NOBOA PAGÁN ABOGADOS
REGULATORY BRIEFING NEWSLETTER

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Editor's Note. Dominican Senate is studying a Competition Bill. Price-fixing agreements prohibition rules of construction, according to US·s SCJ. By A. Noboa-Pagán.

This week, the Ministry of Industry and Commerce (*Secretaría de Estado de Industria y Comercio* "SEIC"), send to the Senate a reviewed version of the Dominican Competition Bill. This new version takes into account several comments and recommendations suggested by private sector·s organizations as well as attorneys, particularly regarding due process of law and other constitutional rights and Administrative Law rules. Comments were reviewed by the SEIC and I. De León, Ph. D., Executive Power·s consultant in this project and author of the original bill.

In our opinion this is a wise proposal useful to enter the legislation process that includes, between other steps, a public hearing to allow congressmen to hear any interested citizen's opinion.

One of the important issues was the determination of the nature of the price-fixing agreements prohibition; whether it shall be considered *per se* illegal or instead construed through a rule of reason analysis.

Just recently on February 28, the Supreme Court of Justice of the United States, held a decision in the petition made by Texaco Inc. and Shell Oil, Inc., regarding a previous judgment held by the Court of Appeal of the 9th circuit of said country. Petitioners collaborated in a joint venture, Equilon Entreprises, to refine and sell gasoline in the western United States, under the two companies' brand names.

After Equilon set a single price for both brands, respondents, Texaco and Shell Oil service station owners, brought suit alleging that, by unifying gas prices, under the two brands names, petitioners had violated the *per se* rule against price-fixing long recognized under Section 1 of the Sherman Act or Antitrust Act of the United States.

The District Court acting in first degree determined that rule of reason, rather than *per se* rule, governs respondents' claims, and that, by eschewing rule of reason analysis, respondent had failed to raise a reliable issue of fact. However, the Court of Appeal reversed, characterizing Texaco and Shell position as a request for an exception to the *per se* price-fixing prohibition, and rejecting that request.

Finally the SCJ of the U.S. determined that it is not *per se* illegal under section 1 of the Sherman Act, for a lawful, economically integrated joint venture to set prices at which it sales products. Although SCJ considered that Sherman Act prohibits "every contract (or) combination … in restraint of trade," reminded that it shall not be taken a literal approach to the language, recognizing instead, that Congress intended to outlaw only unreasonable restraints.

Moreover, under the rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. *Per se* liability is reserved for "plainly anticompetitive agreements". While "horizontal" price-fixing agreements between two or more competitors are *per se* unlawful, this case does not present such agreement, because Texaco and Shell Oil did not compete with one another in the relevant market, i. e. –gasoline sales to western service stations- but instead

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participated jointly through Equilon. When those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market. As such, Equilon's pricing policy may be price fixing in a literal sense and not price fixing in the antitrust sense.

SCJ pointed out that the court below erred in reaching the opposite conclusion under specific joint venture regulation. That doctrine has no application here, were the challenged business practice involves the core activity of the joint venture itself, the pricing of the very goods produced and sold by Equilon.

In the drafting of a Dominican Competition bill, opinions have been raised regarding the applicable rule in the construction of the price-fixing prohibition and other conducts, whether it shall be taken as *per se* illegal or instead submitted to the rule of reason analysis in each case and how shall the solution must be drafted. In this recent decision United States' SCJ explains: 1) *Per se* liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry to establish their illegality; 2) SCJ have expressed reluctance to adopt *per se* rule where the economic impact of certain practices is not immediately obvious; but, 3) Price-fixing agreements between two or more competitors, otherwise know as horizontal price-fixing agreements, fall into the category that are *per se* unlawful (this case doesn't not present such an agreement between Texaco and Shell).

Therefore, the solution adopted in the reviewed Dominican Competition bill delivered by SEIC this week to the Senate, where price-fixing is prohibited, not indicating however whether it shall be used the *per se* or the rule of reason analysis, leaving that decision to the regulatory authority or the acting judge, is consistent with the United States judicial criteria, because in the construction of the prohibition the acting authority shall take into account any efficiencies generated by the agreement, leaving therefore space for an a rule of reason analysis, when it is admissible or limited it to the per se rule, when there is no need for such analysis, depending on the characteristics of the specific case under investigation. This was the original recommendation of Dr. De León.

However, it is understandable that opposite to the United States Supreme Court of Justice, Dominican authorities are not yet exposed to the examine to the evolution of antitrust jurisprudence that the provision of the original bill acknowledges. To avoid discretional solutions it will be highly useful to attach to the Competition Bill at least some consideration of the provision accurate sense and rules of construction in the form of a Motives Statement document.

It is advisable to avoid the use of legislative solutions that allows a very wide range of exception cases allowed not related to the antitrust analysis or prevailing judicial and doctrinal criteria above mentioned. Admitting, as certain positions pretended, the celebration of price-fixing agreements and other conducts just because it contributes to competitiveness or technical and economic progress in the benefit of consumers would be inadequate. It will provide regulators with a very dangerous discretional faculty to admit exceptions in practically any case. In that

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sense, many firms or sectors can easily claim that a price-fixing agreement for their product or service enhances the country's competitiveness in the international market. However there's no automatic link between that product's attribute, *vis a vis*, the objective of a competition law intended to promote efficiencies within economic agents for the benefit of local consumers. It is necessary to undertake an analysis in each specific case to evaluate such agreement contribution to national market's efficiency.

