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LATIN AMERICAN COMPETITION FORUM

Session I: Criteria for Setting Fines for Competition Law Infringements

Contribution from Chile (TDLC)

3-4 September 2013, Lima, Peru

The attached document from Chile (TDLC) is circulated to the Latin American Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session I: Criteria for Setting Fines for Competition Law Infringements

CONTRIBUTION FROM CHILE (COMPETITION TRIBUNAL)

1. In Chile, Decree Law N° 211 (hereinafter “DL No. 211”) establishes the regulations for the defence of competition. The legislation broadly defines contraventions of free competition in Article 3: “*The commissioning or execution, individually or collectively, of any deed, act or agreement that prevents, restricts or hinders free competition or that tends to produce such effects, shall be penalized according to the measures set out in Article 26 of this law, without prejudice to the preventive, corrective or prohibitive measures with respect to such acts or conventions that may apply in each case.*” The same provision goes on to set out specific types of behaviours, specifically including cases of cartels and abuse of dominant position.¹

2. In turn, Article 26 of the same law sets out the measures that the Competition Tribunal (*Tribunal de Defensa de la Libre Competencia* – hereinafter “TDLC”) may take, including, in subparagraph c) the imposition of fines: “*(...) In the final ruling the Tribunal may take the following measures: (...) c) Apply tax benefit fines up to an amount equivalent to 20,000 annual tax units [approximately USD 19 million] and, in the case of penalizing conduct covered in point a) of Article 3 (collusion), up to an amount equivalent to 30,000 annual tax units [approximately USD 28.5 million]. Fines may be imposed on the legal person concerned, its directors, administrators and all those involved in carrying out the act in question. The fines imposed on individuals may not be paid by the corporation in which they worked no by the shareholders or partners of the same. (...) In the case of fines imposed on legal persons, the directors, managers and those who have benefited from the act in question will be jointly liable for payment, provided that they participated in the commissioning of the act.*”

¹ “*The following deeds, acts or agreements shall be considered to prevent, restrict or hinder free competition or that tend to produce such effects: a) Express or tacit agreements made between competitors, or practices established between them, which grant them market power and consist of fixing prices for sale, purchase or other trading conditions, limiting production, allocating market areas or shares, excluding competitors or influencing the outcome of tendering processes. b) The abusive exploitation by an economic operator, or a group of operators, of a dominant position, fixing prices for sale or purchase, imposing a different product on a sale, allocating market areas or shares, or imposing other similar abuses; c) Predatory or unfair competition carried out in order to achieve, maintain or increase a dominant position.*”

3. Fines may only be imposed by the TDLC following a legally processed adversarial trial initiated at the request of the National Economic Prosecutor's Office or an individual complaint (articles 18 Nos. 1 and 20 of DL No. 211), it being inadmissible for the TDLC to initiate a trial or apply penalties ex officio.

4. The TDLC applies fines when it proves the commission of a violation of the rules of competition, whether it be a case of collusion, of abuse of dominant position, or any other type of offense. In terms of fines, there are three basic differences between cases of collusion and cases of abuse of dominant position:

- In 2009 the range of fines applicable to cases of cartels was modified, establishing a maximum of 30,000 annual tax units (approximately USD 28.5 million, as provided for by the current text of the law cited above). Prior to this change, there was a single level of fine for all types of offense, with a maximum set at 20,000 annual tax units (approximately USD 19 million). This range is currently applicable to fines imposed for offenses other than formation of cartels.
- Only participants in cartels can also qualify for an exemption or a reduction of the fine that would be applicable by submitting a request for leniency, in accordance with the provisions of Article 39a of DL No. 211.
- Collusion is considered to be the most serious offense against free competition,² which has an impact on the process of determining fines.

5. It is also important to note that fines can be applied equally to legal persons (ordinarily companies, but they may be imposed on other economic operators), natural persons (individuals) or both, and that they are applied equally to private and public entities. In the case law of the TDLC examples may be found of each of these situations.

6. The fines imposed by the TDLC fulfil, in the first instance, a punitive function. Two of the factors considered by DL No. 211 in determining the amount are based on censure of the behaviour of the economic operator (severity of behaviour and repeated offenses). Another factor taken into account by Legislative Decree No. 211 is the economic benefit obtained by commissioning of the conduct, such that the recovery of illegally-acquired profits (disgorgement) is, to some extent, the second aim of the penalties.³ The potential deterrent effect is a third goal of the system.

