

# Competition Trends in Central America

August 27, 2019

In 2019, we have seen the worldwide antitrust enforcement trend continue, keeping even Silicon Valley giants on their toes. Transactions have been halted, in some cases due to prohibition by the competition authorities, in others, due to abandonment of the parties, who in many cases have not been in a position to offer proper remedies to the competition authorities. As is natural in M&A transactions, there is a strong desire and pressure on the parties involved to close and implement transactions as quickly as possible with the aim of maximizing synergies. Recent actions taken by Competition Authorities worldwide have made it clear that these preparatory closing measures should be carefully reviewed and implemented under close watch, as this wave of antitrust enforcement has also seen the highest fines imposed due to gun-jumping, which has called pre-closing M&A practices into question.

Central America is not the exception to this worldwide trend. While in the region competition rules vary from country to country and are not as consolidated as those of long standing systems such as the European Union or United States of America systems, global transactions impact the way business is done in Central America and, at the same time, competition enforcers are increasingly coordinating their efforts, and this is where local competition rules come into play.

## Costa Rica

1. In Costa Rica, Competition rules were first introduced in 1994, when Law 7472, Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor, (Law for the Promotion of Competition and Effective Defense of Consumers) came into force. Among other things, Law 7472 called for the creation of the *Comisión para Promover la Competencia*, the “Commission” an agency with technical autonomy within the Ministry of Economy, Industry and Commerce, charged with enforcing Competition rules. This law has remained for the most part unaffected until now, with the exception of the introduction of merger control rules in 2012. New amendments, in response to the peer review conducted by the OECD in 2014, have been approved in a first debate at the Legislature.
2. Local merger control rules state that if a transaction meets the thresholds and conditions established under the Competition Law, a filing before the Commission is mandatory and should take place prior to the transaction execution. The obligation to notify falls on all parties involved in the transaction, and therefore, upon failure to notify the Commission under a mandatory notification scenario, all parties to the transaction will bear the consequences, which include fines and the possibility of unwinding the transaction. Transactions which do not meet the thresholds are only subject to pre-merger voluntary notification. The Commission or its Technical Unit may request any additional information considered necessary to analyze current market conditions, market impact post-transaction and relevant market indicators such as market shares, market competitors, consumer possibility to substitute products, among other relevant market data, which must be provided and justified from a technical and legal perspective by the parties to the transaction.
3. On August 26, the Legislative Branch approved in a first debate, 52 votes positive – 0 negative, the changes to local Competition rules. These changes will be taken to a second debate for final approval, set for August 29, and

upon approval in second debate and due publication in local legal newspaper “La Gaceta”, the changes will come into effect. These include:

- A standstill obligation, which will prevent companies from implementing the transaction until merger clearance has been granted. This will apply unless the Commission waives the standstill requirement, in exceptional cases where the companies involved have properly submitted a reasoned request for this waiver. However, the scope/extent of the standstill obligation is not covered by the proposed changes and, as seen in other jurisdictions, this in practice may result problematic and will require close watch by M&A lawyers as to the pre-closing actions and rights that the buyer may effectively exercise without falling in the gun-jumping risk.
- The institutional design of the Commission, by which the current part-time commissioner scheme will be replaced for full time dedicated commissioners. The commissioners will have prohibition to provide other services or duties as independent consultants, with the exception of teaching positions. The OECD has previously qualified the current part-time commissioner scheme as a structure that contributes to the conflict of interest and which gives rise to inconsistencies between commissioners and the technical support unit. This change is long overdue and is a direct response to one of the main weaknesses of our competition system.
- Transactions that meet the following conditions will be subject to approval by the Commission (prior to implementation): i) At least two economic agents participate in or have carried out activities with effects in Costa Rica at any time during the two fiscal periods prior to the transaction. ii) That either the sum of the gross sales or the sum of the productive assets in Costa Rica of all the economic agents involved in the transaction reached during the previous fiscal period, amounts to or is greater than the thresholds established by Commission, within the range of thirty thousand to sixty thousand base salaries<sup>1</sup>. iii) That individually, at least two of the economic agents involved in the transaction have generated gross sales or own productive assets in Costa Rica during the previous fiscal year, for amounts equal to or greater than the threshold established by the Commission, within the range of one thousand five hundred to nine thousand base salaries<sup>2</sup>. Note that the Commission is set to later establish, through a resolution, applicable threshold guidelines.
- The following transactions would be exempt from the obligation to notify prior to implementation: i) Acquisition of goods and services that form part of the ordinary course of business of the buyer, without having the object or effect of concentrating operations of independent economic agents. ii) Purchase of assets, shares or participations made temporarily and for resale purposes, provided that the resale takes place within a period of one year from its acquisition, and that the buyer does not participate in making decisions related to commercial strategies of the acquired economic agent and, that prior to its resale, the assets, shares or participations are not subject to a new concentration that should be notified to the Commission in accordance with the conditions set forth under local law.
- Similar to the EU merger control, a phase I – phase II analysis will also be implemented locally, by which only transactions that require an in-depth analysis will be taken to a phase II (90 calendar days' term in addition to the phase I term to resolve), while those considered unproblematic and thus compatible with the local market would be cleared during phase I (30 calendar days' term).
- Leniency and whistleblowing programs, which grant the possibility of obtaining immunity from fines. These programs have proven to be strong tools in long standing competition systems, and are expected to also be a strong tool for local Competition Authorities in uncovering cartel behavior or any other infringements affecting consumers.
- Higher fines: The proposed changes also provide for higher fines, which are divided in three categories: minor, severe and very severe fines. These will apply depending on the severity of the infringement and the highest fine which may be imposed amounts to 10% of the total volume of the business of the company in the fiscal year prior to the imposition of the sanction.

