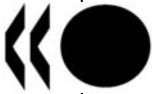

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Chile

-- Session II --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. A brief view of the Chilean system.

1. Chile has an important tradition on competition. The first principles about competition and market access were issued in 1959, even when the actual institutionality on competition was created by the Decree Law number 211 of 1973 and the subsequent reforms approved during the past decade.

2. The competition law in force has not considered a special definition or treatment for hard core cartels. This situation is explained by the fact that the Chilean law has only generic definitions of anticompetitive conducts.

3. The article 3 indicates: *"He who enters into or executes, whether individually of collectively, any deed, act or contract that prevents, restricts or hinders free competition or tends to produce such effects shall be liable to the measures prescribed by article 26 of this law, without prejudice to the corrective or restrictive measures that may be decreed in each case in respect of any such deed, act or contract. Among others the following deeds, acts or contracts shall be regarded as preventing, restricting or hindering free competition: (a) Expressed or implied agreements between business agents or concerted practices between them having the intent of fixing sale or purchase prices, limiting production or assigning themselves market zones or quotas, abusing the power conferred upon them by such agreements or practices*."

4. In simples words, according with the law, the hard core cartels are included in the generic form of "collectively agreements between business agents" under an explicit or implicit way. In the first case, the hard core cartels have an explicit agreement (but usually not written) in order to affect or cause distortion on the market. In the second, there is not an agreement, just a common behaviour between the competitors that produces the same effect. Both kinds of conducts are illegal under the Chilean competition law. The cartel under an "implicit agreement" creates a consciously parallel conduct.

5. From the view of the sanctions, the cartels, like all other anticompetitive conducts, are not prosecuted criminally in Chile, and they are principally subject to fines up to US$12.5 millions. Also, the law gives to the Competition Court the faculty to impose the amend or terminate the acts, contracts, agreements, systems or arrangements which are contrary to the provision of the law, including the amendment or dissolution of the partnerships, corporations of other private-law entities involved in the conduct.

6. The proof and the evidence are very important issues in the hard core cartel investigation and prosecution. In the Chilean case, the competition law provides some flexibility. One of them (and the most relevant) is the evaluation of the proof according with the *"sana crítica"* rule. This form of evaluation gives to the judges the opportunity to assign value to every single proof in harmony with the merit of the process and his or her logic and experience.

7. Other important matters are the presumptions or circumstantial evidence which is admitted in the process like effective way to prove a conduct. The article 22 indicates: *"The means of evidence indicated in the article 341 of the Code of Civil Procedure shall be admissible as proof, as well as any findings or grounds that, in the opinion of the Court, are fit to establishing the relevant facts…"*

8. The economic evidence is particularly relevant in those cases because the cartels and the collusive conducts in general, are not crimes under the Chilean law. Thus, the power of the Prosecutor to investigate is limited by law and cannot considere measures like interception telephones or other ways of communication.

9. In merit of that, the Court's treatment of cartels implies a thorough analysis of the facts and proof to conclude in economic evidence that permits enacting the collusive agreement. However, from the legal perspective, there is not any difference between the cartel with direct evidence and the other case (without it). In both cases, it is power of the Court to determine the sanctions and fines, considering, for legal mandatory, the "seriousness of the conduct" (article 27).

10. From the view of our system, the existence of some rules that give flexibility to the proof in the investigation of cartels and all other anticompetitive conducts, permits effective prosecution. However, the lack of some rules to investigate –in terrain- more effectively the conducts some time can create difficulties to carry on a case behind the Court.

2. "The fresh milk case"

11. On 1995, the Fiscalía Nacional Económica started an investigation in the market of fresh milk[1]. The investigation pretended to determinate the existence of some anticompetitive conducts among the six more important industries of milk-based products in the center and south of Chile.

12. After a long investigation, the competition authority required behind the "Resolutive Commission" (the preceding of the current Court of Competition) for the followings conducts: market distribution, refuse to buy[2], price discrimination, arbitrary reduction of prices in prejudice of providers and absence of a regular, clear and public process for the control of the fresh milk quality.

13. The Court's decision, issued in 2004, resolved this case and determined three relevant aspect for this market: (1) even when there is no barriers to entry or to exit from the market, it is very necessary to avoid the explicit or implicit agreements among the companies in order to coordinate they price politics, specially because they conform an effective oligopsony; (2) according with the proof, the market shows some imperfections and transparency absence that it needs to be correcting to prevent the exercise of market power; and (3) the transparency and the "no discrimination principle" are consubstantial for the competition, and it must be considered in the price determination process.

14. The more important measures in the decision were: (1) the milk processor industries must have a price list to buy with adequate information for the sellers; (2) any change in the conditions to buy, by the industry, must be notified at least with month in advance to the fresh-milk providers; (3) the refusal to buy must be founded; (4) the milk industries must have a register of refusal-bids; (5) the milk process industry must implement, within six months after the decision, a common system to determinate the milk quality. Also, this system must be approved by the competition agency.

15. This case shows with clarity a kind of agreement among competitors where there was no direct evidence of it. The Court, following the evidence and the proof compiled by the competition agency, stressed the necessity to incorporate such measures in order to improve the information on the market, giving protection to the providers and reducing the asymetry information.

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1. This market includes the milk producers like sellers and the milk products industry like buyers.

2. Refusal to buy for the fresh milk provider of the competitors in the market restricting the mobility of the provider in the milk industry.

16. At present, the competition agency is watching over the behaviour of the industries in this market to prevent those kinds of conducts, especially because the fresh-milk market structure is favourable to parallel conducts or agreements.