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LATIN AMERICAN COMPETITION FORUM

-- Session I: Using Leniency to Fight Hard Core Cartels --

Contribution from Chile (FNE)

9-10 September 2009, Santiago, Chile

The attached document from Chile is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Chile on 9-10 September 2009.

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**LATIN AMERICAN COMPETITION FORUM
- 9-10 September 2009, Santiago, Chile -**

Session I: Using Leniency to Fight Hard Core Cartels

Contribution from Chile (FNE)

**RECENT CHALLENGES FOR CARTEL COMBAT:
CHILE'S NEW LENIENCY PROGRAMME**

1. Foreword

1. In Chile, as in many other countries, collusive conduct and cartels are one type of anticompetitive behaviour formally established as an infringement by the Competition Act.¹

2. Detecting cartels is notoriously difficult due to the information asymmetries affecting the Competition Authority –which often relies on publicly available data and complaints- when it comes to detecting and breaking cartels.

3. As a result, leniency programmes have evolved into an important device for the authorities – based on the notion that without the help of an “insider”, the veil of secrecy may be impossible to lift. For instance, the European Union introduced leniency programmes in 1996,² after the example of the United States, where the programme was first introduced in 1978, but amended in 1993 (corporate leniency) and 1994 (leniency for individuals). Such programmes have also been implemented in many cartel frameworks in

¹ Decree Law No. 211 / 1973, and its amendments, Art. 3 a).

² Updated in 2002 by the “Commission notice on immunity from fines and reduction of fines in cartel cases” (2002 / C45 /03), which revised the preceding policy mainly in that the EC Commission will grant complete immunity from fines; and in 2006, by OJ C298/17.

other OECD jurisdictions³, and are strongly recommended by the International Competition Network (ICN) to deal against cartels;⁴ there are many instances where they have contributed to the successful break-up of cartel activity.⁵ As of late, several jurisdictions –such as Singapore or New Zealand- have improved their leniency programme implementation. Likewise, countries just recently implementing its competition policy, such as India or China,⁶ have also designed an effective competition policy endowed with a leniency programme.

4. Following the trend, on July 13, 2009 new Law No. 20,361 was passed amending the Chilean Competition Act. This reform to Chilean antitrust law focuses mainly on the detection and punishment of collusive behaviour and cartels and, among other clauses, toughens the investigatory powers of the National Economic Prosecutor's Bureau (the FNE).

5. The Chilean Leniency Programme –and all new provisions therein- shall become effective on October 12, 2009.

6. The FNE is currently opening public consultations of a preliminary version of a guideline that deals with the administrative aspects of the new system.

2. Combating cartels and leniency: The stick and carrot approach

7. Leniency programmes can be defined as a mechanism of incentives that encourages a firm or an employee involved in a cartel, to come forward to the authority and self-report such illicit conduct.⁷ In return, the authority offers leniency, in the form of a reduction or even complete elimination of legal sanctions and/or fines (immunity).

8. The economic rationale behind the incentive mechanism has been thoroughly analysed in several articles and text books on antitrust.⁸ The main incentives for firms to engage in a cartel with their rivals are the financial gains and large revenues derived from using their collective market power in an illicit cooperative conduct. Firms must in turn understand that an active Competition Authority can launch at

³ OECD (2002) "Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes" and "Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws". Visit <http://www.oecd.org/dataoecd/16/20/2081831.pdf>

⁴ ICN (2006), *Anti-cartel Enforcement Manual*. See Chapter 2, "Drafting and Implementing an Effective Leniency Program".

⁵ See "Leniency Regimes. Jurisdictional Comparisons", Kevin Arquit, Jacques Buhart and Oliver Antonione, General Editors. The European Lawyer Ltda., 2007, second edition.

