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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- Contribution from Chile --

4-5 April 2017, Managua, Nicaragua

The attached document from Chile (TDLC) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- CONTRIBUTION OF CHILE (TDLC)* --

1. Background – Chilean regulation on setting fines and private damage actions

1.1 Fines

1. The Competition Tribunal may impose fines to corporate entities or individuals that infringe the Competition Law –either by means of an abuse of a dominant position or by a cartel or concerted practice.

2. As it will be explained below, fines in Chile exclusively pursue deterrence against anti-competitive practices, whereas private damage claims or class actions are aimed to achieve restitution of the harm caused.

3. Under Chilean law, fines can be levied on cartel members irrespective of the harm caused by the cartel. Thus, fines can be levied on participants of an unimeplemented cartel. This implies that damages from a cartel is not as a prerequisite for establishing fines.

4. Moreover, the law governing until 2016, stated that in a cartel case, the plaintiff must only demonstrate the existence of an agreement or concerted practice aimed to price fixing, market allocation or division, bid rigging or output restrictions and that such an agreement of concerted practice conferred market power to its participants.

5. In August, 2016, a legal reform to the Chilean Competition Law became into force. This reform encompassed substantial changes such as introducing criminal sanctions and establishing illegality *per se* for hard-core cartels, among others changes (the "Reform"). The *per se* rule means that in case of hard-core cartels or concerted practices, in order to levy fines on the cartel members, it is not required anymore to demonstrate market power as a result of the cartel –but only the existence of the agreement or concerted practice.

* Contribution by the Tribunal de Defensa de la Libre Competencia ("Competition Tribunal" or "TDLC").

6. In relation to fines against anti-competitive conducts, the Reform replaced the fixed cap under the prior law (for cartels the maximum fine was circa US$25 million) with a flexible cap. In particular, anti-competitive practices may trigger fines of up to double the illicit gains obtained by the offenders or, alternatively, up to 30% of the annual sales of the companies related to the goods or services to which the infringement relates during the period in which the infringement took place. From an economic view, the illicit gain or economic benefit obtained by cartel member is understood as the re-distribution of rent from consumers to the firms of the cartel due to supra-competitive prices/it is equivalent to “overcharge”. Thus, the upper limit to set fines does not include the deadweightloss caused by the cartel.

7. As a default option, if the Tribunal is unable to determine neither the ilicit benefit or the sales of the companies infringing, fines could be up to US$50 million.

8. Finally, the Reform incorporated some factors that must be considered when the TDLC is setting fines: deterrence and economic capacity of the offender. Other circumstances –in force before the Reform- include cooperation with the Antitrust Prosecutor prior to or during its investigation, severity of the conduct, the illicit gain obtained and recidivism.

1.2 Damages actions

9. Private damage actions in Chile are exclusively aimed to the restitution/compensation of the harm caused by the infringing firms. They are not punitive as in other jurisdictions.

10. Regarding compensation of damages, so far, civil courts have been responsible in Chile for deciding private antitrust damages claims (or follow-on actions pursuing damages). The 2016 Reform modifies this regime and now empowers the Competition Tribunal to decide these actions.

11. Since the Reform became into force, either affected customers, intermediate firms or competitors can bring follow-on actions seeking damages before the Competition Tribunal. Moreover, victimized consumers can bring class actions before the TDLC, that is, file a lawsuit collectively, according to the procedure set forth in the Consumer Protection Law.

12. Private damages actions can only be filed once the cartel members are sanctioned by the TDLC. Thus, unlawful behaviour is taken as given –from the judgment issued in the administrative procedure- so the damages procedure focuses on whether the behaviour caused harm or not, and if so, the magnitude and the causal link between the cartel and the harm. Nevertheless, the TDLC could have already assessed the illicit gains when estimating fines during the administrative procedure and this assessment could be considered in the subsequent damages procedure.

13. As explained *infra*, the implementation of rules concerning private damages actions will give rise to several challenges, particularly, on the quantification of damages.

2. Method for setting fines in cartel cases

14. As indicated above, fines in Chile are aimed to deter future cartel behaviour. In this regard, the TDLC has explicitly stated that deterrence is the objective of fines (e.g. Judgment No.122/2012 and Judgment No.136/2014, both on cartel cases).[1]

[1] Judgment No.122/2012, ruling 124, on refrigerant compressors; and Judgment No.136/2014, ruling 135, on a cartel of inter-urban buses.