4. Competition laws have become increasingly relevant for companies doing businesses in Costa Rica, due to

enforcement levels and possible sanctions by the Competition Authorities. Local Competition Authorities have been kept busy by market events that have required intervention and action from competition enforcers. On December 2018, Competition Authorities blocked Walmart's acquisition of Gessa (Grupo Empresarial de Supermercados, S.A.), as the acquisition would have resulted in high market power for Walmart, with high probabilities of significantly impeding competition. Earlier this year, the Competition Authorities informed of their decision to impose a fine of CRC 11.891 million colones (approximately US\$20.864 million) to CEFA-Fischel, a strong player in the pharmaceutical industry, due to monopolistic behavior in the market during the years 2010, 2011 and 2012. Furthermore, growing tension between local competition authorities and market players was further evidenced earlier this year when, as a result of an unconstitutionality action filed before the Constitutional Chamber of the Costa Rican Supreme Court on December 2018, which challenged applicable merger control rules, the Competition Authorities were unable to decide on cases filed for merger clearance. The situation brought great uncertainty to the overall business climate in the country and was considered a low blow to the competition system in place. Following strong opposition and pressure from competition practitioners and companies that required due merger clearance, the Constitutional Chamber of the Costa Rican Supreme Court resolved to enable the Commission to continue applying merger control rules, even while the unconstitutionality action is in process.

5. Finally, local companies should remain vigilant of the way business is being conducted, as it can take just one meeting to transgress competition law and Competition Authorities seem to be playing hardball. In view of the newly approved competition rules, companies should be vigilant of general practices that companies have been implementing to gain market power and position their brands, including exchange of information by their sales force with other players in the market or even communication with clients, as it has traditionally been the rule in Costa Rica that the Competition Authorities only intervene in extreme cases, however, this approach has changed and our competition enforcers are becoming more active, investigating market industries and conducting market studies to uncover practices that may bring harm to consumer welfare, both in the short term and on a lasting basis.

## Panama

1. In Panama, Law No. 45 of 2017 sets the framework for Consumer Protection and Defense of Competition (Law No. 45) and created the Consumer Protection and Defense of Competition Authority ("Autoridad de Protección del Consumidor y Defensa de la Competencia", the "ACODECO", which formerly existed as the "CLICAC" or Commission for Free Trade and Consumer Protection). ACODECO has the capacity to investigate potential market concentrations and monopolistic practices, monitor pricing and pricing control, effect routine inspections of market operators at the retail and wholesale levels, supervise product recall operations, monitor product and service advertising and marketing, verify compliance with product labelling and packing, product and service warranties, monitor the observance of access and facilities for handicapped citizens, as well as monitor observance of mandatory discounts to senior and pensioned citizens. ACODECO has a small claims administrative-court, it can issue fines against market and free trade rules infringers and mediate and represent the interests of consumers in action before the Courts of Commerce. ACODECO issues the rules and guidelines on market concentration and vertical and horizontal integration practices.
2. According to Law No. 45, market operators considering carrying forward merger and acquisitions, as well as other transactions that could lead to a potential market concentration or potentially result in an absolute or relative monopolistic practice prohibited by the law, can file an application for prior determination before the ACODECO, who will have 30 days to issue its position the transaction. If ACODECO fails to answer within the 30-day period (or otherwise does not request further details on the transaction, which in practice generally occurs), the transaction will be considered licit. Submission of a potential market concentration transaction to verification by ACODECO is of voluntary nature. ACODECO can investigate and challenge market concentration transactions, and following its investigation, can subject the transaction to specific terms and conditions or instruct the partial or full de-concentration. Also, any individual can challenge a market concentration operation before the Courts of Commerce. It should be noted that there is a three-year statute of limitations for market concentration

