

Honduras

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Strengthened M&A and antitrust legislation

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Before February 2006, Honduras was missing a Law which could be used to effectively enforce the economic principle set forth in Article 339 of its Constitutional Law, which prohibits the monopolisation of trade and industry and declares as illegal all those business practices that in any way obstruct trade and commerce. This constitutional disposition is the fundamental legal base upon which the recently enacted Honduran Competition Law is now founded.

On February 4 2006, the Honduran Congress addressed the abovementioned constitutional mandate and enacted Decree 357-2005. Before the decree, a few legal bodies regulated business conduct in the sense mostly found in our Commerce Code, but no governmental agency had been empowered with sufficient legal means to enforce any of these dispositions. Therefore, Honduran consumers and the economy at large remained unprotected against the abuses of large corporations with monopolistic business practices that negatively affected trade, free competition and consumer rights.

Efforts are now being made to break up existing obstructive practices and agreements and prevent the formation of new ones. Congress did consider the fact that, as a consequence of the absence of a Competition Law, companies had been conducting business regardless of any consideration of whether such operations obstructed trade or commerce in any way.

Therefore, the new Law granted a period of time for companies to consider such a possibility and voluntarily cease any obstructive conduct. This period of adaptation has now

ended, and any obstructive business practices will be punished accordingly.

We might expect Honduras to eventually enjoy a healthier and more competitive economy. Naturally, this will be a continuing process: the market, as well as the entity responsible for enforcing the Law, are both new to the application of these terms, so we imagine that for the first years some mistakes, confusions and difficulties in the application will accompany the learning period.

Obstruction of trade: illegal agreements and conduct

The Competition Law considers as illegal and unenforceable any contract, combination, conspiracy or conduct that has the effect of obstructing trade.

With the goal of preventing and eliminating these types of obstruction from our economic community, the Competition Law has adopted two different standards.

(i) A flexible standard, also known as the rule of reason test, which requires, in the determination of whether a challenged practice restricts competition, the consideration of several factors such as if the defendant has a dominant position within the relevant market, the ability of the defendant's competitors to respond to or neutralise the challenged practice and the existence of an actual obstructive effect on trade. Among practices made unlawful under this standard are vertical price-fixing agreements, tying agreements, production limitation agreements and market allocation agreements between non-competitors.

(ii) Illegal *per se* (that is, without any flexibility). Those practices listed by the law of certain contracts, practices, combinations and conspiracies that are considered to be illegal by their very nature. These include horizontal price-fixing agreements, market allocations and boycotts.

Dominant position in market share

Honduran law does not prohibit the acquisition of a dominant position within a certain market, but it will intervene in those cases in which it is determined that the position was obtained unfairly or if there is abuse of such.

Antitrust control of M&A of stocks or assets, takeovers and other types of concentrations

In the past few years, the Honduran economy and markets have shown a significant rise in corporate M&A, especially within the financial sector. Before the enactment of the Competition Law, none of these transactions were controlled and were entirely regulated by contractual agreements among the parties, with certain limited authorisations imposed by special Laws (for example, authorisation for the sale of shares of banks, related more to aspects of the origin of funds and anti-money laundering dispositions than to market concentration).

The core objective of the antitrust control of concentrations contained in our law is to maintain free competition, with a special focus on consumers' rights and their ability to choose a provider of goods or services. Our law does not distinguish between horizontal, vertical or conglomerate mergers: all of them are equally likely to be examined and either approved or rejected.

Two types of merger control regimes

First, there is a mandatory regimen, where the parties are prevented from closing a deal until they have received merger clearance. In this case, a legal review of the concentration is made. This review will mainly focus on the market share of each party and the effects such concentration will have in respect to other competitors and on clients of the products and services, the possibility that such concentration will promote or permit anti-competitive practices, and the creation of entry barriers to new competitors, among others.

Second, there is a voluntary regimen. This applies to cases in which, according to the terms of the Competition Law, the parties are not prevented from closing the deal in advance of having applied for and received prior merger clearance. A prior notification of the intended transaction is required which can be subject to review.