15. This implies, according to the deterrence theory on sanctions, that an optimal amount of fines would be above the illicit gain obtained by the cartel members. In other words, a sanction will be deterrent provided that the expected cost of being in a cartel, which is equal to the probability of being sanctioned multiplied by the amount of the sanction, should be equal or higher than the expected profit from the cartel.

16. Is important to note that, so far, all the fines that have been imposed by the TDLC, entail the upper threshold under the previous Law (fixed cap of US$25 million).

17. In Chile there are no binding legal rules or soft law providing guidelines on how to estimate fines.

18. Nevertheless, in recent cases, the TDLC has considered the illicit gains obtained by the cartel members when estimating fines. In particular, we will examine a case law decision explaining the quantitative approach and methodology used by the Competition Tribunal to estimate fines[2]:

2.1 Case law decision

2.1.1 Cartel among asphaltic products companies – allocation of customers and bid rigging (Judgment No.148/2015)

19. The Competition Tribunal found that several companies selling asphaltic products -*Asfaltos Chilenos S.A.* ("**ACH**"), *Dynal Industrial S.A.* ("**Dynal**"), *Empresa Nacional de Energía Enex S.A.* ("**ENEX**") and *Química Latinoamericana S.A.* ("**QLA**")- had operated agreements to allocate specific contracts for the provision of asphaltic products used in road works and projects. In particular, the TDLC held that they had coordinated to allocate certain projects within public bidding processes organized by construction companies that use asphaltic products as an input.

20. The Tribunal fined ACH with approximately USD$ 1.3 million, Dynal with USD$587,000 and QLA with USD$1.5 million. ENEX was exempted from paying the fines as beneficiary of the leniency programme. In addition, all four defendants were ordered to implement an antitrust compliance programme, in accordance to the Antitrust Prosecutor's guidelines.

21. Considering the factual context and the evidence rendered in the case, the Competition Tribunal assessed and quantified the appropriate fine, based on proportionality and reasonability principles. In particular, the TDLC provided guidelines on how to estimate fines in cartel cases:

- The fine is two-fold, encompassing two economic components, each accounting for 0.5 of the total fine, to avoid doble penalty:
  - a fixed component that entails the fine for all the cartel members, only sanctioning the participation in the illegal agreement, irrespective of the illicit gains obtained from the cartel ("basic amount of the fine"). The same amount is charged to all the cartel members, and
  - a variable component depending on the illicit gains obtained by each cartel member.

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2 The same methodology was used to quantify fines in a cartel among a group of gynecologists through their trade association – price fixing cartel (Judgment No.145/2015). This is a collusion case in which the Antitrust Prosecutor accused the Trade Association of Obstetric Gynecologists of Ñuble -a southern province of Chile- as well as 25 gynecologists of price fixing. According to the complaint, the Association had fixed minimum prices for standard maternity procedures, causing direct harm to privately insured patients. The fines were upheld by the Supreme Court in 2016.

- The TDLC states that the basic amount of the fine is a percentage of the total sales related to each illegal agreement. With regard to the estimation of the variable component, given that the evidence rendered during this trial on illicit gains was not conclusive, the TDLC used a percentage of the sales of the cartel members as a proxy for such illicit gains. However, the TDLC acknowledged that the illicit gains is the ideal factor to calculate the variable component.

- Then, the Competition Tribunal estimates a "global basis of the fine" –the sum of the fines for all cartel members-. The TDLC stated that it accounted for 20% of the sales related to the products involved in all the illegal agreements, as a general rule; 30% of the sales when cartels are stable and extend over time, and provided that direct evidence is submitted in the trial, and 10% when there is a concerted practice exclusively relying on circumstantial evidence (understood as economic evidence and/or plus factors). The global basis of the fine is divided into equal parts to quantify both the basic amount of the fine and the variable component (e.g. if it is 20%, the fixed component will account for 10%).