⁶ Since May 2009, the Indian Competition Authority (CCI) will operate a leniency programme applicable to cartel cases. Firms that disclose evidence and information on cartels to the CCI under this programme can obtain reduced fines or avoid fines altogether. Accordingly, the Anti-Monopoly Law of the People's Republic of China (AML), promulgated on Aug. 2007 and effective since Aug., 2008, establishes a leniency approximation in its Art. 46, "Where the business operators concerned voluntarily provide information and important evidences with regard to the monopoly agreement reached, such business operators may be granted a mitigated penalty or be exempted from punishment by the Agencies".

⁷ Self-reporting can take two forms: ex ante (before the Competition Authority has detected the case) and ex post (after detection of the case, with no one convicted yet.)

⁸ See for instance "The Political Economy of Antitrust". Vivek Ghosal and Johan Stennek, Editors. Elsevier, 2007, second edition; and Aldo González (2006), "Fundamentos de los Programas de Delación Compensada para la Persecución de los Carteles".

any time an anti-cartel investigation of an industry. If the investigation succeeds, firms shall not only forgo benefits but also face harsh punishment as well (fines, imprisonment).

9. Yet the authority's success is uncertain –the probability of reaching a conviction depends on the quality of the available evidence, which is costly for the agency to get. Consequently, firms in a cartel face, on the one hand, expected benefits and, on the other hand, expected sanctions for their conduct, all of which is a function of the probability of each event. If a member of the cartel realises that there is substantial likelihood of defection by the remaining members, his valuation of the expected profits of cartel membership will fall.

10. With a leniency programme, the authority can destabilise the cartel, boosting the chance of a successful conviction if a firm with sufficient information does come forward. Even more, following Becker (1968),⁹ all else being equal, as the probability of being caught in an anticompetitive activity rise, the less likely an individual is to engage in such behaviour.

11. In other words, well-designed leniency programmes not only strengthen the possibility of abuse detection, but also act as a deterrence tool, preventing the formation of new cartels while making defection more attractive.

12. Leniency provides the “carrot”. Sanctions provide the “stick” regarding collusive agreements. Hence

- On the side of the leniency coin, the sanctions “stick” must be severe enough to enhance the “carrot”: The higher the fines and penalties, the higher the incentives to apply for leniency in order to get the “carrot”; and
- The higher the agency's resources to investigate successfully –i.e., access to higher investigatory powers, as on-site inspections, dawn raids, and wiretapping-, the higher the incentives for the offenders to apply for leniency in order to avoid the “stick”.

13. According to these, the competition authorities' concern is to design the most effective leniency programme in order to identifying/preventing cartels. It must include the extent of leniency to offer, the fines for collusion and the opportunities for firms to self-report.

3. The amended Chilean Competition Act and its Leniency provisions

14. By Law N° 20.361 of July 13th 2009, several amendments to the Competition Act were enacted. Since most of the legal changes aim at reinforcing the fight against hard-core cartels, this reform can be viewed as a political recognition of cartel activity as the most wrongful competition infringement and the need for specific tools to fight against it. The amendments introduce, among others, the following provisions:

- Incorporate leniency rules as a mechanism to detect and punish cartels;
- Increase the FNE's powers by providing new tools for the investigation and detection of collusive behaviour;
- Raise the amount of fines applicable for cartels;

⁹ Gary Becker (1968), “*Crime and Punishment: An Economic Approach*”, Journal of Political Economy, Vol 76(2).

- Increase the statute of limitations regarding cartel cases; and
- Improve the definition of anticompetitive acts and conducts, particularly collusive practices.

The immunity/leniency provision [Article 39 bis]

15. The section provides that:

«Whoever executes a conduct contained in letter a) of article 3) may request a reduction of the fine or its exemption, when providing information to the FNE that leads towards proving such conduct and identifying the responsible parties.

