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LEGISLATION ON ANTIMONOPOLY AND UNFAIR COMPETITION: CENTRAL AMERICA AND PANAMA

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INTRODUCTION

The principle of free competition is established by the Central American Constitutions. This principle has been inherited from the ideology of the French Revolution: free access to any economic activity. However, the free competition principle has suffered in some cases from limitations established either by the Constitutions or by special laws in the respective countries. There are some public and private monopolies recognized by law.

Several laws regulate monopolies and unfair trade practices for the purpose of protecting free competition in Central America. A summary of the antimonopoly and unfair competition laws in Central America is presented in this work. Constitutions, Codes (Commercial and Criminal) and special laws will be reviewed on a country by country basis.

GUATEMALA

Political Constitution

Art. 124 recognizes the free enterprise system and establishes that the State must support and stimulate such system in order that it might contribute to the economic and social development of the country. Art. 128 establishes that the State might, in the event of force majeure and only for the necessary period of time, intervene those enterprises rendering essential public services to the community, when the performance of such services is interrupted. Art. 140 prohibits monopolies. It also establishes that the State shall limit the operation of enterprises which might absorb,

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in detriment to the national economy, the production of one or more industrial activities or commercial, agriculture and cattle activities. Applicable laws will regulate this matter.

Commercial Code

Art. 361 to 367 regulate monopolies, unfair competition and unfair practices. It is interesting to note that Art. 361 imposes the obligation on enterprises to negotiate with anyone who asks for its products or services, observing an "equal treatment" among the several categories of consumers. Any action against commercial good faith (Art. 362) shall be considered unfair competition. Specifically, several actions are considered unfair competition (Art. 363). These actions are divided into four categories:

1. Those directed to deceive or confuse the public or particular persons;
 2. those which cause harm to any merchant without committing any violation of a contractual obligation;
 3. those causing damages to a merchant by violation of a contractual obligation;
 4. those aimed at deviating the clientele of any merchant.
- Any of the aforementioned actions might originate a civil action by the offended party with the right to claim the payment of damages.

Criminal Code

Monopoly, monopolistic activities, speculation and unfair competition are regulated respectively, by Art. 340, 341, 342 and 358 of the Criminal Code as follows:

Monopoly—(Art. 340). Any action taken for the unlawful purpose of impairing the national economy by absorbing the production of one or more branches of industry or a single commercial, agricultural or cattle activity; or advantages taken exclusively therefrom through any privilege or through the utilization of any other means, actions or agreement, whether such actions are disguised by using several companies to sell goods at given prices to the detriment of the national economy or of the economy of private parties, shall be punished with five to ten year imprisonment and a fine of Q500 to Q10,000.

Monopolistic Activities—(Art. 341). The following are also considered monopolistic activities:

1. Controlling or withdrawing basic commodities with the purpose of provoking price increases in the internal market.
2. Any act or procedure which prevents or aims to prevent freedom of production or trade.
3. Agreements executed without Government approval which aim to limit production or manufacture of any product with the purpose of enjoying privileges and profit therefrom.
4. Selling goods at prices below cost with the object of preventing free trade in the internal market.
5. Unauthorized export of essential articles, which require Government approval, if such export may give rise to shortages or price increases.

Individuals liable for any of said activities shall be punished with six months to three years imprisonment and a fine from Q200 to Q5,000.

Speculation—(Art. 342). Publishing or divulging false rumors on offer and demand which may unjustifiably increase or decrease the value of the currency acceptable as legal tender, regular price of goods, public or private income, marketable securities, salaries, etc. shall be punished with six months to two years imprisonment and a fine of Q200 to Q3,000.

Unfair Competition—(Art. 358). Any individual, who through fraudulent maneuvers or any means of unfair propaganda, attempts to deviate the clientele of an industrial or commercial business for his own benefit or for the benefit of a third party, shall be punished with a fine of Q200 to Q2,000.

Law on Distribution of Basic Commodities (Decree 80-73).

This law is applicable to agricultural products and should not affect other businesses.

Regulatory Law on Export of Basic Commodities (Decree 81-73).

