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

The attached document from Chile 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 Chile\* -**

#### **1. Introduction**

1. The imposition of a fine for fiscal benefit, in both the national context and comparative legislation, is one of the main means of penalising and deterring the perpetration of unlawful anticompetitive acts. In the current institutional framework in Chile, the authority to impose penalties and, along with this, the final determination of the fine to be imposed on offenders lie with the Chilean Competition Tribunal (Tribunal de Defensa de la Libre Competencia, TDLC) and the Supreme Court.

2. However, with a view to penalising any act, agreement or practice preventing, restricting or inhibiting free competition in the markets, or likely to produce such effects, the National Economic Prosecutor (hereinafter “FNE” or “Prosecutor”) may, as the agency responsible for protecting and promoting free competition in the markets and productive sectors of the Chilean economy, exercising its power to act as a party before the TDLC (bringing legal proceedings or presenting an order), base its claim for a penalty payment in any form that it deems to be lawful, at its own discretion, as follows from Articles 1, 2, 3, 3 bis, 4 bis, 18(1), 20, 39 first paragraph and subparagraph (b), and 39 bis of Decree-Law No. 211 of 1973 (“DL 211”), which lays down the antitrust rules.

3. In the interests of maximum transparency, objectivity, predictability and alignment with the existing legal parameters and case law in this matter, the FNE has systematised the guidelines that it will follow in order to determine the amount of the fines to be sought in legal proceedings before the competent courts. It has produced the Internal Guidelines on Requests for Penalty Payments (Guía Interna para Solicitudes de Multa, “Guidelines”),<sup>1</sup> published in August 2019, with the particular purpose of co-operating with the courts in the process of setting these penalties. This document thus sets out the manner according to which the Prosecutor will base its penalty claims in each case, effectively disclosing the rationale for such claims and fleshing out certain aspects of the room for discretion that it has been granted by law.

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\* This contribution was produced by the Chilean National Economic Prosecutor (Fiscalía Nacional Económica).

<sup>1</sup> See <https://www.fne.gob.cl/wp-content/uploads/2019/08/Gu%C3%ADa-de-multas.pdf>. In addition to the conduct of a specific, original analysis of the new legal provisions in this matter, in the drafting of the guidelines the case law history of the TDLC and the Supreme Court, and also the content of other guidelines and instructions about the application of fines produced by foreign antitrust agencies and organisations, were taken into account. Likewise, contributions were made to the FNE’s analysis by various institutions involved in the public discussion process to which the guidelines were subjected.

## 2. Background: New legislation on the charging of fines for competition law infringements

4. Law No. 20945 on the Improvement of the Competition Law Regime, introducing major amendments to Decree-Law 211, came into force on 30 August 2016. As regards financial penalties, changes were introduced to the upper limits for fines and to the approaches to be taken by the TDLC and the Supreme Court for calculating and setting them.

5. The current wording of Article 26 (c) of the aforementioned legal text provides that fines for fiscal benefit imposed by the courts can amount to up to 30% of the value of the offender's sales corresponding to the line of products or services associated with the infringement for the period during which the infringement continued, or, alternatively, up to twice the amount of the financial gain derived from the infringement, and, secondarily, if it is not possible to determine the value of sales or the financial gain, the TDLC may charge fines of up to 60 000 annual tax units (UTAs).<sup>2-3</sup> Likewise, the regulation establishes that the following will be taken into account in determining the fine: (1) any financial gain derived from the infringement; (2) the seriousness of the conduct; (3) the deterrent effect; (4) recidivism (which will come into play if the offender has been convicted under an enforceable sentence for competition law infringements in the past 10 years); (5) the offender's economic capacity; and (6) any cooperation that the offender has provided to the FNE before or during the investigation.

## 3. Methods for determining fines

6. In its guidelines, the FNE states that it adopts a two-stage methodology to determine the amount of the fine to be requested before the TDLC and the Supreme Court. The first of these consists in determining a base amount, and the second in adjusting the amount up or down depending on certain legal and factual considerations.