Senate and parties with legitimate interest in the debate must be very careful and be aware of the best practices in the economic analysis admitted by the international case law and basic constitutional and administrative rules that an antitrust law shall promote and respect.

Institutional. Bill for purchase and contract of goods, works, services, and concessions under review by the National Congress. By B. Roa-Mateo.

The Bill for the Purchase and Contract of Goods, Services, Works, and Concessions was resubmitted to the Dominican Senate this past April 5, 2005 by the Executive Branch with the intent to replace laws No.295 and 105 of June 30, 1966 and March 16, 1967 respectively. The main objective of this bill, approved in first lecture on march 13 of the present year, is to establish a regulatory framework so that the Government, represented either by the central government, city councils, public companies, or decentralized institutions, may acquire goods and services, contract public works, and grant concessions within a purchase and contract system integrated by a set of principles, rules, agencies/committees and processes established by the law itself, with the objective to guarantee the public interest, progress, and social equity.

This project responds to rules provided in the DR-CAFTA in the interest to establish methods for planning and scheduling of public contracting and purchase processes that meet people's needs and requirements, as well as the budget and finance availabilities contemplated by the government at the required time.

Other novelties embodied in this bill's articles are the inclusion of governing principles on economy, flexibility, equity, transparency, and publicity; along with the procedures of selection and standards governing anything that has to do with purchasing and contracting, from presentation to evaluation, awarding, and final contract.

In addition, these articles provide that the offer, provision, acceptance or request of any valuable item with the intent to influence the conduct of a public official with respect to the process of contracting or execution of a contract shall be a cause for rejection of the proposal itself, regardless of the status of the selection procedure or contract. This limits the performance or actions by public officials with regard to an intervention role in government negotiations.

The project also establishes the limitation that contemplates the participation in biddings. It provides that individuals, whether natural persons or legal entities, interested in participating in any bidding or contracting process shall have previously registered in the appropriate national registry in order to support their solvency, reliability, experience and compatibility as to

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the social intent with respect the contract's object.

This project reacquires special relevance with the enactment this past February 22 of this year of the so-call "bridge decree" No. 36-06, through which the regulation for the application of the systems for the public contracting of goods, works, services and concessions was passed. This event puts in place a national system for government purchases and contracting in accordance with international standards as one of the requirements for the coming into force of the DR-CAFTA on July 1 of this year.

Competition/Telecommunications. EU opens antitrust probe into Telefonica. (Resource: The Associated Press/Brussels, Belgium)

Feb. 22 12:01 P.M. ET. European Union antitrust regulators opened a probe Wednesday into Spanish telecommunications company Telefonica S. A., claiming it appears to have abused a dominant position in Spain's market for broadband Internet access.

The European Commission said it had asked the company to reply within two months to a "statement of objections" outlining claims that Telefonica was squeezing margins to for new entrants that need access to the network structure.

Telefonica said Wednesday it had no comment.

Telefonica is the only Spanish network operator with national coverage, the EU said.

In the statement, the Commission said the "margin squeeze occurs because there is insufficient spread between Telefonica's prices for wholesale and its tariffs for retail broadband access to end users."

The Commission's assessment showed that new entrants have not been able to compete in the retail broadband access on the basis of Telefonica's national and regional wholesale products."

Telecommunications. INDOTEL passes resolution establishing the supplementary rule to law No. 126-02. By B. Roa-Mateo.

The Instituto Dominicano de las Telecomunicaciones (INDOTEL) (Dominican Telecommunications Institute) passed a resolution that establishes the supplementary rule to law No.126-02 on e-commerce, documents, and digital signature, relative to the determination of time in electronic media and Internet. This resolution sets a true reference, which in this Rule is called "Reference Time Signal," with respect to the time for the carrying out of electronic transactions, and electronic information treatments or transmissions, in which regulated subjects, public entities, and Internet Service Providers intervene.

This resolution establishes, among others, the distribution procedures of the already referred Time Signal through the Internet; the obligation of regulated subjects, public entities and Internet service providers to adjust their information systems to the distributed Reference Time Signal, and additionally establishes the obligation to use the Reference Time Signal for registrations and processes carried out by regulated subjects, public entities, or Internet Service Providers, thus indicating the effects of such use.

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Tax. DGII issues general rule providing the settlement and payment process for the payment of asset taxes. By B. Roa-Mateo

This past March 9, the Dirección General de Impuestos Internos (DGII) (Internal Tax Head Office) issued the general rule No. 03-06 that establishes the settlement and payment of asset taxes seeking to establish the appropriate tax administration and collection, previously established in article 19 of law 557-05.

Taxpayers of this tax include all natural individuals operating business as sole-owner businesses or any company conducting operations or not, with a one-time 1% annual rate, calculated on a taxable base that contemplates the total value of all assets of the taxpayer, including the real estate in the taxpayer's balance sheet, unadjusted of inflation, and upon application of depreciation deduction for uncollectibles.

Payment shall be submitted and made in the same income tax filed. Payment shall be made in two installments at a fixed date. The date may change based on the physical or legal nature of the taxpayer. The amount settled on account of the income tax payment shall be taken as a credit against the asset taxes for that same tax year, the payment obligation considered to be extinguished in the event the amount paid on account of the income tax exceeds or equals the asset taxes.

On the other hand, artificial persons exempted from income tax payment, by virtue of the present legislation, or agreements previously approved by the National Congress, shall also be exempted from payment of asset taxes.

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