To distinguish between cases of mandatory and voluntary review, the Law uses certain market thresholds. Even though many transactions have been executed, notified and approved since the enactment of the Competition Law, it was not until June 11 2008 that the regulatory agency, the Commission for the Defense and Promotion of Competition, through a resolution, established the thresholds that will accordingly determine the applicable process. According to Resolution 18-CDPC-2008, any concentration transaction will have to be legally revised in the event that the following market thresholds are exceeded: (i) if it involves assets valued over La10,000 (\$1.72 million); (ii) if it implies a participation in the relevant market of over 20%; or (iii) if the companies involved have sales volumes equal to or in excess of La15,000 on a daily average.

In summary, new M&A rules apply in Honduras. As the country lacked regulations covering monopolies and antitrust principles in the past, we envision a period of several years during which the markets and their participants, as well as the Commission, will have to adapt and learn. The Commission is making efforts to take on additional staff with the appropriate expertise, but the issues of limited budget and human resources in Honduras will need to be overcome before these processes come to fruition. The Law is now in effect, but we are still in uncharted waters for the time being.

Financial and corporate

Recommended firms

Tier 1

Arias & Muñoz
 Consortium - JR Paz & Asociados
 López Rodezno & Asociados

Tier 2

Aguilar Castillo Love
 CF Danzilo & Asociados
 García & Bodán

Tier 3

Batres y Asociados
 Gutiérrez Falla & Asociados
 Medina Rosenthal & Fernández Central Law
 Ortez Sequeira & Associates

In Honduras, the story is energy. Deals in the industry are surging, thanks in part to the government's efforts to promote investment in renewable resources.

Honduras is replete with rivers, and in the past, the country's energy needs were mainly provided by hydroelectric dams. Now, the country is primarily fuel-powered. Naturally, with the price of oil rising so steeply, there is widespread interest in finding alternative sources of fuel. Many of these potential energy developers are local companies, with knowledge of the terrain and the access to resources, but they lack financing to get the projects started.

In order to meet the energy demands of the growing industrial zones, the government is beginning to look to private enterprise to jump-start the dam projects, and has provided incentives, like tax benefits, for these types of investments. International companies are preparing to bid for the construction of dams and the transportation of energy. Private companies are entering the country and investing in wind power and hydropower generation. Near Tegucigalpa, there is a project underway for the production of a 100MW wind generation facility.

In December, the government replaced the former minister of natural resources, in order to expedite the granting of environmental licences. Typically, a feasibility study for these projects will take two years to be conducted and reviewed by the appropriate governmental agencies; legislation was recently passed which directs these studies to be approved more quickly. For example, if the environmental portion of a viability study has not been fully evaluated by the regulator in six months, then the legal consequences will owe to the regulator, rather than the investor.

This administration has been steadily deregulating certain industries, including energy. The government is aware that it will

require help from private enterprise in order to meet the increased demand from economic growth and tourism. Still, concerns remain that the government is not moving in a timely manner, and is motivated to stall these projects because of prior obligations to companies that have already committed to producing energy through fuel.

Arias & Muñoz

The Honduran branch of the Arias & Muñoz network has earned a solid reputation as one of the best firms in the country. The Honduran office, which was founded in 2002, also benefits from the favourable image of the offices in other jurisdictions, like El Salvador and Costa Rica, and is able to take advantage of these connections to participate in cross-border deals.

Competitors certainly respect the abilities of the attorneys in the Honduran office: "Arias & Muñoz certainly deserves to be a tier-one firm," says one. A client adds: "Arias & Muñoz did a good job working with complicated legal structures for us, and successfully worked on a transaction that was not straightforward."

The firm is involved in important banking transactions, advising its clients on both loan agreements and equity investments in banks. Led by Dennis Matamoros, the firm counselled FMO and DEG, a member of German banking group KfW Bankengruppe, in an equity investment of \$30 million in preferred shares in Banco Ficohsa, a Honduran bank. In January 2008, the firm advised a team of investors, including IFC, CabeI, FMO and BIO, which participated in an \$8 million investment in Banco Popular.

