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SANCTIONS IN ANTITRUST CASES

Contribution by Chile

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SANCTIONS IN ANTITRUST CASES

-- CHILE (TDLC)* --

1. Legal Framework

1. The *Tribunal de Defensa de la Libre Competencia* (“**TDLC**” or “**Competition Tribunal**”) has the authority to impose sanctions concerning antitrust infringements, both on corporate entities –either public or private- and on individuals. Its decisions concerning sanctions stem from adversarial procedures that are triggered by claims filed by the FNE as well as from complaints filed by private parties. TDLC’s judgments can be challenged before the Chilean Supreme Court of Justice that is empowered to review the legality and the merits of the former’s decisions including power to scrutinize the sanctions imposed.

2. The sanctions that may be imposed by the TDLC upon an antitrust infringement are set out in the Chilean Competition Law (“**DL 211**” or “**Competition Law**”). Chile does not have guidelines –understood as soft law- on calculation of fines. On August 30, 2016, the Law No. 20,945 on the Improvement of the Competition Law Regime (“**2016 Legal Reform**” or “**Law No. 20,945**”) was published and thus, became into force. The 2016 Legal Reform introduced several changes on the Chilean Competition Law, and it will have a substantial impact on the Chilean competition enforcement, as will be explained *infra*.¹

3. In this context, given that the provisions contained in the 2016 Legal Reform concerning new sanctions and maximum fines became into force only just recently, reference to specific cases and precedents will take into account the former provisions of DL 211 applicable to sanctions that were in force until August, 2016. These former provisions, in brief, state that sanctions in antitrust cases include fines to individuals and corporate entities, amendment or dissolution of corporate entities and amendment of agreements where they are found anti-competitive. In relation to fines, the TDLC can levy fines of up to 20,000 tax units (approximately US\$9,4 million) for abuse of a dominant position, whereas 30,000 units is

* This contribution was written by the Tribunal de Defensa de la Libre Competencia (“TDLC” or “Competition Tribunal”)

¹ In particular, the 2016 Legal Reform introduces substantial modifications, such as the following: i) increases the applicable fines and introduces new administrative sanctions against cartels; ii) considers hard-core cartels as a criminal offence, as well as it incorporates a per se illegality rule regarding them; iii) establishes a mandatory merger control regime; iv) empowers the FNE to request information to private undertakings for the execution of market studies; v) introduces the concept of interlocking as a breach of competition law; vi) requires to notify the FNE of any minority interests; vii) strengthens the leniency policy; viii) empowers the Competition Tribunal to determine compensation of damages arising from anti-competitive infringements (private enforcement); and, ix) imposes administrative sanctions for infringements to the duty of collaboration with the FNE during its investigations. Please see OECD, Chile’s Annual Report, 2016.

the maximum for collusion (approximately US\$12.5 million), including concerted practices and hard-core cartels. For a more detailed description, please see OECD, 2013.²

4. It is noteworthy that the 2016 Legal Reform includes a flexible maximum for fines providing that the TDLC may impose up to double the illegal gains obtained (*economic benefit*), or alternatively, up to 30% of the offender's sales during the corresponding period in which the infringement was executed. In this regard, it is coherent with other OECD jurisdictions where revenue is used as a proxy of illegal profits obtained during an infringement.³ Furthermore, the 2016 Legal Reform states that, in case neither the sales nor the profits can be determined, the TDLC may impose a maximum fine of 60,000 tax unit, that is, approximately US\$24,5 million (double the maximum fine cap indicated in the former provisions).

5. Furthermore, a new sanction against collusive conducts was incorporated by Law No.20,945, which is the prohibition to enter into agreements with the Public Administration, the National Congress and the Judiciary as well as State-owned companies. Additionally, it prohibits an undertaking to be awarded any public bidding were the Government is involved, for a period of up to five years ("debarment from future public procurement"), that can be imposed on any hard-core cartel and not only bid-rigging (in contrast with other jurisdictions, such as Germany).

