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LATIN AMERICAN COMPETITION FORUM

Session I: Criteria for Setting Fines for Competition Law Infringements

Contribution from Colombia

3-4 September 2013, Lima, Peru

The attached document from Colombia 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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-- 3-4 September 2013, Lima (Peru) --

Session I: Criteria for Setting Fines for Competition Law Infringements

CONTRIBUTION FROM COLOMBIA

1. Introduction

1. One of the duties of the Superintendence of Industry and Commerce (SIC) is the investigation of antitrust violations. When such violations are proved, the SIC will impose monetary sanctions to the infringers.

2. Until 2013 Colombia did not have a methodology for fixing fines that were imposed as a result of violations to competition rules. This could be partly explained by the fact that the amounts of the sanctions were not higher than 700.00 USD approx. per infringer, and therefore the quantification of the sanction was not done by the authority and –interestingly- was not demanded by investigated parties.

3. It is for this reason that at the beginning of 2013, the Office the Superintendent of Industry and Commerce designed an internal methodology to set the fines for antitrust violations.

4. Establishing the amount of a fine -which may seem as a simple task *a priori*- results in an arduous job since there exists no system of setting fines which is absolutely objective. It is clear that sanctions should be imposed at a level appropriate to discourage future antitrust violations by the investigated party and also by other participants in the market. In addition, the amount of the sanction should not be so high as to become prohibitive, thereby forcing the infringing company to bankruptcy. Such result would be even more restrictive of competition than the conduct itself.

5. We will present this document in the following sections: Item number 2 of this document revises existing provisions in Colombian legislation related to fines; item number 3 gathers international criteria for calculating this type of monetary sanctions; item number 4 presents the method currently applied by Colombia's antitrust authority, which is influenced by the standards included in items 2 and 3; and item number 5 contains the conclusions resulting from the document.

2. Colombian legislation related to fines in antitrust proceedings

6. Articles 25 and 24 of Law 1340 of 2009 establish the rules that must be followed by the SIC in the process of setting fines for antitrust violations.

7. Article 25 regulates the fines to be imposed to offenders, which may be legal persons (companies), or natural persons that directly (and not like company agents) have infringed the regime.

8. Article 26 regulates the fines to be imposed to natural persons as representatives of the legal persons that committed the violation, in those cases where they tolerate, authorize, or execute, as representatives of the enterprise, the anticompetitive conduct.

9. Article 25 of Law 1340 of 2009 establishes that the fine must not surmount 100.000 Colombian monthly minimum legal wages – CMMLW (approximately 30 million USD), or 150% of the income resulting from the infringing conduct, if this value turns out to be higher than the first one. Following this regulation the article states that when establishing the amount of the fine, the following variables must be taken into account:

1. The impact of the conduct on the market;
2. The dimension of the affected market;
3. The benefit obtained by the offender with the performance of the anticompetitive conduct;
4. The extent or degree of engagement of the implicated company in the illegal conduct;
5. The procedural conduct of the investigated parties;
6. The market share of the infringing company, as well as the part of its assets and/or sales income involved in the infringement;
7. The total estate of the implicated company

10. The Law also establishes some factors of aggravation (as recurrence in the conduct, persistence of the conduct in time, etc.), that serve as legal grounds to increase the value of the fine. In opposition to these aggravations, there also exist mitigation grounds that attenuate the degree of the conduct as well as the value of the sanction (for example collaboration during the investigation).

11. Article 26 of the same Law establishes the regulatory framework to sanction those natural persons that tolerate, authorize, enable, assist, or perform, as members of the infringing company, the anticompetitive conduct. In this order, the norm defines a maximum fine that can be imposed to those persons, which is 2,000 CMMLW (about 700.000 USD), and recommends certain elements to consider during the quantification of the fine:

1. Persistence in the anticompetitive conduct
2. Impact of the conduct in the market
3. Recidivism in the prohibited conduct
4. Procedural conduct of the offender
5. Degree of involvement of the implicated person in the conduct

12. As we can see, the legislative framework in Colombia is not sufficiently concrete on how to calculate the fines for antitrust regime violations. Regardless of the latter, and as we will afterwards see, the described articles constitute excellent cornerstones to apply the quantification methods used in other countries.

13. In the following section, we will analyze some international standards that the SIC has taken into account in order to establish its own regime for the imposition of sanctions.

3. Analysis of international fining criteria

14. This section describes the standards utilized in other jurisdictions regarding the quantification of fines for antitrust violations.

15. After a small research the SIC found that one of the most specific criteria for setting fines is established in the “Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) Regulation No. 1/2003” of European Commission (EC). Also, another pertinent document is the “*Setting of Fines for Cartels in ICN Jurisdictions*” elaborated by the *International Competition Network* (ICN), also related to the methodology used to calculate imposed fines.

16. According to these documents, we can conclude that a procedure for quantifying fines is usually divided in two phases. The first one implies a calculation of the base amount of the fine. This base amount is calculated having into account the volume of commerce of the infringing company during the years in which the conduct took place. Over this value, a percentage is applied (in the European Union, the maximum percentage is 30% and this is the amount usually applied in cartel cases) and the result is later multiplied by the number of years the conduct took place. The percentage to be applied depends on several diverse variables, such as the severity of the conduct, the combined market share of the implicated companies, the extraordinary benefits deriving from the conduct, the practical implementation of the conduct in the market, and the extension of the affected geographic market. The European Commission allows an additional charge that goes from 15% to 25% over the total base amount of sales justified under the figure of “cost of entry” to the fine in specially severe conduct cases (such as cartels) to intensify the punishment.