This law is declared a law of national emergency enacted to prevent disproportionate price increases on basic commodities as well as on

medicine and other articles indispensable for human life. The law declares as economic crimes the monopolistic activities enumerated in Art. 341 of the Criminal Code. It is transitory and may be repealed by Congress on petition of the Executive Power when the latter considers that the emergency and circumstances which warranted its promulgation have ceased. However, Art. 341 of the Criminal Code which contains similar provisions, will remain in force.

Regulatory Law on National Economic Emergency (Acuerdo M. de E. 30-73).

Empowers the Ministry of Economy to require information on purchases, stock, sales or any other transaction on basic commodities and articles of ordinary consumption, including purchase and sale prices. It also authorizes audits of business enterprises.

EL SALVADOR

Political Constitution

Art. 136 establishes the guarantee of economic freedom, if such freedom is not opposed to the social interests. In addition, the State shall promote and protect the private interests within the necessary conditions to increase the national wealth in order to secure the benefits derived from such wealth to the greatest number of the country's inhabitants. Art. 142 prohibits private monopolies. The same article establishes that the law may grant privileges for a limited period to inventors. Monopolies in favor of the State or the municipalities may be granted in the social interest.

Commercial Code

Art. 488 to 497 regulate commercial activities, including unfair commercial practices. Art. 489 considers valid agreements which may restrict the commercial activities of a merchant within a region or to a determined commercial activity up to ten years, if such restriction does not violate any other constitutional guarantee. However, if such agreements create a monopoly or result in damage to the national economy, or to the rights of third parties, the affected parties shall have an action before a court in order that the latter may declare the contract terminated. In the first two cases the Attorney General of the Republic can also initiate the action. Art. 491 considers unfair competition the per-

formance or execution of actions destined to deviate the clientele of another merchant, including the actions defined in such article, similar to the ones established by Art. 363 of the Commercial Code of Guatemala referred to above.

Criminal Code

The following articles are important from an antitrust point of view: *Definition of "Día-Multa"*—(Art. 61). *Día-Multa* is a fine between ¢1.00 and ¢100 fixed by the Judge at his discretion.

Monopolizing—(Art. 340). Anyone who stores, withdraws or retains basic commodities keeping the same from normal trade, inducing or enabling to induce an excessive increase in prices, in the judgment of the administrative authorities, shall be fined from 30 to 500 *días-multa*.

The same fine shall be imposed upon anyone who through any trickery prevents free trade of said commodities in the internal market.

Unlawful Export—(Art. 341). Anyone who exports commodities without permit from the pertinent authority, when such permit is required, and said exportation shall cause or may cause shortages or price increases, shall be fined from 30 to 100 *días-multa*.

Sale at Unlawful Prices—(Art. 342). Anyone who sells commodities at prices higher than those fixed by pertinent authorities and those who assign such commodities to third party intermediaries to be sold at prices higher than the ones approved, shall be fined from 10 to 60 *días-multa*. If such sales are made during a national emergency situation, the fine shall be from 50 to 200 *días-multa*.

Unlawful Trade—(Art. 344). Anyone who undertakes any economic activity which has been forbidden by law or by pertinent authority shall be fined from 50 to 200 *días-multa*.

Except for Salvadoreans and Central Americans, anyone who undertakes small business or industrial activities, shall be imprisoned from 6 months to 2 years.

The following articles refer to trade and industrial fraud.

Agiotage—(Art. 356). Anyone who publishes or otherwise divulges false rumors, exaggerated or tendentious news or uses other fraudulent trickery resulting in an increase or reduction in the internal market of goods, salaries, securities or exchange trade shall be imprisoned

from six months to one year. Said penalty may be increased up to two years imprisonment if the crime is committed during a period of war or public disaster.

Speculation—(Art. 357). Anyone who divulges false rumors or uses any other maneuver or trickery to attain an increase in the price of foodstuffs or commodities shall be fined from 30 to 100 *días-multa*.

Commercial Fraud—(Art. 358). Anyone who, while carrying out business activities, sells as legitimate, genuine or original, in whole or in part, products, materials or things which are not so, or delivers one thing instead of another or one thing which by reason of its origin, quality or quantity is different from the one declared or agreed to, shall be imprisoned from six months to one year, if the act is not considered a heinous crime.

