

Unclassified**English - Or. English**

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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 13 November 2019****Hub-and-spoke arrangements – Note by Chile**

4 December 2019

This document reproduces a written contribution from Chile submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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Chile

1. There is only one precedent in Chile in which the Chilean Competition Tribunal (“Tribunal”) has explicitly acknowledged a hub and spoke (“H&S”) cartel -- known as the “Supermarkets case”. In its final decision (Judgment No. 167/2019) the Tribunal established a standard regarding this kind of conduct and set up the criteria to condemn.

2. The case started in 2016, when the National Economic Prosecutor (“FNE”) filed a complaint against the three main supermarket chains in Chile (Walmart, Cencosud and SMU), accusing them of agreeing on a common minimum resale price for fresh poultry meat between 2008 and 2011. The price was set by each upstream supplier through vertical agreements signed individually with each supermarket. Allegedly, though, there was an implicit mutual understanding between the supermarkets that each of them would comply with the price.

3. According to the FNE, the case had then two core elements:

(1) The existence of a “rule” or mode of behavior among the supermarkets. This was the “vertical” component of the practice – i.e. a separate vertical restraint between each producer and each supermarket, which consisted of the prohibition of selling fresh poultry meat below the wholesale price¹.

(2) The voluntary observance of that rule by each chain, subject to the observance of the same rule by the other supermarket chains (the “horizontal” component of the practice).

4. Given the evidence submitted in the trial –mainly, e-mails exchanged between each supermarket and each producer requesting other supermarkets not to deviate from the rule and threatening punishments– the three defendants were found guilty. It was proved the rule existed and that its enforcement was conditioned to mutual compliance. The judgment also states that there was no alternative explanation that could justify the pattern of behavior displayed by the firms.

5. No charges were presented against each poultry producer². Each supermarket was condemned to fines that ranged from US\$3 to 5 million. Walmart benefited from a 15% fine reduction because it had an antitrust compliance program in place while the conduct was carried out, albeit highly incomplete. It was also considered that the firm improved its program after the conduct ended. It was the first time the Tribunal acknowledged that a firm may not be found liable if it has a complete and serious compliance program in place,

¹ It is important to mention that supermarkets usually sell products below their cost when those products are used as “traffic generators” to attract customers, in order to recoup those losses by the sale of other profitable products (chicken was considered a loss leading product or key value item).

² The same poultry producers had been previously sanctioned by the Tribunal in a different cartel case, for a market allocation agreement in the production of poultry between years 1994 and 2010 (Judgment No.139/2014, upheld by the Supreme Court). Perhaps the decision not to prosecute them in the Supermarkets case had legal considerations into account. The case was prosecuted under the former Chilean competition law, which sanctioned collusive agreements “among competitors”. In 2016, the law was amended, and now sanctions “agreements or concerted practices that involve competitors”.

and that the program may be considered a mitigating circumstance provided it fulfils certain standards.

6. The judgment of the Tribunal was challenged before the Supreme Court. The final decision is still pending. The Supreme Court is empowered to carry out a merit review of the Tribunal's decision.