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Disloyal Competition in the Honduran Commercial Code and in the Proposed Law for the Promotion and Protection of Competition

Disloyal Competition in the Honduran Commercial Code and in the Proposed Law for the Promotion and Protection of Competition

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In order to be able to play, cheating is not allowed; the basic principle of free competition requires that the specific competitive act not be in conflict with the justification of freedom of competition; central to this justification is the possibility that competition offers for guaranteeing the success of those products that are better, and as judged by the consumers through their manifest preference for certain goods in the satisfaction of their needs.[1]

Introduction

Honduran legislation contains two different regulations on disloyal competition: a) disloyal competition under Articles 425 *et seq.* of the Honduran Commercial Code of 1950; and b) disloyal competition under the Proposed Law for the Promotion and Protection of Competition (hereinafter Proposed Law) now being debated in Congress.

Although both regulations are intimately related, substantial differences exist. The Proposed Law specifies that it applies to the same types of factual situations as those of disloyal competition regulated by the Commercial Code. This is true beyond the procedural point of view. On the one hand, resolution of problems of disloyal competition under the Commercial Code requires that the rules of civil procedure be applied. On the other hand, in cases of disloyal competition under the Proposed Law, an administrative proceeding before the Institute for the Promotion and Protection of Competition is applied.

There also exists in both laws a difference between the parties that are authorized to exercise the respective actions. Under the Commercial Code, only merchants or merchant associations are entitled to act. In contrast, under the Proposed Law the government or any natural or juridic person affected by anti-competitive acts has a right of action. The interest protected by the Commercial Code is the enterprise[2] of the merchant, while the Proposed Law protects the market place and therefore, the national economy, and all persons

1. TULIO ASCARELLI, TEORÍA DE LA CONCURRENCIA Y DE LOS BIENES INMATERIALES. 37 (Spanish translation of Verdera and Suárez-Llanos, Ed. Bosch, Barcelona 1970).

2. Under Article 644 of the Honduran Commercial Code, an enterprise is the coordinated aggregate of labor, material and inmaterial elements to offer to the public with the purpose of obtaining a gain, goods or services, it being considered a movable good under Article 646 of the aforesaid Code, operated by a merchant who is its titular head though not necessarily its owner the term "merchant" includes both natural as juridic persons). *See* Laureano F. Gutiérrez Falla, *Derecho Mercantil Vol.I* LA EMPRESA. (Editorial Astrea, Buenos Aires 1985).

who are directly or indirectly affected by illegal activities in said market.

Notwithstanding, in both cases, acts of disloyal competition are considered by the Penal Code as felonies and are subject to prosecution under the Code of Criminal Proceedings.

I. Disloyal Competition in the Commercial Code

Article 425 of the Honduran Commercial Code defines disloyal competition as "acts executed by a merchant to improperly attract the clientele of another merchant." Under the Commercial Code, disloyal competition refers to merchants. Accordingly, the juridically protected interest is the merchant's enterprise with its "aviamiento" (roughly translated as good will). In addition, the Commercial Code provides remedies against acts executed by another merchant that may improperly attract the merchant's clientele. Only merchants whose clients were affected by disloyal acts of the infracting merchant may exercise these remedies.

Upon analysis of the Commercial Code's various regulatory effects, one must conclude that it is a typical example of the individualistic, professional or corporate doctrine of disloyal competition[3] found in the legislation and doctrines of the early twentieth century. At the time, the Commercial Code was viewed as a set of rules intended to resolve the conflicts that arose between direct competitors whose forbidden acts were executed within a framework of direct competition. Only merchants were permitted to act in cases of disloyal competition. Illicit competition was considered a violation of the subjective rights of the merchant.[4]

Article 426 of the Honduran Commercial Code could raise doubts about the conclusions stated above. Article 426 provides:

> When acts of disloyal competition damage the interests of a professional group, the action corresponds not only to those directly affected, but also to the respective professional associations or chambers of commerce and industries.