Restrain of Freedom of Trade, Industry or Profession—(Art. 360). Anyone, who through violence or intimidation, prevents or interrupts another from carrying out a commercial, industrial or professional activity shall be imprisoned from six months to one year, if the act is not considered a heinous crime.

Improper Use of Trade Name—(Act. 361). Anyone who improperly uses someone else's registered trade name shall be imprisoned from six months to one year.

Unfair Competition—(Art. 364). Anyone who divulges false rumors or uses any other mean of fraudulent propaganda which may cause serious damages to a competitor, with the purpose of securing for himself or for a third party an undue benefit shall be fined from 100 to 500 *días-multa*.

Fraudulent Deviation of Clientele — (Art. 365). Anyone who divulges false rumors or uses any other mean of unfair propaganda to deviate for his own benefit or for the benefit of a third party the clientele of any commercial or industrial business, shall be fined from 100 to 500 *días-multa*.

HONDURAS

Political Constitution

Art. 92 guarantees freedom of industrial and commercial activity. Also Art. 250 to 263 recognize the principle of the free enterprise system

in Honduras. Private monopolies are prohibited (Art. 263). The same article establishes that the State may limit the operation of enterprises which absorb or might absorb in detriment of the national economy, the production of one or more agricultural, cattle, or industrial activities, or of the same commercial or service activities. A special law shall regulate the matter. Special privileges granted to inventors or authors or for the use of brand names shall not be considered private monopolies.

Commercial Code

Art. 422 to 429 regulate commercial activities and unfair practices. The provisions are similar to the ones established by Art. 488 to 497 of the Commercial Code of El Salvador, and also to the provisions established by Art. 363 to 367 of the Commercial Code of Guatemala previously mentioned.

Protection to Consumers — (Decree Law No. 91/73).

Authorizes the Executive Power to take steps for the protection of the consuming public whenever abnormal situations warrant it, either for lack of supplies, excessive prices or other reasons affecting production or trade of basic commodities. Steps to be taken are:

1. Control of exports and imports of basic commodities through quotas or licenses. Fixing of prices for internal consumption.
2. Grant of customs duty exemptions on the importation of certain goods.
3. Prevent and punish monopolization of products and any other conspiracy aiming to unduly increase prices of goods.
4. Fix sales prices of medicines and drugs.

Criminal Provisions

Crimes Against the Economy — (Decree Law No. 92/73).

Imposes six months to two years imprisonment and a fine of Lps.100 to Lps.1,000 on those divulging false rumors or using any other fraudulent method to obtain, in the public market, stock exchange or trade bureau an increase or decrease in the salaries, stock or other securities, or in the prices of groceries, articles or goods.

Imposes three to six years imprisonment and a fine of Lps.1,000. to Lps.10,000. on those who:

1. Monopolize, withdraw or keep basic commodities outside normal trade, provoking therewith an excessive increase in prices.
2. Restrain trade thereof in the internal market.
3. Export without the required license.
4. Offer a grant to dissuade from participating in public bids for purposes of jeopardizing prices.

The foregoing penalties shall be doubled if the violator is an enterprise.

NICARAGUA

Political Constitution

Art. 65 establishes that the State recognizes total freedom of commerce, industry and contractual activities. Applicable laws will establish the necessary conditions to regulate such right. Private monopolies are prohibited (Art. 67). Monopolies in favor of the State may be established if the national interests demand it.

Law on Industrial Promotion (Decree No. 317, March 20, 1958).

Art. 21 items e) and g) of the Industrial Promotion Law of Nicaragua, establishes the obligation to sell products at competitive prices locally, and to avoid monopolistic practices which could damage the suppliers of raw material or the public consumers.

COSTA RICA

Political Constitution

Art. 46 of the Constitution prohibits private monopolies and any action which threatens or restricts the freedom of commerce, agriculture and industry. It is in the public interest that the State act to prevent any practice or monopolistic tendencies. Enterprises which become a monopoly "de facto" shall be subject to special legislation. Monopolies constituted in favor of the State or the municipalities shall be approved by two thirds of the members of the Legislative Assembly.

Law No. 34, of December 23, 1940.

Art. 17 of the above law, penalizes anyone who sells industrial products, directly or indirectly, at prices equal to or below their production cost, under the presumption that such practice is a monopolistic activity. However, the law does not establish the correspondent penal sanctions for such crime.

