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Fining methodologies for competition law infringements****- Contribution from Dominican Republic -****24-25 September 2019, San Pedro Sula, Honduras**

The attached document from the Dominican Republic is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 24-25 September 2019 in Honduras.

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Session I: Fining methodologies for competition law infringements

– Contribution from the Dominican Republic* –

1. Powers to impose sanctions vested in the Governing Council of the National Antitrust Commission (PRO-COMPETENCIA) of the Dominican Republic

1. The National Antitrust Commission (PRO-COMPETENCIA) was established under General Law No. 42-08 on the Defence of Competition (hereafter the “Competition Law”) as a decentralised state body with the objective of promoting and guaranteeing the existence of effective competition in order to increase economic efficiency in markets for products and services through the implementation and enforcement of competition policies and legislation and the exercise of powers to investigate, report, regulate, arbitrate, make decisions and impose sanctions.

2. The Governing Council of PRO-COMPETENCIA is the domestic body empowered *inter alia* to impose sanctions for the commission of the offences provided for in the Competition Law and order the discontinuance of infringing acts, and to order measures and lay down obligations against the sanctioned economic agent for the purposes of correcting market distortions and restoring competition.¹

3. The conditions governing the sanctions that may be imposed by the Governing Council, having taken into account the evidence and arguments presented in each case, are laid down in the Competition Law, which adopts a tapered system for economic sanctions based on the type and seriousness of the anticompetitive conduct at issue.² Specifically, that law refers to the description of the offences and lays down the consequences arising from non-compliance; it is therefore in line with the principle of prior definition of criminal offences required in the constitutional, legal and doctrinal order.³

4. When setting the base fine, regard is had to how the anticompetitive practice in question is defined under the Competition Law, and to the maximum and minimum values of the applicable fines, based on the minimum applicable wage in the sector in which the business or the person concerned operates; the value in question is obtained from the Ministry of Labour’s annual resolutions on *national minimum wages*. The amount ranges from 30 to 3 000 times the minimum wage. By way of illustration, Annex I to this

* This contribution was prepared by the National Antitrust Commission (PRO-COMPETENCIA).

¹ General Law 42-08 on the Defence of Competition, Article 31.

² *Ibid.*, Article 61.

³ PRO-COMPETENCIA Resolution No. 018-2018 of 4 December 2018 ruling on the administrative procedure for the imposition of penalties brought under Resolution No. 001-2018 of the Governing Council of the National Antitrust Commission (PRO-COMPETENCIA), on the ground of reasonable indications of the existence of practices contrary to General Law No. 42-08 on the Defence of Competition in the market for the production, marketing and distribution of beer in the Dominican Republic by the economic agent Cervecería Nacional Dominicana SA, paragraph 406.

document contains a table setting out the legal provisions governing the exercise of PRO-COMPETENCIA's power to impose fines.

5. However, the maximum level of sanction for a breach of that Law bears no relation at all to the nature or size or some of the businesses in our markets; this is because the economic situation at the time the Competition Law was issued, in 2008, was markedly different from the one in place now. Additionally, the Governing Council is bound to a ceiling, implying that sanctions will be imposed following a case-by-case analysis of each behaviour.

6. Additionally, the Competition Law provides as follows: (a) payment of a fine does not imply validation of the irregularity giving rise to it – the offender must immediately desist from the acts that gave rise to the fine;⁴ (b) on each occasion where the defaulting agent fails to settle a fine within the prescribed period, the amount of that fine may increase each month by three per cent (3%) of the original amount;⁵ (c) the anticompetitive arrangements and concerted practices subject to fines under this law do not have legal effect, and the obligations arising from any such effects are automatically void;⁶ and (d) “minimum wage” is to be interpreted as meaning the official minimum wage applicable to the industry to which the business or the person subject to the infringement in question belongs.⁷

7. In the Dominican Republic, the purpose of the fine-setting process is, in principle, to act as a deterrent; however, in the Competition Law, the Dominican legislator failed to set a ceiling on fines that might deter many major economic agents from engaging in anticompetitive practices with the result that a fined economic agent might regard “punishment” as the purpose.

8. By way of illustration, we attach as Annex II a table detailing the amounts of the fines that apply under the Competition Law. Given the official minimum wages for each sector of the Dominican economy, it is clear that the process of calculating the maximum fine under the Competition Law would yield a maximum fine of around USD 1 030 226.21, a sum that is not going act as a deterrent for the bulk of economic agents with a dominant position that operate in the various Dominican markets for goods and services.

9. It is therefore evident that improvements are required in order to achieve an optimal level of fines; the fines should be brought into line with the current economic situation in our markets by regularly raising the ceiling or indexing. However, PRO-COMPETENCIA does not have the legal powers to amend the provisions on the determination of monetary sanctions. Under the Constitution of the Dominican Republic, the Legislature makes and promulgates laws; accordingly, the Legislature is the only state power that can modify the system of fines set out in the Competition Law, unless a court finds the fines or any other provision of that law to be incompatible with the Constitution and therefore declares it unconstitutional.