Interpreting a similar rule of the German Law of June 7, 1909, German jurisprudence established the principle that the repression of disloyal competition should also protect the consumer public against

3. The Proposed Law, which also contains rules of disloyal competition, applies the more modern doctrine of the social model (see section II).

4. *See* Rafael Acevedo, *El Modelo de la Competencia Basado en la Eficiencia de las Propias Prestaciones y la Publicidad Desleal.* R.D.C.O., BUENOS AIRES, 183, año 31, June-September 1998 at 495-496.

acts that could affect it.[5] In applying this doctrine, the German Law on Disloyal Competition of June 21, 1967 permitted the consumer associations to act in cases of publicity that were deceptive or contained false representations and similar acts.

We believe this interpretation would not be applicable under the Honduran Commercial Code for two fundamental reasons:

1. The right of consumers to act against deceptive advertising, false representations and similar publicity is contained in the Consumer Protection Law (Decree #41-89 of April 7, 1989, which prohibits illicit publicity in the broadest sense), guaranteeing that consumers receive the goods or services that correspond to the price paid.[6]

2. The plain language of the Commercial Code, taken in its full context, clearly indicates that disloyal competition only applies to merchants.

II. Definition of Disloyal Competition in the Honduran Commercial Code

As stated above, disloyal competition is institutionally regulated in Article 425 *et seq.* of the Honduran Commercial Code. As a result, the Honduran approach is similar to the category of laws that specifically regulate disloyal competition. In contrast, France does not expressly regulate disloyal competition, but permits consumers to seek relief under the general rule of extracontractual liability.

In regulating disloyal competition, the Honduran Commercial Code follows the same approach as that of Italy and Germany. The approach sets forth a list of illustrative factual situations not intended to exhaust all possible scenarios. In addition, each provides a general definition that tries to embrace all the possible violations of disloyal competition in a deliberately generic form. This approach permits the inclusion of those factual situations not specifically described in Article 425, and others that are unforeseeable: "as the malice of the disloyal competitor is very ardent and his fantasy is always rich in new discoveries."[7]

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5. *See* Consuelo Gacharna, *La Competencia Desleal*, EDITORIAL TEMIS, Bogotá, Colombia (1982) at 103.

6. *See* Laureano F. Gutiérrez Falla, *La Publicidad Ilícita y la Competencia Desleal a la Luz del Derecho Comunitario Europeo*, R.D.C.O., BUENOS AIRES, 129/141, January-June 1991, at 145, *reprinted in El Nuevo Derecho Mercantil y el Derecho del Consumidor*, IMPRENTA DEMOGRAFIC, S. de R.L., Tegucigalpa, M.D.C. (1999) at 99.

7. Francisco Messineo, *Manual de Derecho Civil y Comercial*, (Traducción de Santiago Sentis Milendo, EDICIONES JURÍDICAS EUROPA-AMÉRICA, Buenos Aires

Article 425 of the Honduran Commercial Code begins by providing that "[d]isloyal competition is considered the execution by a merchant of acts that improperly attract clientele (of another merchant)." Four general categories are enumerated:[8]

I) Deception of the public in general, or of particular persons.
II) Directly damaging another merchant, without violating contractual obligations with same.
III) Directly damaging another merchant by breach of contracts.
IV) Any similar act that directly or indirectly deviates the clientele of another merchant.

The analysis of Article 425 of the Commercial Code results in the following conclusions:

III. Legitimated Subjects

Article 425 of the Commercial Code defines, in precise terms, the active and passive subjects of disloyal competition. In a typical scenario, a merchant improperly attracts the clientele of another merchant. Therefore, the active and passive subjects of disloyal competition are both merchants. This includes, by virtue of Article 426 of the Commercial Code, merchant associations or chambers of commerce and industry. In all cases, the juridically protected interest is the merchant's enterprise.

IV. Field of Application

Honduran legislation clearly distinguishes between acts of disloyal competition, which are those defined in Article 425 of the Commercial Code, and acts which prejudice the free circulation of goods and services in the market. The latter are covered by "competition law," which is the subject matter of the Proposed Law.

