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Exploitative Abuses – Contribution from Chile

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Chile

1. Introduction

1. Decree Law No. 211 (**"D.L. N° 211"**), the Chilean Competition Act, establishes in Article 1 that the purpose of the law is to "promote and defend free competition in the markets". The case law of the Chilean Competition Tribunal (**"TDLC"**) has clarified what this objective entails.[1]

2. This does not mean protecting competitors in terms of their number or size, but it rather means promoting and defending free competition understood as the competitive process as a whole, which includes removing barriers to entry and enabling inefficient firms to exit the market more easily.

3. Chilean competition law seeks to prevent harm to free competition in each industry, whether through abuses of a dominant position or through agreements or concerted practices among competitors, without prejudice to the possibility of sanctioning other conduct under the general prohibition on restricting free competition. In all such cases, the TDLC may sanction the companies involved following infringement proceedings, impose corrective measures, recommend that a rule be amended, or issue general instructions, depending on the various types of proceedings provided for by law.

2. Exploitative and exclusionary abuses of a dominant position

4. Article 3 of Decree Law No. 211 provides that: "The following, among others, shall be deemed facts, acts or agreements that prevent, restrict or hinder free competition, or tend to produce such effects:

> *(...)*
>
> *Abusive exploitation, by an economic agent or a group of economic agents, of a dominant market position, by fixing purchase or sale prices, tying the sale of one product to another, allocating market areas or quotas, or imposing other similar abuses."*

5. Therefore, Chilean law condemns unilateral abuses of a dominant position as well as those carried out by a group of economic agents. Furthermore, given the broad wording

[1] See (i) Judgment No. 176/2021, Action brought by Sindicato de Trabajadores Independientes Chile Taxi against Maxi Mobility Chile II SpA and Others, recital 32: "(…) only conduct capable of infringing the legally protected interest at issue in these proceedings, namely the competitive process, may be adjudicated"; (ii) Judgment No. 178/2021, Action brought by Servicios de Correspondencia Envía Limitada against Empresa de Correos de Chile and another, recital 143: "(…) only conduct capable of infringing the legally protected interest at issue in these proceedings, namely the competitive process and, ultimately, consumer welfare, may be adjudicated"; (iii) Judgment No. 181/2022, Action brought by REDTEC S.A. against WALMART CHILE S.A., recital 63: "(…) only conduct capable of infringing the legally protected interest at issue in these proceedings, namely the competitive process, may be adjudicated"; and (iv) Judgment No. 188/2023, Action brought by Papelera Cerrillos S.A. against CMPC Tissue S.A. and another, recital 6: "(…) Competition law does not seek to protect competitors, but to safeguard the competitive process".

of Article 3(b) of the D.L. N° 211, the case law has held the unlawfulness of both exploitative and exclusionary abuses of a dominant position.

6. Specifically, charging excessive prices has been characterized as an exploitative abuse of a dominant position. Such conduct is not harmful to free competition per se and, therefore, it is necessary to prove before the TDLC how it affects free competition in each case.

7. Regarding exclusionary abuses of a dominant position, the case law has identified a range of practices that may harm free competition, including tying, bundling, refusal to deal, margin squeeze, discounts and retroactive rebates, among others.

8. In every case of abuse of a dominant position, two elements must be present: a structural element (dominant position) and a behavioral element (the dominant undertaking engages in abusive conduct).

3. Excessive Pricing Cases in Chile: What has the TDLC said?

9. The TDLC's earliest case law on the matter, dating from 2010, did not recognize the charging of excessive prices as possible exploitative abuse of a dominant position punishable under D.L. N° 211. The reasoning was that it would be impossible, or very difficult, to determine when a price is excessive and therefore abusive. That judgment stated that the competition authority, in this case the TDLC, is not a price regulator.[2]

10. The earlier case of law subsequently changed. In Judgment 140/2014 (Campomar), the TDLC held that, under certain exceptional conditions, this practice fell within the conduct condemned by Decree Law No. 211.