In order to obtain one of these benefits, the applicant shall comply with the following requirements:

1. *Provide precise, true and verifiable information that represent an effective contribution to constitute sufficient evidence in order to support a submission of charges before the tribunal*
2. *Abstain from disclosing the request of these benefits until the FNE has submitted the charges or has ordered to file the records regarding the request*
3. *Immediately after presenting its request it shall put an end to its participation in the conduct*

In order to obtain a fine exemption, besides from complying with the requirements set forth above, the applicant must be the first among the parties involved in the conduct, to provide the information to the FNE.

In order to obtain a fine reduction, besides from complying with the requirements set forth above, the applicant must give additional information to the one presented by the first person that provided information to the FNE according to this article. In any case the reduction requested by the FNE in its submission of charges, should not be higher than 50% of the highest fine requested for the other parties involved in the conduct not able to obtain the fine exemption or reduction benefits.

In its submission of charges, the Fiscal will identify each party involved in the conduct that had met the requirements for the benefits of fine exemption or reduction. If the tribunal issues a condemnatory decision, it cannot apply a fine to whoever was identified as a beneficiary of the exemption nor can it set a fine higher than the one requested by the Fiscal to whoever was identified as a beneficiary of the fine reduction, unless during the process is proven that such beneficiary was the organizer of the illicit conduct by coercing the other parties to participate in it.

Whoever reports the existence of a conduct of the ones contained in letter a) of Article 3, knowingly based on false or fraudulent information, with the purpose of harming other economic agents by requesting the benefits set forth in this article, shall be punished according to the provisions of article 210 of the Penal Code.»

Investigation powers against cartels [Article 39 n)]

16. The section provides for special powers in cases of serious and qualified cartel inquires. The intrusive powers provisioned include searches, raids, inspections, wiretapping, and compulsory measures to obtain communication records from the telecom companies.

17. The use of these powers is subject to a double judicial control. A first authorization or warrant should be given by the Competition Tribunal (TDLC), and a second one by a judge of the corresponding Court of Appeals.

18. In addition, in using these powers –along with the police- several provisions of the penal procedural code should be abided by; otherwise, an action against the FNE can be submitted by the plaintiff before the judge of the Court of Appeal who issued the warrant.

The increase of statutory limitations [Article 20]

19. Up until the law approved last July, the statutory limitations for investigating a competition infringement provided for two years after the execution of the conduct. The amendment increases the general term from 2 to 3 years, and in cases of cartels, to 5 years. In the latter case, the count of the five years period will not begin if market effects of the cartel are still in place.

The increase of the maximum amount of fines [Article 26]

20. The amendment to the Competition Act raised the maximum amount of fines to US\$ 22.5 million up from nearly US\$ 15 million in cartel cases¹⁰. Besides, it establishes the collaboration that the offender has granted to the Prosecutor as an element to be considered by the Competition Tribunal in determining the fines. In addition, the amendments also provide that fines imposed on individuals cannot be paid by their companies or by the shareholders or partners of the same.

Changes in the substantive provision concerning cartels [Article 3 a)]

21. The changes aimed at defining precisely hard-core cartel conduct (boycotts or competitors exclusion and bid rigging were also included).

22. The new cartel substantive provision concerning agreements among economic agents and concerted practices was set as follows:

«Article N° 3: Among others, the following deeds, acts or contracts shall be regarded as preventing, restricting or hindering free competition, or as tending to produce such effects: a) Express or implied agreements among competitors or concerted practices among them, any of which give them market power and consist in fixing sale or purchase prices or other terms of commerce; reducing the output; allocating markets or quotas; excluding competitors; or affecting the outcomes of tender processes.»

4. Design of the Chilean Leniency Programme

23. The above-mentioned provisions will come into force in October 12, 2009. In the meanwhile, the FNE has prepared a draft “Internal Guide regarding the Benefits of Immunity and Reduction of Fines in Cartel Cases, recently submitted for public consultation. The purpose of this Guideline is to inform the economic agents and the community at large on the criteria and internal procedures it will employ to apply article 39 *bis* of the Competition Act. The following Table summarises the main topics of this Guideline.