According to Champaud, there are substantial differences between the law that regulates disloyal competition and the law that regulates competition.[9] The source of the former is found in commercial deontology; the action for disloyal competition is of a disciplinary nature. In contrast, the sources of the latter are foreign to commercial law and beyond the limits of private law. Instead, far from being the expression of the will of the merchant, as is the private right of a merchant when confronted with disloyal competition, it not

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1971, T.VI) at 576.

8. Article 425 sets forth various examples for each category.

9. Cl Les sources du droit de la concurrence au regard du droit commercial et des autres branches du droit commercial en France en etude en honneur de L. Houin, p.60 ss, *quoted IN* REF. INT. DU DROIT ECONOMIQUE, T. 0-198, at 25.

only assures free competition of enterprises, it forces them to compete effectively.

Honduran legislation follows the principle stated above and distinguishes between disloyal competition, which is regulated by the Commercial Code and private law, from the "law of competition," which is of a public nature and which guarantees the free circulation of goods and services in the market. The law of competition forbids so-called monopolistic and other restrictive practices, which have been rendered illegal by Article 339 of the Honduran Constitution (and also the Proposed Law) as well as in treaties such as GATT.[10] In addition, Article 713 of the Commercial Code forces merchants who have concessions, authorizations, or permits to transact business with the public, or are otherwise able control the price of merchandise or services, to contract with consumers and comply with the Consumer Protection Law and its Regulation.

V. Type of Activity

The third conclusion that must be reached in analyzing Article 425 of the Commercial Code is what type of activity constitutes disloyal competition.

According to Garrigues:

> [C]ompetition means, in general, coincidence or concurrence (this is the French and Italian word) in the desire to obtain ... the same thing as another party at the same time. When the object is economic, we are in the field of commercial competition, which may be defined as the independent activity of various enterprises to obtain, each one, in the market, the largest number of contracts with the same clientele, offering the most favorable prices, qualities or contractual conditions. The basis of competition is the freedom of economic activity.... Honduras lives, at this date, in an economic regime ruled by the

10. By Decree 17/94 of April 13, 1994, the Honduran Congress approved the admission of Honduras to the General Accord on Customs Duties and Commerce (GATT).

By Decree 177-94 of December 1994, it approved the final "Acta de la Ronda de Uruguay de Negociaciones Comerciales Multinacionales" of April 15, 1994, which includes the Resolution to apply Article VI of GATT.

Article 2 of said Resolution prohibits dumping, which is typified in Section 2.1 as the act which: "introduces products in the market of another country at a lesser price than their normal value, when its exportation price upon being exported from one country to another, is less than the comparable price, in the course of normal commercial operations, of a similar product."

The Resolution later explains the application of the rule in different situations.

> principles of market economy based on the freedom to compete, which entails the possibility all merchants have to obtain the largest number of clients, even on the basis of deviating the clients of another competitor by following the "rules of the game."[11]

Obviously, disloyal competition is one of the limits to the fundamental principle of freedom to compete, prohibited to the benefit of the merchants themselves against abusive acts of other merchants. Following Acevedo, the object is to preserve a competitive system whereby merchants, through their own initiative, attempt to attract clients through strategies that do not imply availing themselves of the prestige or the results of the efforts of a third party, and which do not alter the consumers' rational process to reach their decisions.[12]

How does the Commercial Code structure this prohibition? Article 425 of the Commercial Code clearly states that disloyal competition consists of the execution by merchants of acts intended to improperly attract the clientele of another merchant.

To interpret this principle, it is necessary to determine the legal meaning of the word "clientele." Further, it must be determined if clientele can be a "commodity" of ownership and thus an absolute right of a merchant.[13] Authors such as Vivante[14] considered clientele to be an object of personal property of the merchant and protected by law. Thus, the term "aviamiento"[15] is the equivalent of clientele.

To date, this explanation is unacceptable. Authors such as Ascarelli[16] state:

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11. *Curso de Derecho Mercantil*, EDITORIAL IMPRENTA AGUIRRE, (5a ed., Madrid 1968) at 196.

