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Latin American and Caribbean Competition Forum

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - SESSION II: COMPETITION AND INTELLECTUAL PROPERTY

- Contribution from Chile -

7-8 October 2025

This attached document from Chile (TDLC) is circulated to the Latin American and Caribbean Competition Forum (LACCF) FOR DISCUSSION under Session II at its forthcoming meeting to be held on 7-8 October 2025 in Asunción, Paraguay.

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Session II: Competition and Intellectual Property

- Contribution from Chile -*

1. The Tribunal for the Defence of Free Competition (hereafter "Tribunal" or "TDLC" per the Spanish) is responsible for hearing cases concerning possible infringements of free competition. This may be at the request of a party or Chile's National Economic Prosecutor.

2. Chilean law refers to anti-competitive offences in Article 3 of Decree Law No. 211 (DL No. 211). This provision includes a first paragraph that generically establishes as anti-competitive conduct "any deed, act or agreement that impedes, restricts or thwarts competition, or tends to produce such effects". A second paragraph establishes as unlawful concerted agreements or practices, abuse of a dominant market position, predatory practices, unfair competition – in the case of the latter two, when they seek to obtain, maintain or increase a dominant position – and interlocking directorates (Judgements[1] No. 160/2017, No. 167/2019, No. 172/2020 and No. 185/2023).

3. As such, in the Chilean antitrust system, unfair competition is unlawful under civil law, regulated by Law No. 20.169, subject to its ability to obtain, maintain or increase a dominant position. The TDLC has held that, for an action to be deemed unfair competition conduct in this forum, it must be proven that the perpetrator has a dominant position or can reasonably acquire one by virtue of such unfair conduct. Failing this, there would be no conflict of public interest justifying an intervention, but of private interest, which should be resolved in another forum (the civil courts, in accordance with Law No. 20.169) (Judgement No. 176/2021, c. 31; similarly, Judgement No. 197/2024, c. 67).

4. In Chile, Article 4 g of Law No. 20.169 considers as an unfair competition offence "the manifestly abusive exercise of legal action with the purpose of hindering the operation of a market player". On this basis, the TDLC has heard cases alleging the use of legal action relating to intellectual and industrial property in order to affect free competition. The most recent of these is the judgement in the case of Pacific Mining Parts Chile SpA vs. Geobrugg AG and Geobrugg Andina SpA (Judgement No. 192/2024, hereafter "Judgement").

5. In May 2018, Pacific Mining Parts (PMP) executives travelled to China to evaluate potential manufacturing partners. The selected factories underwent an audit and certification process and then tests were carried out to check the quality of the meshes, which were finally certified in September 2019. With this certification complete, PMP was invited to tender for the first time, in January 2020, for the supply of steel mesh for the El Teniente division of the state mining company Codelco.

6. In April 2020, Geobrugg sent a letter to Codelco indicating that some companies were offering steel mesh from China that was similar to its own, which could be infringing its existing patents or those in the process of being obtained. Although the letter did not explicitly mention PMP, at that time only PMP and Geobrugg meshes complied with the technical requirements for the El Teniente division.

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* Contribution from the Tribunal for the Defence of Free Competition (hereafter "Tribunal" or "TDLC").

[1] The judgements cited in the contribution refer to decisions of the TDLC, unless otherwise stated).

7. In May 2020, Codelco reported that the mesh tender had been awarded in part to PMP and in part to Geobrugg.

8. In October 2020, Geobrugg filed a lawsuit requesting that 679 PMP meshes be retained in order to prevent them being imported from China, alleging an infringement of its invention patents. That request was initially granted, but the retention order was subsequently lifted in November 2021, following a decision by China's intellectual property authority to invalidate the allegedly infringed patents on 28 September of the same year (Judgement c. 27).

9. On 11 November 2020, Geobrugg simultaneously filed a series of border measures, provisional measures, lawsuits and complaints before Chilean courts against PMP for alleged infringement of its patents, in order to have PMP's mesh shipments retained by Chilean customs.

10. The situation recurred in July 2021, when Geobrugg filed two new lawsuits simultaneously to request that a dispatch of 8 000 PMP steel meshes be suspended.

11. Based on these facts, on 9 March 2022, PMP filed a lawsuit before the TDLC against Geobrugg (parent company and subsidiary) accusing them of violating DL No. 211 through abuse of dominant position and unfair competition.