17. Once the base amount of the fine is determined, reductions or augmentations are applied to this number responding to aggravation or mitigation legal precepts.

4. Methodology to be implemented in Colombia

18. Taking into account the experience of other jurisdictions, the Office of the Superintendent has considered appropriate to follow a two-phase process when setting fines. The first stage involves the determination of the base amount of the fine, whilst the second concentrates in making the necessary adjustments with respect to the aggravation and mitigation factors.

19. The first segment of the method initiates with the calculation of the **sales value** of the company in the affected market during the last financial year in which the conduct was executed. Over this amount, a percentage of a maximum of 30% (used for cartel cases, as the EC does) is applied and the result is multiplied by the number of years that the company fulfilled the illegal conduct¹. Following these mathematical exercises, the Superintendent’s Office will apply, if it considers necessary, a surcharge that

¹ If the extension of time that the conduct was performed results in less than half a year, it will be rounded up to half a year. If the conduct was executed between half a year and one year, a one year extension in time will be considered. From that point on, the year will be rounded up by excess.

goes between a 15 to 25 % over the total sales, in cases that show special severity (reinstating the fact this is also influenced by the EC standards). The final result is then the so-called **base amount** of the fine.

20. In the second stage the adjustments are introduced to the base amount value with respect to the aggravation and mitigation factors.

21. After these adjustments are made, the Office will increase the amount of the fine in case the investigated party is a company of considerable size, regardless of the economic activity that is being affected by the conduct (being this the case of large corporations or conglomerates). Additionally, if the investigation calculates the economic damages deriving from the anticompetitive behavior, the numbers might also be adjusted to include this aspect in the amount of the fines.

22. At last, a corroboration is made with respect to: (i) assuring that the total amount of the fine is not greater than 10% of the total income of the investigated company during the last complete financial year (responding to the purpose of preservation of the financial stability of the company) and (ii) clarifying that the fine does not surpass the legal maximum sanction amount established in Colombian legislation (100.000 CMMLW or 150% of the income resulting from the infringing conduct, if this value turns out to be higher than the first one).

23. Hereafter, we present a list of informative elements that must be included in each case's file in order to confirm and serve as evidence while the imposition of sanctions for each implicated party. This information must be demanded by the Deputy during the legal term of proof ordaining in each investigation:

4.1 Checklist of the required information by the Deputy over each investigated party:

- Specific income of the economic activity affected by the anticompetitive practice from the last practical financial year in which the conduct was executed
- Total income of the company from the last and most recent financial year
- Total estate of the company from the last and most recent financial year
- Income statement, for the cases of natural persons
- Length of the conduct (number of years it was executed)
- Recidivism of the undertaking in the conduct
- Cooperation or obstruction in the investigation
- Immediate termination of the anticompetitive conduct as soon as the investigation has initiated
- Role of the undertaking in the conduct

4.2 Example applying new method for setting fines:

24. Under the above exposed criteria for setting fines a practical exercise will be developed for a more comprehensive approach to this new methodology.

25. Suppose that a company is declared guilty of being part of a cartel for two years in the one of the markets it participates. In the last financial year in which the cartel existed, the total sales value of the company was determined for \$30.000.000.000. This value constitutes the keystone for determining the base amount of the fine. As this conduct constitutes the conformation of a cartel, the maximum percentage will be applied:

$$\mathbf{\$30.000.000.000 \times 30\% \times 2 \text{ years} = \$18.000.000.000}$$

26. The surcharge for being a cartel is also included in this calculation. This means an extra 25% is applied to the total sales value perceived by the company as income in the last financial year:

$$\mathbf{\$18.000.000.000 \times \$30.000.000.000 \times 25\% = \$25.500.000.000}$$

27. This gives us the value for the base amount of the fine: \$25.500.000.000. Over this value, we apply the corresponding increases or reductions with respect to the aggravating or mitigating factors. These corrections will be expressed in percent values over the base amount of the fine.

28. Supposing again that during the investigation phase, it was determined that the undertaking was the instigator and leader of the conduct, reason why an additional surcharge of 30% will be applied. Regarding mitigation elements, it was determined that the conduct was immediately terminated in the moment the investigation stated, which results in a 15% reduction of the fine, and also, the company fully cooperated during the investigation, which meant an additional 10% reduction. Over these modifications the fine calculation is as follows:

$$\mathbf{\$25.500.000.000 \times (100\% + 30\% - 15\% - 10\%) = \$26.750.000.000}$$

29. The corrected fine is determined for \$26.750.000.000. Now, the last step is to corroborate that this amount is neither greater than 10% of the total income of the investigated company during the last complete financial year nor above the legal maximum. With respect to the first, we see that the enterprise in question had an income of \$110.000.000.000, for which the 10% value is less than the established amount of the fine. Consequently the fine will be \$11.000.000.000. This value is not greater than 100.000 CMMLW, it is equivalent to 19.411 CMMLW.

5. Conclusions

30. This new methodology designed for calculating or setting fines in Colombian competition law infringements has its basis in more clear and objective criteria in order to determine concrete values for fines. As we can see, this method had into account the current Colombian legislation for fine setting and adjusts to the most international fine quantification standards as well.