Criminal Code

Art. 238 of the Criminal Code, establishes a penalty of six months to three years imprisonment for persons who, with the purpose of obtaining an excessive profit, try to increase or reduce prices on products, securities or tariffs through feigned negotiations, false rumors, monopoly. destruction of products or through agreements between producers, security holders or enterprises. If such persons achieve changes in prices, the penalty shall be increased by one third, or be doubled if the change affects food products, disregarding in this case whether the price was changed or not. In the event of a moral person committing the crime, the establishment (if any) of such person shall be closed up to thirty days.

Protection to the Consumer

Law No. 5665, published in the official daily of April 9, 1975 and regulated on July 10, 1975 by Decree No. 5000-MEID, regulations were established to protect the consumer in Costa Rica. With regard to anti-monopoly practices, Art. 18, item CH, of Law No. 5665 considers a crime, the interruption, paralyzation or intentional decrease in the rendering of services or production activities, if the purpose is to alter the market, or the obtainment of economic advantages, or to create difficulties in the supply of products or services for production and national consumption. Also, it is a crime under the same article, item D, to change the prices of products or securities or tariffs, through feigned negotiations, false rumors, destruction of products or through agreement between producers, security holders or enterprises, for the purpose of obtaining an excessive profit. The penalties for the aforementioned crimes are regulated by Art. 19. The commission of a first offense will be penalized with three to eight days imprisonment; the second offense from eight to thirty days, and the third and subsequent offenses, from three to six months imprisonment. In addition, if there is a business or establishment open to the public, the Court is authorized, if the offense is repeated, to close the establishment for a period of one to six months. One interesting aspect of this

legislation is that the right (action) to present an accusation is public. In other words, anyone can make an accusation to the public authorities, a telegram may be used to make the accusation, at no cost to the sender. Of course, the person who makes an unfounded accusation, may be considered a calumniator by the Court.

PANAMA

Political Constitution

Art. 254 of the Political Constitution prohibits, in commerce and industry, any agreement or action directed to restrict or impede free commerce and competition, if such agreement or action produces monopolistic effects to the detriment of the public. A retail chain operated in a way that eliminates the competition of small merchants or industrialists is considered a monopoly. Anyone may present an action before the Courts alleging the practice of any combination, agreement or action which has as its purpose the establishment of monopolistic activities. Applicable laws will regulate this matter. Also Art. 257 of the Constitution prohibits private monopolies.

Criminal Code

Art. 150 establishes punishments of one month to a year and fines from 20 to 400 balboas for anyone who, through violence and threats, restricts or eliminates in any way freedom in industry or commerce. Anyone who divulges false rumors or uses any other maneuver or trickery to attain an increase in the price of commodities, goods, bills of exchange, salaries or in the value of foreign currency, is subject to one to ten months imprisonment and a fine from 50 to 300 balboas (Art. 248). Also, anyone who, while carrying out business activities, defrauds the purchaser by delivering one item instead of another, or an item which by reason of its origin, quality or quantity is different from the one declared or agreed to, shall be punished with fifteen days to four months imprisonment and a fine from 10 to 300 balboas. (Art. 250).

It is also a crime under the provisions of Art. 254 to accept grants or money for non-participation in public bids. The author of the crime shall be punished with fifteen days to four months imprisonment and a fine from 10 to 200 balboas.

CENTRAL AMERICA UNIFORM LEGISLATION

The General Treaty for Economic Integration of Central America contains some provisions relating to monopolies and unfair practices. (Chapter III, Subsidies to Export and Unfair Trade). Also Chapter III, of the Central American Protocol on the Equalization of Importation Duties (*Protocol de San José*) and Art. 8 and 9 of the Protocol to the agreement on Central American integrated industries contain provisions on unfair practices. These provisions are designed to protect production activities in Central America, penalizing dumping practices of manufacturers from outside the area.

The Central American agreement for the protection of industrial property approved by Guatemala, Costa Rica and Nicaragua, and still pending approval in Honduras and El Salvador, regulates, in Art. 65 to 71, cases of unfair trade in regard to industrial property (trade marks and commercial names). Penalties for violators are established by Art. 161 of the same agreement. Should the action constitute a crime under the internal law of the respective states, sanctions will be in accord with such laws.