6. Regarding cartel prosecution, Law No.20,945 establishes that cartel infringement is a criminal offence and thus, is consistent with other OECD countries (e.g. UK, United States, Canada, Brazil). Indeed, it underpins a trend towards strengthening anti-cartel enforcement and imposing harsher sanctions against cartels as they entail the most serious anti-competitive behaviour.

7. Specifically, this implies that executives that are found guilty of engaging in a hard-core cartel can be sanctioned with imprisonment up to 10 years and will spend at least one year in prison. Criminal sanctions were introduced in order to boost deterrence on cartels. Although individual fines are well-targeted because they punish the actual decision maker, they have limitations that make imprisonment necessary to prevent cartel behaviour. In contrast, imprisonment prevents firms from compensating individuals for their time in prison and further, it may increase the incentives to destabilize cartels through leniency programs.⁴

8. Moreover, the 2016 Legal Reform provides for a new criminal sanction on individuals, prohibiting them to act as director or manager of stock corporations, State-owned enterprises or trade as well as professional associations, for a maximum period of ten years ("disqualification").

9. The criminal cartel prosecution can only be initiated by a complaint filed by the FNE and it triggers a criminal procedure developed before a criminal judge and according to the criminal standard of proof. Additionally, Law No. 20,945 recognises the *per se* rule with respect to hardcore cartels.

10. Regarding private enforcement, so far, civil courts have been responsible in Chile for deciding on follow-on actions pursuing damages. Private enforcement acts as complementary to fines because they aim to compensate the harm caused whereas the latter only seeks deterrence. The 2016 Legal Reform

² On the application of sanctions under the former provisions, see e.g. OECD, Latin American Competition Forum (2013), Contribution from Chile for a review of these provisions on the criteria for setting fines, DAF/COMP/LACF(2013)13.

³ See e.g. Lianos et.al. (2014): Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova E., David, E. et al (2014), An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis (CLES Research paper series 3/2014, UCL Faculty of Laws: London).

⁴ See e.g. OECD (2009) Latin American Competition Forum Session I: Using Leniency to Fight Hard Core Cartels, contribution from the United States, Chile.

empowers the Competition Tribunal to decide on these actions. This change entails several challenges in order to rigorously quantify the harm and define the limits and scope of ‘compensable’ injuries. Furthermore, the Competition Tribunal will decide on class actions seeking compensation of damages, according to the Consumer Protection Law procedure, where consumers representing collective interests have standing to file a complaint.

11. Given that the reform came into force last August, there are no precedents concerning these changes yet.

2. Determination and Adjustment of the Basic Fine

12. The case-law reveals that the system for determining fines in Chile has the following characteristics:

13. Firstly, as stated in Chile’s prior contribution concerning fines,⁵ it relies on broad legal criteria seeking effective deterrence of anti-competitive practices. Sanctions are imposed *ex post* to anti-competitive behavior after a judicial process is concluded. It is noteworthy that the rigid fine cap included in the former legal provisions (up to approximately US\$12.5 million) was criticized because it was not sufficiently deterrent and thus, it was replaced with a flexible cap in the 2016 Legal Reform together with other sanctions, as explained *supra*.

14. Secondly, the TDLC has levied fines on corporate entities and to a lesser extent, on individuals. The reason is that the FNE -as prosecutor and complainant- has not requested fines for individual defendants and hence, the TDLC cannot impose sanctions beyond the request (*non ultra petita*). This issue was expressly addressed in 2010 by the TDLC.⁶

15. Fines have been levied on individuals since 2013 in four cartel cases (collective boycott and bid rigging by advertising companies, two cartels among inter-urban buses and a cartel among a group of gynecologists).⁷ The maximum fine imposed on an individual has been approximately US\$8,200.⁸ As pointed out by the OECD (2005)⁹, although individual fines are well-targeted because they punish the actual decision makers, they have limitations. Indeed, companies can reimburse the fines paid to their agents *ex ante* or *ex post* the anti-competitive infringement. Even if reimbursement is prohibited and penalized, it would be difficult to enforce because firms can find mechanisms to indemnify through informal mechanisms.

