the team appointed by the Technical Department completes its investigation a report is prepared for the Commission plenary, which is presented by the Department and the lawyers and economists working on the case. This report is discussed, and once a consensus is reached, a draft resolution is prepared for final approval by the plenary. On occasion the plenary has returned the file, requesting further inquiries or additional information; this has not happened often, however, given the short deadlines prescribed by the Law. The CDPC then adopts the administrative sanctions and remedies needed to correct the effects of prohibited acts and practices.

Table 3. CDPD decisions as at June 2011

	2006	2007	2008	2009	2010
Decisions to sanction	0	0	2	1	6
Non-infringement decisions	-	-	-	-	-
Decisions on M&A operations	1	14	11	5	3
Responses to queries	-	4	7	1	-
Total	1	18	20	7	9

Source: Prepared by the authors on the basis of data provided by the CDPC.

3.5 Sanctions and remedies

3.5.1 Administrative orders

The CDPC has a number of administrative powers. First, the Law authorises it to take all steps necessary to ensure that the prohibited practices or conduct ceases. It is therefore normal that, in sanctioning decisions, the Commission orders the cessation of a conduct or requires firms to adopt certain measures with similar effects. In the course of ongoing investigations the Commission may adopt interim measures that it deems necessary to avoid the damaging effects of the acts being investigated. Finally, as noted above the Commission can impose fines on firms and individuals who do not fulfil its information requests.

3.5.2 Administrative fines

The CDPC is authorised to impose administrative sanctions in cases where it finds that the Competition Law has been violated. The sanction takes the form of a fine equivalent to three times the amount of the economic benefit obtained by the economic agent as a result of the unlawful conduct. Where it is impossible to determine the amount of that benefit, the Commission will set a fine which in no

circumstances may exceed 10% of the gross profits on sales in the previous fiscal year.[10] It has seldom been possible to use the first standard because of difficulties in determining the amount of the benefit. According to the Law[11], the amount of the fine will depend on the seriousness of the violation, whether there have been repeated violations of the Law, the modality and scope of the restriction on free competition, the injury to consumers, the size of the affected market, the duration of the violation and other similar factors.

If the fine is not paid, the offender may be liable to additional fines ranging from L.1,000 to L.50,000 for each day of delay up to thirty days. In cases of repeat offenses the fine is doubled.

3.6 Judicial review

Administrative rulings issued by the Commission plenary can be appealed before the CDPC itself *(recurso de reposición).* This is the final administrative appeal channel, but then the law provides for three levels of judicial review.

The sanctioned party has 15 working days to apply to the Administrative Disputes Tribunals for review of the CDPC ruling. Nonetheless, the filing of this appeal does not suspend the enforcement of the fine, which must in any event be paid within five days of the administrative ruling.

The requirement to pay the fine before the judicial process is complete has led to strong criticism from the private sector, on the grounds that this undermines due process. Given this situation, petitions have been filed before the Administrative Disputes Tribunals to have appeals declared admissible without the fine having been paid. On one occasion (the sugar case) such a petition was granted, although it is not clear on what grounds.

There are two Administrative Disputes Tribunals in Honduras: one in the capital, Tegucigalpa, and the other in the country's second-largest city, San Pedro Sula. To date, almost all of the Commission's rulings have been reviewed by the Tegucigalpa court, whose judge has received specialist training from the Commission in the form of workshops and courses on competition principles, pursuant to an agreement signed with the Supreme Court.

Thus far, the Tegucigalpa Administrative Disputes Tribunal has reviewed 11 cases at first instance, upholding the Commission's ruling in five cases, while the remainder are awaiting a final decision. The Administrative Disputes Tribunal of San Pedro Sula is currently reviewing one case. In judicial reviews thus far, the judge has considered both procedural and substantive aspects of the case. In

particular, the judge reviews the due justification required of the Commission's ruling, attaching great importance to the economic report prepared by the Technical Department, which it studies according to the "rule of reasoned opinion or judgment".[12]

The Court of Appeals for Administrative Disputes may then perform a second-instance review of the case, and its decision may be appealed *(recurso de casación)* to the Supreme Court, which is currently hearing the cement case - described below.

Proceedings before the judge of the Administrative Disputes Tribunal are relatively expeditious, since most of the evidence that the parties can put forward is already contained in the administrative file held by the Commission. Moreover, since 2009, the Code of Civil Procedures, which has supplementary application on this subject, has been reformed to uphold the "principle of orality"[13], thereby making proceedings much shorter. The judicial procedure in the Administrative Disputes Tribunal with supplementary application of the old rules of the Code of Civil Process used to take about 18 months. Under the new rules the judges believe that the time can be reduced to six months. Proceedings in the Court of Appeals take roughly six months, and the same period is envisaged for resolving appeals before the Supreme Court *(recurso de casación).*

Despite these reasonable deadlines, the judicial review process can become lengthy and costly because of the practice of not combining the appeals filed by the different parties affected by the Commission's ruling. In the case of cartels, several of which have been sanctioned, the practice has been to treat each appeal separately on its merits. For example, in the pharmacies case, ten firms were sentenced, so there are ten appeals pending in the courts, whereas it would be more efficient to combine all of them into a single case.

As noted above, the CDPC has signed a training agreement with the Supreme Court of Honduras, for the purpose of training the judges who will hear competition cases. While training has been given to the judge in the Tegucigalpa Administrative Disputes Tribunal the President of the Supreme Court wishes to spread its benefits much more widely, both to train other members of the judiciary and to provide training to Commission lawyers on the new civil process.

3.7 Private action

Article 58 of the Law enables private individuals to bring a suit before the civil courts for damage and injury suffered as a result of violations of the Law. It is not clear whether it is possible to file a civil case in the absence of a prior official sanction of the conduct. In any event, a ruling by the Commission and the courts that

the competition law has been violated serves as evidence against the defendant in private cases. To date, private individuals have not brought any competition suits before the civil courts.

3.8 Sector studies

According to the article 34 Nº 8 of the Law, the Commission has carried out various sector studies for the purpose of promoting the Law and the principles of free competition. These studies have been undertaken at the initiative of the Commission in line with its planning process. The CDPC has signed co-operation agreements with the Inter-American Development Bank (IDB) and the International Development Research Centre (IDRC) to finance sector studies. The results of these initiatives are published on the CDPC website, and have sometimes been presented publicly at special events. To date the CDPC has undertaken sector studies in several markets, including pharmaceuticals, the health sector, transport, insurance and financial services. While there is no statutory time limit to complete the studies, the CDPC has on average taken five months to finish each one.

Table 4. Sector studies

Sector study	Date
Pharmaceutical products	May 2007
Liquid petroleum fuels	October, 2007
Pasteurised milk	August 2008
Payment cards (debit and credit)	October, 2008
Sugar	December 2008
Cement	March 2009
Iron bars	March 2009
Agrochemicals and fertilisers	August 2009
Electric power	September 2009
Private health services	September 2009
Concentrated food formula for animal consumption	January 2010
Air passenger transport	January 2010
Basic grains	January 2010
Freight and passenger road transport	February 2010
Wheat flour	June 2010
Insurance services	August 2010
School utensils	December 2010
Poultry market	June 2011
Mobile telephony	August 2011

Source: CDPC.

The background to the CPDC's studies has been varied. For instance, in the Payment Cards study, the CDPC opened it ex officio because of concerns over potential collusive behaviour in the banking sector. This emanated from the failure of the new Law of Payments Card to deliver the anticipated decrease in interest rates; in fact the interest rates increased. The launch of the Air Passenger Transport study was linked to the importance of the sector to the country's economic development. With respect to the Wheat Flour study, the objective was to provide information about the market to inform the decision-making of the economic agents involved.

Box 1. Payment Cards Study (5 March 2007)

This study was initiated *ex officio* by the CDPC as a consequence of a new law regarding credit cards. In the Commission's view, the new law was expected to lead to lower interest rates, but instead they increased, raising concerns about possible collusive behaviour. Two aspects of this study are noteworthy. First, the limited time period between the law coming into force and the initiation of the study. Second, given that the CDPC suspected the existence of a cartel, it could have initiated a formal infringement investigation instead of a study.

The report concluded that the market for credit cards was concentrated to a few actors, that economies of scale created barriers to entry for new competitors, and that the interest rates charged to users were similar and had uniform variations. These factors prompted the CDPC to conclude that, at a minimum, tacit collusion was taking place.

The report concluded with some recommendations, aimed primarily at promoting competition in the consumer credit market, which acts as a substitute for credit cards. This included proposals to deregulate the requirements imposed by banks when granting these loans. It also recommended improved co-ordination between the banking sector regulator, the National Banking and Insurance Commission (CNBS), and the CDPC. Finally, it called for improved information on the industry through the generation of statistical data to facilitate further analysis of the sector.

As a result of this study, an investigation was initiated ex officio by the CDPC, which produced no concrete evidence of a cartel in this market.

3.9 Substantive provisions

3.9.1 Market definition

Article 2 of the Competition Law in Honduras explicitly defines what is understood by the terms "market"[14] and "relevant market".[15] The definition of the

latter includes the domains of product and geographic area, considering, for the former, substitutability in terms of characteristics, price and use, whereas the latter relates to conditions of competition. In this regard, Honduras has adopted the criteria established by the European Commission[16] in defining the scope of the two market parameters.

In addition to the legal definitions, the CDPC has established more specific criteria for determining the relevant market in the Regulations to the LDPC; and it uses these guidelines[17] to analyse the relevant market in the investigations it undertakes. Although the Economics Department performs the corresponding economic analysis in all of the Commission's investigations, the main resolutions handed down in cases involving an abuse of a dominant position (discussed further in section 3.9.5) and merger operations, only incorporate a highly abbreviated version of that analysis, which could detract from the consistency of the Commission's decisions. It would be better, therefore, if the economic reasoning were incorporated in its entirety. Moreover, and without prejudice to the quality of the economic opinions issued by the Department, the studies in question need to be enhanced by incorporating, as far as possible, tools such as the hypothetical monopolist test, the cross-elasticities test and other variables that allow for more consistent analysis on this subject.

3.9.2 Horizontal agreements

Horizontal agreements are addressed in Articles 5 and 6 of the Law.[18] The first of these specifies the types of agreement that are prohibited *per* se, due to their form, and contains the following elements: (a) the broad concept of agreement, which includes contracts, covenants, agreed practices, combinations or arrangements, whether written or verbal; (b) it is only applicable to acts between competitors, whether current or potential; (c) agreements are prohibited according to their purpose and effect; and (d) the classic concept of "hardcore cartels" in respect of pricing agreements, limits on production, division of markets and collusion in tenders.

Article 6 states that such acts are void and that the economic agents undertaking them are liable for the sanctions provided for in the Law, without prejudice to any civil and criminal responsibility that may also apply. This provision reiterates that this type of practice is sanctionable, regardless of its current or potential effects on the market.