11. More recently, in Judgment 204/2025 (WOM), the Tribunal reviewed those conditions and introduced a three-stage test for assessing excessive prices as an exploitative practice by an undertaking holding a dominant position. The first stage examines whether the alleged infringer is dominant; the second asks whether the prices were unquestionably excessive under comparison standards or benchmarks relevant to the case; and the third considers whether any possible alternative justifications that would rule out treating the price found to be unquestionably excessive as an abuse of a dominant position.

12. Recognizing the risks involved in sanctioning excessive prices, especially that it may discourage investment and innovation, the Tribunal has stated that, for the conduct to be established, the first two stages require more stringent requirements. Dominance requires the existence of insurmountable and non-transitory barriers to entry. Regarding the benchmarks, the emphasis is that, for the charging of a given price to be considered abusive, it is not enough for the price to be higher than the competitive price; it must be "unquestionably excessive", which requires the use of several benchmarks in order to establish that fact.

13. Chile's case law on this matter is summarized below.

3.1. Judgment 93/2010 (Emelat Case)

14. In this case, the Chilean National Economic Prosecutor's Office (**"**FNE**"**) brought an action against Empresa Eléctrica de Atacama (EMELAT) for charging discriminatory

[2]Judgment No. 93/2010, Application by the FNE against Empresa Eléctrica Atacama S.A., January 6th 2010.

and therefore excessive prices for an escort service provided to Transportes Cortés. The escort service consists of lowering electrical power lines that cross public roads (highways or rural roads) so that trucks carrying loads higher than the cables can pass and subsequently raising the lines again once the truck has travelled along the public road. It should be noted that, in Chile, electricity transmission and distribution are considered natural monopolies and are therefore subject to price regulation.

15. The Tribunal dismissed the Economic Prosecutor´s application against EMELAT, holding that although the electricity company had a dominant position in the provision of escort services for oversized cargo transport within its concession areas, it had not abused that position in relation to the services provided to Transportes Cortés in February 2007.

16. The TDLC stated that:

i. there were alternative routes to the one ultimately used to transport cargo;

ii. EMELAT did not choose that route;

iii. the charges were not unjustified;

iv. the mere charging of excessive prices is not, in itself, punishable as abusive exploitation of a dominant position, but only when it results from an act or conduct contrary to free competition (as follows from Article 3(b) of D.L. N° 211, which requires exploitation of a dominant position to be abusive in order to harm free competition);

v. it was not proven in the proceedings that EMELAT had engaged in unlawful acts or conduct enabling it to charge excessive prices, or in arbitrary price discrimination.

17. The following are some relevant recitals from this Judgment:

> *"it is not correct to maintain that this Tribunal —by determining, in a specific case, which prices are excessive and which are not— should set itself up as a price regulator for final consumers, since such regulation may only be imposed by express statutory provision in markets that require it, for example in the case of natural monopolies with substantial market power, and with all the safeguards that sector-specific legislation affords the regulated undertaking, which could not be provided in contentious proceedings such as these" (recital 31);*
>
> *"In any event, the fact that a company charges prices exceeding its relevant costs, including the normal return from providing the service, is a clear indicator of its market power. Therefore, if the reason that enables the accused company to charge such prices, higher than those that would prevail in a competitive market, lies in acts or agreements contrary to free competition for which it is responsible, that company may and must be sanctioned for such conduct" (recital 32).*
>
> *"Thus, for example, possible abusive conduct includes the artificial imposition of barriers to entry; exclusionary practices - including charging excessive prices for an essential input in order to exclude downstream competitors - and other pricing strategies such as arbitrary discrimination or resale price maintenance, or tying strategies, among others, where they lack a reasonable economic justification" (recital 33);*

18. The Honorable Supreme Court upheld the TDLC's judgment, but, unlike the Tribunal, stated the following in relation to excessive prices:

> *"One form that abuse of a monopoly position may take is charging excessive prices that lack economic justification. If such an unfair charge is obtained by a company*

holding that position through the pressure these places on the other contracting party - which has no option to choose another provider - it must be sanctioned under antitrust law" (recital 3).

