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ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

-- Note by the Delegation of Chile --

This note is submitted by the delegation of Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 February 2011.

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QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

-- Note by Chile --

1. Introduction

1. It is not easy to identify the theory of harm followed by Chilean competition authorities. In case-law, the identification of harm in cartels and exploitative abuses seems clearer than in exclusionary conducts. Quantification of harm, however, is generally uncommon.

2. Likewise, the idea of harm to competition plays only a minor role in antirust private litigation. Civil judges tend to consider pecuniary losses rather than economic harms. Also, there are no relevant civil law cases on cartels and exploitative abuses, where the harm to competition seems clearer from a competition law perspective. All the relevant cases on private damages so far concern exclusionary conducts.

2. Harm to competition and its quantification

2.1 Overview

3. The system of competition protects the competitive process. The Chilean Competition Act[1] ("the Act") indicates that "…any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects".

4. Traditionally, competition authorities (including both the Fiscalía Nacional Económica or "FNE", and the Competition Tribunal or "TDLC") have understood this broad definition as inclusive of all economic actors (i.e. current and potential consumers, competitors and intermediaries), directly or potentially affected by the conduct, and as inclusive of any negative effect on welfare.

5. Since the creation of the TDLC in 2004, competition authorities have increasingly adopted economic efficiency as the main guiding criterion of analysis.[2]

6. In cartel cases, competition authorities have usually estimated the harm computing price differentials using a counterfactual. The counterfactual is estimated using, as much as possible, economic models and techniques, with data being provided by the defendants both during the investigation (under request of the FNE) or submitted directly to the TDLC in support of their position. The FNE, however, faces obstacles to obtain data, which in Chile must be mainly requested to private entities. The problem is even more relevant in the case of exclusionary conducts, because the identification of harm requires more information to develop the models and the counterfactual is more uncertain.

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1 Decree Law No. 211, 1973, and its amendments.

2 Although the Act expresses a broader goal (i.e. *to promote and defend free competition in markets*), the influence of neoclassical economics on competition law's operators has lead to understand the goal as a duty to promote and defend economic efficiency (i.e., productive efficiency, allocative efficiency and dynamic efficiency), with the expectation that in the long run this will contribute to consumer welfare maximisation.

7. Competition authorities have also used economic tools to assess the anticompetitive effects of the infringements. Nonetheless, they face the problem of quantification of harm to competition. Particularly, lack of data and time constraints have made difficult a sound process of quantification of antitrust harm in most cases.

8. The quantification of harm has been usually focused on transfers of wealth. Although innovation or dynamic efficiency has been affected in some cases, the approach is normally static.

2.2 Cases

2.2.1 NUTRIPO et al vs. Los Andes Land Port Concessionnaire (PTLA) and the State of Chile[3] (2010).

9. In this case, six importers of goods from Brazil and Argentina filed complaints before the TDLC against PTLA (an infrastructure concessionaire) and the Chilean Ministry of Public Works. Plaintiffs argued that PTLA had overcharged them, breaching the concession contract. Specifically, PTLS would have been charging them a higher amount for a different, lower cost service.[4]

10. The TDLC indicated that PTLA was a legal monopoly provider of, among others, sampling and support services for the inspections carried out by border control authorities that were different from cargo loading and unloading services – the latter being the only services subject to regulated prices. Unlawfully, PTLC charged its users the highest regulated flat-tariff (US$ 210 each truck) notwithstanding the nature of the services.

11. The TDLC held the charged price was abusive. In fact, it was twice or three times higher than the TDLC's own estimation of a competitive fee for the rendered services. In order to estimate the competitive fees, the TDLC appointed an expert to technically assist in determining the costing method. The TDLC imposed PTLC a fine of nearly US$ 320,000.[5]

12. The TDLC quantified the "benefits gained from the infringement" (which is the legal requirement) in US$ 11.6 million. The quantification was based on the over-price paid by the plaintiffs (comparing the fee estimated by the TDLC as benchmark with the effectively paid price) and the number of inspections for sampling and support.[6]

2.2.2 FNE vs. Cía. Chilena de Fósforos (CCF)[7] (2009).

13. In this case the FNE filed a complaint against CCF, the dominant manufacturer of matches for domestic use (with over 90% market share), for alleged exclusionary practices. CCF gave its retailers (mainly supermarket chains, the most important distribution channel of matches) incentives such as rebates for the accomplishment of sales goals and exclusive dealing. Also, according to the affected company, Canada Chemicals, CCF would have incurred in sham litigation.

