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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

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

-- Contribution from Dominican Republic --

4-5 April 2017, Managua, Nicaragua

The attached document from Dominican Republic 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

A CONTRIBUTION ON COMPETITION FINES, HARM AND ILLICIT GAIN

-- CONTRIBUTION FROM DOMINICAN REPUBLIC --

1. In the Dominican Republic, the General Law on Competition Defense, Law No. 42-08, does not contemplate damage estimation to determine the fine. At the time of a sanction, the law establishes sanctions ranging from thirty (30) minimum wages to three thousand (3000) minimum wages, (minimum wage is the official salary applicable to the sector of activity to which the Company or legal entity subject to the matter in question¹).

2. Nonetheless, PRO-COMPETENCIA considers that it is important to calculate the damage caused by an anticompetitive conduct since it is useful to demonstrate that the application competition law generates economic efficiency that results in social welfare. It is the belief of PRO-COMPETENCIA that when estimating the damage, an accurate assessment of the demeanor is necessary because there might be cartels that represent minimal damages, in some cases zero damage², in which the product of a merger has generated greater social welfare than prior to the merger. In other cases, the damage is so high that the maximum fine that is imposed by PRO-COMPETENCIA, that is, three thousand (3000) minimum wages does not compensate for the social loss and even the economic agent responsible of the violation would consider this an incentive to continue the transgression, that is to say that an economic incentive could exist that propitiates the nonobservance of the competition law.

3. Forgoing the above, the impact on social welfare will be taken into account in calculating and estimating the damage. Although it is true that the Law 42-08 is limited when determining the amount of damage, it is not less true that this limitation can be offset with the regulatory and resolution capacity that

¹ Paragraph VI, article 60 of the General Law on Competition Defense No. 42-08.

² It is important to clarify that Law 42-08 in article 7 numeral 1, warns that concerted practices will not be considered prohibited if they are incidental or complementary to an agreed integration or association that has been adopted to achieve greater efficiency of a productive activity or to promote innovation or productive investment.

the agency has, which allows it to remedy the limitations of the law. It is in this manner that PRO-COMPETENCIA is working to conclude, in the upcoming months, its methodology and indicators for the estimation of damage and/or threat of damage that a cartel could generate. These results, which are expected to be as accurate as possible, always observing best international practices³ experience and assuming the size and composition of the Dominican market can be used to show conclusively that PRO-COMPETENCIA measures increased social welfare and the increase in consumer surplus. In this sense, although PRO-COMPETENCIA cannot directly sanction beyond the fines established in its regulation, it is without a doubt that the quantification of the damage caused to the market by a determined economic agent and that has been estimated by the agency will serve as a valuable contribution so that the affected economic agents can, through civil and/or administrative lawsuits, pursue the corresponding sanctions according to the assessments made by PRO-COMPETENCIA.

4. Up to this date, there is no experience of administrative courts linked to competition cases in the Dominican Republic. On this subject, it is good to clarify that, although Law 42-08 was enacted by the Executive Government in 2008, it was not until January 2017 that it came into full force due to the appointment of the Executive Director, who is the legal entity empowered to conduct investigative procedures related to anti-competitive practices.

5. Nonetheless, outside the scope of cartels, the courts have been consistent in assuming the decisions of the competent national authorities in the matter in question. For example, in the case of the Commercial Defense Commission, the judicial precedent has been to accept the decisions of the national authority regarding the imposition of precautionary measures and/or estimation and determination of injury or threat of injury, without examining the elements of acknowledgment, being the court limited to analyze the fulfillment and observance of due process.

6. Likewise, in the case of PRO-COMPETENCIA, the possibility of successfully filing private claims for damages does not reduce the need for the authority to examine the effects and prejudice of a cartel, since it is the entity empowered and pertains the necessary inputs to adequately carry out these estimates. It is our belief that the favorable outcome to private claims of damages decreases the need to impose larger fines, because there will be no incentives that encourage non-compliance with the law. As to if the probability of being subject to claims for damages has an influence on the assessment of the "inability to pay" allegations, this should be weighed on a case-by-case basis, given that the inability to pay is a situation with origins and different consequences depending on the economic operator in question.

7. Establishing a basic fine, in one way or another predestines the damage, however, in the Dominican case where it is established by law, the amount is related to the economic valuation of a given moment, which influences it to lose value in time. It is not necessary that the damage be effective since the law establishes that prohibited practices are those that produce or could produce unjustifiably barriers of entry. However, recidivism is considered as an aggravating circumstance involving the imposition of an additional fine.

8. Thus, the general welfare is assumed as standard criteria, so that both the producer and the consumer are covered by the scope of the law. This in order to avoid creating greater inefficiencies due to the protection of one or the other, which could generate negative externalities that impact the economy in aggregate terms. This is important in small economies where there are companies that have a significant impact on key variables for economic policy decision making, given their contribution to GDP, employment, trade balance, collections, among other important variables.

³ Quantification of Harm to Competition by National Courts and Competition Agencies 2011, (OECD).

9. As explained above, PRO-COMPETENCIA has not yet made estimates of damages, and is in the process of defining its methodological technique for calculating the same. However, within the techniques that are being considered are:

- Method based on comparison of the current price.
- Method based on regression analysis.
- Method of valuation of sales
- Among others.

10. Consequently, the types and sources of evidence will depend on the criteria that the Commission decides to adopt, for example, for the above criteria the price history before and after the behavior of the cartel would be used as sources of evidence. For the regression analysis the factors that determine the price of the thing in question, that vary between one and another, between markets are required.

11. It is important to emphasize that not all the necessary information is always available, there are setbacks due to the lack of institutional collaboration related to the statistical confidentiality of institutions that hold primary information, as well as the lack of collaboration of economic agents, since they are in the process of building a culture of transparency on competition issues. Additionally, some sectors are developed within the considered informal economy which does not regard systematization of the data. It should be noted that in the case of PRO-COMPETENCIA afore the refusal of an economic agent under investigation to deliver information within a process, the authority may use public force to obtain such information.