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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

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

-- Contribution from Argentina --

4-5 April 2017, Managua, Nicaragua

The attached document from Argentina 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
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Session I: Cartels: Estimation of Harm in Public Enforcement Actions

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-- CONTRIBUTION OF ARGENTINA* --

1. Introduction

1. This paper summarises the current status of Argentine legislation on economic penalties for cartel participation, as well as its current problems and future outlook. It also analyses the feasibility of compensating for harm caused by collusive conduct through the application of fines by the Authority for the Defence of Competition in Argentina.[1]

2. Lastly, the paper analyses the role of harm in the penalties applied under Argentine law, and the various methods that can be used to calculate harm as an element for determining the fine and the relationship with reparations.

2. Argentine law and the role of harm in the application of penalties for cartel participation

2.1 Current Argentine legislation on the defence of competition

3. The Law for the Defence of Competition No. 25,156 (hereinafter "the LDC") was adopted in 1999, and subsequently regulated in the year 2001. As established in its article 46 (b), persons who engage in acts prohibited by the law "*shall be punished with a fine ranging from ten thousand pesos ($10,000) to one hundred and fifty million pesos ($150,000,000)".*

4. Again, as stipulated in that article, the fines are to be graduated on the basis of the following factors: (1) the loss incurred by all persons affected by the prohibited activity; (2) the benefit obtained by

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* Contribution from the Comisión Nacional de Defensa de la Competencia (CNDC) - Argentina.

1 Decrees 1/2016 and 718/2016 establish the Commerce Secretariat of the National Ministry of Production (Secretaría de Comercio del Ministerio de Producción de la Nación) as the Enforcement Authority for Law 25,156 for the Defence of Competition and the National Commission for the Defence of Competition (Comisión Nacional de Defensa de la Competencia) as the technical body in this area.

all persons engaged in the prohibited activity; and (3) the value of the involved assets of the persons engaged in the prohibited activity at the time the offence is committed. The article also explains that the amounts may be doubled in case of a repeat offence.

5. Article 49 of the LDC establishes that the harm caused must be considered in imposing fines, among other factors.[2]

6. Notwithstanding the above, legislation on the defence of competition in Argentina does not include a mechanism for calculating the fine that would set a basic amount to which would be added further amounts in light of the circumstances, as occurs in the European Union.[3]

7. During the last 10 years, the system of graduating fines established in the framework of the LDC has been notably weakened as a result of the high inflation that has prevailed in Argentina during that time. By way of example, at the time the minimum and maximum amounts were introduced, the minimum was equal to USD 10,000 and the maximum was equal to USD 150 million. Today, the minimum amount of the fine is equal to approximately USD 650, while the maximum is approximately USD 10 million. Consequently, the dissuasive or penalising effects of the regulation have been notably undermined. This poses the need to undertake a legislative reform that includes changing or updating the benchmark for quantifying fines in order to have a greater dissuasive effect in terms of enforcing the rules for the defence of competition in Argentina.

2.2 The Bill amending the law for the defence of competition in Argentina

8. The National Congress is currently considering a draft Bill that emerged from a process of consensus building and consolidation of proposals by the CNDC and by legislators [4] who had presented draft amendments to the Law for the Defence of Competition during 2016. This Bill also reflects the observations and comments of specialists, international organisations and other competition agencies (hereinafter "the Bill").

9. When it comes to penalties, the Bill provides that the fines shall be subject to a ceiling of (i) up to 30% of the turnover associated with the products or services involved in the illicit behaviour, during the last business year, multiplied by the number of years during which that behaviour persisted; or (ii) up to 30% of the consolidated turnover at the national level recorded by the economic group to which the offenders belong, during the last business year; or (iii) double the economic benefit generated by the illicit behaviour. If it is possible to calculate the amount against more than one of these criteria, the highest resulting fine will be applied.[5]

10. This means that in calculating the fine to be imposed according to the Bill, the turnover of the firm in question will be taken into account in setting the monetary ceiling that the enforcement authority may impose, leaving it to lower-ranking rules to determine the graduation of the penalties within the

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2 According to article 49 of the LDC, the other factors that must be considered by the enforcement authority are the gravity of the offence, indications of intent, the violator's market share, the size of the affected market, the duration of the practice and any repeat offence, and the past record of the offender, as well as its economic capacity.