In addition to these types of conduct that are specifically proscribed in Articles 5 and 6, which gives certainty to economic agents, Article 7 point 9 of the Law[19]

contains a broad definition of prohibited conduct, which means that other sanctionable horizontal agreements may exist, for which it will be necessary to prove anti-competitive effect.[20]

From the above, it can be inferred that cartels in Honduras are sanctioned according to the *per se* rule; in other words the act is sanctioned irrespective of the effects it may or may not have produced in the market. The provisions do not recognise *de minimis* exceptions for hardcore restrictions. Nonetheless, the CDPC's policy has been to apply the market share criterion established for M&A operations to this issue, prioritising the most important markets in which the leading firms participate in each case.

The CDPC has limited powers to investigate cartel conduct. Its inquiries almost always rely on information requested from the investigated parties themselves, and although those parties are required to provide such information, subject to a fine of L.50,000 (equivalent to US$2,600) for failure to do so, sometimes they simply do not comply, which makes the Commission's work more difficult. Unannounced inspections ('dawn raids') can also be done at the premises of the investigated parties, with a judicial warrant, but this power has thus far not been exercised, as preference has been given to conducting such inspections after prior notice and with the consent of the economic agent being investigated. It is important to note that information obtained in these inspections can be used as evidence in a subsequent proceeding.

As noted in section 3.4.1 on investigations, there are no immunity or leniency programmes in Honduras. However, there is a provision in the Law (Article 54) that could encourage co-operation from investigated parties, in that acceptance of charges brought by the Commission reduces the applicable fine by one-third.

Consequently, the cases of cartels investigated and sanctioned so far have been resolved mostly on the basis of indirect, or circumstantial, evidence.[21] For these purposes, Article 4 of the Regulations specifies a number of criteria for justifying the presumption of an illegal horizontal agreement. These are the classic elements, in addition to parallel pricing, that competition agencies use in the absence of direct evidence, namely price changes unrelated to costs, the degree of concentration in the market,, evidence of communication between competitors, and so forth.

Despite the lack of a leniency programme, the CDPC has been able to sanction a significant number of cases, considering the short time it has been in existence. According to information provided by the Commission, eight infringement proceedings have so far been initiated against conducts prohibited under Article 5, of which four resulted in a sanction, including those occurring in the pharmacy, cement

and sugar markets. The first of these is particularly important, because the investigation began in February 2007 shortly after the CDPC began work.

Further information on these cases is given in the following boxes:

Box 2. Pharmacies case Resolution Nº 4-2008

This was the Commission's first investigation (February 2007) into illegal horizontal agreements, in which 15 pharmacies were accused, along with the Honduran Pharmaceutical Association (*Colegio Químico de Farmacéuticos de Honduras*) and the National Association of Drugstores (*Asociación Nacional de Droguerías*) of setting discounts on pharmaceutical products of 15% for the general public and 25% for elderly people, in an agreement reached on the premises of the of Honduran Pharmaceutical Association on 5 February 2007. Although the investigated firms did not deny attending that meeting, they claimed that it was not official and that no discount policy been agreed upon or made official.

Once the charges had been formulated, Commission staff made several inspection visits to the pharmacies and associations involved in this case, from which they produced reports confirming that: (a) economic agents acknowledged having been called by the Pharmacy Owners Association (APROFA) to a meeting at the premises of the Honduran Pharmaceutical Association on 5 February 2007, to discuss the problems of the sector; and that an agreement had been reached at the meeting on the discounts to be granted by pharmacy chains and independent pharmacies, namely 15% for the general public and 25% for elderly people; (b) most of the pharmaceutical chains, except for *Farmacia del Ahorro* S. de R. L. de C. V. agreed that discounts of up to 30% on all medicines to the general public and 40% on medicines for elderly people generated losses and were unsustainable in the long run; and (c) some drugstores exercise market power and impose conditions of sale on certain pharmacies, arguing that the benefits they receive from drugstores are occasional and are not received on all products, for which reason the discounts are not sustainable in the long term and cannot be given on all products.

On the basis of these reports, combined with additional data obtained from the industry, consisting of its degree of concentration, entry barriers and the behaviour of the firms, the Commission issued Resolution 004-2008, convicting 13 of the pharmacies accused, and sanctioning them in line with the maximum fine provided for by the Law (10% of gross sales profits obtained in the previous fiscal year). The fines ranged from L 39.900 (approximately US$2,100) to L 7.106.000 (approximately US$374,000), depending on the turnover of each firm. As the National Association of Drugstores and the Honduran Pharmaceutical Association did not themselves have revenues, the average of the fines imposed on the firms was also imposed on them.

This ruling is currently under review before the Administrative Disputes Tribunal.

Box 3. Cement producer case Resolution Nº 22-2010

In January 2008, the Commission opened an investigation *ex officio* into the cement market, to establish whether an agreement existed to fix prices and share markets between the country's two cement producers, Cenosa and Lafarge. Both firms denied the accusations, claiming that the similar prices resulted from government measures which set prices through various Decrees.

In this case, the Commission identified collusion on the basis of indirect or circumstantial evidence, including the following:

- That the price-fixing mechanism used by the government had been applied by the firms to co-ordinate their conduct.
- The regular communication between the two firms under investigation through the Cement Institute Foundation (*Fundación Instituto del Cemento*)
- Parallel behaviour in both setting and changing prices.
- The small number of competitors in the market.
- The lack of a rational explanation by the largest firm for the fact that it charged the same prices as its competitor despite lower production costs.

Despite the seriousness of the violation in this case, the Commission decided not to impose the maximum fine provided for by the Law, in other words 10% of the gross profit on sales in the previous fiscal year. Instead, 8% of that figure was imposed, which meant a fine of L 51.896.000 (approximately US$2,730,000) for Lafarge, and L 35.515.000 (approximately US$1,869,000) for Cenosa.

As in the case of the pharmaceutical market, this ruling is being reviewed before the Administrative Disputes Tribunal.

Box 4. Sugar case Resolution Nº 23-2010

The sugar industry is one of the key sectors of the Honduran economy. As in the cement case, in January 2008, the Commission opened an *ex officio* investigation into the sugar market, to clarify the possible existence of concerted practices between the sector's leading firms: Azucarera Choluteca S.A., Compañía Azucarera Chumbagua S.A., Compañía Azucarera Hondureña S.A., Compañía Azucarera Tres Valles S.A, Azucarera La Grecia S.A. and Azucarera Yojoa S.A.

The indirect evidence considered by the Commission in formulating its case included uniformity of pricing and the positive correlation between their movements, the existence of different costs despite price uniformity, and simultaneous price changes. This indirect evidence was supported by additional facts relating to the structure of the market, such as: the degree of concentration, the lack of substitutes, homogeneity of the product, inelasticity of demand and high profit levels achieved by each of the firms.

In their defence, the investigated firms claimed that the Ministry of Industry and Trade invited them to regulate and agree upon sale prices to the wholesaler Central de Ingenios S.A., which is symptomatic of the interventionist culture that still prevails in Honduras.

In addition to imposing a fine on each of the firms ranging from L.20,204,899 (US$ 1,095,000) to L.6,514,306 (US$ 324,000), the Commission's ruling prohibited them from participating in meetings at the Ministry of Industry and Trade for the purpose of regulating market prices.

As in the previous cases, this ruling is being reviewed in the Administrative Disputes Tribunal.

In another interesting case, the Coffee Exporters Association (*Asociación de Exportadores de Café*) consulted the Commission in March 2011 over agreements adopted in the National Coffee Council (CONACAFE) to establish both the percentage of coffee that exporters must sell on the domestic market and the price at which it should be sold. These agreements had arisen as a result of an intervention by the Ministry of Industry and Trade, and to avoid being investigated by the CDPC, CONACAFE decided to consult in advance. Although this was clearly an agreement on production and prices, the CDPC decided that there was no intention to interfere with free competition, because the agreements in question had been reached in response to a mismatch between coffee supply and demand on international markets. Although this was a consultation and not an investigation, the CPDC should take care that its analyses avoid casting doubt on the *per se* nature of the rule that should be applied to this type of practice under Article 5 of the Law.

3.9.3 Public procurement

Although Article 5 defines the establishment, agreement, co-ordination of positions or collective abstention from participation in tenders, price quotes, contests or public auctions as restrictive practices by nature, the CDPC has not targeted this area. No infringement proceedings have thus far been initiated as a result of concerted practices in public sector tendering processes, and there is no government plan to provide training to civil servants on detecting collusive practices in such processes.

3.9.4 Vertical restraints

Article 7 of the Competition Law provides, in its first paragraph:

> *Contracts, agreements, combinations, arrangements or conducts not included in Article 5 of the present law are prohibited when they restrict, diminish, damage, impede or weaken the exercise of free competition in the production, distribution, supply or commercialization of goods and services.*

The article then lists a series of conducts that include the classical vertical restraints, such as assigning exclusive territories, exclusive supply and distribution and the setting of prices. As occurs with the other conducts listed in this Article, these are sanctioned to the extent that they cause negative effects on the market; in other words they are analysed under the rule of reason. Furthermore, Article 9 of the Law explicitly states that these acts are not prohibited if, on balance, they generate increases in economic efficiency and consumer welfare. As in the case of horizontal agreements, the CDPC's Implementing Regulation contains rules for assessing the value of these benefits.[22]

But further, Article 8 provides that the conducts listed in Article 7 will be prohibited only if the group of economic agents involved, or one of them, has a significant market share, as measured by the criteria established for this purpose by the Commission.

3.9.5 Abuse of dominance

Although the Law does not explicitly define abuse of dominance, the general language in Article 7 quoted above implicitly sanctions such acts. In addition, in the list of specific conducts set forth in Article 7 is the following:

> *Any other act or negotiation that the Commission considers restricts diminishes, damages, impedes or weakens the process of free competition in the production, distribution or commercialization of goods or services.*

As noted above, Article 8 provides that conduct listed in Article 7 can only be declared unlawful if the economic agent or agents participating in it have market shares exceeding a limit set by the CDPC. The Commission has not yet specified that threshold, but investigating teams use the 20% market share criterion stated in Resolution 32, which sets the thresholds[23] for verification in M&A transactions.

As is well known, however, percentage market share alone does not necessarily mean that an economic agent has market power; it must also be able to behave independently without its profits being affected. For these purposes, the CDPC's Regulations[24] set out criteria for judging whether an economic agent enjoys market power, including the existence of entry barriers.

In addition to significant market share, the Law requires that, to be sanctionable, the conduct does not generate efficiencies or enhance the welfare of the consumers sufficiently to offset the harm to competition. Article 9 of the Law provides that contracts, agreements, combinations, arrangements, or conducts that generate increases in economic efficiency and consumer welfare and compensate the negative effect on the process of free competition are not considered to restrict, decrease, damage, hinder, or impair free competition — the onus of proof being on the complainant.

As noted above, Article 7 deals with a mixture of conducts. In addition to the aforementioned vertical restraints consisting of allocating exclusive geographic zones (No. 1), exclusive distribution (Nos. 5 and 8) and the setting of prices (No.2), there are abuses of buyer power (No.4), predatory practices (No.6) and acts of unfair competition (No.6). The Law also identifies a collective act, boycott, which is more of a horizontal agreement. It does not explicitly sanction abusive prices, although paragraph 9 in the list of conducts, quoted above, defines a residual situation under which the CDPC could take steps to investigate situations of this type. To date, the CDPC has not investigated any cases of abusive pricing. Lastly, there is no mention of unjustified refusal to supply an input or provide access to an essential facility, despite the fact that one of the two cases sanctioned in this area related specifically to a refusal to sell an essential input.