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3 TDLC Ruling No. 100/2010, July 21st, 2010.

4 The claim against the Ministry of Public Works (MOP) and its General Directorate of Public Works (DGOP) was dismissed because their oversight role did not include the services related to the infringement. (*Ibidem*, Gr. 102°)

5 *Ibid*, Dec. No.5.

6 *Ibid,* Gr. 105° and 106°.

7 TDLC Ruling No. 90/2010, December 14th, 2009.

14. The TDLC ruled against CCF in December 2009. The TDLC held that these practices created entry barriers, producing market foreclosure and violating competition law.[8] The TDLC stated that the defendant's anticompetitive practices *"... caused significant damages to the market, since, for a long period, CCF remained as the sole actor, depriving consumers' choice from different companies and brands, and, eventually, access to lower prices resulting from a stronger competition.*"[9] It fined CCF in US$ 1 million.[10]

15. Whilst the TDLC's decision identified a negative impact on consumers, there was not quantitative measure of harm.

16. In June 2010,[11] the Supreme Court upheld the TDLC's decision and increased the fine originally imposed to US$ 1,3 million, accepting the FNE and Canada Chemical's arguments.

3. Role of harm to competition

17. The FNE is not legally required to quantify or specify the harm to competition in its submissions. According to the Act, the FNE must describe only the conduct and the relevant market. However, the FNE frequently describes a theory of harm to competition. A quantification of harm is rare and done mainly in high impact cases.

18. Private actors and public bodies other than the FNE can also initiate proceedings before the TDLC. They do not need to prove damages from the infringement, and the "passing on defence" does not bring the proceeding to an end.[12]

19. The evidence submitted for supporting "harm to competition" is difficult to differentiate from evidence on other elements of a violation. In pricing conducts (either exploitative or exclusionary) much of the information refers to prices and costs, as well as concentration and market shares. If economic data suffices, the FNE uses quantitative methods. However, because of difficulties in obtaining relevant data, the evidence most frequently submitted is qualitative.[13]

20. In some cases, a mere reference to the existence of an actual or potential harm to competition is sufficient to condemn or acquit. This reference does not always detail or quantify the actual harm to competition.[14]

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8 *Ibid*, Gr. 158°.

9 *Ibid*, Gr. 161°.

10 Ibidem, Dec. No. 2

11 Supreme Court of Justice, Decision No. 277 issued in June 2nd, 2010.

12 In an exploitative abuse of dominance case where construction companies and their trade association complained against excessive pricing by water supplier monopoly companies, the passing on defense raised by the defendants was dismissed.

13 For instance, in re *Philip Morris vs. CCT*, Infra, the most important evidence submitted to prove that the plaintiff had been actually excluded from access to distributors was the deposition of witnesses as well as the written contracts between the defendant and its distributors.

14 In cartel cases, for instance, the TDLC has required an 'objective capacity of the conduct to affect free competition'. In several unfair competition cases, the practice is proved but the infringement discarded because of lack of 'harm to competition'. In a case where the retailer was condemned for imitating a supplier's product, the harm to competition was apparently identified with the potential confusion of consumers in the downstream market. TDLC, Ruling N° 24/2005, July 28th, 2005.

21. For the determination of fines, the Act[15] orders to consider: the economic benefit obtained from the violation, the seriousness of the behavior, and recidivism. The TDLC's decisions consider economic benefits whenever applicable. When assessing the seriousness of the violation, the TDLC considers the impact of the infringement on competition. Although seriousness is not normally measured, the finding of certain antitrust harm increases the seriousness of the case and, in turn, this may have an impact on the TDLC's decision on fines.