12. *See* Acevedo, *supra* note 4, at 500.

13. *See* Laureano F. Gutiérrez Falla, *El Derecho Mercantil y el Derecho del Consumidor. El Consumidor y la Clientela*, ANUARIO DE DERECHO COMERCIAL, Montevideo, Uruguay, December 1993, at 97, *reprinted in* EL NUEVO DERECHO MERCANTIL Y EL DERECHO DEL CONSUMIDOR at 83.

14. César, *La Propieta commercialle della clientela*, RIV. DIR. COM. 1930, Tomo XXVIII at 1.

15. The Exposición de Motivos of the Honduran Commercial Code defines "aviamiento" when it states that it has already been indicated that the enterprise is, by its own nature, an aggregate of elements. The adequate combination of same to be able to comply with the object of the enterprise is the "aviamiento", *i.e.* the aptitude of the enterprise to obtain the ends for which it was created. *See* Laureano F. Gutiérrez Falla. *Derecho Mercantil*, LA EMPRESA, V.I, (Editorial Astrea, Buenos Aires, 1985) at 42.

16. TULIO, INICIACIÓN AL ESTUDIO DEL DERECHO MERCANTIL, (Evelio Verdera y Tuelles translation, Editorial Bosch, Barcelona) at 292.

> [c]lientele does not constitute a good, an object of personal property (which does not mean it does not have a value); it is a factual situation, that results from the elements that compose the "aviamiento" and which becomes a factor of same. Those who consider that the clientele is an inmaterial good, an object of personal property, forget the freedom to compete; if the clientele were an object of absolute right, this would mean that it would be protected against all acts of competition (whatever those may be). To reply, as has been replied before, that gas may also escape from the pipeline is to forget . . . that when said escape is provoked, it is an illicit act, whilst he who attracts the clientele of a third party (when the modalities that qualify the competition as illicit do not occur) executes a licit act (and, I will add, fortunately as progress would cease with the monopoly of clientele).

Although it is true that the clientele, in accordance with Article 648 (II) of the Commercial Code, is one of the "elements" of the enterprise," under Honduran law, it does not constitute a "good." Nor is it the subject of an absolute right of ownership. On the contrary, it is an abstract term that has an economic value and a juridic meaning.[17] It is symbolic of the habitual flow of purchasers or users to a commercial establishment, separate from the individuality of those that compose it. It constitutes, therefore, one of the externalizations, or if preferred, a factor of the "aviamiento," that constitutes a non-tangible quality of the enterprise and not a tangible good.[18] For these reasons it cannot appear as an asset on the balance sheet of the merchant.[19]

For the aforesaid reasons we agree with Rodrígues and Rodrígues,[20] in that:

> disloyal competition supposes, necessarily, an act that [improperly diverts] the clientele, as it is in the public that goes to an enterprise to obtain merchandise or services where the "aviamiento" is clearly [externalized]; it is a right that protects, not the clientele as such, but the enterprise as a whole, and as

17. Garrigues, *supra* note 11 at 170, 293.

18. Laureano F. Gutiérrez Falla. *El Derecho Mercantil*, LA EMPRESA, Vol. I, at 42, 57.

19. Unless it is one of the items included in the acquisition price of an enterprise, in which case, in accordance with Article 438 III of the Commercial Code it cannot be calculated for a value in excess of its acquisition or cost and should be amortized annually within a period not to exceed five years.

20. CURSO DE DERECHO MERCANTIL, (Editorial Porrúa, 5a. ed., Mexico (1964) at 443.

> part of same, its capacity to make money, that constitutes its "aviamiento."

In considering the term "clientele" as used in the first paragraph of Article 425 of the Commercial Code and as defined above, the question remains: What are the "improper" acts that the Commercial Code considers as "unduly" attracting the clientele of another merchant? Different concepts have been used in comparative law.