- Finally, mitigating and aggravating circumstances are considered to obtain a final and total fine for each cartel member.[3]

- Moreover, in this specific case, special considerations played a key role: companies engaged in several bid rigging agreements for the supply of asphaltic products and in each illegal agreement only one of the cartel members was awarded the specific contract ("awardee"). Therefore, in a particular bidding process, some of the competitors that were cartel members were not awarded the contract. However, the TDLC concluded that these competitors should pay the variable component of the fine for this bid-rigging anyway, but to a lesser extent compared to the awardee.

- So, all of the cartel members pay to some extent a variable component, but the TDLC deemed necessary to differentiate the amount payable by the awardee and the competitors engaging in the agreement. Following a conservative and simple criterion, the TDLC decided that the awardee must pay double the variable component of the fine with respect to the other cartel members, for each bid rigging agreement. For instance, in one of the biddings, three companies (A, B and C) submitted bids. Assuming that the general rule of 20% indicated above is applied, if A is awarded the contract, it would pay 5% of the sales involved in the bid as a variable component, whereas B and C would pay each 2.5% for this concept, which add up 10%.

2.1.2 Practical application:

22. One of the bid rigging agreements included ENEX, ACH AND QLA. ENEX was the awardee. The general rule of 20% as the global basis of the fine was applied.

23. Therefore, ENEX had to pay 3.33% of the sales involved in this contract as basic amount of the fine plus 5% (as variable component). So, the total fine ENEX paid for this particular agreement accounts for 8.33% of the sales involved in this contract for the supply of asphaltic products. In contrast, both ACH and QLA paid a variable of 2.5% of the sales related to the contract as variable component plus 3.33%. Consequently, each company paid 5.83% of the sales involved in this contract (that was awarded to ENEX).[4]

[3] For instance, in the gynecologists' case, mentioned ibid. supra, an aggravating circumstance was taken into account. Indeed, the fine imposed on the chairman of the trade association was increased by 20% because he acted as instigator of the price fixing agreement.

[4] Recall that, as indicated supra, ENEX was beneficiary of the leniency programme so, ultimately, it was exempted from the fine. Anyway, it was considered to calculate the fines of the other defendants.

3. Quantifying damages

24. As explained above, the 2016 Reform in Chile entails that the Competition Tribunal will decide private damage actions. Since the Reform is recent, there are no case law decisions yet awarding damages. However, the TDLC acknowledges the difficulties that it will encounter to rigurously quantify the harm and define the limits and scope of 'compensable' injuries.

25. It is likely that the main challenges will be:

- Availability of data (it could be particularly difficult to estimate the deadweight loss caused by the cartel due to the output effect).
- Quantitative and economic tools are used to quantify harm. The TDLC must carefully choose the approach according to the available data, type of industry and product, among other factors.
- Moreover, in order to estimate the overcharge of the cartel (illegal gains) it is necessary to establish a counterfactual, that is, what would have happened in the market in the absence of the cartel in terms of price. This is not trivial at all. Multiple methodologies are useful such as financial, structural methods and empirical approaches that strongly rely on econometrics. However, there are difficulties during the quantification such as the period of the cartel, the avaialbility of data, particularly gathering data for the period prior to the cartel, and knowledge of others factors that can influence the prices of the products.
- For example, from an empirical approach, a difference-in-difference estimation can be a reliable, widely applied estimation method for harm caused by cartels. It uses the same idea of experimental treatment and control groups, without having to actually conduct the experiment. The main assumption underlying the validity of this technique is that in absence of treatment, the difference between 'treatment' and 'control' group is constant over time, named the parallel trend assumption. It is relevant that the underlying assumption must be met. In other words, the control group has to be a valid control group (it has to be as if it were random) and that factors different from de cartel affect both groups in the same way.
- Moreover, issues can arise from estimating indirect damages, that is, when a cartel entails an industry that sells input to downstream firms [intermediate firms] and the latter pass-through the overcharge from the cartel to consumers. Therefore, since the pass-on from the intermeidate firm to consumers lessens the damage caused to the former, the TDLC must determine if pass-on defences will be allowed during the private damage actions. Allowing indirect customers to allege damages together with the intermediate firms seems a sensible option.However, the TDLC has no official position on this issue yet.
- Additionally, it is necessary to determine whether the impact of a cartel on dynamic efficiency or innovation will be considered or not and if so, it can represent an additional difficulty to quantify the harm.