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**Amendments to Chilean Antitrust Law,
Decree Law N°211 of 1973 ("DL 211")**

José Manuel Bustamante

On July 13, 2009 new Law 20,361 amending DL 211 was published in the Official Gazette (the "New Law"). This reform is one of the most important amendments to DL 211 – Chilean antitrust law - from its enactment in 1973, and is directed mainly to the detection and punishment of collusive behavior and cartels.

The main changes introduced by the New Law to Chilean antitrust law are the following:

- Incorporates leniency rules as a mechanism to detect and punish cartels;
- Increases the powers of the National Economic Prosecutor (the "Prosecutor"), by providing new tools for the investigation and detection of collusive behavior;
- Increases the applicable fines for cartels;
- Increases the terms of the statute of limitations, particularly in the case of cartels;
- Amends the description of acts and conducts against free competition, particularly of collusive practices;
- Incorporates new standards to promote greater independence of members of the Court for the Defense of Free Competition (the "Competition Court") and the Prosecutor; and
- Amends the adversary and non adversary procedures.

Leniency rules

Following the trend of various countries, the New Law incorporates a leniency system as a tool to detect and punish cartels. The rules considers full fine exemption for the first member of a cartel approaching the authority and providing information leading to the penalization of other members, and reductions of up to 50% of the fines for subsequent *whistleblowers*.

Leniency programs will be administrated by the Prosecutor, before whom the member of the cartel that wants to obtain the benefits must provide the information "*leading to the confirmation of such conduct* [collusion practice] *and the identification of those responsible*".

The rules requires that no trial has been initiated before the Competition Court, and the fulfillment of three conditions: (i) the delivery of "*accurate, reliable and verifiable*" background information which represents an "*effective contribution*" to support the claim

that the Prosecutor should submit before the Competition Court; (ii) maintain the confidentiality regarding the request until the claim has been submitted or its records are filed; and, (iii) terminate the participation in the cartel.

The exemption from the fine will apply to those who meet the above mentioned requirements and are the first to approach the Prosecutor. The other members of the cartel may apply for a fine reduction of up to 50%, to the extent they comply with the requirements mentioned above, and provide additional background information to that already delivered.

The Prosecutor, when submitting its claim before the Competition Court, must identify the beneficiaries of the exemption and reduction of fines. If collusive behavior is confirmed, the Competition Court may not apply fines to the person or entity identified by the Prosecutor as beneficiary of the exemption, and may not impose higher fines than the ones proposed by the Prosecutor for the beneficiaries of the reductions. The foregoing shall not be applicable if, during the trial, it is proven that a beneficiary *“was the organizer of the unlawful conduct by coercing others to participate in it”*. Thus, the organizer of the cartel that has coerced other members may not qualify for the exemption or reduction and, therefore, shall be punished by Competition Court even though the Prosecutor has requested leniency.

As a way of discouraging abuse of the system, the New Law provides that those who make use of leniency *“knowingly based on false or fraudulent background information with the intent to harm other economic agents”* will be criminally punished.

Leniency rules shall become effective on October 12, 2009, and the Prosecutor is currently discussing a guideline related to the administrative aspects of the system.

Powers of the Prosecutor

The New Law broadens the existing powers of the Prosecutor, granting it very intrusive tools for the detection of collusive behavior.

The new authority permits the Prosecutor, in significant and qualified cases, during investigations related to cartels, and with prior approval of the Competition Court and authorized by a member of the Court of Appeals, to exercise the following measures:

- Enter into public or private premises;
- Register and seize objects and documents;
- Intercept communications, except those between individuals under investigation and certain qualified persons such as confessors or lawyers; and
- Request communication records to communications services companies.

Authorizations granted by a member of the Court of Appeals shall specify the measures, the deadline for its implementation and the persons it shall affect.

The New Law provides safeguards of Chilean criminal proceedings for the implementation of these measures, and establishes that in the event they do not comply with the requirements established by the law, the information obtained may not be used as evidence before the Competition Court.

Finally, the New Law authorizes the Prosecutor to enter into out of court agreements with entities subject to investigation. Such agreements shall be subject to the approval of the Competition Court and will be binding upon the parties.

Fines and statute of limitations

DL 211 establishes fines of up to 20,000 UTA (approximately US\$ 15,000,000 as of this date). The New Law increases the fines to up to 30,000 UTA (approximately US\$ 22,500,000 as of this date) for cartels. On other hand, it establishes the collaboration that the offender has granted to the Prosecutor as an element to be considered by the Competition Court in determining the fines.

The New Law also provides that fines imposed on individuals cannot be paid by their companies or by the shareholders or partners of the same.

Regarding statute of limitations, the New Law increases the general term from 2 to 3 years, and in cases of collusive behavior, to 5 years. In the latter case, the period *"will not begin as long as the effects on the market attributable to the conduct subject to the proceedings remain"*.

Description of acts and conducts

The New Law incorporates several clarifications to article 3 of DL 211, which contain the description of acts and conducts considered to be contraventions of free competition. The most important refers to the description of collusive behavior, having removed subjective motivation as a requirement of the violation. Similarly, the new language includes an express reference to conspiracy in public biddings.

Other amendments

The New Law includes additional provisions to emphasize independence of members of the Competition Court. These rules include salary increases, reelection for only

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one period for members of the Court, and the obligation to hold hearings at least three days a week (instead of two, as currently is the case).

The nomination of the National Economic Prosecutor will be made through the senior government official selection system, and once appointed shall last 4 years in office.

Regarding procedural matters, the New Law incorporates several amendments to the adversary and non adversary procedures, which are designed to make them more efficient and expeditious.

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If you have any questions or comments regarding new Law 20,361 amending DL 211, please feel free to contact José Manuel Bustamante (jmbustamante@urod.cl) or Gonzalo Rencoret (grencoret@urod.cl), or any of your regular contacts at the firm.