3 Guidelines on the method of setting fines pursuant to article 23 (2) (a) of Regulation No. 1/2013.

4 National Deputy for the province of Córdoba, Mario Negri (UCR-Cambiemos) and the National Deputy for the Autonomous City of Buenos Aires, Elisa Carrión (Coalición Cívica – Cambiemos).

5 Bill to Reform the Law for the Defence of Competition, Article 57 (b).

permitted limit, and considering a series of criteria, including the harm caused, the benefit obtained, and other variables such as the dissuasive effect and the duration of the practice.[6]

11. The Bill also provides that, if the calculation cannot be done using the criteria established in points (i), (ii) and (iii) cited above, the fine may be set at an amount equivalent to 200 million Moving Units. "Moving Units" as defined in the Bill are benchmark values that can be updated to prevent inflation from having a significant effect on the value of fines in local currency, as is currently the case.[7]

12. In conclusion, the Bill seeks to resolve some of the problems that the competition authority now faces in imposing fines by, on one hand, bringing greater predictability to the criteria and methodology for determining the penalties, and on the other hand avoiding the devaluation of the fines, and their consequent loss of dissuasive power, as a result of inflation.

13. With respect to the harm caused, the Bill includes this as one of the parameters to be taken into account in graduating the fine, for consideration by the agency at the time of its quantification..

3. Fines imposed in cases of cartels: Argentine experience

14. The Argentine Competition Authority has imposed fines for anticompetitive behaviour in several cases since 1980, under the aegis of Law No. 22,262 until the year 1999, and since then within the framework of the current Law No. 25,156.

15. Both of these laws provide for administrative fines intended to punish the offender and to dissuade economic agents from engaging in anticompetitive conduct.[8]

16. Although the above-mentioned criteria established in articles 46 and 49 of the LDC are combined in determining the graduation of fines, there are some cases deemed "grave" within the jurisprudence of the CNDC for which the competition authority has calculated the fine on the basis of elements of comparative law.

17. In the "liquid oxygen case"[9] the authority took as the basis for calculation a percentage of the invoices of the firms involved, according to their respective financial statements, but only for the proportion corresponding to the affected market. To this "base" it then added a percentage to reflect the volume of sales of the firms that made up the cartel. In turn, a second additional percentage resulted from taking into account for each firm the percentage of sales (through tendering) that exceeded a certain price level, considered as a "threshold" above which the price could be deemed clearly abusive. Lastly, a further percentage increase in the "base" amount was added in recognition of the fact that the product in question

6 Article 58 of the Bill establishes the following criteria: harm caused to all persons affected by the prohibited activities; the benefit obtained by all persons engaged in the prohibited activity; the dissuasive effect; the value of the assets involved at the time the offense was committed, intentionality, and duration; the offender's market share; the size of the affected market; the duration of the practice or concentration and the previous history of the offender as well as its economic capacity. Cooperation with the enforcement authority in its investigation of the conduct may be considered an attenuating factor in setting the fine.

7 Article 89 of the Bill provides that the Moving Unit will be the unit of account for the purposes of that legislation. As well, it establishes the initial value at 15 Argentine pesos, which will be updated automatically on an annual basis, using the change in the consumer price index published by the National Statistics and Census Institute (INDEC).

8 Law 22,262 also provides for criminal fines in the case of conduct that constitutes an offence, and such fines must be imposed by a judge at the behest of the competition authority. Nevertheless, in practice this type of penalty has never been applied because there were no cases brought before a criminal court.

9 Dictamen [Decision] of the CNDC No 510 of 8 July 2005.

(liquid oxygen) was an input used in the health sector. The total amount of the fines imposed was 70 million pesos.

18. In the "cement case"[10] the leading cement producing firms in Argentina were penalised for dividing up the domestic market among themselves over a period of some 20 years, and fines were imposed to a total of about 310 million pesos.[11] On that occasion, the fines were calculated through application of the criterion of "illicit benefit obtained", even though it was not possible to calculate the illicit benefit directly.[12] In this case, the CNDC estimated that the illicit benefit could not have been less than 1% of the updated invoicing of the firms involved during the period analysed, and this amount was used for calculating the fines.