The CDPC has applied sanctions in two cases for abuse of dominance. In the first of these, it sanctioned a cable TV firm for pressuring certain television programme providers to refuse to supply a competitor; while the second relates to exclusive distribution in the beer market. Unlike the horizontal agreement cases, both investigations began as a result of complaints filed by affected competitors.

Box 5. Cable TV operators case Resolution Nº 29-2008

In August 2007, the firm Inversiones y Servicios Técnicos S. A. de C. V. (Insetec S. A. de C. V.) applied to the CDPC accusing the firms Amnet de Honduras S. de R. L. and Amzak International LLC. of pressuring various television programme providers to cease supplying a number of channels to the complainant. Insetec explained that the two defendant parties maintained a relationship of vertical integration and that Amzak had stakes in several programme providers. During the course of investigation, Insetec withdrew its complaint against Amzak and only maintained that against Amnet.

The Commission's analysis employed the usual steps in this type of investigation. It first studied the relevant product and geographic market, ruling that for reasons of price and use, broadcast television was no substitute for cable television because it did not offer the same amount of content and could not be supplied on the same platform as Internet and fixed telephony services. In terms of geographic market, it was limited to the city of San Pedro Sula. Although it found that Amnet was dominant in the relevant market as defined, with a 73% market share, the resolution did not include the analysis of market entry barriers done by the Economics Department.

The evidence that the Commission took into account in deciding that there was a collective refusal of supply included the lack of justification that programme providers had for suspending their services, despite the fact that their contracts allowed them to do so. While the programme providers Turner Broadcasting System Latin America, Inc.; MGM Network Latin America LLC., and Visat, S. A. de C. V., now Televisa Networks, accused the complainant of not fulfilling its obligation to report on subscribers, the Commission did not consider this to be a sufficient economic justification, thus implying the presumption of the existence of a collective refusal to supply. Another indication was that Turner Broadcasting System Latin America, Inc. (supplier of the television channels CNN, CNN en Español, CNN Headline News, TNT and Cartoon Network) agreed, after a lengthy negotiation, to sign a new contract containing much more burdensome conditions than the first — a cost per subscriber that was 319% higher than in the first contract. Lastly, also deemed relevant was the pattern of hostile behaviour by Amnet de Honduras S. de R. L. in processes to purchase other Honduran cable TV companies, especially in San Pedro Sula, where it launched a trade war with any cable company that rejected its purchase proposal.

As a result, the Commission concluded that the events described in paragraphs 3[25] and 7[26] of Article 7 of the Law, were present, and it ordered Amnet de Honduras S. de R. L. to refrain from its abusive conduct, published a resolution in two newspapers and fined it L.3,675,511.35 (US$ 193,447 approx.) equivalent to 3% of the gross profit of the previous fiscal year (2007).

This ruling is currently being reviewed before the Administrative Disputes Tribunal.

Box 6. Beer case Resolution Nº 14-2010

This is a typical case of exclusivity conditions imposed by the dominant firm in the beer market through the 'on-trade' distribution channel (bars and restaurants) to prevent other competitors from entering that market. The case began in May 2009, as a result of a complaint filed with the CDPC by Bay Island Brewery Company S.A. against Cervecería Hondureña S.A. for violation of the provisions of paragraphs 5[27] and 9[28] of Article 7 of the Law.

In its analysis, the Commission considered it unnecessary to segment the market according to different types of beers, but it did separate the 'off-trade' distribution channels (supermarkets and shops) from 'on-trade' distribution channels (hotels/restaurants and amusement centres), restricting the relevant product market to the latter and the geographic market to the island of Roatán. In terms of market power, the Commission considered that the mere fact that the defendant firm had nearly a 95% share of the market, thus defined, enabled it to raise artificial entry barriers.

With regard to the alleged conduct, the Commission ruled that the exclusivity conditions or clauses that the defendant company had imposed on its distributors on the island of Roatán constituted artificial market entry barriers, with the effect of excluding competitors from the market or obstructing the entry of potential competitors. Nonetheless, it ruled that exclusion from the claimant's market was not caused by the practices in question but as a result of consumer preferences. The Commission made an interesting analysis of the importance of the cooling equipment that the defendant firm lent on condition that it was not used by other brands; but, despite noting the potential anti-competitive effects of this practice, the Commission ultimately did not consider it as one of the grounds for its ruling. The CDPC imposed a fine of L 9,645,416 (US$507.653 approximately), equivalent to 10% of the gross profits on sales in the previous fiscal year.

As in the previous cases, this ruling is being reviewed before the Administrative Disputes Tribunal.

As noted in earlier paragraphs, the rulings in the cases of abuse described above did not analyse the issue of entry barriers, nor did they apply the criteria established in the Regulations to determine whether the economic agent actually enjoyed market power or a significant market share— issues that were included in the Economics Report.

The Law does not explicitly address the possibility of collective dominance, but it seems to do so implicitly in Article 8, which establishes a market share pre-requisite for sanctioning Article 7 conducts, employing the language ". . .

participation on the affected market by an involved group of economic agents or by one of them. . . .". Nonetheless, to date the Commission has not initiated any investigation involving possible collective dominance.

The table below provides statistics on the investigations initiated by the Commission:

Table 5. CDPC investigations

CDPC investigations: official and in response to a complaint		
1	NOVATEC, S.A. de C.V.	Complaint
2	Copena and American Petroleum	Complaint
3	Credit cards	Ex officio
4	NOVATEC and Marks de Honduras	Complaint
5	Body Center S. de R. L. and Bioestethic	Complaint
6	Pharmaceutical industry	Ex-officio
7	COMUNITEL - CELTEL – SERCOM	Complaint
8	DECOTRANS	Complaint
9	Credit cards (CNDH)	Ex-officio
10	Fuel transport	Official
11	Fuel supply outage	Official
12	Cable Sula and AMNET	Ex-officio
13	PETRONOR	Complaint
14	Banco HSBC de Honduras, S. A.	Ex-officio
15	LACTHOSA and LEYDE	Ex-officio
16	INCEHSA and CENOSA	Ex-officio
17	Sugar industry	Ex-officio
18	Bay Island Brewery and Cervecería Hondureña	Complaint
19	American Airlines and COSESNA	Complaint
20	Link Telecom and HONDUTEL	Complaint
21	Cable Sula, Sulanet and AMNET de Honduras	Complaint

Source: CDPC, as of June 2010.

3.9.6 Mergers

Both the Competition Law and its Regulations contain several provisions regulating economic concentrations (M&A). The substantive standard for merger review is found in Article 12 of the Law:

> *Concentrations whose effects are to restrict, diminish, damage, or impede free competition are prohibited.*

The Law establishes a compulsory notification system for this purpose. Title II of the Law defines[29] "economic concentration" for competition policy purposes,

excluding temporary alliances. This definition emphasises the concept of control or influence on corporate decisions as a decisive element in determining whether economic concentration has increased, which is in line with international best practices. The rest of this title contains provisions governing the criteria to be used by the Commission when analysing these operations; the consultation requirement; the effects arising from submitting to the review process and the decisions that can be adopted. The most important points on each of these subjects will be discussed further in the following paragraphs.

The CDPC Regulations also specify the general concepts established in the Law in greater detail, including how the total value of assets should be calculated for the purposes of setting the thresholds; the exceptional situations that justify approval of certain operations; and the documents that economic agents must submit when required to notify M&A transactions. As noted above, the Regulations also articulate a number of criteria for determining when a firm has a significant market share, including the analysis of entry barriers (Article 8).

Compulsory prior notification and review. Article 13 of the Law imposes a mandatory notification regime for M&A transactions. The Commission interprets the article as requiring the notification of all concentrations, regardless of size. Then, those transactions that exceed thresholds established by the CDPC are subject to a second, more thorough, level of review. Article 13 labels the first notification as "mandatory" and the second as "voluntary." The "voluntary" classification is inappropriate, however, as it too is mandatory. The requirement that all concentrations be notified has meant that approximately 60% of the Commission's work to date has been spent analysing these operations. The Commission defends the process as having enabled it to learn how various markets operate, which has been useful in the initial enforcement operations of the authority

The second stage review occurs whenever the operation exceeds certain thresholds established by the CDPC in the Implementing Regulation, which, as explained above, can be based on any of following three criteria: (i) if it involves assets valued over 10,000 times the minimum wage; (ii) if the combined share of the merging parties in the relevant market would exceed 20%; or (iii) if the companies involved have sales volumes equal to or in excess of 15,000 times the minimum wage on a daily average.

The following comments can be made on these thresholds. First, the quantitative thresholds for total assets (US$37 million) and sales (US$56 million) cannot be judged as either low or high at this stage, without further experience with them. Second, 20% may be a relatively low threshold for the market share attained by the merged firm, considering that Honduras is a small economy, in which the

minimum efficient scale to be able to compete must inevitably give rise to more concentrated markets. There is perhaps a more important objection to this market share criterion, however. Employing market shares as a notification threshold requires that a relevant market be defined. Market definition is a difficult and often contested exercise. This introduces unnecessary uncertainty into the notification process. The practice of employing a market share test in merger notification thresholds is contrary to accepted international practice.[30] Finally, each of the three criteria apparently refers only to the combined assets, sales or market share of the merging parties. The better practice is to define size thresholds separately for each merging party, in order to avoid a situation in which a concentration must be reported in which a relatively large enterprise that itself exceeds a threshold makes a *de minimis* acquisition of a much smaller enterprise, which is unlikely to have a significant effect on competition.

Procedures. The initial notification for all mergers must be done before the merger takes place, and the law defines the situations in which this occurs (Article 14 of the Regulations). Notification must be accompanied by background information relating to legal, accounting, commercial and financial data on the enterprises intending to merge. Neither the Law nor the Regulations specify the scope of the Commission's analysis. Nonetheless, in practice this stage enables the CDPC to decide whether the transaction exceeds the thresholds for activating the second stage review.

If the transaction meets the size thresholds that trigger the second stage the parties to the transaction are required to provide additional information, including a description of the transaction, data relating to the goods and services involved, market shares and other information about markets and competitors. If not all of the information required by the Law [31] and Regulation[32] is provided, the Commission will allow an additional 10 working days for compliance.

The Commission has 45 working days to determine the legality of the transaction, beginning on the date on which all of the necessary information is provided. This deadline can prove to be quite short if the transaction is a complex one. The Commission uses a standard methodology for this type of analysis, determining the relevant product and geographic market, the degree of concentration before and after the operation measured by the HHI index, market entry barriers,[33] risks of unilateral abuse and co-ordination and counterweights and efficiencies.