19. So, in the view of the Honorable Supreme Court, Article 3 of Decree Law No. 211 does recognize as an anticompetitive offence the abuse of a dominant position by charging an excessive price that lacks economic justification.

3.2. Judgment 140/2014 (Campomar Case)

20. In this case, Condominium Campomar brought an action against real state agency Inmobiliaria Santa Rosa de Tunquén Limitada for charging excessive prices for the drinking-water service that the real-estate company supplied to condominium residents. [3]

21. The TDLC dismissed the action because, although it was established that real state agency Inmobiliaria Santa Rosa de Tunquén had significant market power in the abstraction and treatment of drinking water and its subsequent distribution within the condominium, the existence of insurmountable barriers to entry in the relevant market had not been established. This was because the urban drinking-water company could potentially provide those services even though the condominium was in a rural area.

22. The judgment recognizes that an abuse of a dominant position may occur through excessive pricing, but states that "the practice of imposing excessive prices must be interpreted selectively and restrictively...;" (recital 15) and that "particular care must be taken not to diminish the legitimate benefits derived from the successful commercial policies of a firm with market power;" (recital 14).

23. It states that Chilean law recognizes abusive excessive pricing as punishable conduct, provided that the following conditions are met:

- The party committing the abuse has market power,
- Barriers to entry are very difficult to overcome and are non-transitory.

24. Accordingly, the TDLC states that: "an infringement of free competition through behavior of this kind will occur only when a firm with substantial market power, not arising from its own investments or innovative capacity, charges prices significantly higher than those resulting from the application of one or more comparison standards whose results, reasonably weighted, are consistent with one another" (recital 20);

25. In this case, two judges issued a separate opinion, stating that although they concurred in the decision to dismiss the action, they did so because, under Chilean law and case law, Decree Law No. 211 does not establish so-called exploitative excessive pricing as punishable conduct.

3.3. Judgment 204/2025 (WOM Case)

26. Connectus and other public voice-over-internet (VoIP) service concessionaires sued WOM for charging excessive prices for A2P (application-to-person) SMS text-message termination services from August 2021 onward, which WOM had classified as a new International A2P SMS service. SMS is a complementary service provided over public telecommunications networks which, at the time of the events, was not subject to price or

[3]See Judgment, Case No. 1022-2010, of the Honorable Supreme Court, August 18th, 2010.

rate regulation. The claimants initially paid WOM CLP $1.4, including VAT, for terminating SMS messages to their mobile telephone users.

27. WOM contested the action, stating that "there was no contractual amendment following the introduction of International A2P SMS; rather, a new service was regulated that had never been covered by the contracts originally entered into or by their subsequent amendments", and that the new service required additional resources for processing, resulting in higher costs and a higher price.

28. Following the change in commercial terms, WOM allegedly began offering this International A2P SMS service through Infobip — a third-party company— which would act as an "integrator" or demand aggregator. That company was awarded the service contract with WOM through a tendering process but does not hold a public-service concession.

29. If Infobip was not used as the integrator, WOM would charge the claimants CLP $79 plus VAT for the message-termination service. On average, other mobile network operators charged CLP $2.1 plus VAT for this service, without distinguishing SMS termination whether it was domestic or international.

30. The TDLC held that this constituted exploitative abuse in the form of excessive pricing and imposed a fine of 1,312 UTA (USD $1.16 million) on WOM, corresponding to an estimate of the expected economic benefit from the conduct plus 20%. TDLC did not address the competitive price because the sector regulator had included the SMS termination service in the mobile-services rate-setting process carried out between the filing of the action and the Tribunal's decision. Furthermore, since the invoices issued by WOM to the claimants have not yet been paid, the Tribunal ordered that they be cancelled and reissued using the price regulated in that rate-setting process.

