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The Future of Effective Leniency Programmes – Note by Chile

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This document reproduces a written contribution from Chile submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. Introduction

1. According to article 39 bis, paragraph 5, of the Chilean Competition Defense Act¹, the benefits of the leniency program are not available for the organizer of the cartel which coerced the other members of the cartel to participate.

2. A decision by the Chilean Supreme Court, that revoked a decision by the Competition Defense Tribunal (*Tribunal de Defensa de la Libre Competencia*, or TDLC), has set the standard for excluding the benefits. This decision has been criticized for debilitating effective enforcement against cartels, as participants in cartel activity would be less likely to apply for leniency if one of the participants –usually the biggest member– would have no incentive to do it, therefore, making the cartel more stable.

3. This development has been one of several challenges that have occurred in Chilean law regarding leniency program. Leniency was enacted in 2009, after a pharmacy store chain confessed its participation in a cartel during trial, generating a significant impact in public opinion and a consensus regarding strengthening of competition defense laws. However, after more than a decade, although the focus of the Chilean system moved decisively to detecting and combating cartels as its priority, there has only been 8 cases based on leniency applications, representing 31% of the total of cartel cases brought before the TDLC since the program was enacted.

4. Several reasons have been proposed as causes of this phenomenon. In the first years of the program, there was uncertainty regarding its relation to criminal law, as it was proposed that an old provision of the Penal Code, related to the “natural price” of certain goods², could be used to prosecute members of a cartel, with no connection to the competition defense laws or the leniency program. That concern was addressed in 2016, when proper criminalization of cartel offenses was enacted in the competition law. Some academics have forwarded the idea that damages provisions disincentive applying for leniency, as it provides no benefits in that regard. Finally, protection of the leniency program was discussed during the drafting of a new constitution as per definition of the powers of the Chilean Attorney General.

2. The tissue paper cartel decision by the TDLC

5. On December 28th, 2017, the TDLC decided the so called “tissue paper cartel”, between CMPC Tissue S.A., an affiliate company of the largest Chilean paper producer, CMPC, and SCA Chile S.A. The cartel dated back to 2000 and was formed to end a price war caused by the entrance of a budget brand of toilet paper distributed by the largest supermarket chain. In any case, the cartel subsisted until 2012. In 2015, CMPC decided to apply for leniency. The FNE (*Fiscalía Nacional Económica*)³ brought the action on

¹ D.F.L. No. 1/2004/Economy, that establishes the consolidated, coordinated, and systematized text of Decree Law No. 211/1973, rules for free competition defense.

² Chilean Penal Code, article 285: “Those who, by fraudulent means, are able to alter the natural price of work, goods, shares, public or private rent, or any other goods that are the object of contracts (...)”.

³ The FNE (National Economic Prosecutor in English) is the agency in charge of the defense of competition and enforcement of competition laws. However, it does not have decision-making powers, therefore it has to

October 27th, 2017, asking for the maximum fines available at the time (aprox. USD \$23MM) granting the benefit of exemption of fine to CMPC.

6. During the judicial proceeding, coercion by CMPC to enter the cartel was one of the main defenses of SCA. The TDLC argued in Ruling No. 160/2017, that the definition of coercion under competition law must be construed in connection with the public interest protected by the statute. Therefore, the concept of coercion excluded any damages or threats of damages related to legitimate competitive acts directed to the subject of the threat. It also considered that a leniency program sacrifice sanctioning an agent that incurred in an unlawful conduct, to increase the ability of the system to detect cartels. Following that idea, the TDLC stated that anticompetitive conduct would also be outside the scope of the concept of coercion under competition law.

7. The Tribunal argued that if the law allows an agent to be exempted from fines even though it was part of a cartel to increase the chance of detection, it would be inconsistent with that objective to deprive the same agent of the benefit because it incurred in a less severe conduct than be a part of a cartel. The TDLC relied in a legal opinion by Ioannis Lianos to argue that a more relaxed coercion standard would be detrimental to the effectivity of the leniency program.

8. Therefore, the TDLC defined “coercion” under Chilean competition law as physical violence or the threat of, or irresistible emotional violence. Those forms of violence nullify the will of the subject, impeding a different course of action; in a sense, it would be a situation analogous to *force majeure*. There would be no agreement, as the collusion would be the result of only one of the members of the cartel. The agent that suffered the coercion would have been prevented to ask for the assistance of the agency.

9. As there was no evidence of physical violence or irresistible force, but only of threats of economic nature, the TDLC dismissed SCA’s allegations and maintained the exemption granted to CMPC. Note that the TDLC determined that CMPC was an *organizer* of the cartel, using a broad concept. However, for removing the benefits, Chilean law demands both to be an organizer and to have coerced the other members of the cartel.

3. The tissue paper cartel under the Supreme Court

10. The Supreme Court thought otherwise. Pointing out that a cartel offense demands the existence of an *agreement*, it concluded that the TDLC standard for coercion would be contradictory with that requirement, as physical violence or an irresistible force would eliminate the will of the other members, and there can be no agreement without consent. The Court also noted that assimilation of coercion and *vis absoluta*, would be a standard exceeding that of criminal law. Therefore, it follows that coercion must have a different meaning.

11. According to the Supreme Court, coercion has to be construed as a form of *duress*, this is, as a form of *vis compulsiva*. However, it is a different kind of duress because competition law applies to companies; physical violence is irrelevant to them. A threat of severe economic damage could be a significant pressure and can be deemed as coercion.