Article 1 of the German Law Against Disloyal Competition of 1909, described it as: "acts contrary to honest uses." Article 2598 of the Italian Civil Code used the term "principles of professional correctness," a concept that, according to Messineo,[21] was based on the "honest uses of commerce" of the International Convention of Paris-Hague, and that it includes those acts which, by their nature, are contrary to ethics (or customs), a zone of contact between ethics and the law. Article 5 of the Spanish Law of Disloyal Competition defines it as "all conduct that produces results objectively contrary to the requirements of good faith."

All these principles are, we believe, applicable to Honduran legislation in that, as the "Exposición de Motivos" of the Commercial Code establishes:

> [I]t was considered convenient to regulate two aspects of professional activities of the merchants: the one that refers to the necessary union between commercial activity and the public good, and that which refers to the duty to compete with loyalty, based on the requirements of a minimum ethical conduct.

Therefore, an "improper act of disloyal competition" would be one that violates the principle of "loyalty" as applied to the minimum ethical requirements. As Baylos Carroza put it, "disloyal competition basically results in an exorbitant anomalous gain that does not correspond to the effort of the merchant."[22]

The Honduran Commercial Code contains an Article that helps explain these abstract concepts. Article 422 of the Commercial Code states:

> Merchants must exercise their professional activities in accordance with the law and commercial uses and customs without damaging the public, the national economy and without violating socially accepted mores.

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21. Messineo, *supra* note 7, vol. VI, at 576.

22. HERMENEGILDO, TRATADO DE DERECHO INDUSTRIAL, (Editorial Civitas, Madrid, 1978) at 261.

> The violation of this obligation for the purpose of competing permits the injured party to request the cessation of the illegal conduct, and the payment of the damages he may have suffered.

This rule of law not only serves as a parameter to identify acts that violate the "law of competition," but undoubtedly characterizes the "improper" acts of Article 425; a classification that, in many cases, would depend on the opinion of the judge ruling on the case.

What are the elements that these "improper" acts should contain? Following Gacharna,[23] in part, the act must comply with the following requirements.

A. It Must be an Act of Competition

This means that it must be capable of promoting or assuring the knowledge by the consumer public of the merchants' goods or services, or must cause alterations in the behavior or economic decisions in the marketplace.[24] But, as Gacharna stated:

> [F]or this requirement to be met it is not necessary that the author of the illegal act actually have his own clientele, for he who is only in the initial stages of his commercial activities is, from that moment, the potential competitor of those who already have entered the market place; therefore, he may be an author of acts of improper competition, if he tries to obtain the existing clientele of others by illegal means; as he may also be protected against acts of disloyal competition, as a victim of same, if his future competitors execute illegal acts with the object of stopping him from obtaining his own clientele.[25]

B. The Act Must be "Improper"

In considering what is improper, as described above, it is necessary to stress that in the execution of the act, the element of subjective "animus" does not intervene. Therefore, even when the transgressor has acted in good faith, his acts would be considered as disloyal competition if they meet the statutory requirements. The element of damage is unnecessary (as would be the case if the rules of extracontractual liability were applied) because the potential of damage to a clientele of another competitor is sufficient. The right to

23. Consuelo Garcharna, *supra* note 5, at 52.
24. *See* Acevedo, *supra* note 4, at 497.
25. Consuelo Gacharna, *supra* note 5.

loyal competition is a subjective right of the merchant and, therefore, protected against any act that improperly attacks it.

VI. Defenses of the Affected Merchant

The merchant or professional associations affected by an act of disloyal competition may assert their rights in two different areas: in the criminal field and in the civil field.

A. In the Criminal Field

Article 299(3) of the Penal Code (modified by Decree 59-97), considers that acts of disloyal competition under the Commercial Code and other special laws or international conventions, constitute felonies against the economy. Accordingly, violations subject the offender to sanctions including sentences of improsonment for three to six years and fines from Lps. 50,000.00 to Lps. 1,000,000.

Additionally, if the acts of disloyal competition cause damages, the injured party has the right to invoke Article 105 of the Penal Code. A party who commits a crime in violation of Article 105, may be held liable to the injured party for civil damages. Under Article 107 of the Penal Code, the injured party may be entitled to restitution or repair of the material damages, indemnity for loss of profits and moral damages under Article 110. Moral damages are determined by the judge and may consist of economic indemnity as measured by the circumstances of the infraction, the conditions of the persons involved and the nature and consequences suffered, or which the injured party could potentially suffer.