31. In these proceedings, the Tribunal specified that, to analyze the conduct, barriers to entry had to be "insurmountable and non-transitory" (recital 165), rather than merely "high and non-transitory", as it had stated in Judgment 140/2014 (recital 16).

32. The Tribunal also referred to "unquestionably excessive" prices and added a third stage to examine possible justifications for the increase in the prices charged. An appeal against this judgment before the Honorable Supreme Court is pending.

33. It should be noted that, following a recommendation by the Economic Prosecutor (FNE), Subtel (sector regulator) regulated the price for terminating short-message services through Decree No. 5, January 26th, 2024, which applies to the rate-setting process for the 2024-2029 period.

3.4. Judgment 206/2025 (Altos de Punitaqui v. CGE Case)

34. Minera Altos de Punitaqui sued Compañía General de Electricidad (CGE) and CGET (Transmission) for charging excessive and discriminatory prices for electricity transport services through dedicated transmission systems, arising from a contract previously signed by Transnet, CGE's legal predecessor.

35. However, the Tribunal stated that the facilities associated with the challenged price had not previously existed, and that, therefore, the disputed contract was in fact a contract for the development and construction of the new transmission works. In light of this, and notwithstanding that the defendants did hold a dominant position in the zonal electricity transmission or sub-transmission market, the Tribunal found that there was insufficient evidence to conclude that the defendants, CGE and CGET, held a dominant position in the

market for engineering and construction services for works connecting to the zonal transmission grid.

36. The Tribunal also reasoned that, even if the existence of a dominant position at the time the contract was signed had been established, the structural element required to sanction excessive pricing would still not have been met, because the existence of insurmountable and non-transitory barriers to entry in that market had not been proven. For this reason, the TDLC dismissed the action.

37. Despite dismissing the action because the structural element was absent, the Tribunal nevertheless examined the behavioral element, namely whether the prices charged could be classified as unquestionably excessive. After analyzing the three benchmarks proposed by the claimant -the contract's profitability, the criteria used for regulated transmission segments, and a subsequent contract associated with the same transmission facilities- the TDLC concluded that none was suitable for analyzing the toll under the disputed contract and, therefore, for establishing that the price was unquestionably excessive.

38. Lastly, the judgment also analyzed the subsidiary allegation, based on the same facts concerning discriminatory pricing, which the Tribunal dismissed.

3.5. Judgment 215/2026 (Generadora Metropolitana "GM" Case)

39. GM brought an action against Metrogas before the TDLC for charging a discriminatory and excessive rate for the use of Metrogas's distribution network to transport natural gas generated at GM's Nueva Renca power plant.

40. The GasAndes Pipeline Project (from the late 1990s) involved the construction of a gas pipeline between Chile and Argentina, a natural-gas distribution network in the Santiago Metropolitan Region (owned by the distributor Metrogas), and the construction and installation of the Nueva Renca combined-cycle power plant (natural gas and diesel), owned by GM. At that time, it was decided that the plant would use the Metrogas pipeline to distribute its natural gas. Consequently, Nueva Renca cannot operate without using Metrogas's facilities.

41. For the use of these facilities, GM pays Metrogas a gas-transport toll. Three successive contracts governed the toll between 1997 and 2022.

42. Initially, the toll or rate was paid on a "take-or-pay" basis, meaning that the agreed rate for gas transport was paid whether transport occurred. In November 2022, following the introduction of a bill declaring natural-gas distribution infrastructure to be open access, this payment method changed to an interruptible rate under which payment was based on the volume of gas transported. The rate became USD 0.4622/MMBtu under an interruptible contract, with no option of a discount for a firm contract. In other words, it would be 1,413% higher than the original rate (USD 0.0348/MMBtu).