In its ruling, the Commission can authorise the transaction, prohibit it or impose risk mitigation measures, either structural or behavioural, without prejudice to its ability to require interim measures in advance, if the situation warrants. The governing criterion for its decision is that of efficiency, as set forth in several parts

of the Law. As is the case with practices that are restrictive because of their effect (unilateral abuses and vertical restrictions), the Law considers mergers that generate increases in economic efficiency and consumer welfare, thus compensating for the negative effect on competition, to be compatible with free competition. In terms of mitigation measures, the Law authorises the Commission to order the divestment of assets or shares, amend or eliminate contractual clauses and, in general, order the undertaking of a given conduct or the cessation of others.

The Law grants a form of immunity by establishing that concentrations approved following the verification process cannot subsequently be contested if the parties fulfil the conditions imposed on them, unless false information had been provided in the process. As a counterpart, if an economic agent fails to notify the transaction the Commission has three months to begin an investigation, after which it may order a breakup or other corrective measures according to the situation.

Special rules. Article 13 of the Regulations[34] to the Law lists a number of situations in which the Commission must approve a concentration. Two of these deserve special mention. The first concerns transactions involving the acquisition of foreign enterprises, whereby the parties involved are not acquiring control of an Honduran enterprise. This raises local nexus issues. The second concerns strategic alliances, which can often cause problems for free competition. In the case of the purchase of firms that are insolvent, the Regulation correctly requires other alternatives to have been sought unsuccessfully, before authorising the operation.

Exceptions. The CDPC analyses all concentrations irrespective of whether they take place in regulated markets. Nonetheless, there are potential problems with some regulators that also have legal powers to review these operations. An example is the telecommunications regulator, the National Telecommunications Commission (CONATEL), which by law[35] must give prior approval to concessions, permits or licences to be assigned to third parties. The CDPC is currently (June 2011) considering a merger between the mobile phone companies Digicel and Megatel. Similarly, in the banking sector, the National Banking and Insurance Commission (CNBS) also authorises M&A transactions in the sector, for which it requires the CDPC's prior opinion from the firms intending to merge. The CDPC and the CNBS have signed a co-operation agreement for these purposes.

Investigations and cases. To date the Commission has considered numerous M&A transactions under the mandatory notification procedure, of which it has prohibited none and set conditions in 13 instances.

The table below lists the transactions analysed by the CDPC to date, as of June 2010.

Table 6. M&A operations

	Mergers resolved by the CDPC Period 2007- June 2010
1	Citibank Overseas Investment Corporation and Banco UNO
2	Supermercado La Colonia, S.A. de C.V and La Colonia Retail Investments, S. A.
3	Grupo General Electric and BAMER
4	Grupo Financiero BGA and HSBC
5	Distribuidora de Productos de Petróleo (DIPPSA) and PUMA
6	Credomatic International Corporation and BAMER
7	Casa de Cambio del Centro and Bolsa de Valores
8	Casa de Bolsa Mercantil de Valores, S. A. and Credomatic International Corporation
9	Citibank Overseas Investment Company and Grupo Cuscatlán de Honduras, S.A.
10	Citibank and Banco Cuscatlán, Grupo Cuscatlán and UBC International
11	Grupo Cuscatlán Guatemala, S.A.
12	Centro Médico Hondureño, S.A. and Centros Alcerro Castro, S. A. de C. V.
13	MONSANTO and SEMINIS
14	Cia. Azucarera Hondureña and Azucarera Yojoa
15	BAC Honduras and Oswaldo López Arellano
16	BAMER and BAC
17	General Cable Holding and Phelps Dodge Corporation
18	Central de Ingenios, S.A. de C.V. (CISA)
19	Banco Cuscatlán and Banco Uno
20	Oswaldo López Arellano and Credomatic de Honduras
21	Sale of shares in Compañía Nacional de Inversiones (CONISA) and in Banco del País (BANPAIS)
22	Sale of shares held by Oswaldo López Arellano in Credomatic de Honduras to Credomatic Internacional Corp.
23	Sale of shares held by Oswaldo López Arellano in Ventas Internacionales to Credomatic Internacional Corp.
24	Grupo Financiero Uno with Sociedad de Inversiones Aval Card and with Banco Uno in favour of Citibank Overseas Investment Corp.
25	Kly de Warren Energy Investments, S.A. and Roatán Electric Company, S.A. de C.V.
26	Monsanto Company and Harvestland Overseas, S.A.
27	Pantaleón Sugar Holding Company, Caribean Sugar Holding and Canal Sugar Import-Export
28	Millicom Cable and Central American Capital Group
29	Grupo Q de Honduras, S.A. and REASA
30	Imex Oettinger and Danville Holding Inc.
31	Agropecuaria del Campo, Agropecuarias del Campo Danlí, Agropecuarios and Equipos
32	Financiera Credi Q S.A. and Administración de Servicios Especializados S.A. de C.V.
33	Grupo Q de Honduras and Grupo Q Inmobiliaria
34	Bimbo Holanda and Primatec Ventures
35	San Andrés and Yamaha Gold Inc.
36	CELTEL and MULTIFON
37	Inversiones Petroleras and Shell
38	DLJSAP Publishing and PRISA (Editorial Santillana)
39	Centro America Consulting and Administración, Servicios e Inversiones
40	Monsanto Agrícola de Honduras and Semillas Cristiani

Source: CDPC.

Box 7. Takeover of Amnet Telecommunications Holding Ltd. by Millicom Cable N.V. Resolution Nº 16-2009

In this takeover transaction, Millicom Cable N.V. (Millicom) acquired control of Amnet Telecommunications Ltd. (Amnet) along with its subsidiaries, both firms operating in the telecommunications market. In its report, the CDPC made an economic analysis of the operation, and ruled that the subsidiaries and branches of both firms competed in the fixed telephony, mobile phone, cable television and broadband Internet data transmission markets. In particular, the Commission analysed the relevant market and degree of concentration, reaching the conclusion that there was no substitutability between fixed telephony and mobile and IP; that broadband Internet access should be separated into residential and corporate segments; and that the increase in concentration indices only caused problems in the broadband Internet corporate segment.

As noted above, the Commission's ruling did not include an analysis of entry barriers, concluding that, although the operation did not aim to alter free competition given the context of a wider transaction being undertaken across several Central American countries, it could be susceptible to various anti-competitive acts that would be hard to detect. Consequently, it decided to apply the following conditions:

- Abstain from cross-subsidisation and predatory pricing.
- Establish conditions of access to the heads of submarine cables connecting Honduras with the rest of the world, in a reasonable and non-discriminatory way, to promote competition in the broadband market.
- Prohibit unjustified refusal to supply.
- Notify the non-competition clauses that were being discussed at the time.

4. Limitations on competition policy: exclusions and sectoral regimes

4.1 Exclusions and exemptions

As noted in the chapter analysing the Competition Law, no sectors are excluded from the free competition system in Honduras, since there are no limits on the markets to which the Law applies, the actors subject to the Law, or the place in which the potentially anti-competitive practice is undertaken. Accordingly, the Law is applicable to regulated markets and any person, entity or group involved in economic activities, which explicitly includes government agencies or entities.[36] It

also applies to economic agents legally domiciled outside the country when the practice or conduct in question produces an effect in Honduras.

Despite the broad scope of its application, thus far the CDPC has not launched any investigations into public bodies, or in relation to acts or practices committed abroad with effects in Honduras. Certain cases have been heard that affect firms governed by special sectoral regulations, basically stemming from the analysis required in M&A transactions between firms in the banking and telecommunications sectors.

With regard to exemptions, the Law also does not recognise any special regime applicable to a given sector or economic agent. There are no *de minimis* rules, or special regulations for SMEs. Nonetheless, the conditions and requirements established in the Law applying to unilateral and vertical restraints and to mergers mean that small firms are seldom investigated and sanctioned for anti-competitive practices, because the economic agent in question must also have market power.

4.2 Regulated sectors

4.2.1 Telecommunications

Until 1995 the telecommunications sector was regulated by the country's State-owned telecommunications company, HONDUTEL, created in 1977, which was also the fixed telephony operator. In the 1990s, in the telecommunications sector as in other regulated markets, substantive reforms were beginning to be introduced following the approval of the Telecommunications Sector Framework Law[37] of 13 October 1995, which separated the roles of regulator and operator and created the National Telecommunications Commission (CONATEL).

Once the Law had been promulgated in 1995 an exceptional exclusive concession was granted to HONDUTEL in the fixed telephony segment for a 10-year period, after which it was required to separate its networks. As of 2010, HONDUTEL had a 74.43% market share, measured in terms of the number of telephone lines, while the remaining 25.57% was shared among various suboperators.[38] Service rates are regulated by CONATEL whenever it is determined that adequate competitive conditions do not exist, which is the case in this sector. As would be expected, the development of fixed telephony has declined in recent years as result of competition[39] from other technologies such as mobile phones, Internet, and cable television. Fixed telephony declined by 6.28% over the past year.

In the case of mobile telephony, the authority has not liberalised rates, but has imposed a ceiling. Despite the existence of maximum rates, there is competition in

this market, in which four firms participate: Celtel with 55% of mobile phone lines, Digicel Honduras with 27%, Megatel with 17% and Hondutel with 1%. As noted above, the planned merger between Megatel and Digicel is pending and under review by the CDPC. The industry grew by about 18% over the last year. There is also room for a new operator to enter the electromagnetic spectrum market, which is administered and controlled by CONATEL.

All concessions for the provision of telecommunications services are granted through competitive tender, for which CONATEL can establish any of the contract-award criteria provided for in Article 130 of the Regulations to the Telecommunications Framework Law, namely best economic bid, best technical project, the fee to be charged to users, coverage, etc. In the mobile telephony segment, CONATEL's practice has been to award contracts under the best economic bid criterion.

Cable TV is a highly dynamic market with sustained growth over the last few years. There are a currently five operators: Cable Sula, Claro TV, Amnet, Cable Color, and Sky Centroamérica, of which the first three have national coverage. In the case of Internet services, the figures also show explosive growth over the last three years, although there are signs of a slowdown (40% in 2008, 30% in 2009 and 15% in 2010). Nonetheless, there is still potential for growth because the total number of subscribers is only 90,744 out of a total population of 8 million.

The Telecommunications Law expressly prohibits[40] practices that restrict or distort competition, for which it identifies certain conducts that are described in greater depth in the Regulations.[41] CONATEL reviews such violations and imposes fines of up to US$80,000, under a special sanctioning procedure provided for in its law and regulations. Thus, the existence of two regulatory bodies with powers to sanction the same conduct could cause jurisdiction and co-ordination problems, as well as potential violations of the rules of due process, such as the proportionality of the punishment and *non bis in idem*. Although CDPC and CONATEL have signed an interagency co-operation agreement, there are no formal co-ordination mechanisms in place. Nonetheless, there have been no conflicts of jurisdiction on this issue so far. As noted above, both organisations have the competency to investigate mergers and acquisitions, which occurred in the Millicom-Amnet takeover, and is also happening in the merger between Megatel and Digicel.