² This is illustrated in the following ruling issued by the Supreme Court of Chile, in resolution of an appeal against a collusion ruling on bus operators: *"of all behaviour that violate free competition, collusion is the most worthy of censure and the most serious, as it involves the coordination of competitive behaviour among companies. The likely result of such coordination is a rise in prices, restrictions on production and an increase in the profits of those involved."*

³ For the purposes of determining the economic benefit obtained, the TDLC attempts to estimate the social losses suffered by society as a result of the sanctioned practices, including the so-called deadweight loss and damage sustained by economic operators in particular. In the case of the latter, those affected can claim compensation for damages in accordance with Article 30 of DL No. 211, which states: *"Claims for damages based on the emission by the Tribunal for the Defence of Free Competition of a final judgement, shall be brought before the competent civil court in accordance with general legislation, and will be processed according to the summary procedure provided for in Book III of Title XI of the Civil Procedure Code. - The civil court, when ruling on compensation for damages, shall base its decision on the behaviours, acts and their legal status established in the judgement of the Tribunal for the Defence of Free Competition, issued on the basis of application of this Law."*

7. To ensure proportionality, predictability and transparency in the process of setting fines, the TDLC makes explicit in the opinions accompanying its rulings the different parameters taken into account when imposing the penalty. In this regard, it is instructive to note the Judgment No. 97 of 2010 on unilateral conduct relating to restrictions imposed by a telecommunications company on Voice Over Internet Protocol transmissions by another company via the latter's internet platform, a service that competed with the fixed telephone service offered by the former:

“Seventy-sixth. That, first, it should be recalled that in October 2006, TCH was penalized by the Judgment of this Court No. 45/2006, for imposing restrictions on wholesale broadband service contracts in order to prevent market entry and development of IP telephony, which was then a new technology that threatened to snatch customers from traditional phone services;

Seventy-eighth. That, thus, TCH not only displays recidivism because it has again violated the regulations on defence of free competition laid down in DL No. 211, but is also guilty of contempt, since it has repeatedly to engage in behaviours that exclude and raise barriers to market entry for IP telephony providers, which were also those affected by its original offense. Indeed, openly violating the provisions of paragraph 11 of the abovementioned ruling No. 45/2006, TCH again committed deeds or acts or made agreements that unreasonably hindered the provision of IP telephony over broadband;

Seventy-ninth. That, then, the economic benefit obtained by TCH in connection with the offense, corresponds to the higher revenues owed to artificially increasing its market share in telephone services, which is especially difficult to estimate, considering that IP telephony has been unable to develop normally precisely because of repeated exclusionary behaviour by TCH;

Eighty. That, finally, the offenses to be sanctioned are particularly severe, above all in light of the fact they did not constitute an isolated case that occurred in mid-2007 but that, on the contrary, as noted above, the prices of their joint bids currently continue to persuade customers to pay for minutes of voice traffic with the company, with the aforesaid exclusionary effect;

Eighty first. That, in addition, as has been argued, the offenses questioned affect a significant percentage of the national population, for which TCH holds market power in the provision of broadband. Thus, broadband customers who also want a phone service face a less competitive market and are restricted in their freedom to choose the network provider that suits them best. Meanwhile, broadband customers who do not want a phone service are forced to contract this service in order to obtain broadband access;” (emphasis added).

8. Unlike other legislation, the system of fines provided for in DL No. 211 does not consider the determination of a base fine, set to take account of the volume of business affected by illegitimate behaviours, sales made by penalized economic operators or other similar parameters. The TDLC only has available to it the two legal ranges of financial penalties already mentioned (up to approx. USD 28.5 million for cases of cartels and up to approx. USD 19 million for other offenses), and must set the fines applicable to a specific case following consideration of the factors identified in DL No. 211 (severity of the conduct, economic benefit obtained, recidivism, cooperation with investigations),⁴ and other such criteria deemed relevant under case law.

⁴ Article 26, letter c), paragraph two of DL No. 211: “For the determination of fines, the following circumstances will be considered: the economic benefit obtained as a result of the offense, the seriousness of the conduct, previous offenses and, for the purposes of reducing the fine, assistance it has provided to the Prosecutor before or during the investigation.”

9. Although it is often difficult to calculate the economic benefit obtained by offenders, the TDLC always tries to estimate the damage caused by the conduct censured in its judgments. To do this, it takes into consideration, for example, the volume of sales in the market affected by the conduct and the duration of the conduct. The following excerpt illustrates the reasoning normally pursued by the TDLC when setting fines (extract from Judgment No. 63, 2008, relating to collusion between two department stores that agreed to block a technology fair organized by a bank):

“One hundred sixty. That therefore, for the purposes of determining the amount of the penalty, as provided in the final paragraph of Article 26 of DL No. 211, this Tribunal must consider, among other circumstances, the economic benefit obtained as a result of the offense, the seriousness of the conduct and repeat offenses. In this case, Falabella and Paris are both repeat offenders, and the severity of the exclusionary behaviour is greatly increased by the fact that they acted in collusion;

One hundred sixty-first. That, as another important element in determining the amount of the fine, this Tribunal considers that the economic benefit achieved by the illicit conduct corresponds not only to the higher sales made by the offenders by preventing the Fair taking place, but also the long-term deterrent effect on their suppliers and on those considering developing new sales channels for these, in the terms described;