investigations following the completion of the transaction.

3. Market concentrations with restrictive effects on free trade can be approved by ACODECO if they represent a development in efficiency, such as is the case with the improvement of production and trading systems, promotion of technological or economic development, improvement of sector competitiveness, that results in a benefit to consumers.
4. ACODECO's investigations of potential monopolistic practices span across all areas of trade and commerce, including: travel agencies, marketing agencies, rice, beer, bread, and flour markets, airlines, dry-cleaning services, oil and gas companies, and telecoms companies.
5. Law No. 36 of June 5, 2018, specifically regulates market concentrations between telecoms personal services operators of and cellular phone sectors, making it mandatory to apply for the conformity by ACODECO. This law seeks to regulate an eventual cellular phone market consolidation which would result in three (formerly four) operators. Furthermore, on April 2019, ACODECO granted its conformity to a shares purchase transaction in favor of an important packed-ice distributor. ACODECO recognized the validity of a non-compete clause in Panamanian territory, limited to a three-year period.

## Guatemala

1. In Guatemala there are no specific rules governing competition matters, and thus, unlike the rest of the Central American countries, there are also no Competition Authorities.
2. Notwithstanding the above, Law Initiative No. 5074, is a Competition Law initiative currently in Congress. However, its review and approval process in the Congress agenda has been slow. This initiative seeks to regulate Competition Law in Guatemala, through the control and supervision of restrictive practices deemed contrary to the free market policy, investigation processes carried out by a specialized competition authority and the application of sanctions where restrictive behavior and practices have been identified.
3. Behavior considered as unfair competition is regulated by the Commercial Code and in cases where an industrial property right is affected, Industrial Property Law applies. Additionally, it is relevant to point out that only acts of unfair competition in matters of Industrial Property are sanctioned by the Criminal Code. In general, the Criminal Code only sanctions monopoly cases.

## El Salvador

1. The authority responsible for the application of Competition Law in El Salvador is the Superintendence of Competition. It is an autonomous administrative agency attached to the executive branch of the government through the Ministry of Economic Affairs. The applicable Competition Law in El Salvador was approved in 2004 and entered into force in 2006. It was amended in 2007, when the authorization to execute dawn raids in investigations, and a leniency program was included. Currently, the OECD is analyzing the country's competition policy through an inter-peer review. The report is expected to be public by September or October 2019. It is anticipated that recommendations for changes to the Competition Law will be made in this report.
2. There are mandatory ex ante control rules in place in El Salvador, by which transactions that meet the following thresholds must be filed for approval of the Competition Authorities: a) when the agents are independent from each other; b) when, through the transaction, a company acquires control over another company; c) when both companies carry out economic activities directly or indirectly in El Salvador; and d) when any of the following thresholds are met: that the combination of annual assets in El Salvador between the purchaser and seller exceeds US\$182.5 million; and that the combination of annual income in El Salvador between the purchaser and seller exceeds US\$219 million.
3. In February of this year, the Law on Administrative Procedures entered into force, and it seeks to standardize procedures throughout the Public Administration, including in competition processes. Its application has been

chaotic, and one of the first rules adopted was to suspend the term for the authorization procedure for concentrations. Prior to this, the Competition Authorities had a period of 90 calendar days to resolve, failure to resolve within this term would imply automatic approval of the transaction; now the Competition Authorities have incorporated the suspension of the term and by doing so have managed to extend the deadlines to authorize concentrations.