⁴ *Ibid.* Article 61, paragraph III.

⁵ *Ibid.* Article 61, paragraph IV.

⁶ *Ibid.* Article 61, paragraph V.

⁷ *Ibid.* Article 61, paragraph VI.

10. Other measures that could be applied really amount to compensation for affected economic agents and/or consumers, and to the re-establishment of ideal conditions for free competition in the markets.

11. Additionally, in order to increase the transparency and objectivity of decisions made by PRO-COMPETENCIA when exercising its power to impose fines, the Competition Law provides for the following aggravating or mitigating factors that may be taken into account when determining the amount of the fine: (a) the manner and extent of the restriction on free competition; (b) the size of the affected market; (c) the effect of the competition restriction on other actual or potential competitors, other aspects of the economic process, and consumers and users; (d) premeditation and intent; (e) the economic agent's market share, economic capacity and the size of the affected markets; (f) the length of time for which the prohibited arrangement, practice or conduct has been in place; and (g) repeat offending and the offender's record.⁸

12. Foremost among those criteria is the duration of the conduct: the fact that the Dominican Republic has had a competition law in force for only a relatively short period (January 2017, when the Executive Board was appointed) implies that the conduct in question cannot have been going on for a significant length of time: even if incidents are known to have taken place previously, they cannot be punished because of the principle of legality that is binding on all government acts.

13. The Law provides that the offender's economic capacity, in other words its size, must be taken into account when establishing the base fine, and in fact that criterion has cast light on business profiles, a business's special responsibility in the relevant market and the possibility of its having trained staff to implement the various laws and regulations governing the business's proper operation in the Dominican Republic.

14. The Competition Law regards repeat offending to be an aggravating factor that justifies the imposition of an additional fine of as much as double the applicable amount and regards the demonstration of possible procompetitive effects or economic efficiency on the part of the investigated economic agent to be a mitigating factor, without prejudice to the mitigating or aggravating factors that could arise from applying the criteria laid down in Article 62 of the Competition Law that are to be used when determining the sanction. In practice, PRO-COMPETENCIA has made a decision in just one set of administrative proceedings for the imposition of penalties, and therefore has not processed cases that might establish that an offender has committed a repeat offence.

15. In order to reduce the discretion available to the Governing Council of PRO-COMPETENCIA when exercising its powers to impose penalties, an evaluation is currently under way into the application of certain guidelines on the economics-based criteria referred to above. The guidelines are set out in detail in Annex III.

16. Hitherto, in the Dominican Republic, the Governing Council of the National Antitrust Commission has made only one Resolution imposing a penalty. That Resolution was in relation to Cervecería Nacional Dominicana (the Dominican National Brewery – a subsidiary of the multinational AMBEV) for engaging in anticompetitive conduct in the form of abuse of a dominant position in the market in the production, marketing and distribution of beer.⁹ The assessment of that administrative proceeding states that the

⁸ *Ibid.* Article 62.

⁹ PRO-COMPETENCIA Resolution No. 018-2018 of 4 December 2018 ruling on the administrative procedure for the imposition of penalties brought under Resolution No. 001-2018 of the Governing

Governing Council of PRO-COMPETENCIA acted strictly in line with the provisions of the Competition Law by weighting each of the criteria referred to above individually against each behaviour that was punished.

17. As an administrative body, the imposition of any fine by the Governing Council of PRO-COMPETENCIA may be appealed to the Administrative High Court under the Dominican Constitution which provides for the right of appeal when it states that “any ruling may be appealed in conformity with the law. The High Court may not increase the penalty imposed when only the convicted party appeals the ruling.”¹⁰ Currently, only one case has been the subject of a penalty and the decision in question has been appealed at the High Court. Therefore, there is currently no experience of changing fines as a result of a judicial review.

18. Turning to the monitoring and efficient enforcement of rulings containing administrative penalties handed down by the Governing Council, the Competition Law provides that the Executive Directorate must oversee enforcement, which entails drawing up guidelines, plans and actions concerning not only payment of fines but also the dismantling or undoing of anticompetitive practices.

19. It should be noted that, hitherto, PRO-COMPETENCIA has not encountered any difficulties in collecting fines; the process has been one in which ordinary law has been exhausted, namely a formal notice of payment, issued to the economic agent to whom a penalty has been handed down, requesting him to comply with the ruling. In that regard, we note also that, although the economic agent in question paid the fine, he did so only after exhausting the remedies available through the courts and seeking a preventive measure at the Administrative High Court for the stay of the decision imposing the penalty; that application was refused, and he was asked to pay, which he did fairly promptly after receiving our notice.