22. In *Philip Morris vs. Cía. Chilena de Tabacos* (*"CCT"*[16])[17] (2005), *Philip Morris International Tobacco Marketing Ltda*. ("PM") filed a complaint before the TDLC against CCT, the main player in the Chilean cigarettes' industry (with 97.1% market share). In August 2005 the TDLC ruled against CCT,[18] indicating that CCT had driven PM's products out of the market by imposing artificial entry barriers to competitors.[19] The TDLC imposed a US$ 560.000[20] fine on CCT and ordered the firm to refrain from future exclusionary conduct. The judgment does not contain any quantification of harm to competition. The Supreme Court upheld the TDLC's decision in 2006.[21]

23. In Producción Química y Electrónica Quimel S.A. ("Quimel") and Cementa S.A. ("Cementa"). vs. James Hardie Fibrocementos Ltda. ("Hardie")[22] (2006), Quimel and Cementa filed a complaint before the TDLC, claiming that since Hardie started its operations in Chile in 2001 it had been pricing its fiber cement sheets below costs. By engaging in predatory practices, Hardie would have significantly restricted competition, squeezing out of the market mid- and small-sized producers and causing the bankruptcy of some of those companies (including Cementa).

24. The TDLC dismissed the charges. It held that only dominant firms can engage in predatory practices,[23] which was not the case[24]. In addition, plaintiffs did not submit "irrefutable" evidence that defendant's prices were below average avoidable costs.[25]

25. The Supreme Court's overturned TDLC's ruling,[26] holding that "[….] it is not necessary for the party carrying out a predatory practice to have a dominant position in the market, given the fact that one of its objectives is precisely to attain this position due to not having it [….]".[27] The Supreme Court also disagreed with the TDLC about the cost reference for predatory pricing. It held that prices were predatory

15 Art. 26

16 *Chiletabacos* is the national subsidiary of British American Tobacco.

17 TDLC Ruling No. 26/2005, August 5th, 2005.

18 *Ibid.*

19 *Ibid,* Gr. 20°, 22°, 32° - 34°. The entry barriers consisted in different contractual arrangements with its distributors in order to block and or deter entry by other competitors.

20 *Ibid*, Decision No. 4.

21 Supreme Court of Justice, Decision No. 4332/2005 issued in January, 10th 2006.

22 TDLC Ruling No.39/2006, June 13th, 2006.

23 *Ibid,* Gr. 25°, 26°.

24 Dominance was held by *Pizarreño Pudahuel* with more than 60% market share, while *Hardie* the defendant had near 32%.

25 *Ibid, Gr. 31°- 33°.*

26 Supreme Court of Justice, Decision No. 3449/2006 issued in November, 29th 2006.

27 Supreme Court decision, Gr. 2°.

because they were below "costs", without specifying what measure of cost it considered relevant. In spite of the vote of two dissenting judges, the Court's overturned the TDLC's judgment and ordered Hardie to pay a fine of approx. US$ 736,432. The Supreme Court's ruling is rather formal, so no theory of harm can be clearly identified.

4. Quantification of harm to competition and private damages litigation

4.1 Overview

26. Before 2003 there was no provision in the Act regulating private damages actions. Damages claims for antitrust infringements were subject to the common provisions for civil awards contained in the Civil Code.[28]

27. In 2003, an amendment to the Act introduced a new provision that regulates civil damages suits for antitrust violation in the following terms:

> The damage claim that may result from the anticompetitive conduct judged as such by a final ruling of the Competition Tribunal, shall be filed in the competent civil court according to the general rules, and shall be handled according to the summary proceedings established in Book III Title XI of the Civil Procedure Code. / The competent civil court, when ruling on the damage claim, shall base its ruling on the conduct, actions and legal classification thereof, as established by the decision of the Competition Tribunal.[29]

28. The amendment aimed at reducing the length of private actions proceedings and gave TDLC's decisions an important role in civil proceedings. According to the law, the TDLC's ruling on fact and law cannot be neglected in the civil procedure. This means that only the existence of the civil injury, causality and damages[30] can be debated.

29. Notwithstanding the improvements, the number of private actions is still very low. Up to date, there have been no private actions based on cartel infringements. This may be due to the absence of procedural incentives such as class actions, which in Chile are only available for consumer protection.[31] Case law on civil damages actions is so far limited to injuries from exclusionary abuses.