### 3.1. Stage 1: Determination of the Base Amount

7. As set out in Article 26(c) of the aforementioned DL 211, the FNE will base its requests for fines either on the sales or the financial gain of the alleged offender, or secondarily based on a fixed amount of up to 60 000 annual tax units.

#### *3.1.1. Sales of the alleged offender corresponding to the line of products or services associated with the alleged infringement*

8. The best available data will be used to quantify the value of the sales.<sup>4</sup> If the information provided by the economic operator is insufficient or incomplete, it will be determined from projections and estimates based on those partial data.

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<sup>2</sup> An annual tax unit is currently equivalent to approximately 820 dollars.

<sup>3</sup> Formerly, the fine was capped at the amount equivalent to 20 000 annual tax units and, in the case of collusion, penalised under Article 3(a) of DL 211, up to an amount equivalent to 30 000 annual tax units.

<sup>4</sup> "Best available data" means the data provided by the alleged offenders, public bodies and institutions and data obtained from open sources.

9. If the sales were made in a currency other than the Chilean peso, their value will be converted using the annual average exchange rate published by the Central Bank of Chile for the year preceding the year in which the calculation is being made.<sup>5</sup> Likewise, the amounts to be taken into account to calculate sales will not include the amounts subject to taxes directly related to the volume of sales (such as Value Added Tax, duties or other customs levies, or the tax on tobacco or on alcoholic beverages).

10. The Base Amount of the fine will take account of the entire period covered by the alleged infringement and will be equivalent to a percentage of the sales of the alleged offender corresponding to the line of products or services associated with the conduct being investigated, which shall not exceed 20% thereof.

### *3.1.2. Financial gain derived from the alleged infringement*

11. This will be calculated or estimated from the best available data. Where the information is incomplete, the financial gain may also be determined from projections or estimates based on the partial data at hand.

12. According to this approach, the Base Amount will not be greater than the figure equivalent to the financial gain derived from the infringement plus 35%.

### *3.1.3. Fine in an amount up to 60 000 annual tax units*

13. This approach is limited to the following circumstances: (1) where the economic operator being investigated is a person or body that does not make financial gains or carry out sales (such as certain state bodies and most trade associations); (2) where the economic operator being investigated only sells products or services unrelated to those associated with the infringement; (3) where the alleged offender is a natural person who is not acting on the market as an independent economic operator; and (4) where the nature of the infringement is unrelated to the sales of the alleged offender and has not directly generated a financial gain for the alleged offender.

14. The Base Amount calculated according to this secondary approach will cover the time during which the conduct being investigated and its effects continue and shall not exceed 40 000 annual tax units.

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<sup>5</sup> If the sales are negotiated in a currency for which the Central Bank of Chile does not report an exchange rate, the conversion will be made using official sources of the country of the currency used.

### *3.1.4. Arrangements common to the three approaches to determining the Base Amount*

15. In determining this amount, the nature of the unlawful anticompetitive act constituting the infringement<sup>6</sup> and the deterrent effect of the fine<sup>7</sup> will be taken into account.

16. Where an economic operator that is part of a corporate group, and which has the capacity to adopt decisions in matters of competition in the market as an independent economic operator of the group to which it belongs, is the alleged perpetrator of an infringement, but has not carried out the sale or derived the financial gain, since that is received by a related entity, the background to the sales or the financial gain of the related entity may be assessed in a similar way in order to calculate the fine for this operator. The same rule will be applied where the economic operator responsible makes up a single competitive entity with other unrelated persons carrying out the sale or deriving the financial gain. Thus, neither the specific legal or natural person carrying out the sales or experiencing the enrichment nor the way in which the financial gains were shared out will be looked at in isolation.<sup>8</sup>