16. Thirdly, the TDLC has attempted to rigorously assess the economic benefit (illegal profits) obtained from an anti-competitive practice. In this regard, the TDLC always tries to estimate the illegal profits obtained by the offenders due to the illegal conduct, as indicated in OECD (2013).¹⁰

⁵ OECD, Latin American Competition Forum (2013), Contribution from Chile for a review of these provisions on the criteria for setting fines, DAF/COMP/LACF(2013)13.

⁶ TDLC Judgments No.100/2010, consideration 113°.

⁷ TDLC Judgments No. 128/2013, 133/2013, 137/2014 and 145/2015.

⁸ Judgment No. 133/2013.

⁹ Organization for Economic Co-operation and Development-OECD (2005), Cartels: Sanctions against individuals, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP (2004) 39.

¹⁰ See p.5, reference is made to Judgment No.63/2008, on a collective boycott case concerning two retailers.

17. However, it has encountered practical issues concerning the availability of data. Having sufficient and robust data poses a major challenge to economic attempts to estimate the profits obtained by the infringement (e.g. over-charge from a cartel). For instance, in the *Gynecologists* case, the Competition Tribunal acknowledged the difficulties of quantifying the historic output (doctor appointments) as well as the over-charge.¹¹ In this aspect, the evidentiary burden about the illegal profits is on the complainant and the TDLC is legally restrained to require all the information it needs during the judicial procedure.

18. Fourthly, the proportionality principle is not explicitly provided under the Chilean Competition Act. However, the Chilean Constitutional Court has construed the proportionality principle concerning antitrust as striking the right balance between the sanctions imposed and the conduct executed. Moreover, the Constitutional Court stressed that proportionality emerges from the constitutional fundamental rights of legal equality and due process. Specifically, according to the Court, the TDLC is compelled to fulfil proportionality when imposing fines and thus, cannot impose sanctions arbitrarily because:

- (i) The Competition Tribunal's decisions must be substantiated and reasoned, as provided in the Competition Law - Art. 26 refers to factual, legal and economic considerations- and so, the TDLC must explain the parameters considered to calculate fines. The Supreme Court has emphasized this aspect;¹²
- (ii) The TDLC must take into account the aggravating and mitigating circumstances indicated in the Competition Law that play an important role as safeguards towards excessive discretion; and
- (iii) The Law provides a general framework concerning fines and the jurisprudence assesses the amount on a case-by-case basis, being constrained by the proportionality principle.¹³

19. The TDLC has explicitly addressed the proportionality principle when determining fines (e.g. *Poultry* cartel).¹⁴ As indicated in the judgment, in order to calculate the applicable fine, the TDLC mentioned proportionality as a guideline. In particular, it estimated revenues generated by the defendants during the last year as well as their ability to pay when adjusting the fine.¹⁵

¹¹ Judgment No.145/2015: the FNE accused the Trade Association of Obstetric Gynecologists of the rural area of Ñuble -a southern province of Chile- as well as 25 gynecologists of fixing prices for standard maternity procedures to privately insured patients, during 2012 and most of 2013. Fines were levied on the defendants and further, the Supreme Court ordered the dissolution of the trade association. TDLC Judgment No.145/2015, considerations 58° to 66°.

¹² Supreme Court Judgment No.5937-2008, case on collusion among doctors on price-fixing (*AM Patagonia*).

¹³ Constitutional Court Judgment No. 2658-14-INA. This ruling stems from a constitutional claim filed by one of the bus companies that was convicted by the TDLC due to its participation in a hard-core cartel. The company alleged that the Competition Law infringes the proportionality principle. In particular, the company argued that the law must provide differentiated sanctions for infringements that effectively harm competition and those that only have the ability to undermine it. The claim was dismissed.