43. GM states that this rate would be discriminatory because it applies the rate for the distribution and sale of natural gas to end users, which is subject to a maximum return of 9%, on the basis that the entire network is used, whereas GM uses only 32% of Metrogas's network.

44. The claimant further states that the rate would be excessive because Nueva Renca is now a Metrogas-specific facility (there is a sunk cost) and is captive to Metrogas's decisions, unlike in 1997, when Nueva Renca could have chosen to build its own pipeline rather than connect to Metrogas's network.

45. Lastly, it argues that the rate would be exclusionary because it affects the performance of its Nueva Renca plant in the electricity-generation market, in which Metrogas also participates by supplying energy through natural gas.

46. All of this allegedly occurred after Metrogas was split into two companies in 2016: the distribution company (Metrogas) and the natural-gas supply company (AGESA).

47. In its judgment, the TDLC defined the relevant market as the service of transporting natural gas through distribution networks in the city of Santiago and stated that Metrogas was a natural monopoly in that market.

48. It also stated that Metrogas "is able to charge excessive prices to GM because the generator has been captive since it sunk its investments and because the profitability cap applicable to Metrogas applies across all customers and all assets." (recital 175).

49. For its excessive-pricing analysis, the TDLC used the following benchmarks:

- The Former Rate (negotiated under more competitive conditions): because the new rate was 12 times higher than that standard, it amounted to an unquestionably excessive price (recital 141).
- The cost of the infrastructure used by GM: the New Rate is unquestionably excessive because it is 400% above that cost (recital 178).
- The cost of constructing a new dedicated pipeline: "the rate applied to GM is equal to or higher than the alternative represented by that pipeline" (recital 179).

50. So, the TDLC found that the New Rate was unquestionably excessive under three benchmarks and that, if Metrogas was complying with the statutory 9% profitability cap, this could only be because the rate discriminated against GM (recital 198).

51. The Tribunal imposed a fine of 3,800 UTA (USD 3.57 million) on Metrogas, ordered it to cease charging GM the New Rate, and required it to charge GM a rate resulting from negotiations between the parties, subject to the conditions specified by the TDLC in the Judgment.

52. The judgment included a dissent by one judge, who disagreed with the benchmarks used by the TDLC to determine whether the rate charged to GM was unquestionably excessive. In particular, the dissent questioned the Tribunal's reliance, in reaching its conclusion on excessiveness, on decisions of a regulatory nature, for example whether each user should be charged only for the portion of the transmission network it uses or whether the total cost should be distributed among all users, without a procedure designed for that purpose and on the basis of insufficient evidence.

53. Appeals were filed before the Honorable Supreme Court on August 25th, 2026, and remain pending.

3.6. Judgment 216/2026 (Ucuquer v. CGE Case)

54. Ucuquer sued CGE and Transnet (CGET) for price discrimination and abusive pricing associated with the rate agreed between the two companies for the development, construction and operation of a dedicated electricity transmission line.

55. That line connects Ucuquer's electricity-generation plant to the National Electricity System (SEN) in the Litueche area (Bernardo O'Higgins Region).

56. As in the Minera Altos de Punitaqui judgment, the Tribunal stated that there were two relevant markets:

- The local market relates to connection works to the transmission system. In this market, the Quelentaro substation owned by Transnet competed with the Rapel substation owned by Transelec.
- The national market for the development and construction of transmission works and facilities.

57. Regarding price discrimination, the Tribunal states that "the offence of discriminatory pricing concerns the charge for a good or service that unjustifiably discriminates by comparison with what the same supplier has charged another purchaser for the same good or service". It defines price discrimination as "the sale of different units of the same product at price differentials that do not correspond to cost differences" (recital 138).