4. Although the Competition Authorities have the power to carry out raids with search warrants to obtain direct evidence in cartels cases, in practice this has not been used since 2008. The Competition Authorities prefer to resolve cases with evidence for presumptions. This situation implies a high risk of false positives, since the uniformity of commercial behavior can lead to presume the existence of a cartel. Finally, considering recent sanctions that have taken place, companies should remain vigilant in the following matters: exchange of information, communication with competitors, distributors and customers, joint publications between competitors, communications and discussions in business associations and homogeneous behaviors in the market (price increases during the same period).

## Nicaragua

1. In Nicaragua, Competition rules are enforced by the *Instituto Nacional de Promoción de la Competencia*, PROCOMPETENCIA (the National Institute for the Promotion of Competition), an autonomous technical institution created by Law No. 601 enacted in 2006 (the Competition Law). The Nicaraguan regulator has been mostly focused on enforcing merger control and unfair competition rules; nonetheless, businesses should remain vigilant of the way the operation is being conducted, information that is being exchanged by their sales force with other players in the market or even clients, general practices that companies are implementing to gain market power and position their brands, since PROCOMPETENCIA is becoming more active in investigating market industries and conducting market studies to uncover practices that may bring harm to consumer welfare and free market.
2. Merger control rules in Nicaragua provide that if a transaction meets the thresholds and conditions established under the Competition Law, filing before the PROCOMPETENCIA should take place prior to its execution. Prior filing of a merger is required when, as consequence of the transaction, (i) a relevant market share of 25% is either increased or acquired; or (ii) the economic agents subject to a merger have a combined income higher to approximately US\$113 million. If no filing is made under a mandatory authorization scenario, the parties to the transaction may be subject to fines and, if found to be incompatible with the local market, unwinding of the transaction may be ordered.. PROCOMPETENCIA may request additional information considered necessary to analyze current market conditions, market impact and relevant market indicators such as market shares, market competitors, consumer possibility to substitute products, among other relevant market data, which must be provided and justified from a technical and legal perspective by the parties to the transaction. PROCOMPETENCIA may also receive prior consultations by entities in order determine whether a proposed transaction meets the threshold to submit mandatory filing for authorization. In 2019, the competition regulator has received around 10 prior consultations and has not ordered the unwinding of any transaction.
3. PROCOMPETENCIA has started a Compliance Program designed to promote compliance with competition regulations amongst Nicaraguan companies. Through this program, a company may request the assistance of the Nicaraguan competition regulator in order to review its practices, make an assessment and make suggestions on how to better comply with current regulations and what best practices may be implemented. Additionally, Nicaragua is soon to reach the 15th anniversary of the enactment of its Competition Law, hence PROCOMPETENCIA is making a general revision of the law and its regulations in order to propose changes according to international competition best practices and trends.

## Honduras

1. In Honduras, Competition rules are enforced by the Commission for the Promotion and Defense of Competition (Comisión para la Defensa y Promoción de la Competencia). Local competition rules are regulated in the Law for the Defense and Promotion of Competition (Ley Para la Defensa y Promoción de la Competencia – Decreto Legislativo No. 357-2005) which intends to promote and protect free competition and seeks the correct functioning of the local market and the wellbeing of the consumer. Amendments to this law are contained in Decree No. 4-2015, which provides a mechanism to exempt companies from fines when, having taken part in a cartel, they report the existence of such association and generate evidence to support the investigations.
2. In terms of merger control rules currently in force, if a transaction meets the thresholds and conditions established under the Law for the Defense and Promotion of Competition, any of the parties must notify and obtain approval of the Competition Authorities before the transaction enters in force. Late notification, failure to notify or failure to deliver information requested by the Competition Authorities will result in a fine to the involved parties, which does not exempt the transaction from requiring the approval of the Competition Authorities nor avoids the official cancellation of the transaction if not approved.
3. Honduras is currently classified among the lower ranked nations in terms of competition, however, we are beginning to observe consistent efforts from within the private and public sectors that aim at guaranteeing free competition and promoting and protecting investments. New initiatives to more effectively regulate and enforce competition and consumer protection, are expected to arrive in the next few years.
4. This year, the Latin American and Caribbean Competition Forum will take place in San Pedro Sula, Honduras on September 24th and 25th and will be hosted by the local Commission for the Promotion and Defense of Competition. As stated by the OECD, this Forum brings together high-level competition officials each year to promote dialogue, consensus building and networking among policy makers and enforcers in the region.

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1. As a reference, 2019 base salary is 446.200 colones, the equivalent to approximately USD\$780↔
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