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ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by the Delegation of Chile --

This note is submitted by the delegation of Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by Chile[1] --

1. Background

1. The concept of competitive markets requires strong assumptions, not easily observable in real life. Among others, transparency (understood as common knowledge about prices and costs, and symmetric information among market players), no entry barriers and low switching costs (or better still, no switching costs at all). Asymmetry of information is the key issue of information economics. Entry barriers and switching costs are dealt with by antitrust policy, but price transparency is not as clear as those other issues.

2. Market and price transparency are a common goal for consumer protection agencies and sector regulators (such as in the bank or financial industry) all over the world, grounded in the fact that easy access to information on prices and product characteristics is a *conditio sine qua non* for consumers to be able to compare and choose (comparison shopping), reducing search costs, and reaching effective decisions given their preferences. Of course, consumers also need to be able to deal with the complexity of such information, but there is no doubt that well informed, confident and effective consumers can play a key role in activating competition between undertakings. In addition, due to the fact that in a market economy prices are the right signal for allocating resources, price transparency could also benefit potential entrants in markets.

3. However, antitrust agencies must confront and asses price and market transparency with caution, because of the risks of anticompetitive practices they can give rise to. For instance, price and market transparency solves the "veil of ignorance" concerning the actions of rival undertakings, making conscious parallelism, concerted practices and collusion easier than otherwise. Such “negative impact is especially likely in markets already prone to anti-competitive coordination” and increasing “price transparency is unlikely to significantly increase the risk of anti-competitive co-ordination unless the affected markets are already particularly susceptible to such co-ordination” (OECD, 2001). Thus, balancing the pros and cons of price transparency is not an easy task. Antitrust agencies should carefully assess the characteristics of affected markets, how the suppliers acquire, use and react to price information and which are the benefits for buyers, in order to measure the impact of enhancing price transparency for the society as a whole.

4. The exchange of information among competitors is a different and more complex issue faced by antitrust authorities. Actually, there are multiples ways in which these information exchanges can take place: public announcements, information and data shared by trade associations, or sharing past transactions and future intentions or market positions directly among competitors. Even though information exchange could sometimes be pro-competitive -implying efficiency gains for society-, there are some situations where these information exchanges make firms aware of their competitors’ market

[1] Note submitted by the FNE, Chile. The FNE is an independent government competition agency in charge of detecting, investigating and prosecuting competition law infringements, issuing technical reports and performing competition advocacy. Its enforcement actions are brought before the Competition Tribunal (Tribunal de Defensa de la Libre Competencia-TDLC) which has adjucative powers on competition matters. The FNE’s website is available at www.fne.gob.cl.

strategies lessening rivalry among them, with possible restrictive effects on market competition. In fact, information exchanges have a strong potential for collusion, facilitating the implementation of a cartel by enabling undertakings to monitor the compliance of an agreement. According to the experience of competition authorities in Chile, the outcome of information exchange in the affected market depends on the nature of the information exchanged and on the characteristics of the industry in which it took place.

2. The Chilean Competition System and the Competition Act

5. The Chilean Competition Act was established by Decree Law No. 211 (DL No. 211) in 1973 and its subsequent amendments. Its first article establishes that the purpose of the law is "to promote and defend free competition in markets". It then spells out the institutional framework, the authority of the National Economic Prosecutor and the National Economic Prosecutor's Office (FNE) who represent the general interest, and the Competition Tribunal (Tribunal de Defensa de la Libre Competencia-TDLC). These institutions are in charge of investigating (FNE) and sanctioning (TDLC) anticompetitive conducts. In subsequent articles, DL No. 211 states that the anticompetitive illicit is "…any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects…" in a broad sense (Article 3). The following sections of the Act illustrate anticompetitive behaviours, like collusive agreements between competitors and abuses of a dominant position.

6. The Chilean statute does not distinguish between anticompetitive conducts submitted to a per se illegal rule, and those analysed under a rule of reason. The Competition Act does not consider general procedures for defining markets, market share presumptions as indicators of dominance, thresholds for evaluating market concentration, references to entry barriers nor indicators of the scope of an efficiency defence. In this sense, the analyses by the TDLC has traditionally been performed on a case by case basis, which includes, among others, the definition of the relevant market and the identification of market power used or obtained in a wrongful way, or –in merger analysis- the assessment of the risks of abuses or coordination in the future market scenario. In this sense, and unless a previous order or injunction has been issued by the TDLC regarding a specific sector or industry, under the provisions of the Competition Act, it is hard to conceive the exchange of information among competitors as a per se restriction of competition. Hence, a conduct of this kind would be analyzed under its own merits and in the context of an investigation, with particular attention to the potential or actual effects that such exchange of information would have in the markets.