4.2.2 Electricity

The Energy Commission (now known as the National Energy Commission) was also created in the 1990s, with responsibility for regulating the electric power market. The country's energy matrix is heavily biased towards thermal generation

(61% capacity)[42] with hydroelectric plants accounting for the remaining 30%. Thermal power plants are privately owned, whereas the national electricity company (*Empresa Nacional de Electricidad* - ENEE) owns most of the hydroelectric facilities. Although there is a degree of competition in the generating sector, the price is regulated. For this purpose a contract is signed between the generators and ENEE, setting a marginal cost price, according to a benchmark formed by the international oil price, which must be approved by the CNE. Approval of a generating project requires various permits and authorisations from Congress, the Office of the President of the Republic, the National Environment Service (SERNA) and the CNE.

Electricity transmission is operated exclusively by the State, although distribution can be privatised. Currently, however, the only firm in this segment of the market is ENEE, which means that vertical integration exists. Both the tariffs charged by the State-owned transmission company and those charged by the distributors are regulated by the CNE, despite the existence of a draft regulation defining deregulated customers for electricity distribution services. The dispatch centre is also controlled by ENEE.

There are no co-operation agreements between the CNE and CDPC, nor any formal co-ordination mechanisms, because the three segments of the electricity market are regulated.

4.2.3 Banking and financial services

Banks and financial institutions are supervised by the National Banking and Insurance Commission (CNBS), created under Decree 155-95 as an autonomous body attached to the Central Bank of Honduras. The CNBS focuses on compliance with and monitoring of the Basel Principles. In general, it supervises variables related to systemic financial risk, namely the liquidity of the banks and study of loss provisioning. Its jurisdiction encompasses banks, saving and loan co-operatives that voluntarily submit to its supervision and other financial institutions (excluding commercial entities that grant consumer credit). The requirements for setting up a bank in Honduras are generally within the normal parameters for Central American countries, requiring a minimum capital of US$15 million. The CNBS has discretion in authorising new banks, due to the risk of money laundering.

Although the CNBS is obliged to authorise mergers in the banking sector, the regulatory body has adopted the wise policy of requiring a prior favourable opinion from the CDPC, before its review. This reveals a significant level of co-ordination between the two institutions, which have signed a mutual co-operation agreement. As explained in the section on mergers and acquisitions, the CDPC has analysed and

approved various operations in the banking sector without any problems arising with the CNBS. Similarly, the CDPC has investigated and made recommendations in the bank credit and debit card market. In 2007, the Central Bank of Honduras set interest rates in the credit cards market, following a report from the CDPC, for which it received collaboration from the CNBS.

4.2.4 Agriculture

As in nearly all other countries of the region, the agriculture sector is crucial for the Honduran economy – the most important products being sugar, coffee and bananas. Although the Competition Law is applicable to these sectors, they sometimes receive special treatment owing to their sensitive nature. In the multilateral domain of small and vulnerable economies, Honduras has promoted special and differential treatment as an integral part of its international agriculture negotiations, mainly in terms of recognising protection for special products that Honduras may designate in the future and in establishing a new special safeguard mechanism.[43] The Ministry of Industry and Trade (*Secretaría de Industria y Comercio* – SIC) constantly monitors the prices of these products, and in the event of sharp rises it calls on producers to adjust prices in line with their costs**.** The Ministry has been forced to change this practice thanks to CDPC intervention, which, as noted above, has imposed fines in the sugar sector. As a result, trade associations have decided not to attend the meetings convened by the SIC without prior consultation with the CDPC — as happened in the case of coffee, described above in the section on horizontal agreements.

5. Challenges to competition policy in Honduras

5.1 Price controls on essential products

The State can intervene to set the prices of certain essential products in various ways. In 2007, a price control mechanism was set up for essential mass consumption products included in the consumer basket of goods. The prices of some 25 products, including rice, beans, sugar, salt, vegetable oil, lard, wheat flour, maize flour, eggs, milk, ground coffee and chicken became the subject of price monitoring. Prices were initially set for a six-month period, which could be shortened if trade "regularised", or lengthened if it did not. According to the authorities, trade regularisation depended on the domestic market being supplied. Ceiling prices for controlled products were set on the basis of the prices recorded on 1 September 2007 in the Agriculture and Craft Fair organised by the Ministry of Industry and Trade.[44] Price setting was not proposed again between 2007 and late 2010.

In addition, the Directorate General of Consumer Protection (DGPC) can determine the price of essential goods in the situations listed in Article 73 of the Consumer Protection Law, the details of which are discussed below in the chapter on consumer protection.

In the case of public utility services, some service-providing State institutions set prices autonomously. These include the National Electricity Company (ENEE)[45], the National Water and Sewerage Service (SANAA)[46], the Honduran Telecommunications Company (HONDUTEL)[47]and the National Port Company (*Empresa Nacional Portuaria* - ENP). In addition to the above, regulatory bodies also set maximum prices for the firms they supervise.

5.2 State aid and subsidies

There is no provision in the competition law relating to state aid, nor any general control of it, nor a clear definition or control of subsidies. The CDPC has not, to date, communicated with the government on what qualifies as state aid or the potential anti-competitive effects of such measures. Agriculture, mainly the production of basic grains, receives state aid in the form of a technology bond and technical assistance, in addition to loans at below market interest rates. These loans are also available to microenterprises and certain small firms, and the housing sector. In addition, some activities, such as maquila, fast food, hotels, car rental and private schools, are exempt from paying taxes. Lastly, there are import regimes and duty-free zones to promote production for export.

Urban passenger transport services, electric energy, drinking water and liquefied petroleum gas for residential use all receive subsidies.

5.3 Informal sector

According to the information provided by the Macro Economics Statistics Department-National Accounts Division of the Central Bank of Honduras (BCH), the informal sector represented 25.5% of the GDP in 2008, that is Lps. 66,951.1 millions (US$3,561.2 millions). In summary, the informal sector of the economy is quite significant in Honduras. The impact of the informal sector on competition law and policy in Honduras is not clear. The relevance of the informal sector for competition policy will depend on the extent to which informal firms compete with formal firms.

5.4 Unfair competition and consumer protection.

The LDPC does not explicitly define acts of unfair competition, although paragraph 9 of Article 7 of the Law can be applied on a residual basis, in which case the entity perpetrating such acts must have a significant market position. Unfair competitive practices are regulated in the Commercial Code, Title II,[48]Articles 422 through 429, which sets limits on commercial activity and unfair competition in Honduras. Legislation to protect industrial property rights also addresses this subject indirectly,[49] as does legislation protecting consumer rights.[50]

Honduras has new regulations on consumer protection. On 7 July 2008, Decree No. 24-2008 was issued, containing the Consumer Protection Law, and on 15 April 2009 the corresponding Regulations were issued. Its content is exhaustive, consisting of 116 Articles in 11 chapters that regulate the traditional issues of rules protecting consumer rights, including information and advertising requirements; identification of goods and services; guarantees; and an interesting chapter on credit transactions, which is a key consumer protection issue in Honduras.

This law is implemented by the Directorate General of Consumer Protection (DGPC), which is attached to the Ministry of Industry and Trade. In the case of violations, the DGCP can impose a series of sanctions, ranging from cautions to fines of up to 10,000 times the minimum wage and closure of the offending establishment for a month. Certain violations also give rise to prison sentences.

There are three consumer protection associations in Honduras, including the Consumer Protection Association of Honduras (ASPROCOH), which has 3,600 members and has worked intensively to promote consumer's rights throughout the country. ASPROCOH holds talks and seminars in cities and smaller localities, supplemented by regular appearances in the media, particularly on radio programmes. It is currently present in 14 of the country's 18 departments.

This association conducts field surveys to establish whether consumer rights are being upheld. During the 2011 Easter Holy Week, various members of the Association visited inter-urban buses to check whether there was adequate information on prices and if discounts were being given to older adults. Steps have also been taken to ensure that the food sold in schools contains the necessary nutritional information. In general, it does not file complaints with the DGCP but with the various public services that regulate or inspect the sectors in which the consumer problems occur or with private firms directly.

The relationship between the DGCP and the CDPC on free competition issues is not fluid. However, after various attempts, a co-operation agreement was

concluded in August 10th, during the annual "Competition Week". The DGPC has not filed any complaints with the CDPC on cases potentially affecting free competition.

Despite this, the two institutions are required to interact by law. Article 73 of the Consumer Protection Law authorises the DGPC to determine the maximum sale price of certain essential goods in two situations: (a) cases of emergency, disaster or calamity; and (b) when the goods or services are being sold in a regime of monopoly or oligopoly, and the absence of competition is proven. In the latter case, a favourable opinion from the CDPC is required, but to date no such case has been put forward by the DGPC.

In short, the country has very recent legislation on the consumer protection. The public seems unaware of the DGPC, the enforcement agency, and much of the supervision of consumer rights is done directly by ASOPROCOH which, in some respects, has taken over the DGPC's inspection function. Particularly worrying is the DGPC's power to regulate prices.

6. Competition advocacy

Like any new agency, a major part of the CDPC's work in these first few years has focused on activities to promote competition from two angles: an advisory role and education. From the standpoint of advisory services, adequate use of competition policy requires analysis of all laws and regulations affecting economic activities, to prevent them obstructing the free competition process. The objective of the advisory service is not to promote free competition above other values, but to ensure that the protection of other values does not interfere unnecessarily with the capacity of firms to respond efficiently to consumer demand. This work to promote the principles of free competition in analyses and studies of the regulations that could affect it is done through a variety of media, such as conferences, studies, opinions presented to Congress, ministries, etc.

From the educational standpoint, competition advocacy involves disseminating the values of competition in the community, to create a genuine culture of competition. This dimension of advocacy also uses multiple and diverse activities such as press conferences, seminars, master-classes, talks to trade associations and consumers, meetings with public agencies, etc.

6.1 Participation by the competition authority in the legislative and administrative process

Article 34 paragraph 1 of the Law authorises the CDPC to issue opinions or recommendations in cases where it deems this appropriate, or when requested to do so, on draft laws, regulations, decrees or executive agreements, resolutions, accords, covenants, international treaties and other government acts related to this Law. It has generally issued its opinions through sector studies, and occasionally in the recommendations contained in the rulings handed down as a result of its investigations.

This tool has been widely used by the Commission. It has issued opinions and recommendations on certain legal provisions contained in special laws and on draft legislation that could contravene the Competition Law or raise barriers impeding the entry of economic agents in certain sectors. These include recommendations on draft laws on telecommunications and information technology; consumer protection; the law regulating the issuance and operation of credit cards; and the draft special law for the control of tobacco. It also issued opinions on government Decrees setting prices for products in the consumer goods basket; the law regulating liquid fuels and the law governing the distance between pharmacies.

Recommendations have also been made in the sector studies discussed individually in this report. The numerous and valuable proposals made by the CDPC to improve the regulations of each of the sectors examined include the following:

- In the *electricity sector*, there was a recommendation that the regulator privatise the management of the energy dispatch centre, to put it in third-party rather than government hands, and that limits be set on vertical integration.

- In the *sugar market*, a recommendation to allow substitutes to be imported, such as syrups with a high fructose content.

- Eliminate restrictions on *domestic passenger air transport* (*cabotage*), and set up a concession mechanism for allocating slots to avoid monopolisation.