58. In this judgment, the Tribunal distinguishes between price discrimination and excessive pricing, stating that: "an alleged differentiated charge relative to what a regulation prescribes, or relative to a hypothetical price that has not been charged to another operator, does not constitute price discrimination, but rather a direct challenge to the price charged, which must be treated as an allegation of excessive pricing. The distinction is relevant because the forms of conduct require different conditions to be met. Thus, when faced with an allegation, the Tribunal must carefully determine whether it concerns an exploitative discriminatory offence or whether what is being challenged is an excessive price, which is subject to more stringent scrutiny" (recital 138).

59. Along the same lines, the Tribunal stated that: "there is no offence of price discrimination based on sector-specific regulation or, in other words, by reference to the price that should be charged under a particular regulation" (recital 140).

60. As regards the specific case, the TDLC analyzed Ucuquer's two allegations, namely discriminatory pricing and excessive pricing. The Tribunal dismissed the action because CGET's dominant position was not established, given that alternatives to CGET existed in both markets identified above and, specifically in relation to excessive pricing, because there were no insurmountable and non-transitory barriers to entry in the market for the development and construction of transmission facilities. Nor was it established that price discrimination had occurred or that the rate charged was unquestionably excessive; for this purpose, the benchmarks submitted by the claimant were rejected.

61. An appeal was filed before the Honorable Supreme Court on August 31st, 2026, and remains pending.

4. Outstanding Challenges in this Area

62. TDLC's own case law shows that controlling abusive excessive pricing is a controversial matter, because determining what price level is excessive in a market is complex, requires information that is often unavailable, and cannot always be estimated. It may also threaten investment in technology and innovation and affect the dynamism of the competitive process, since high returns act as an incentive by attracting new suppliers to the market. For these reasons, the TDLC has stated that such cases are exceptional and has adopted an ex-post approach aimed at condemning a situation that has already occurred.

63. In many cases, this is a regulatory problem, specifically an absence of regulation in markets where services are provided by a natural-monopoly undertaking and the rates for its principal or basic services are regulated by law, while the rate charged for related services is not, for example services complementary to electricity distribution or transmission, and to the production, distribution and sanitation of drinking water. Thus, in

its Report (May 2023), the Expert Committee for Regulatory Improvement in the Natural Gas Market recommended regulating an interconnection rate or toll payable to the distributor for use of its network (primary, secondary, or tertiary network).[4]

64. From this perspective, it should be noted that the TDLC is not a price-regulating body. Nevertheless, one challenge for Chile's competition authority is to identify services that are not subject to rate regulation but should be.

65. For this purpose, both the TDLC and the Economic Prosecutor (FNE) have the power to open regulatory-recommendation proceedings on their own initiative with the aim of promoting free competition. This instrument prevents excessive pricing by recommending that prior regulations be designed by the sector's regulators.

66. Furthermore, in certain sectors the law requires TDLC to issue an opinion before price regulation can proceed. In the state-owned port sector, for example, it specifies that a TDLC report is required so that the Tribunal can determine in advance whether sufficient competitive conditions exist for the operation of a port facility under monopoly conditions (cargo handling under a single-operator model), and which basic services should be subject to maximum prices to be determined during the competition for the port operation.

67. In the electricity-generation sector, prices are freely set, but the law also requires a TDLC report on whether the regulator should be asked to set rates for certain services provided to small -generation facilities that connect directly to the distribution network, which operates under monopoly conditions. The Tribunal is also asked to determine whether certain complementary or related services provided by companies that are natural monopolies in basic services (such as electricity distribution or transmission, and the production, distribution, collection and sanitation of drinking water) should be subject to price regulation.

68. For the reasons set out above, exploitative abuses of a dominant position through excessive pricing remain controversial. Although such pricing is recognized as a practice capable of harming free competition, the challenge is to establish an analytical framework that gives market participants legal certainty as to the approach taken in the case law.

[4]Technical Report of the Expert Committee for Regulatory Improvement in the Natural Gas Market, May 2023, p. 8.