¹⁴ TDLC Judgment No.139/2014. The TDLC sanctioned the three main production and commercialization companies of poultry meat in Chile for participating in a hard-core cartel. Moreover, the Supreme Court toughened the sanction against the Poultry Producers Trade Association ("APA") by confirming its dissolution and setting a fine of USD\$1,6 million. It is interesting that the Supreme Court acknowledged that collusion can be a continuous infringement and thus, statute of limitations is calculated as of the cartel ceases its operation. This discussion plays a relevant role to determine the applicable law in this case. The reason is that collusive conducts that started under the former law, but that continue after the 2016 Legal Reform became into force, are subject to the new fines provided thereof.

¹⁵ TDLC Judgment No.139/2014, *consideration* 356°.

20. Fifthly, with regard to mitigating and aggravating circumstances, the Competition Law provides some circumstances as examples. Hence, the TDLC could take into account other circumstances as deemed relevant during its assessment. The chart below shows the circumstances indicated by DL 211:

AGGRAVATING CIRCUMSTANCES	MITIGATING CIRCUMSTANCES
Recidivism	Cooperation provided to the FNE (Competition Agency) before or during an investigation
Seriousness of the conduct	
Illegal profits obtained (economic benefit)	
Economic capacity – ability to pay (*)	
Deterrent Effect (*)	

(*): Introduced by the 2016 Legal Reform

21. All the circumstances indicated above have been applied by the TDLC to some extent – so far, only as provided in the former provisions. In particular, regarding seriousness or severity of the conduct, hard-core cartels have been consistently considered the most egregious antitrust infringement, as acknowledged by the TDLC and the Chilean Supreme Court (e.g. Supreme Court Judgment No.1.746-2010, consideration 12°).

22. Recidivism has been considered an aggravating circumstance for calculating fines (e.g. *Teléfonica* as repeated offender regarding abuse of a dominant position on the VoIP service in broadband network).¹⁶ Conversely, lack of previous antitrust convictions has also been considered as a mitigating circumstance (e.g. *gynecologists cartel*).

23. Moreover, it is interesting that in the *gynecologists* case, the TDLC imposed a higher fine to the leader of the Trade Association because he acted as instigator of the collusive agreement. Likewise, on a collective boycott between two retailers, a harsher sanction was imposed to the company that acted as ring-leader.¹⁷

24. In a collusion case involving the incumbent drugstores (TDLC Judgment No.119/2012), the significance of the industry -prescription drugs for chronic diseases- and the number of consumers affected was considered an aggravating circumstance. Finally, ability to pay was explicitly considered in the *poultry* cartel although it wasn't included in the legal provisions until the Legal Reform was enacted.

25. Sixthly, the TDLC can impose remedies or administrative measures as an alternative or complementary to fines. It is interesting that the TDLC ordered the dissolution of the trade association involved in the *Poultry* case. Similarly, the Supreme Court ordered the dissolution of the trade association related to the *Gynecologists* case.

26. Additionally, recent judgments have required, in addition to fines, that the defendants implement an antitrust compliance programme (e.g. *Gynecologists* case and *Asphaltic manufacturers cartel*)¹⁸, in accordance with the FNE's guidelines (2011).¹⁹

¹⁶ TDLC Judgment No.97/2010.

¹⁷ TDLC Judgment No.63/2008, consideration No.162°.

¹⁸ The Competition Tribunal found that several companies selling asphaltic products 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. This decision found no consensus within the Competition Tribunal: A dissenting opinion was included expressing disagreement with the obligation to implement a compliance programme, whereas

3. Concluding Remarks

27. Substantial changes were introduced to Chilean sanctions regime as a result of the 2016 Legal Reform. The FNE and the TDLC will play a pivotal role in the implementation of the new sanctions and their enforcement.

28. Most importantly, it will be interesting to assess the criminalization of cartels in Chile considering its institutional design and the dichotomy involving an administrative prosecutor, a specialized court as well as a criminal prosecutor.

other judges expressly stated they would have incorporated additional elements to the compliance programme, being more severe.

¹⁹

Available at: http://www.fne.gob.cl/wp-content/uploads/2011/08/guia_-asociaciones_-gremiales.pdf.