- Review the legal framework governing the *road transport sector* (both passenger and freight), to adapt it to market conditions, in particular deregulating passenger services in a systematic fashion.

- In the *pharmaceuticals market*, repeal the law that imposes a maximum price for medicines, and the rule of the Chemical Association *(Colegio Químico)* imposing geographic restrictions on the location of pharmacies.

- Repeal the rule on price discrimination that prevents forms of payment other than *credit and debit cards* from being able to compete effectively.

- In the *fuel sector*: deregulate the maximum prices to the final consumer, abolish rules on distances between service stations, and liberalise liquid fuel transport prices.

There is little detail available on the follow-up to these recommendations or the response to them from the government. Despite this, existing channels, such as the co-operation agreements the CDPC has signed with the CNBS, CONATEL, the National Institute of Statistics and the Supreme Court, among other institutions, provide avenues to progress and advocate for these changes to such audiences.

6.2 Promoting a culture of competition

6.2.1 Advocacy to government departments and public authorities

In addition to the work done by the CDPC in issuing opinions and recommendations on draft laws, regulations and rules for the different economic sectors of the country, as described above, the Commission has also carried out a number of activities to promote competition policy in various public institutions. These have included providing training to members of the judiciary, specifically to judges operating in Administrative Disputes Tribunals. The CDPC has also met with members of the National Congress to explain the scope of the Law and raise awareness of the difficulties faced by new institutions such as the CDPC and the need for it to remain independent. Nevertheless, much remains to be done in this field, both to gain traction with government bodies and to improve their recognition of competition law and policy, particularly with the Ministry of Trade (SIC) and the DGPC (the consumer protection authority). Advocacy to other sector regulators could be improved with co-ordination mechanisms, even though several of them have signed co-operation agreements.

6.2.2 Advocacy to business

Although the private sector provided decisive support during the drafting of the Competition Law, the CDPC has carried out little follow-up with the sector in these first few years. The main concern among businesses is that it is proving impossible for them to adapt their commercial practices to the new regulations.

This situation had been explicitly foreseen in the Law. Article 62 granted a six month grace period following its entry into force to enable the private sector to amend contracts, conventions, practices, combinations, arrangements or conducts that could potentially contravene the Law. However, the delay in appointing Commissioners and in setting up the Commission extended beyond the six month deadline and impacted on this adjustment period. There was no functioning Commission to undertake the task of raising business awareness of the law and promoting compliance through information campaigns and other activities to explain what types of conduct might be anti-competitive and detail business obligations under the Law. This was a missed opportunity in a country accustomed to government price-setting and the adoption of agreements between competitors at the government's behest.

The private sector also anticipated that the CDPC would begin its work by publishing sector studies, on the basis of which the parties involved would be convened and advised of the actions that needed correcting. Instead, the Commission's decisive actions in initiating infringement proceedings in markets such as pharmaceutical products and sugar, in which the government itself has urged co-ordination between economic agents, have caused consternation and confusion.

This situation has been recognised by the government. According to the Vice President of the Republic, the private sector needs to have greater knowledge of the work of the CDPC across the private sector, although responsibility for a lack of co-ordination was acknowledged by the government. The Vice President has called for advocacy activities in the business sector based on practical cases, to be conducted by the CDPC in close collaboration with the Ministry of Industry and Trade and the Foreign Trade Department.

6.2.3 Domestic advocacy

To promote a culture of competition, the Commission has carried out a series of advocacy activities, including the aforementioned training events, workshops and dissemination of information on the scope of the Law and the benefits of competition, as well as informing the public of progress made on competition policy in Honduras.[51] The CDPC was particularly active on the advocacy front in its first year, 2007, participating in over 50 interviews on television programmes, as well as giving 30 radio interviews and 19 to the written press. Its representatives also gave over 100 talks, lectures, seminars and workshops for the purpose of disseminating information about the Law.[52]

These activities have also included introducing competition law and industrial organisation topics into the curricula of law and economics courses at Honduran

universities. Perhaps the most important general public awareness-raising activity is "Competition Week," which is held every year during the second week of August to mark the anniversary of the Law's entry into force on 8 August. During that week, two half-day seminars are held in Tegucigalpa and San Pedro Sula, to which authorities, businesses, academics and foreign authorities are invited. In 2011 the directors of the competition agencies in Mexico and Spain were expected to attend. The rest of the week is given over to dissemination activities throughout the country, supported by media coverage.

Despite numerous appearances in different media during its first two years, the CDPC has recently adopted a more cautious approach when using the press to disseminate the principles of competition, and it tries to avoid making public comment on cases that are ongoing before the courts. In general, the media have applauded the Commission's work and are aware that its actions are worthy of media coverage, but they have found it difficult to cover stories more widely because of the Commission's conservative policy on this subject. Furthermore, journalists covering the sector are not yet knowledgeable about competition policy.

Lastly, the CDPC has a good website with up-to-date information on its actions and main activities.[53]

7. International aspects

7.1 Extra-territorial effects

As noted above, the provisions of the Competition Law (Article 4, par. 3) apply to persons legally domiciled outside Honduras, when their activities, contracts, agreements, practices, arrangements, acts or businesses produce effects in Honduran territory.

In terms of the practical implementation of that provision, the CDPC has only carried out one investigation in which a foreign firm was involved (the Millicom Cable NV case), but the complaint was subsequently withdrawn by the complainant. Mergers resulting from legal actions undertaken abroad must be notified before they produce legal or material effects in Honduras. (Article 14 of the Regulations). The specific difficulties that could arise in investigations involving firms domiciled outside the country will need to be resolved through effective co-ordination and collaboration with overseas agencies, as well as within the regional integration systems of which Honduras is a member. To date the CDPC has signed co-operation agreements with the competition authorities of Panama, El Salvador and Costa Rica, and recently Spain, through which information can be exchanged.

7.2 Market access and international trade

In general, the CDPC considers the effects of international trade in its investigations, specifically when it analyses the relevant market. For these purposes, Article 7 of the Regulations to the Law explicitly states that the elements to be taken into consideration in such determination include the existence or otherwise of foreign substitute goods in an accessible geographic area. The same article also requires consideration of international legal or administrative provisions that could restrict access to those goods or services.

Honduras participates actively in the multilateral trading system (it has been a WTO member since 1994), including the Doha Development Round. It has signed the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Duties, and is subject to the Central American Regulations on Unfair Trade Practices (*Reglamento Centroamericano de Prácticas Desleales de Comercio*).[54] To date the country has not been accused in the WTO of practices that are harmful to international trade. At the present time, its average import tariff is 6%; there are few non-tariff barriers; and procedures for producing technical regulations and sanitary and phytosanitary measures have been simplified.

Honduras has also signed free trade agreements with the European Union, the United States and several countries in the region, as detailed above

The Ministry of Industry and Trade conducts investigations in response to complaints of unfair competition or dumping in international trade, except in disputes concerning Central American trading relations, in which case the agency responsible for ensuring fulfilment of the relevant regulations is the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA). Neither of these two mechanisms requires prior consultation with the CDPC. Nonetheless, the Commission is authorised to make recommendations if it sees fit.

7.3 International engagements

Honduras participates regularly in key competition forums worldwide, such as the OECD's Global Forum on Competition, the annual meeting of the International Competition Network (ICN) and UNCTAD's annual competition meeting. It also attends the annual OECD-IDB Latin American Competition Forum and the Ibero-American Competition Forum, in which its representatives have participated in workshops and panels. In addition, and resources permitting, the Commission has sent its professional staff to workshops organised by the ICN. It is also now a member of UNCTAD's COMPAL technical assistance programme. Regionally, the

CDPC has strengthened its ties with the United States Federal Trade Commission, the Federal Competition Commission in Mexico, the National Competition Commission in Spain and the Competition Superintendency in El Salvador, which have provided on-going support and training for its staff. The Commission has also received assistance from international consultants, in particular to assist in implementing the initial phases of activity in the institution.

8. Conclusions and recommendations

Honduras has generally made a good start to its policy of defending and promoting free competition. The process to create a legally-based competition policy began in the mid-1990s with various studies, but the decisive impetus was in 2002, when negotiations began for a Free Trade Agreement with the United States. Consensus among the main political parties was achieved in creating the Law and the business sector played a key role in enthusiastically supporting its approval, despite its historical reticence in that regard.

Nonetheless, this external momentum provided by obligations arising from the signing of the free trade agreement with the United States meant that there was insufficient reflection by the government and private sector on the need to adapt their actions to the challenges posed by the new Law. The government needed to re-evaluate its price-setting and price-control policy, whereas the private sector needed to review its commercial behaviour, having become accustomed to State protectionism. As ECLAC points out,[55] the country's main economic agents still need to make far-reaching changes to deeply ingrained habits and customs concerning the way they conceive and do business.

These circumstances have not seriously affected the CDPC's work, however. Pursuant to its legal mandate, it has carried out its investigations vigorously and independently. That said, despite the efforts made by the Commission to promote and disseminate the law and its effects within government and the business sector, more effective actions are still needed to raise awareness among these stakeholders of the importance of the Competition Law for the country's economy.

Its first few years could be summarised as follows. The Commission received external support from donors and focused on hiring staff, applying strict technical criteria, negotiating its budget and selecting its headquarters. In addition, it approved the Law's Implementing Regulation and launched investigations into high impact markets, such as pharmaceutical products and cable TV operators, as well as undertaking important sector studies (notably pharmacies and fuel). It undertook a number of initiatives to disseminate the new legislation, and it signed collaboration

agreements with other public institutions, such as the training agreement with the Supreme Court.

Since then the CDPC has conducted various sector studies: three in 2008, five in 2009 and seven in 2010. Investigations have been launched both *ex-officio*[56] (horizontal agreement cases) and as a result of complaints lodged by private individuals (the beer case). In 2008, the CDPC issued Resolution No. 32 setting second stage review thresholds for M&A transactions. In the field of competition advocacy, various co-operation agreements were signed, and "Competition Week" was instituted.

The CDPC's work has thus been consistent and serious during its first five years of operation. The following paragraphs set out the strengths of the free competition system in Honduras and identify a number of weaknesses that need to be addressed.

8.1 Strengths and weaknesses of the competition system

8.1.1 Strengths

Without prejudice to the above, Honduras has a good competition law, for which Model Law criteria have been adopted along with the recommendations of international organisations, in particular the following:

- Pro-economic efficiency and consumer-welfare objectives, which are reiterated throughout the Law.
- Legal definitions that provide clarity for business and consumers.
- A scope of application that does not provide for exemptions.
- Application of the *per se* rule to hardcore cartel violations.
- A mandatory pre- notification system for M&A transactions.

The strengths of the CDPC itself include the independence of its plenary members and the strictly technical criteria under which they act, which has been applauded by the stakeholders that deal with it, including private lawyers. Its recruitment policy adheres to strictly technical criteria, and the Commission has provided training for its staff, both in Honduras and abroad, for which collaboration with other competition authorities in the region has been strengthened.

