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.