20. Finally, to date, the Governing Council has not had the opportunity to assess incapacity to pay on the part of an economic agent who may be the object of a fine since, as referred to above, it has made only one ruling in an administrative proceeding for the imposition of penalties, and the sanctioned agent is one of the largest contributors to the country’s tax system.

Council of the National Antitrust Commission (PRO-COMPETENCIA), on the ground of reasonable indications of the existence of practices contrary to General Law No. 42-08 on the Defence of Competition in the market for the production, marketing and distribution of beer in the Dominican Republic by the economic agent Cervecería Nacional Dominicana SA.

¹⁰ Dominican Constitution, Article 69(9).

ANNEX I

Amount of the fine	Sanctioned conduct
Minimum fines equivalent to > 30 times the minimum wage and maximum fines equivalent to < 3 000 times the minimum wage	<p>Concerted practices or anticompetitive conduct:</p> <p>Fixing prices, discounts, extraordinary charges, other sales conditions and exchanging information for the same purpose or effect;</p> <p>Allocating, distributing or assigning segments or parts of a market in goods and services indicating a specific time or area, suppliers and clientele;</p> <p>Restricting production, distribution or marketing of goods; or provision and/or frequency of services regardless of the nature of those services; and</p> <p>Removing competitors from the market or restricting their access thereto from their position as purchasers or vendors of specific products.</p> <p>Abuse of a dominant position</p>
Minimum fines equivalent to > 200 times the minimum wage and maximum fines equivalent to < 3 000 times the minimum wage	Concerted practices or anticompetitive conduct: Concerting or co-ordinating tenders or refraining from participating in public bids, tenders and auctions.
Minimum fines equivalent to > 50 times the minimum wage and maximum fines equivalent to < 200 times the minimum wage	Delivering false information to the Commission

ANNEX II

Chart 1. Fines by sector and infringement

MULTAS POR SECTOR POR INFRACCIÓN										
	Salario mínimo mensual (RD\$)	Salario mínimo mensual (US\$)	MULTAS							
			Artículo 5, Incisos a), c), d) y e)		Artículo 5, Inciso b)		Artículo 6		Proporcionado información falsa a PRO-COMPETENCIA	
			Mínima (US\$)	Máxima (US\$)	Mínima (US\$)	Máxima (US\$)	Mínima (US\$)	Máxima (US\$)	Mínima (US\$)	Máxima (US\$)
Industria Azucarera	\$6,469.00	\$126.15	\$3,784.52	\$378,451.64	\$25,230.11	\$378,451.64	\$3,784.52	\$378,451.64	\$6,307.53	\$25,230.11
Máquina Pesada en el Área Agrícola	\$11,109.00	\$216.63	\$6,499.02	\$649,902.50	\$43,326.83	\$649,902.50	\$6,499.02	\$649,902.50	\$10,831.71	\$43,326.83
Zonas Francas Industriales	\$10,000.00	\$195.01	\$5,850.23	\$585,023.40	\$39,001.56	\$585,023.40	\$5,850.23	\$585,023.40	\$9,750.39	\$39,001.56
Sector Hotelero	\$7,430.15	\$144.89	\$4,346.81	\$434,681.16	\$28,978.74	\$434,681.16	\$4,346.81	\$434,681.16	\$7,244.69	\$28,978.74
ONG's prestatarias de servicios de salud y educación a personas con discapacidad, la cual en la próxima revisión que se hará, incluirá las ONG's prestatarias de servicios a terceros de manera gratuita	\$11,500.00	\$224.26	\$6,727.77	\$672,776.91	\$44,851.79	\$672,776.91	\$6,727.77	\$672,776.91	\$11,212.95	\$44,851.79
Trabajadores del Privado No Sectorizado										
Para quienes prestan servicios en empresas industriales, comerciales o de servicios, cuyas instalaciones o existencias, o el conjunto de ambos elementos, igualen o excedan de la cifra de cuatro millones de pesos dominicanos (RD\$4,000,000.00)	\$17,610.00	\$343.41	\$10,302.26	\$1,030,226.21	\$68,681.75	\$1,030,226.21	\$10,302.26	\$1,030,226.21	\$17,170.44	\$68,681.75
Para los que prestan servicios en empresas industriales, comerciales o de servicios, cuyas instalaciones o existencias, o el conjunto de ambos elementos, igualen o excedan de la cifra de dos millones de pesos dominicanos (RD\$2,000,000.00) y no excedan la cifra de cuatro millones de pesos dominicanos	\$12,107.00	\$236.10	\$7,082.88	\$708,287.83	\$47,219.19	\$708,287.83	\$7,082.88	\$708,287.83	\$11,804.80	\$47,219.19
Para los que prestan servicios en empresas industriales, comerciales y de servicios, cuyas instalaciones o existencias, o el conjunto de ambos elementos, no excedan de la cifra de dos millones de pesos dominicanos (RD\$2,000,000.00).	\$10,730.00	\$209.24	\$6,277.30	\$627,730.11	\$41,848.67	\$627,730.11	\$6,277.30	\$627,730.11	\$10,462.17	\$41,848.67
Por jornada de diez (10) horas diarias, a favor de los trabajadores del campo; salario mínimo que aumentará o disminuirá proporcionalmente, cuando la jornada de trabajo comprenda un periodo mayor o menor de diez (10) horas diarias.	\$400.00	\$7.80	\$234.01	\$23,400.94	\$1,560.06	\$23,400.94	\$234.01	\$23,400.94	\$390.02	\$1,560.06
Para todos los trabajadores que prestan servicios como vigilantes en las empresas de guardianes privados.	\$15,000.00	\$292.51	\$8,775.35	\$877,535.10	\$58,502.34	\$877,535.10	\$8,775.35	\$877,535.10	\$14,625.59	\$58,502.34