In terms of investigations, the work done at the CDPC's own initiative has been very important and has included the launching of investigations in high impact markets with respect to the most serious anti-competitive conduct, namely cartels. The various sector studies undertaken have also been highly valuable in enabling the CDPC to gain knowledge of the main markets in Honduras. Both the investigations and the sector studies are well founded and contain the essential elements of analysis of free competition.

The investigation procedures are clear and well developed in the implementing Regulations to the Law, and the judicial review process is relatively efficient and expeditious compared to those in other countries with similar legal systems.

On competition advocacy, the CDPC has done important work in issuing opinions and recommendations on laws, regulations and decrees, with a view to promoting competition in the country's most important markets. With regard to the education of the public and private sectors about competition policy, the main initiatives are the annual Competition Week held in August and the willingness shown by the Commission to develop closer relations with other key public bodies, with which it has signed co-ordination agreements.

8.1.2 Weaknesses

Despite these achievements, consumers, business and government authorities are largely unaware of the Commission and its mission. In general, the Honduran population has a great distrust of public institutions, and thus the CDPC needs to make more efforts to improve its standing. Experience has shown that when the CDPC and its work become known the agency is viewed very positively.

It needs a more effective strategy to disseminate competition policy among government institutions. There is not a strong relationship with natural "partners" such as the Consumer Protection Authority (DGPC) or with sector regulators, where there is room to improve working relations, despite the existence of co-operation agreements. Particularly serious have been the difficulties encountered by the Commission in obtaining information from public authorities.

The CDPC also needs to improve dialogue with the business sector, which is very powerful in Honduras and could put the Commission's future independence at risk. It also needs to interact more with consumer associations.

Although the mandatory notification procedure for M&A transactions is in line with many other jurisdictions, the system is confused because of the inappropriate classification of a "voluntary" review in what is a mandatory system. The mandatory

regime, alongside the low thresholds for review, has meant that the Commission allocates much of its human resources to this area. In addition, the deadlines for reaching a decision (45 days) may be unduly tight in complex M&A cases.

The time allowed for investigating form-based (cartels) or effects-based (vertical agreements and abuse of dominance) practices is extremely brief, which makes it difficult to carry out a thorough investigation. A mechanism is needed to enable the Commission to reach settlements with the investigated parties. Finally, the sanctions imposed on investigated parties that do not provide the requested information are very light, which enables them to evade their obligation in that regard. The Commission could overcome some of these hurdles by making use of its inspection powers.

The CDPC should analyse entry barriers more thoroughly in its investigations, particularly in cases of abuse of dominance and M&A transactions. More in-depth analysis of efficiencies in such cases is also needed. It is unlikely that these shortcomings are due to a lack of information and data on the different markets.

The Commission has a small staff and budget to fulfil its difficult mission, particularly compared with other regulatory authorities in Honduras.

The Commission's work needs to be publicised more in the media. And no strategy has been developed to better position the CDPC to the public.

8.2 Recommendations

The recommendations set forth below are in two parts: first, those addressed to other parts of government or the Congress, and second, those addressed to the CDPC.

8.2.1 Recommendations to other government agencies and the Congress

8.2.1.1 Government interventions and competition assessments of government measures

The government should not intervene in the unregulated sectors of the economy unless it is absolutely necessary, thus permitting free competition to function as much as possible. In the case of sensitive agricultural markets it may be necessary to consider special regimes or exemptions to avoid legal uncertainties. This would have the benefit of providing a transparent process which could include, for example, that the proponents of an intervention demonstrate that there is no other instrument less harmful to competition that would succeed in stabilizing the market. It is important

for the private sector to have clear rules in this regard, which provide predictability and certainty.

The Regulations to the Consumer Protection Law should be reviewed to limit government intervention to cases of market failure. Article 73 of the Regulations allows the Directorate General of Consumer Protection to set prices of "essential goods" in two situations: (a) in cases of emergency, disaster or calamity, or (b) when a monopoly or oligopoly exists and the CDPC certifies that competition is lacking. It would be helpful if guidelines were developed for the purpose of identifying "essential goods" and clearly define the terms under (a), to ensure that the provision is employed narrowly. To avoid chilling effects on innovation, the provision under (b) should be limited to cases of market failure. The Regulation should be revised to address this.

The Law authorizes the CDPC to issue opinions or recommendations in cases where it deems this appropriate, or when requested to do so, on draft laws, regulations, decrees or executive agreements, resolutions, accords, covenants, international treaties and other government acts that could have effects on competition. It would be helpful if a structured mechanism were established to review and assess key existing and proposed legislation for its potential impact on competition. To avoid the CDPC from having to expend considerable resources monitoring legislative developments, such a mechanism could be introduced within a wider regulatory process. For example, competition assessment could be incorporated into a regulatory impact analysis mechanism. This would enable the Commission to comment on those that it considers important. [57]

On trade issues, as with other government actions, the Commission should be consulted in matters involving safeguards, subsidies and countervailing duties.

8.2.1.2 Regulated sectors

Further steps should be considered to liberalise the regulated industries, notably mobile telephony, where there is scope for improving competition.

Some sectors, notably the electricity sector would benefit from a privatization plan, which could include electricity distribution networks and the dispatch centre.

8.2.1.3 Amendments to the Law

In the short term, the Law should be amended to establish phased periods for appointing members of the CDPC, to ensure the continuity of its work and to prevent it from becoming politicized.

It is also urgent to lengthen the six-month deadline for completing conduct investigations and the 45-day deadline for the analysis of mergers. However, care must be taken to limit the length of such investigations to reasonable periods. This is especially important in the case of mergers, which often are time sensitive.

The Law should be amended to eliminate the obligation to notify all M&A transactions, regardless of size. Notification should be required only of those transactions exceeding size thresholds defined by the CDPC. In this regard, the current Law is confusing in its description of second stage notifications as "voluntary." Presumably this problem would be eliminated if the above amendment were adopted.

8.2.1.4 Leniency and settlements

On the basis of a cost-benefit analysis by the CDPC for introducing a leniency programme, the government should consider in the next three years whether to adopt a leniency programme to assist in fighting hard core cartels. Although it has been able to sanction cartels on the basis of indirect proof so far, greater difficulties in obtaining evidence will inevitably arise at some point in the future. An effective leniency programme would significantly enhance the Commission's ability to obtain direct evidence of cartel agreements. This would need to be balanced against the resources required for the CDPC to implement an effective leniency programme.

A settlement mechanism should be introduced as part of the sanctioning process, to enable the CDPC to reach agreement on early termination of selected cases with the investigated parties. Such a procedure would enhance the Commission's efficiency and ease the burden on the court system.

8.2.1.5 Rules on fines

The Congress should amend Article 37 of the Law relating to fines for infringing the competition law provisions. Currently, Article 37 permits the CDPC to impose a fine of up to three times the economic benefits derived by the defendant from its unlawful conduct or, if that benefit cannot be determined, up to 10% of the defendant's total turnover in the prior year. The first criterion would permit the imposition of sufficiently large fines, but experience in Honduras and elsewhere has shown that it is often difficult to quantify the unlawful gain in these instances. The Article should be amended to remove this first criterion.

The Congress should also consider increasing the level of the fine for non-compliance with information requests from the CDPC. The current fine for failing to provide such information does not seem to be effective.

8.2.1.6 Judicial review reform

A reform to the judicial review process should be introduced to consolidate all appeals by defendants against the same CDPC resolution into one case before the courts.

8.2.2 Recommendations to the CDPC

8.2.2.1 Strategic planning

The CDPC would benefit from mid-to long-term strategic planning and prioritization to improve its internal capabilities and better manage its external interactions with relevant stakeholders. The CDPC could therefore:

- Introduce prioritization principles, internally at first and eventually make these available externally, to manage its workload and case selection. This would help to make the most effective use of resources and would indicate the CDPC's key concerns to external stakeholders, notably business and consumers.

- Introduce a programme to evaluate the results of its actions, after a reasonable period of time. This would assist in determining whether the CDPC has delivered on its objectives and would feed into the prioritization and internal management of cases and projects.

- Integrate budget formulation and execution into the CDPC's strategic planning to improve the soundness of its justifications to the government for a larger budget.

- Develop a comprehensive human resources policy, covering targeted recruitment, training and severance policies. This would help to improve the CDPC's ability to attract and retain staff, ensuring that they receive the expert training and skills necessary for specific cases and projects.

- Improve stakeholder relationship management. Develop and implement strategies to raise awareness of the CDPC and its activities and engage with its main stakeholders. These include the government, Congress, regulatory bodies, consumer associations, the private sector, media and academia. The CDPC should also engage its key stakeholders in on-going dialogues on its key issues.

- Improve co-ordination and procedures between the CDPC and other government departments on sensitive sectors and essential products, notably with the Ministry of Industry and Trade, the Directorate General of Consumer Protection and the Ministry of Finance.

8.2.2.2 Anti-competitive agreements

On cartels, the Commission should make use of its powers to conduct unannounced searches of business premises pursuant to a court order ('dawn raids'). This would overcome to some extent the Commission's current inability to enforce subpoenas and other requests for information.

The Commission needs to be consistent in its analysis of cartel cases which involve government intervention, whether in the context of an investigation or as part of a more general consultation on the issue.

The CDPC should develop an approach on co-operation agreements between competitors (for example, R&D, joint ventures and information exchange) which may not warrant a *per se* prohibition.

The Commission's anti-cartel programme has been impressive in its first few years, with the notable exception of investigations into potential collusion in government tendering processes. This would be a useful focus for the CDPC, as experience in other countries has shown that cartel activity in this sector is prevalent. The OECD Competition Committee's *Guidelines on Fighting Bid Rigging in Public Procurement* provide guidance to governments and competition agencies on how to reduce the risk of collusion in public procurement.[58]

8.2.2.3 Abuses of dominance

The CDPC's resolutions in cases of abuse of dominance require further analysis of market entry conditions, particularly legal, strategic and structural barriers (sunk costs, economies of scale, etc). In addition, the analysis should indicate how efficiencies, if any, would be passed on to consumers.

A high market share is one important factor in determining dominance, but by itself it is not sufficient for that purpose. In this regard, the Commission currently considers that a firm having a market share as low as 20% could be considered dominant, depending on other factors. Such a market share is almost certainly too small to be consistent with a finding of dominance, according to international practice. The CDPC should move away from applying the Merger Regulation's 20%

market share as the criterion for establishing dominance in unilateral conduct cases. Instead, the CDPC should issue guidance specifying the criteria that will inform its analysis for establishing dominance in antitrust cases.

8.2.2.4 Mergers

Thresholds for the prior notification of concentrations should be revised to conform to international best practices in this area, in particular eliminating the market share test. This would free-up the Commission's resources to focus on enforcement and advocacy activities instead of undertaking lengthy and detailed market share analysis.

The CDPC should make more extensive use of economic analysis in its merger assessments and move away from a form-based approach. Its analysis would benefit from a more consistent use of tools such as the hypothetical monopolist test, cross-elasticities test, and consideration of entry/exit barriers and efficiencies.