B. In the Civil Field

Articles 427 *et seq.* of the Commercial Code regulate the means by which a merchant affected by acts of disloyal competition may assert his rights. The action covers three different stages.

1) A preparatory measure consisting of the exhibition or deposit of all the objects that serve as proof of the acts of disloyal competition or of a sufficient number of same. A security bond, however, must be filed by the damaged party to guarantee the payment by the plaintiff of the damages he might have caused the defendant if his claim is adjudged unfounded. This preparatory type of measure is usually utilized in cases in which, for example, the disloyal merchant used containers or labels that attributed the appearance of genuineness to a falsified or adulterated product.

2) A request for the cessation of the act of disloyal competition. This would involve an action that, we believe, could be included within the precautionary measure of prohibiting the execution of acts or contracts on determined goods, and would involve following the procedures established in the Code of Civil Proceedings.

3) A claim for the damages or loss of profits caused by the act of disloyal competition. A damages claim may include, as in the case of criminal jurisdiction, indemnity for moral damages if substantiated.

Actions for civil relief must be exercised under the rules of ordinary procedure before a court of civil jurisdiction.

C. Election of the Action

Article 25 of the Code of Criminal Proceedings clearly indicates that a claim for damages arising from a felony may be initiated either before a judge who is competent to rule on the criminal procedure or before a judge of competent civil jurisdiction. Notwithstanding, Article 25 provides that any procedure for civil indemnity cannot be initiated before a condemnatory sentence has been declared in a criminal proceeding.

Article 25 is complemented by Article 194 of the Code of Civil Proceedings. Article 194 requires that if judge or tribunal of civil jurisdiction were to base its holding exclusively on the existence of a felony, and after having heard the district attorney's opinion, the judge considers it necessary to initiate the criminal proceeding, then he must suspend the civil judgment until the criminal proceedings have been terminated. Taking the aforesaid into account, may a merchant or professional association affected by an act of disloyal competition initiate and resolve its pleading in the civil jurisdiction without the need of using the criminal jurisdiction?

We believe that Honduran law permits the affected merchant to choose either the criminal or the civil jurisdiction. The wording of Article 299 of the Penal Code recognizes as a felony the commission of an act of disloyal competition under the terms of the Commercial Code. This rule seems to emphasize the commercial nature of the infraction and therefore, the possibility of bringing action based on the civil aspects of the disloyal competitive act without entering into the criminal field.

Nevertheless, we accept that, as there is, to our knowledge, no Honduran precedent for this conclusion, it would be a matter for resolution through future Honduran jurisprudence.

VII. Disloyal Competition in the Proposed Law

Article 1 of the Proposed Law provides that it will be enacted to protect and promote the process of free competition in the market place through the prevention and elimination of monopolies, monopolistic practices, monopsonies, oligopolies, hoarding and other restrictions on the efficient functioning of the market for goods and services. Further, Article 3 of the Proposed law prohibits any act or contract that restricts, diminishes, damages, impedes or which in any other manner, violates free economic competition in the production, processing, distribution, supply or commercialization of goods and services.

The above mentioned rules clearly indicate that the protected interest under the Proposed Law is the "market," and this encompasses the national economy in all its phases, including consumers.

Despite this, Massaguer[26] states:

> [D]isloyal competition is not a law enacted in defense of consumers and users as such, and is not, therefore, an adequate forum to obtain, through its interpretation, an answer to the social-juridic problems that arise in the traffic of goods and services between merchants and consumers due to their undeniable inequality.