ANNEX III – Guidelines for implementing the criteria governing the imposition of economic sanctions set out in the Competition Law

21. When determining the seriousness of the offence and imposing sanctions, the National Antitrust Commission (PRO-COMPETENCIA) must follow the criteria governing the imposition of sanctions set out in Article 62 of Law 42-08. Below we set out the criteria that could, from an economic point of view, make the process of setting a fine more transparent and thus reduce the discretion that could be involved in implementing it.

(B) Size of the affected market

22. Accordingly, in order to satisfy paragraph (b) it will first be necessary:

- To identify the relevant market in which the practice occurs;
- To use the estimated demand model for the relevant market in order to consider the size of the market.

$$Q_d = \alpha + \beta_1 P_i + \beta_2 P_{\text{(substitutes(i))}} + \beta_3 P_i + \beta_4 P_i + \beta_5 [\text{others}]_i + \varepsilon_i$$

23. The term α is the intercept of the equation, which in economic terms refers to the total quantity that the market would demand if the price were zero. Accordingly, it could be a first approximation of the size of the market, since that intercept would identify the maximum quantity of clients who would be prepared to demand the product.

24. However, owing to the characteristics of the markets and the lack of information, it is not always possible to construct a sufficiently robust econometric model to estimate demand that allows the intercept to be taken as a “proxy” variable of the size of the market.

25. For such cases, the equilibrium quantity for the market could be taken to be measured by the quantities sold at any one moment in time (Q^*).

26. For example, in an administrative procedure for the imposition of penalties in the market in beer, Q^* would represent the numbers of litres of alcohol declared each month to the tax collection authorities of the Dominican Republic, namely the Directorate of Domestic Taxation (DGII).

(C) The effect of restrictions on free competition on other actual or potential competitors, on other parts of the economic process and on consumers and users

27. For this particular case, the effect could be estimated through Resolution No. 021-2017 “approving the technical criteria to be used by PRO-COMPETENCIA when determining and quantifying the damage caused by anticompetitive practices”. That Resolution sets out a series of methodologies for the cases described in the Competition Law that may apply depending on the practice in question, the quantity of available data and other factors, whose outcome would estimate the effect of the practice on the market, and thus indicating, in turn, the impact on consumers and businesses.

(E) Market share of the economic agent in the market, economic capacity and the size of the affected markets

28. Market share is a key part of the analysis conducted by the Economic Studies Department of the Executive Directorate of PRO-COMPETENCIA into abuses of a dominant position and cartels, and is clearly set out in the appraisal reports.

29. Where abuses of a dominant position are concerned, the key is to recognise the share of the market held by the business alleged to be abusing a dominant position; in fact, it is one of the indicators to be given consideration under Article 9 of the Competition Law when making a determination of a dominant position. Accordingly, the appraisal reports drawn up by the Executive Directorate necessarily take that subparagraph into account. Additionally, prior to making a determination of a dominant position, consideration must be given to the relevant market such that other products that are substituted (if any) will be identified as set out in point 1 above (through the intercept or the equilibrium quantity in the market at a moment in time). A determination of dominant position is evidence of a business's economic power because it demonstrates the unilateral capacity of the business to operate on the market in question.

30. Turning to concerted practices (cartels), certain conditions facilitate the operation of a cartel, including market concentration, because a market that is more concentrated across fewer businesses makes it easier for those businesses to co-ordinate any type of concerted anticompetitive practice. Therefore, the Executive Directorate's appraisal reports include concentration in order to provide a context for the structure that could have been run by the cartel in question.

31. Therefore, in both cases, PRO-COMPETENCIA assesses the market share of businesses and, in turn, the potential economic power that could arise from the supply and demand structure.