4.2 Cases

4.2.1 DAP, Pivcevic et al. vs. LAN Chile et al. (2000)

30. The regional airline *Aerovías DAP* ("DAP") filed a complaint against Lan Chile airlines ("Lan") and *National Airlines* ("National"), claiming damages for a total amount of approx. US$12 million.[32] DAP

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28 Section starting at Art. 2314, Civil Code, for torts or non-contractual damages.

29 Art. 30 of the Act.

30 Some private litigators argue that this also means that civil judges cannot directly adjudicate on antitrust infringements or damages thereof without a previous decision by the TDLC.

31 In the pending retail pharmacies case, once one of the defendants (FASA) settled with the FNE and the settlement was approved, although FASA tried to implement direct compensation mechanisms for paid overcharges, a few consumer groups filled three class actions suits before civil judges in different regions. One of the judges held a lack of competence on the case and another proceeding was abandoned. In the third proceeding the judge held his inadmissibility but the appeal is still pending.

32 This amount decomposed as following: company's actual damages, *lucrum cessans*, and moral damages plus shareholder's moral damages.

supported its petition in the *Comisión Resolutiva*'s (one of the TDLC's predecessors) Ruling N° 479/1996,[33] which condemned Lan and National for exclusionary conducts and imposed fines of approx. US$300,000.[34]

31. The *Comisión Resolutiva's* decision contained no theory of competition harm. The lack of a specific provision on private actions in the Competition Act at that time left plaintiffs merely with the common legal grounds of the Civil Code for claiming damages.

32. Both reasons (i.e. the absence of theory of harm and the lack of a specific legal provision) may explain some of the economic elaborations made by the civil judge.[35] For example, an economist presented as witness by one of the defendants argued that the competition authority had not held that the defendant did not engaged in predatory pricing, since there was no evidence of prices below costs. The economist explained that markets were contestable and hence competitive, and that the Comisión's decision had reasoned on the basis of a strategic behavior.[36] The judge dismissed this argument.[37] However, other financial and non-financial evidence submitted to the civil proceeding led the judge to hold that

> Injuries had been caused by the conducts of the defendants, but in a lower entity than what the plaintiffs claim; the exit of the plaintiff from the market was not attributable to the defendants but to some relevant issues unforeseen by the plaintiffs; pecuniary losses should be limited to operational results and expected benefits within March 16th and May 31st, 1996.[38]

33. The judge adjudicated in favor of the plaintiff, granting damages. The Court of Appeal upheld the decision, but decreased the amount of the damages.[39] The Supreme Court affirmed the Court of Appeal's decision.[40]

4.2.2 Cementa vs. Volcán (2009)

34. The background of this civil damages trial was a Supreme Court's decision on predatory pricing previously ruled by the TDLC. In spite of the TDLC's acquittal,[41] the Supreme Court admitted the claim.[42]

35. In this case, for the first time a civil judge adjudicated in favor of the plaintiff on the grounds of the aforementioned special provision on civil damages actions introduced to the Act.[43] The judgment[44]

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33 *Comisión Resolutiva* was a quasi-judicial body in charge of adjudication on competition law issues before the establishment of the TDLC in 2004. Ruling N° 479/1996, December 31st, 1996.

34 The conducts were a refusal to deal on land services for aircrafts and coordination to decrease retail prices in highly concentrated routes.

35 Civil Judge, 4°, Santiago, June 22nd, 2000, docket number 4831-1997.

36 *Ibid*, Gr. 22°.

37 *Ibid*, Gr. 28°.

38 *Ibid*, Gr. 24°, 31°.

39 Court of Appeals, Santiago, July, 14th 2004, docket number 5954-1999

40 Supreme Court, December 27th, docket number 5835-2004

41 TDLC, Ruling N° 39/2006, June 13th, 2006.

42 Supreme Court, Nov. 29th, 2006, docket number 3449-2006. A dissenting vote was issued by two members of the S.Court.

43 Art. 30. Of the Act (see *supra*)

44 Civil Judge, 26°, Santiago, April 24th, 2009, docket number 13272-2007.

limited the discussion to the legal standing of the plaintiff, the existence of injuries, causality and the quantification of damages. It explicitly held that if the TDLC found a competition infringement, it was not necessary to prove negligence during the civil trial.[45] This means that quantification of harm is not relevant in civil cases. The existence of a previous condemnatory ruling suffices.