12. In the particular case, the Court notice that the relevant market was a highly concentrated one, where CMPC had a market share around 75%, while SCA never surpassed 24%, for at least the prior eleven years. The evidence in the case file pointed to

sue offenders before the TDLC, a specialized court for competition matters. TDLC decisions are subject to the Supreme Court revision through appeal.

a hard roof fixated by CMPC for SCA's market share, accepted by SCA, a company that could not challenge CMPC's position. The Court affirmed that CMPC exerted significant pressure on SCA to be a part of the cartel, that the threats of making SCA disappear were credible, as the market position of both parties were asymmetric, with one of them having three times the market share of the other. The Court concluded its reasoning by referring to the requirements of duress in private law: a force *unlawful, severe* and *determinant* for entering into the agreement, and affirming that all of them were present in this case. The final decision was to partially revoke the benefits granted to CMPC, imposing a fine equivalent to 2/3 of the legal maximum, even though it was established that CMPC obtained an economic benefit that exceeded several times that legal maximum⁴.

13. However, although CMPC was deemed as the organizer of the cartel, and to have coerced SCA, this company did not get any benefits. The Supreme Court pointed out that SCA had a duty to denounce the anticompetitive behavior of CMPC in order to leave the cartel, but it preferred to keep participating in it and modifying its plans accordingly. Also, the law does not contemplate coercion as an attenuating factor for the fine, but only to revoke benefits granted to the one who exerted it.

4. The leniency program after the tissue paper cartel case

14. The tissue paper cartel decision is the only one regarding the coercion exemption under the leniency program. Although *a priori* the Supreme Court seems to establish a lower legal standard than the TDLC, it could be argued it is not actually detrimental to the effectiveness of leniency or diminishes the incentives to apply for leniency.

15. First, the legal standard set by the TDLC, that assimilated coercion with *vis absoluta*, it is contradictory with the concept of coercion, and –as stated– would suppose a higher standard than the one applicable in criminal law. A leniency program assumes a tradeoff between effectiveness and moral responsibility, prioritizing cartel detection over retribution. However, at least in the current state of Chilean law, some balance must be achieved between the different goals of competition law. Assuming that coercion would only be established through the threat or exercise of physical violence or an irresistible moral force, would signifies a complete instrumentalization of the law in order to increase the effectiveness of cartel detection through leniency applications, as the standard becomes unachievable, and the coercion clause, inapplicable in practice. A minimum moral component demands an interpretation that provides meaning to legal provisions.

16. Second, beyond the legal standard set forth by the Supreme Court, which relies on concepts originated in contract law, the real question is regarding the standard of proof. Definition of the level of pressure that would cause a modification of conduct through the threat of significant economic damage is a question of fact, where the circumstances, such as market share, structure or barriers of entry became relevant. A credible threat depends on several factors. In the tissue case, the size and market share difference between the companies was a defining factor. Notwithstanding, it seems clear that lawful commercial strategies that cause injury to a competitor cannot be deemed as coercion, no matter how credible or effective would be.

17. Third, one aspect sidestepped in the Supreme Court decision was the risk of the so-called *strategic leniency*. During the legislative discussion regarding enactment of the

⁴ The law would be amended in 2016, increasing the maximum fine to 30% of the sales of the relevant line of business, or double the economic benefit. If neither of those amounts can be determined, the maximum applicable fine is approximately USD \$45MM.

leniency program, the main reason put forward to include a coercion clause was to avoid a situation where an economic agent organizes a cartel with the purpose of applying for leniency later and cause injury to the other members, this is, its own competitors. A standard such as the one proposed by the TDLC would difficult the approach to this kind of cases.

18. The number of cases brought based on leniency applications has been low, with no evidence than this particular case had been decisive. Therefore, there seems to be other factors at play that thwarts the effectiveness of the program. A major issue has been the lack of coordination between prosecution under competition law and under criminal law. Criminal prosecution of white-collar crime in Chile is associated by public opinion with low sanctions, but lengthy and torturous proceedings. Following formal criminalization of cartel in 2016, there has been only one case brought before the TDLC based on a leniency application. In that case, the application was by a whistleblower, not by a company representative.

19. Another potential element detrimental for the effectiveness of the leniency program is the civil damages provision. Under Chilean law, leniency does not provide any benefits regarding damages actions. Damages actions, individual and class actions, had surged in popularity in the last few years, and could signify a massive economic impact for a company accused of participating on a cartel. The law establishes a shorter procedure, where the discussion is limited to existence and quantification of damages, but only after a final ruling of the competition case. Also, in application of a tort law rule, all members of a cartel, no matter how big or small, are several and jointly liable. If the probability of subsequent civil liability is high enough, incentives for applying to the leniency program are greatly reduced.

5. Conclusion

20. Leniency has never been the main source of cases in the Chilean competition defense system. Since its inception in 2009, there have been 26 cartel cases, but only 8 have been born of a leniency application. Therefore, strengthening the program is one of the pressing issues in Chilean law today. Enforcement of competition law through other strategies, such as an increase in dawn raids and market monitoring is one of the ways by which the FNE could increase incentives for applying to the leniency program, but it is imperative to provide certainty regarding the economic benefits of applying. Higher fines and new sanctions such as disqualification of company directors and executives had been introduced recently, although no decisions have been issued.

21. The coercion standard set forth by the Supreme Court in the tissue paper cartel case is a significant milestone. It clearly states that legal interpretation of the statute demands more than just an instrumental reading of the requirements of the law, forcing the decision makers to incorporate a minimum moral element in their analysis. It also elevates the factual circumstances of the market as a main concern to assess the credibility and severity of the threats. However, the main question remains related to the standard of proof required.

22. Effectiveness of the leniency program as a tool for cartel detection in Chile demands a more profound investigation and data gathering, to determine the elements that are detrimental to its success. Notwithstanding, the specialized competition judiciary have a major responsibility to set forth adequate standards that grant a high level of certainty for economic agents.