The presence of the consumer in the regulation of disloyal competition should not be used to establish objectives other than those that the law itself permits: the protection of competition itself.[27]

The Proposed Law includes in Title II "Of Acts and Practices Restrictive to Competition," Chapter III provisions which regulate acts of disloyal competition. These specify in Article 15 that, without excluding those contemplated in the Commercial Code, acts of disloyal competition are those which create confusion, deception, denigration, imitation, exploitation of a third party's reputation, violation of secrets, inducement to breach contracts, violation of legal precepts, discrimination and publicity that in a direct or indirect manner implies falsehood, inexactitude, obscurity, omission, ambiguities, exaggeration or any other circumstances that could induce the consumer to deception, error or confusion with respect to products or services offered in commercial transactions, comparative publicity

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26. *Quoted in* Acevedo, *supra* note 4.

27. *Cf.* Rogelio Pérez-Bustamante, *Lección Inaugural Fundamentos Históricos y Jurídicos del Derecho de la Competencia en la Unión Europea y de España in* DERECHO DE LA COMPETENCIA EUROPEA Y ESPAÑOLA, (Dykinson, ed. Madrid) at 17 (stating that the competition law, "does not protect competitors, nor even consumers, but competition itself").

being allowed if and when it is not deceptive, does not create confusion and does not discredit, denigrate or underrate.[28] Even though the aforesaid regulations include factual situations recognized by the Commercial Code as examples of disloyal competition,[29] there exists a great difference between the disloyal competition of the Commercial Code, which, as we have already stated, is based on the individualistic, professional or corporative theory of the institution, and the Proposed Law which, to the contrary, is based on the social model. According to Acevedo,[30] the social model protects three basic interests: a) The individual interests of the merchants; b) The collective interests of the consumers; and c) The public interest of the State to preserve the market.[31]

> [T]he construction of the competitive illicitude integrates the interests of all those who expect to obtain their economic objective and the satisfaction of their economic and social needs in and through the market place, considered both individually as well as collectively. In this fashion, the new discipline of disloyal competition is no longer a mechanism to resolve conflicts between competitors; it is consolidated as a mechanism to order and control competitors.

Bercovitz states that the prohibition of disloyal competition has now become the prohibition to act incorrectly in the market place.[32] The requirement of loyal competition has been replaced by the principle of correction in the economic traffic.

Therefore, once the Proposed Law has been enacted, Honduras will have two intimately related yet conceptually and procedurally different regulations governing disloyal competition. One regime being the Commercial Code's regulation of the competitive relations between merchants, whose protected interest is the merchant's enterprise itself. The other being the Proposed Law, enacted to protect the market. The latter entails, as Libonato well stated, "guaranteeing that competition is constantly guarded, excluding, at least, explicit or *de facto* barriers," [33] because, in the words of Adam Smith, the liberal

28. The Proposed Law defines each of these circumstances in the aforesaid Article.

29. *See* Gutiérrez Falla, *supra* note 6. These situations are also recognized by the rules of consumer protection on illicit publicity.

30. Acevedo, *supra* note 4, at 496.

31. Massaguer, *quoted in* Acevedo, *supra* note 4.

32. *Quoted in* Acevedo, *supra* note 4.

33. Bernardino, *Ordine Juridico e Legge Economica Dell Mercato*, RIV. SOC. AÑO 43/1998, at 1554-59.

State is "more than that of laissez faire in its most trivial meaning," it must always construct and preserve the market place.[34]

Nevertheless, as is the case of the Commercial Code, disloyal competition under the Proposed Law only requires the mere existence of the factual situation covered by the Proposed Law without considering the good or bad faith of the offending party.

Conclusion

What are the basic differences between disloyal competition as regulated in the Commercial Code and in the Proposed Law? In addition to the different procedures used in their application, they are conceptually based on two different principles.

Disloyal competition under the Commercial Code is defined as those acts by which a merchant improperly attracts the clientele of another merchant. Merchants are both the active and passive subjects of disloyal competition, and the protected interest is the enterprise.