36. Accordingly, in the judgment quantification of damages was independent from any theory of harm used during the competition proceedings. The state of the market before the exclusionary conduct was used as basis for the quantification[46] (as a sort of "but for" hypothesis). The judge considered as proven that the victim of the exclusionary practice had a stable financial situation during that time. Another basis for quantification was a previous due diligence report prepared for the defendant when it had evaluated the acquisition of the plaintiff's company.[47]

37. The financial distress of the plaintiff's company and its exit from the market occurred during the predation period. This fact proved the causality.[48]

38. The judge quantified three different types of damages: "actual" damages (i.e., the price of purchasing the company as reported by the due diligence) in approx. US$ 7 million;[49] *lucrum cessans* (computed as annual benefits of 4% for the predation period) in approx. US$ 5 million;[50] and "moral" damages (i.e., harm to company's reputation, integrity and viability in approx. US$ 1,5 million.[51]

39. The ruling was appealed. However, before the hearing the parties settled and the plaintiff withdrew his claim. The FNE had not access to the settlement terms.

4.2.3 Philip Morris (PM) vs. Cía. Chilena de Tabacos (CCT) (2010)

40. The TDLC's held that CCT had violated competition law by structuring several contractual arrangements and incentive mechanisms with different distributors. The arrangements were exclusionary and affected its rival PM.[52] PM filed a civil damages suit against CCT.

41. The plaintiff argued that without the exclusionary conduct, it would have reach a 25% market share – well above the 1% participation it had in the period of the exclusionary practice. The plaintiff claimed that the exclusion translated in injuries for approx. US$ 145 million.[53]

42. During the trial several reports and depositions by national and foreign competition economists were submitted by both the plaintiff and the defendant. The discussion focused on the quantification of

45 *Ibid*, Gr. 10°, 14°, 15°.

46 *Ibid*, Gr. 16°,

47 *Ibid*, Gr. 17°,

48 *Ibid*, Gr. 18° - 27°

49 *Ibid*, Gr. 29° - 30°

50 *Ibid*, Gr. 31° - 35°

51 *Ibid*, Gr. 36° - 38°

52 TDLC Ruling N° 26/2005, August, 5th, 2005, Upheld by the Supreme Court on Jan. 10th, 2006, docket number 4332-05. Vid. *supra*

53 *Ibid* Gr. 17°

damages and not on the competition harm. As in previous cases, the judge limited the discussion to damages, causality and the quantification of damages in civil trials.[54]

43. One of the main arguments of the defendant was that civil actions claiming damages were beyond the scope of the TDLC's decision and that claimed injuries had not been caused by any of the conducts considered in the TDLC's judgment.

44. The civil judge decided on the case in January 2010,[55] dismissing the claim. First, the judge held that damages should be limited to the period taken into account in the TDLC's ruling.[56] Second, the burden of proof was borne by the plaintiff, who did not prove its claim. The plaintiff had not changed his strategy after TDLC's judgment and there were several additional factors that had prevented the plaintiff from reaching the pretended market share.[57] As a consequence, damages were not granted.[58]

5. Concluding Remarks

45. Chilean competition authorities do not follow a single theory of harm to competition. In case law, the identification of harm to competition seems easier in cartels and exploitative abuses than in exclusionary conducts.

46. Economic analysis has been increasingly used in Chile in competition law enforcement and adjudication during the last decade. However, it is not common to find a detailed quantification of harm.

47. The Act has clear rules for linking antitrust infringements to damages claimed by private parties to be adjudicated in civil law fora.

48. All the significant cases on private damages deal with exclusionary conducts.

54 *Ibid* Gr. 25°

55 Civil Judge, 10°, Santiago, January 25th, 2010, docket number 19655-2009. The appeal is pending.

56 *Ibidem* Gr. 28°

57 *Ibidem* Gr. 29°

58 *Ibidem* Gr. 32° - 33°