19. In the "medicinal gelatines case"[13] certain laboratories were penalised for bid rigging in response to tenders called by public hospitals from 2005 until 2007, and fines were imposed totalling 20 million pesos.[14] In this case, the authority took into account the value of the assets and the invoices of the firms involved, the turnover involved, the relative size of the firms in the market, the gravity and duration of the anticompetitive practices, an estimate of their harmful effects on the public welfare, the characteristics of the product in question and its specific impact on the public's health. It also took into account the potential liability of the firms involved.

20. In graduating the fine, the authority took into account a series of special weightings beyond the benefit illegally obtained, relating to the financial backing of the firms, the probability of "escape" or "concealment" of the firms investigated at the time they were pursuing their collusive conduct, the social cost generated by the collusion in a market of public interest, and the need to discourage such practices. These aggravating factors taken together led to an increase of 25% in the amount of the fine.

4. Harm and reparation

21. In terms of the design of the legal system for the defence of competition, private lawsuits for compensation and reparation of harm and injury caused as a result of anticompetitive acts or behaviour are an important element, as they constitute an additional dissuasive factor beyond the penalties that the competition authority itself can impose.[15]

22. In Argentina, article 51 of the LDC makes it possible for physical or legal persons who have been harmed by acts prohibited by law to sue for damages in accordance with common law, before the competent court. [16] To date, however, this possibility has not been used in cases involving cartels.[17]

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10 Dictamen of the CNDC N° 513 of 25 July 2005.

11 Worth about US$19 million at the date of this report.

12 This criterion had already been used against YPF in the Liquid Petroleum Gas case, but here it was an abuse of dominant position that was punished, and not a cartel.

13 Dictamen of the CNDC Nº 986 of 25 November 2015.

14 Worth about USD 1,275,000 at the date of this report.

15 Trevisán, P. (2015), "Reparación de daños por infracciones a las normas de competencia. La Unión Europea y la Argentina", *La Ley* 2015-A, 27 February, hereinafter Trevisán (2015).

16 Law No. 25,156, Article 51.

17 The first precedent involving a lawsuit before the courts for damages and injuries suffered as a result of conduct by a firm in violation of the rules for the defence of competition was the "Auto Gas" case against YPF, which was held to have incurred civil liability for damages and injury flowing from its dominant

23. The LDC Reform Bill reinforces and facilitates the possibility of bringing private action for damages, establishing conditions for follow-on actions subsequent to decisions of the competition authority.[18]

5. Conclusions

24. Argentine law recognises the general principle of civil liability, which holds that an individual must repair the damage he causes. Without overlooking the limitation on the amounts of the maximum fine applicable, as described above, the existing legal framework can be said to provide the enforcement authority with sufficient powers for establishing fines for infringement of the LDC, setting certain weighting conditions that are also contained in the Bill.

25. Private enforcement of competition rules has been shown to be a way of compensating victims for harm produced by violations of competition law,[19] thereby establishing a differentiation between compensation for harm and the dissuasive effect of fines imposed by the competition authority.

26. In Argentina there is not a sufficiently developed body of jurisprudence on the separation between civil liability flowing from the violation of competition rules and the penalty itself. While there is doctrine to the effect that civil liability for damage caused by anticompetitive acts is a legal consequence flowing from behaviour in a market setting[20], the scarcity of case law and the difficulties inherent in bringing successful private action for damages mean that there is little jurisprudence in the area, and this poses a significant challenge for the future.

position in the provision of bulk liquefied petroleum gas. Claims have also been initiated as a result of the cement cartel, but no definitive rulings had been handed down at the date of this report.

18 Bill Reforming the Law for the Defence of Competition, Article 64. Article 65, for its part, provides that the competition authority's resolution on violation of the law, once final, will render the matter *res judicata*.

19 Trevisán (2015).

20 De la Vega García, F. (2001) *"Responsabilidad civil derivada del ilícito concurrencial. Resarcimiento del daño causado al competidor"*, Madrid: Civitas, pp. 56 and 57.