One hundred sixty-second. That, in addition, on revision of the merits of the case and according to the facts established in this judgment, the Tribunal determines that the conduct of Falabella was more serious and worthy of censure than that of Paris, considering that it was an executive of that company who took the initiative to call its competitors, Paris and Ripley, with the effects already described, and since, furthermore, it was established that Falabella pressured more suppliers and more intensely than Paris;

One hundred sixty-third. It has also been established that Falabella has a larger market share than Paris: (i) in sales of home appliances; (ii) in sales of these products with store cards – and therefore in the credit associated with these; and, (iii) specifically in sales of products from suppliers who were pressured not to attend the Fair (on average 22% and 14%, respectively). Consequently the economic benefit anticipated by Falabella, because of these illegal actions, is estimated to be higher than that obtained by Paris. Thus, for the sake of reference, the amount of the fine for each company will correspond to approximately 2% of the total sales of home appliance products using store cards made in 2005 by each of these companies;

One hundred sixty-fourth. That, considering the seriousness of the penalized conduct and the profit resulting from it, this Tribunal shall set a proportionally higher fine for Falabella, as stated in the judgement;”

10. Besides the three factors that lead to higher fines (severity of the conduct, economic benefit and recidivism), and a fourth that can decrease the amount thereof (cooperation by the offender with the National Economic Prosecutor’s Office, before or during the investigation), the TDLC has considered other factors explicitly or implicitly in its case law in the process of determining fines, such as the role of instigator or organizer of collusion, the volume of trade affected, or the duration of the practice.

11. Another of the reforms introduced in 2009 was the establishment of a leniency or clemency mechanism. In accordance with Article 39a of DL No. 211, the first operator to provide information to the National Economic Prosecutor’s Office leading to proof of collusion and the identification of those responsible will receive exemption from penalties. It also contemplated the possibility of granting the

benefit of a reduced penalty.⁵ Judgement No. 122 of 2012 is an example in which a company entitled to the benefit of leniency was exempted from fines:

“One hundred twenty-fifth. That, on the other hand, as has been pointed out by the Prosecutor and by the accused, Tecumseh do Brasil, during proceedings, the latter is entitled to the benefit of leniency contained in Article 39a of DL No. 211, and as a result the Prosecutor has requested a full waiver of the fine, indicating that Tecumseh do Brasil has fulfilled the requirements of the law to receive the aforementioned benefit;

Hundred and twenty-six. That having been accredited collusive behaviour and not having allegedly betrayed-or less proven, that Tecumseh was the organizer of the wrongful conduct and coerced other participants of the agreement, it is fine to apply the exemption requested by the National Economic Prosecutor’s Office in your requirement, under the provisions of paragraph 5 of Article 39a of DL No. 211.”

12. Finally, the TDLC has not explicitly considered the payment capacity of the entities fined as a factor when setting fines. Nevertheless, it may be observed that when fines are imposed on small companies or sole proprietorships, which could potentially disappear from the market due to the obligation to pay a disproportionately high fine, the amount of such fines is low enough not to present such a danger.

13. In short, the system for determining the fines to be applied by the TDLC (i) rests on broad legal criteria seeking punitive, compensatory and deterrent aims; (ii) applies to natural or legal persons, whether public or private; (iii) applies *ex post* to anti-competitive behaviour, whether cartels, unilateral conducts or others; (iv) only arises as a result of lawfully processed litigation; (v) is more severe in the case of cartels, for which a leniency system of exemption or reduction of the fine also applies; and (vi) depends on the specific application of the legal criteria set out by the TDLC in each specific case.

⁵ Article 39a of DL No. 211: “Any party commissioning a conduct covered by point a) of Article 3 may be entitled to a reduction or waiver of the fine when it supplies the National Economic Prosecutor’s Office with information leading to the proof of such conduct and the identification of those responsible. – In order to be entitled to one of these benefits, the commissioner of the conduct must meet the following requirements: 1. Providing accurate, truthful and verifiable information that constitutes an effective contribution to the establishment of sufficient evidence to support a summons to the Tribunal; 2. Refrain from disclosing the request made for these benefits until the Prosecutor has prepared the summons or ordered the information relating to the request to be archived; and 3. End its participation in the conduct immediately after making the request. - To be eligible for waiver of the fine, in addition to the requirements outlined in the previous paragraph, the commissioner of the conduct must be the first to provide the information to the Prosecutor, from the group responsible for the alleged conduct. – To be eligible for a reduction in the fine, in addition to meeting the requirements set out in paragraph two, the commissioner of the conduct must provide additional information to that presented by those who first supplied information to the Prosecutor under this article. In any case, the reduction in the fine requested by the Prosecutor in its ruling shall not exceed 50% of the highest fine imposed on other offenders who do not qualify to benefit from this article (...).”