The growing investment in all forms of project finance has not escaped the lawyers at Arias & Muñoz. The firm has overseen a \$160 million investment by the Central American Bank for Economic Integration towards an investment trust for the expansion of Puerto Cortés, the main port in Honduras.

Leading lawyers

Jorge Luis Arenales
 Evangelina Lardizabal
 Dennis Matamoros Batson

Consortium - JR Paz & Asociados

JR Paz & Asociados, the largest firm in Honduras, has certainly benefited from its alliance with other regional firms under the Consortium umbrella. Clients of JR Paz & Asociados are often companies looking to expand into the region; and the firm has developed a reputation as capable of handling

cross-border and regional transactions. One rival says: "JR Paz & Asociados has a good team of lawyers and is very competitive."

In December 2007, the firm advised Standard Bank as administrative agent and bookrunner on a \$100 million syndicated loan for the financing of Banco Industrial de Guatemala's acquisition of Banco del País in Honduras. With the acquisition of Banco del País, Banco Industrial de Guatemala will strengthen its presence in Central America, and specifically will grow its corporate banking practice.

The firm represented Kelsy Warren Group in the acquisition of Roatán Electric Company, the sole provider of electricity for the Bay Islands, an important tourist attraction in Honduras. The target company was purchased for \$60 million. JR Paz has opened an office in Roatán in order to better serve the real-estate and tourism industries that are developing in this region.

The firm was involved in the merger of BAC-Honduras and Banco Mercantile. JR Paz, led by José Ramón Paz, advised the purchasers, BAC and GE Finance, in this \$50 million transaction, which created the largest bank in Honduras in terms of assets.

Leading lawyers

José Ramón Paz
José Rafael Rivera Ferrari

López Rodezno & Asociados

López Rodezno & Asociados is a small local firm with a big reputation in Honduras. Rivals note that the firm, which has been in the country for over fifty years, has cultivated a specific role: "López Rodezno & Asociados is known as a boutique banking and finance operation. They have a good work ethic and are very respectable." Those same competitors observe that López Rodezno has not readily diversified into different practice areas, but the firm has had recent forays into M&A work lend credence to the idea that the firm is moving into new territory.

Given the recent increase in investment in the tourism industry because of a healthier economic outlook and passage of free-trade agreements like Cafta, the firm has gained experience in labour and immigration issues as well.

The firm, well known for its connections to the banking and finance industry, has represented international financial institutions including Citibank, IFC, Banco Cuscatlán and Banco Agrícola.

Leading lawyers

Jorge López Loewenberg
René López Rodezno

Aguilar Castillo Love

Aguilar Castillo Love is working to establish its presence in Honduras. The legal community is beginning to recognise the firm's abilities, especially its involvement in project finance and important acquisitions. Peers and clients specifically praise the professionalism of Enrique Rodríguez Burchard: "Enrique is a fine attorney, especially dedicated to the mining industry."

As an example of this strength in the mining industry, the firm was involved in one of the most important mining concession projects of the last few years. Enrique Rodríguez Burchard advised on all aspects of administrative law and ran negotiations on behalf of Yamana Gold in this \$19 million concession expansion. This type of representation requires very specific knowledge regarding the rules in an industry that has been profoundly influenced by regulators and governmental agencies.

Leading lawyers

Enrique Rodríguez Burchard

García & Bodán

García & Bodán, a small firm with its origins in Nicaragua, has become steadily more involved with transaction in Honduras. Clients are renewing their services with the firm, which is a testament to García & Bodán's competence. Vanessa Oquellí is involved in almost every deal that passes through the office, and is respected by competitors and clients alike.

García & Bodán has been counsel to some large corporations. In June 2007, the firm represented the Mexican airline, Aeroméxico, on its authorisation for the operation of the airline in Honduras. The firm has also participated in M&A work. Vanessa Oquellí led the team that advised Dufenco Steel on its acquisition of the local company Tong Mei Industrial.

Leading lawyers

Vanessa Oquellí