## **3.2. Stage 2: Adjustments to the Base Amount**

17. The FNE will consider the circumstances to be weighed up under Article 26(c).

### *3.2.1. Aggravating circumstances affecting the Base Amount*

18. As has been stated, the following will be taken into account: (1) whether the alleged offender is a repeat offender; (2) whether it is the organiser or instigator of the conduct, or whether it exerted pressure or adopted punitive measures against another operator to carry out the infringement; (3) the degree of its market power; (4) whether the conduct affects goods or services of a sensitive nature to the general public (mass-consumption goods or services, basic necessities or goods or services that are difficult to substitute); (5) whether the practice was organised, co-ordinated, conducted, performed or monitored with the participation of an entity made up of competitors; (6) participation by senior directors, administrators and/or executives of the economic operator, or their representatives; (7) secretive or surreptitious behaviour by the alleged offender; (8) the existence of data showing that the offender was, or should have been, aware of the unlawful nature of its behaviour, or that it sought to hide or tamper with relevant evidence; (9) whether the conduct affects innovation in markets where this is relevant to consumer welfare; and (10) any unjustified behaviour inhibiting or aiming to inhibit the investigation by the FNE,

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<sup>6</sup> As regards the nature of the unlawful act, and in accordance with statements by both the TDLC and the Supreme Court, collusion is the most serious offence against free competition. Furthermore, it is recognised under Chilean legislation that “hard-core cartels” linked to economic variables such as prices, production, market shares or zones and bidding processes are more serious than other agreements or concerted practices among competitors.

<sup>7</sup> This approach is designed so that at least any financial gain derived from the infringement should be eliminated by the imposition of the fine, so as to deter future infringements. The deterrence element is covered in the case law of the TDLC and the Supreme Court.

<sup>8</sup> This will not apply where the FNE is separately prosecuting natural or legal persons constituting a single economic operator.

provided that the alleged offender was not subject to a fine under Article 39(h) and/or (j), in accordance with the procedure laid down in Article 39 ter of DL 211<sup>9</sup>.

### *3.2.2. Mitigating circumstances affecting the Base Amount*

19. For this purpose, the FNE will take the following into account: (1) co-operation by the economic operator before or during the investigation; (2) adoption, prior to the anticompetitive conduct, of a sound, effective antitrust compliance programme; (3) the offender's economic capacity; and (4) the presence of other mitigating circumstances, such as the secondary role of the offender, the production of only negligible effects on the market, or where it is demonstrated that the conduct was authorised by a public authority or under administrative regulations, or that it was publicly announced by the offender before the start of the Prosecutor's investigation.

20. The fine ultimately requested by the FNE, resulting from the adjustments to the Base Amount, shall in no circumstances exceed the statutory maximum set out in Article 26 (c) of DL 211, depending on the approach followed to determine the amount of the fine. Likewise, the fine will never be lower than the financial gain derived from the infringement, if the request for the fine was made on the basis of that approach, save where this would irreparably threaten the operator's financial viability.

## **4. Concluding remarks**

21. Without prejudice to the above, the FNE will, for the interpretation of the legal parameters regulating fine setting, pay special attention to decisions given by the competent courts in this matter, with constant review of the document described here. Likewise, the methodology described is of a general nature, and therefore the specific characteristics of each case could lead the FNE to depart from it to a greater or lesser extent.

22. To summarise, and notwithstanding that it is the TDLC and the Supreme Court that have the authority to impose penalties, the FNE has deemed it desirable to publish the parameters that it will take into account in determining its claims for penalty payments under the new regulations, seeking the maximum effectiveness of the fining regime applying to competition law offenders in Chile, primarily embodied in DL 211.

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<sup>9</sup> Procedure launched by virtue of the FNE's power to request before the TDLC the imposition of a fine on an alleged offender which, having been asked to provide information as part of an investigation being conducted by the Prosecutor, has failed to supply the information or provided only incomplete information, with no plausible explanation.