1. Delimitation of the dispute

12. PMP accused Geobrugg of having executed a plan to exclude it from the market through acts of unfair competition – preventing or delaying its entry, or hindering its growth – in order to maintain its dominant position in the market. It alleged that this conduct began in 2020 and continued at least until the date the lawsuit was filed.

13. In its response, Geobrugg AG (the parent company) asserted that it had legitimately exercised the rights conferred by its invention patents and industrial property assets, both in Chile and abroad, and that its sole aim had been to prevent third parties from infringing its patents.

14. Geobrugg Andina SpA (the subsidiary) argued that, unlike its parent company, it had not participated in the alleged conduct, since it had not brought any of the legal actions described by PMP and had only sent a letter to Codelco informing it of the possible infringement by third parties of its parent company's patents. It also denied having a dominant position in the market and insisted, moreover, that it would not be able to achieve one, much less through the actions in question.

2. Reasoning of the Tribunal

15. Under Chilean law, abuse of a dominant position and unfair competition are different offences, although the TDLC has considered that unfair competition in itself constitutes a form of abuse, so that acts of unfair competition that are carried out when a dominant position exists constitute an abuse of such a position. Abuse – in the sense of abuse of rights – has been defined as a form of abnormal exercise of a right that assumes an intention to harm, or that contravenes minimum standards of respect and loyalty (Barros, Enrique (2020) *Tratado de Responsabilidad Extracontractual* [*Treaty of Non-contractual Liability*], 2nd ed., Editorial Jurídica, Santiago, p. 670).

16. The notion of abuse implies a limitation on the agent's discretion in the exercise of their rights, even when formally acting within the framework established by law. The

commercial strategies of a company, however aggressive they may be, are lawful, even when they harm a competitor, so long as they respect the limits of fair competition. Unfair competition is a civil offence. However, if the agent enjoys a dominant position, the conduct also constitutes an offence against free competition (Judgement, c. 105).

17. Thus, unfair competition conduct is punishable under free competition law only when it can be linked to a weakening of the conditions of competition and to a result that is detrimental to consumer welfare, or when it has the potential to produce that effect. Where this is the case, Chilean law assumes that the conduct was intended to obtain, increase or maintain a dominant position.

18. In the case in question, given that most of the alleged conduct related to the abusive exercise of legal action, an additional complexity arises, as this exercise falls under the right to action, recognised at the constitutional level.

19. The Judgement determined that, to be unlawful, the exercise of legal action under competition law must meet two criteria: (a) that it is objectively established that the action taken has no merit and (b) that it is taken for an anti-competitive purpose (Judgement, c. 108).

20. Regarding the first of these criteria, if the exercise of legal action is materially justified by a legitimate and reasonable interest in litigating, demonstrated by the existence of "reasonable doubts" (Judgement No. 46/2009, c. 20) or "reasonable arguments" (Judgement No. 83/2009, c. 16), it is not within the jurisdiction of the TDLC to re-evaluate the adequacy of the arguments contained in the decisions of other courts, making this an objective requirement. The Judgement recognised that this aspect is particularly relevant when the action is governed by a special statute, as is the case here, falling under industrial property (citing the Supreme Court decision in Oscar Morales Lucero with Trefimet S.A., 8 June 2020, Case No. 26.525-2018, c. 16, which held that the TDLC should not rule on the merits of actions that are not within its jurisdiction).

21. On the other hand, the TDLC pointed out that the mere fact that an action does not have a successful outcome does not make it unlawful; rather, it must completely lack merit.

22. In relation to the second criterion, the TDLC concluded that the series of legal actions brought by Geobrugg against PMP reflected a strategy aimed at excluding PMP's products from the market, or at least at hindering their marketing, but that this plan or strategy was consistent with the legitimate interest of the right holder to protect the patents and industrial property rights granted to it under the law. Indeed, if the infringements alleged by Geobrugg were effective, its conduct was reasonable and proportional in relation to the effects of the alleged infringements (Judgement, c. 177 and 178).

23. Likewise, since at the time the Judgement was rendered there were no rulings by the competent authorities or other elements that could objectively establish that the actions brought by Geobrugg were groundless, since the industrial property dispute had not even been resolved in the relevant courts, the first criterion for considering the legal action abusive was not met (Judgement, c. 179).

24. The Tribunal therefore decided to reject all elements of PMP's claim against Geobrugg AG and Geobrugg Andina SpA.

25. The Judgement was appealed by PMP before the Supreme Court of Justice, and the decision on the appeal is pending.