Article 13 of the Merger Regulations should be amended to clarify the applicability of the merger control system to a transaction involving a foreign (non-Honduran) firm. The accepted international principle is that only those transactions having a sufficient "local nexus" (in this case a not insignificant effect on competition in Honduras) should be subject to a notification requirement.[59] The Regulation currently requires approval of foreign transactions regardless of whether these transactions have an effect in Honduras. The Regulations should be amended to bring this provision into line with international practice.

8.2.2.5 Fining policy

In its early cartel cases the Commission imposed some significant fines, but it is not clear that these fines have been a sufficient deterrent. The Commission should assess whether its current level of fines, particularly in cartel cases, is adequate. Such an assessment should inform the proposed introduction of a settlement mechanism and a potential leniency programme.

8.2.2.6 Advocacy

The CDPC should strengthen its advocacy programme to give competition policy greater social legitimacy, and thus serve as a counterweight to political and private sector pressures. In particular, this programme should include strategy for developing closer relations with key public sector and private sector actors.

Advocacy programmes targeted at the public sector should include:

- Awareness raising seminars on the benefits of competition for other government bodies, ideally supported by a relevant Minister;
- Establishing competition contact points in other government departments to help "champion" competition policy across departments;
- Training programmes for public procurement officials and expanding the existing judiciary training programme;
- Active communications campaigns to inform the public about CDPC recommendations/policy advice relating to particular government restrictions on competition.

Advocacy programmes to the business community should include:

- Drafting clear guidelines and notices explaining the enforcement practices and analytical approach of the CDPC;
- More information campaigns and seminars to improve awareness of the Law and to promote compliance.

8.2.2.7 Relationship with other regulators

The CDPC should develop and implement co-operation agreements with other sector regulators where these do not yet exist.

All co-operation agreements, including existing ones, should provide for formal and informal co-ordination mechanisms to facilitate information exchange and reporting of competition concerns to the CDPC. The Directorate General of Consumer Protection and its Inspection Department should be a priority for the CDPC.

Notes

1. *Estado Actual y Avances de la Política de Competencia en Honduras* [Current status and progress of competition policy in Honduras]. CDPC, August 2010.

2. Macro Economics Statistics Department- National Accounts Division of the Central Bank of Honduras.

3. Article 339 prohibits monopolies, monopsonies, oligopolies, division of the market and similar practices in industrial and commercial activity.

4. National Institute for the Defence of Competition and Protection of Intellectual Property of Peru.

5. Article 3.

6. Article 4.

7. On this point, see the recommendations made in the pharmaceutical sector study launched in September 2007.

8. Article 8.

9. Article 20.

10. Article 37.

11. Article 39.

12. According to this rule, the conclusion of the judge must not be arbitrary but based on logic and experience.

13. Traditionally, the civil procedural rules provide for a formal written procedure, which makes it very long.

14. Set of acts and relations that make it possible to exchange goods or services in circumstances determined by supply and demand which set prices and other commercial conditions.

15. Defined on the basis of the product market and geographic market. The product market is all of the goods and services that consumers consider interchangeable or substitutable by reason of their characteristics, price, or intended use. The geographic market requires evaluation of the territorial scope of the zone in which activities involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

16. On this point, see the guidelines issued by the Commission in *Comunicación relativa a la definición del mercado de referencia* [Communication relating to the definition of the relevant market] published in the Official Journal (Diario Oficial) C 372 of 9.12.1997.

17. Article 7 of the Regulations to the LDPC provides a series of elements that the CDPC should use to determine the relevant market. Among others, the list includes the relevant product and its substitutes, the geographic area, the existence of potential competitors etc.

18. The complete text of these two articles is as follows: *"Article 5:- Prohibited Anticompetitive Practices due to their Nature. Verbal or written contracts, agreements, arranged practices, among competitors or potential competitors are prohibited, when their objective or fundamental effect is one of the following: Establishing agreements to fix prices, tariffs or discounts; Restraining, totally or partially, the production, the distribution, the provision or the commercialization of goods and services; Dividing, directly or indirectly the market in territorial areas, clients, provision sectors or supply sources. Establishing, agreeing or coordinating positions or agreeing to abstain from participating in biddings, quotations, call for tenders or public auctions. Article 6:- Legal Disability. The contracts, agreements, arranged practices, combinations or arrangements prohibited by Article 5 of the present law are void. The economic agents who realize these activities shall be sanctioned according to this law, without prejudice of the corresponding penal or civil responsibility. These economic agents shall be sanctioned even when these contracts, agreements, arranged practices or combinations have not yet produced any effect."*

19. In this Article, the law prohibits, on the basis of effect, any act or deal that Commission considers restricts, reduces, damages, impedes or harms the process of free competition in the production, distribution, supply or marketing of goods or services.

20. Article 7 is discussed further below in the sections dealing with vertical restraints and abuse of dominance.

21. The OECD has considered this subject of using circumstantial evidence in cartel cases. See *Prosecuting cartels without direct evidence*, OECD Policy Round Tables (2006).

22. Article 6 of the Implementing Regulation. In the specific case of vertical restrictions, the criteria established in subparagraphs (a) and (c) of this Article, referring to the exclusionary effect that the practice must have, are particularly applicable.

23. These thresholds can be based on any of the following three criteria: (a) when the total asset value exceeds the equivalent of 10,000 times the minimum wage, calculated on an annual average basis, which means multiplying by 10,000, the minimum wage established in the current table of minimum wages per ordinary day's work, contained in the decree or agreement approved by the Secretariat of State in the Employment and Social Security Bulletin (*Despachos de Trabajo y Previsión Social*), which is designated as a daily average, multiplied in turn by 30 and by 12; or (b), when it exceeds a sales volume of 15,000 times the minimum wage, calculated on an annual average basis, which means multiplying 15,000 by the minimum wage, established in the current table of minimum wages per ordinary day's work, contained in the decree or agreement approved by the Secretariat of State in the Employment and Social Security Bulletin, which is designated as a daily average, multiplied in turn by 30 and by 12; or (c) when the joint share of the economic agents involved in the merger exceeds 20% of the relevant market.

24. Article 8 of the Implementing Regulation.

25. Concerted action between economic agents to dissuade another economic agent from a given conduct or oblige it to act in a certain way.

26. Restriction on production, distribution, or technological development by an economic agent, to the detriment of other economic agents or consumers.

27. Transactions conditional on not using, acquiring, selling, or providing the goods or services produced, distributed or marketed by a third parties.

28 Any other act or deal that the Commission considers restricts, reduces, damages, impedes, or harms the process of free competition, distribution, supply, or marketing of goods or services.

29. Article 11. An increase in economic concentration is defined as the gaining of control or change of control of one or more firms through shareholdings, control of management, merger, takeover, or any claim on shares or participations in capital or debt securities, which afford influence on corporate decisions, or any act or acts involving the grouping of shares, equity participations, trust funds or assets between suppliers, customers or any other economic agent. The term economic concentration does not include potential partnerships formed for a specified period of time to implement a given project.

30. See, International Competition Network, *Recommended Practices for Merger Notification Procedures, II.B (2010), available on the ICN website.*

31. Article 52.

32. Article 22.

33. The Commission has defined the following entry barriers in its Regulations: financial costs in developing alternative channels; limited access to financing, technology or inefficient distribution channels; the amount, indivisibility and payback period of the necessary investment, compounded by low or zero profitability of alternative uses of infrastructure and equipment; the need to obtain concessions, licences, permits or any type of government authorisation; use or exploitation rights that are protected by intellectual property legislation, but not required equally of all participants in the industry in question; the advertising investment in needed for a commercial brand or name to acquire market presence enabling it to compete with already established brands and names; restrictions on competition in international markets; restrictions implied by common practices among economic agents already established in the relevant market; and the actions of national, departmental or municipal authorities that discriminate when granting incentives, subsidies, support or any other type of benefit to certain producers, marketers, distributors or service providers.

34. (a) Economic agents involved in legal acts involving shares or ownership stakes in foreign companies that do not acquire control of Honduran companies, or accumulate shares, social stakes, participation in trust funds or assets generally in national territory, additional to those which, directly or indirectly, they held before the transaction; (b) the mergers relate to an economic agent that is insolvent, provided the latter shows that it has unsuccessfully sought non-competitor buyers. (c) the concentrated firms have set up temporary linkages between them to develop a given project or in pursuit of a specific purpose, such as consortia, strategic alliances, and others; (d) the concentrations consist of simple corporate restructuring, where an economic agent has directly or indirectly owned and possessed 98% of the shares of the economic agent(s) involved in the transaction for the last three years at least.

35. Article 29 of the Telecommunications Framework Law.

36. At this stage it is not clear how competition law is to apply in practice to regulated sectors, such as electricity, where the regulator has some legislatively authorised price setting authority.

37. Legislative Decree No. 185-95.

38. Source: Annual Report of the National Telecommunications Commission, 2010.

39. Despite the fact that the CDPC does not consider mobile and IP telephony as perfect substitutes for fixed telephony, according to the analysis made at the time of the Millicom-Amnet merger.

40. Article 38.

41. Article 211 A.

42. Electricity market statistics, CNE Honduras 2010.

43. WTO document WT/MIN (05)/ST/64 of 15 December 2005.

44. Law on the Control of Prices in the Basic Shopping Basket, and Decree No. 113-2007 of 30 October 2007.

45. Framework Law of the Electricity Subsector, Decree No. 158-94, published in the Official Gazette (*La Gaceta)* of 26 November 1994.

46. Law creating the Autonomous National Water and Sewerage Service (SANAA), Decree No.91 of 23 May 1961.

47. The Organic Law of the Honduran Telecommunications Company (HONDUTEL), Legislative Decree No. 341 of 4 June 1976.

48. The Competition Law explicitly repealed Articles 422, 423, 424 and 425-III.

49. See the Industrial Property Law, Decree No. 12-99-E of 19 December 1999, Articles 170, 171, 172 and 173; the Law to Implement the Free Trade Agreement between the Dominican Republic, Central America, United States of America, on the intellectual property regime, Decree 16-2006 of 15 March 2006.

50. See the Consumer Protection Law and its Regulations, Decree No. 24-2008 of 7 July 2008 and Agreement No. 15-2009 of 15 April 2009.

51. In August 2010, the CDPC published a document entitled *Estado actual y avances de la Política de Competencia en Honduras* [Current status and progress of competition policy in Honduras].

52. Current status and progress of competition policy in Honduras, CDPC 2010.

53. At http://www.cdpc.hn/.

54. Resolution 12-95 of the Council of Ministers Responsible for Economic Integration and Regional Development, 1995.

55. Marlon Tábora. *Condiciones Generales de Competencia en Honduras* [General conditions of competition in Honduras]. ECLAC, 2007.

56. In 2008, an ex-officio investigation was launched into collusion in the cement and sugar markets. In 2009, an investigation was launched following a complaint in the beer market.

57. The *OECD Competition Assessment Toolkit* (2011) provides guidance on how such a programme might be structured, www.oecd.org/competition/toolkit.

58. See www.oecd.org/competition/bidrigging.

59. See, OECD, *Recommendation of the Council on Merger Review (2005);* International Competition Network, *Recommended Practices for Merger Notification Procedures*, (2002-2005).

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