On the other hand, disloyal competition under the Proposed Law applies to all persons, both natural and juridic, public or private, national or foreign, with or without *animus lucrandi*, who undertake economic activities in all or part of the national territory, including those persons not legally domiciled in Honduras who execute economic activities outside of the country insofar as such acts, activities or agreements produce effects in the national market.[35]

Therefore, the Proposed Law is applicable to all natural or juridic persons who directly or indirectly, through their acts, whether executed with or without *animus lucrandi*, affect the proper operation of, and competition within, the marketplace. As Lara Ferreiro stated:

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34. A typical example of this type of legislation was the U.S. Sherman Antitrust Act of July 1890, which provides in Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Section 2 provides that "every person who shall monopolize, or intend to monopolize, or combine or conspire with another person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor." The Clayton Antitrust Act of October 15, 1914 completes the rules of law on protection of competition under the U.S. law.

In Europe, Articles 85 and 86 of the Treaty of Rome of the European Economic Communities, forbade two types of restrictions on competition. Article 85 prohibits all agreements between enterprises and the decisions of association of enterprises and agreements on practices that may affect commerce between the member states whose purpose or effect is to impede, restrict or falsify competition within the Common Market. Article 86, considers incompatible with the Common Market and therefore prohibited, the exploitation by one or more enterprises of a dominant position in the market or in a substantial part of same.

35. Article 2 of the Proposed Law.

> [T]he defense against disloyal competition is not conceived, at this date, in our legal system as a sector of the juridic body directed to resolve conflicts between competitors but, as an instrument of order and control of the conduct of the operators in the market, be they merchants, artisans, farmers or members of the liberal professions, the law not requiring the existence of a direct competitive relationship between the parties.[36]

On the one hand, it is true that in Article 15, the Proposed Law identifies acts of disloyal conduct "without excluding those of the Commercial Code." The reference to the Commercial Code is not for the purpose of applying to the disloyal competition under the Proposed Law the same principles that govern disloyal competition in the Commercial Code. Instead, the purpose is to recognize that the factual situations contemplated in Article 425 of the Commercial Code are, as well, factual situations covered by the Proposed Law. Moreover, under the Proposed Law, the juridically protected interest and the parties authorized to act in accordance with it are totally different than those of the disloyal competition of the Commercial Code.

As a result, the Proposed Law does not require that the questionable act lure away the clientele of another, because the Proposed Law is not intended to defend the enterprise of a particular merchant. Instead, the Proposed Law has the much broader purpose of protecting the market place. This is similar to the approach outlined in the preamble to the Spanish Law of Disloyal Competition (Law 3/1991 January 10):

> [T]his law introduces a radical change in the traditional concept of disloyal competition. It is no longer conceived as a regulation directed primarily to resolve conflicts between merchants, but broadens its sphere of application to become an instrument to assure order and control in the conduct of the market. Competition itself becomes, therefore, the direct object of the protection. The new orientation and discipline broadens the protection of the Spanish law to include the interests that traditionally eluded the attention of commercial legislators. The new law, in effect, protects not only the private interests of the merchants in conflict, but also the collective interests of the consumer.

Nevertheless, the acts that typify disloyal competition, whether analyzed under the Commercial Code or under the Proposed Law,

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36. Francisco Javier, *Diferencia de la Competencia Desleal in* DERECHO DE LA COMPETENCIA EUROPEA Y ESPAÑOLA at 297.

also typify acts prohibited by other legislation such as the Industrial Property Law, Rights of Authors, Consumer Protection and the Penal Code. Lawmakers and scholars studying modern commercial law are faced with a body of law that regulates the massive traffic of goods and services in the market place, and that rotates on the two frequently antagonistic but always complementary poles of producer and consumer. The analysis of any institution of a commercial nature requires the investigator to take into account the regulations that coincide on the same issues. Therefore, to properly analyze and study modern commercial law and the nature of commercial institutions, the investigator must take into account all the regulatory acts coinciding on issues common to all. Notwithstanding that the economic system now predominant in Honduras is that of a market economy, those regulations, when duly coordinated, must seek the same fundamental objective expressly recognized by the Honduran Constitution. The primary and fundamental principle of all regulations, regardless of underlying intent, is to obtain "a state of law that assures a political, economic and socially just society, which affirms the nationality and propitiates the conditions for the full realization of man as a human person."

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