¹⁰ Fines are set in Unidades Tributarias Anuales (UTA), whose maximum has recently been raised to UTA 30.000 up from UTA 20.000. UTA results from multiplying by 12 the monthly UTM outstanding when the fine is charged. The UTM is a currency legally defined for tax purposes, indexed monthly by the Consumer Price Index.

Table 1. Benefits of Immunity and Reduction of Fines in Cartel Cases: Summary

Benefits: Full and /or partial leniency	The leniency programme considers full exemption of administrative fines for the first member of a cartel approaching the authority and providing information leading to the punishment of other members. Also considers fine reductions of up to 50% for subsequent whistleblowers.
Opportunity to self-report: <i>Ex ante</i> and / or <i>ex post</i>	Does not take into consideration whether the FNE has or has not launched an investigation on this particular cartel case, if no trial is already before the TDLC when the leniency application arrives.
Does leniency depend on the evidence provided?	Yes, it does. The leniency program will be administrated by the <i>Fiscal</i> , to whom the cartel member applying for benefits must provide the information " <i>leading to the confirmation of such conduct [collusion practice] and the identification of those responsible</i> ".
Who can benefit from the leniency program (individual / businesses)?	Both the company and an individual may apply.
What are the requirements of full leniency?	Full leniency requires the fulfillment of three conditions: (i) The delivery of " <i>accurate, reliable and verifiable</i> " background information amounting to an " <i>effective contribution</i> " to support the claim that the <i>Fiscal</i> should submit before the TDLC; (ii) Maintain the confidentiality regarding the request until the claim has been submitted or its records are filed; and (iii) Terminate the participation in the cartel.
What are the requirements for partial leniency?	The applicants for a fine reduction must comply with the abovementioned requirements and provide additional background information to that already delivered.
During the application process, when is the applicant given certainty of his eligibility for leniency, and how is this done?	Before bringing the case to the Competition Tribunal, the <i>Fiscal</i> must identify the beneficiaries of the exemption and reduction of fines. Collusive behaviour proved, the TDLC can neither fine the person or entity identified by the <i>Fiscal</i> as beneficiary of the exemption, nor impose fines higher than the ones proposed by the Prosecutor for the beneficiaries of the reductions.
Does the leniency programme consider a marker system, and how does it work?	Yes, it does. There is a marker system based on an electronic standardized form (called Marker Application Request) available in the FNE's Web Site (www.fne.gob.cl), which demands compulsory information to the applicant. Once received, and if it fulfils the required information, the applicant is notified -through the electronic mail- of the Marker, with the date and hour in which the electronic form was received and the position in relation to other applications. The same notification will summon the Applicants for the Planning Meeting, which shall take place at the FNE's premises within 5 working days from the issuance of the notification.
Does the policy address the possibility of leniency being revoked?	Yes, it does. The benefit shall not be applicable if the trial proves that a beneficiary " <i>was the organizer of the unlawful conduct by coercing others to participate in it</i> ".

5. Challenges for the leniency programme implementation and concluding remarks

24. Leniency programmes have become an increasingly important tool for Competition Authorities and competition policy, playing a significant role in undermining firms' incentives to engage in collusive agreements with competitors. It is hard, however, to measure the whole effectiveness of such programmes. Their ability to deter firms from collusion is difficult to assess since it involves measuring something that does not still occur. Consequently, the only way to assess the success of this policy is the number of cases in which leniency programmes have been applied.¹¹

25. Thus, on the one hand, the main challenge for a newly implemented leniency program -as is the Chilean case-, is to have a design attractive for applicants. On the other hand, it also requires the business community's' trust in the procedure and mechanisms defined by the FNE to attain the programme's benefits. The generation an Internal Guideline of public knowledge by the FNE is a relevant step towards providing certainty to potential leniency applicants.

¹¹ This is not fully clear, since one would expect the number of cases as a whole to decline if leniency programmes are effective as an *ex-ante* deterrent to anticompetitive conducts.