7. Regarding how the FNE approaches price and market transparency, its Guide for the Analysis of Horizontal Concentration Operations -which is an internal working tool, non binding for the TDLC- expressly refers to this issue as a criteria for describing and analysing the markets involved, particularly about the risks of coordination in markets affected by M&As. Among other criteria, the Guide states that the FNE will analyse the decline in the number of competitors and the risk of coordination among those which remain in the market, considering among others, the flow of information from existing competitors in the market, that would enhance mutual monitoring, which can be facilitated, for instance by the existence of trade associations or legal entities to which the competitors belong (especially those who own and/or manage inputs or essential infrastructure).

8. On the other hand, for investigating concerted practices or collusion, the FNE does not have an internal guideline or protocol but its analysis follow international guidelines and best practices recommended by the International Competition Network. Accordingly, price and market transparency as well as the exchange of information among competitors are considered, at the least, as facilitating practices for anticompetitive conducts, being carefully scrutinized by the case handlers in order to assess their implications.

3. Experience of Chilean competition authorities regarding enhancing price transparency

9. Although underlying the Chilean competition authorities' experience there is no unique approach towards cases where price or market transparency has been a key issue, there are cases where the balance has shifted toward the pro-competitive effects of enhancing transparency.

3.1 Cases where enhanced price transparency has been ordered

10. **Cow raw milk producers**. Markets with value chains characterized by many intermediate stages between the primary producer and the final consumer can have competition concerns, particularly where there is an imbalance between buyer power and seller power in some stages of the chain. As in some other jurisdictions, in Chile the relation between cow raw milk producers and dairy processors has been a matter of investigation and decision by the competition authorities.

11. In 1997, the FNE began an investigation against six dairy processors (including a number of subsidiaries of multinational companies) and brought a case before the '*Comisión Resolutiva*[2]'. The processors were accused, either together or individually, of various infringements to the Competition Act, including abuse of their dominant position against suppliers (discriminatory pricing and refusal to deal -or purchase refusal) and colluding to determine market share, among others. In 2004, the TDLC issued a ruling[3] rejecting most of the grounds of the FNE's claim, due to lack of sufficient evidence of collusion (market share agreement) and of proof of a refusal to deal. However, the TDLC did find evidence to issue a holding on discriminatory pricing, imposing a fine to one of the accused processors. In addition, the TDLC detected an imbalance of power in the relationship between dairies and milk producers due to the lack of transparency in the market for the acquisition of raw milk, to the detriment of the producers. Accordingly, the TDLC's provision established general instructions for purchases -for instance, that trade conditions must be clear, transparent, objective, non discriminatory and precise, or that the trade terms cannot be changed ex post, or unilaterally, and should be in writing and known by both parties- but also defined precise mechanisms to ensure enhanced price transparency: "There shall be price lists detailing the parameters that compose it, in order to avoid arbitrary differences that affected the cow raw milk producers" or "Prices could not be grounded on historical quotient between winter and summer deliveries".

12. **Pharmaceutical industry**. In early 2000, the *Comision Preventiva Central* (CPC) opened a case concerned about the performance of the pharmaceutical market with respect to final customers, mainly due to the increasing development of big retail pharmacy chains (or 'pharma-retail'). The scale differences between 'pharma-retail' and the independent retail pharmacies (or traditional channel), and the subsequent asymmetric bargaining power between them with respect to their pharmaceutical suppliers, exposed the latter to severe risks, either being directly abused by laboratories' seller power–for instance, by means of a discriminatory pricing scheme-, or excluded by the 'pharma-retail' –for instance, through predatory pricing. To avoid these risks, the CPC issued general instructions[4] ordering pharmaceutical industry suppliers that sell products (drugs or other items) as wholesalers to retail pharmacies[5], to disclose permanent information about their products and selling conditions (price lists and credit conditions). All of these providers must keep that information updated and publicly disclosed in their premises and on a website. The FNE was in charge of ensuring the compliance of this provision.

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2 The '*Comisión Resolutiva*' and the central and regional Consultative Commissions (the *Comisiones Preventivas*, central (CPC) and regional) were the former institutions in charge of deciding about competition issues according to the Chilean Competition Act, before the current Competition Tribunal (TDLC) was established in 2003.

3 Ruling No. 7/2004. Spanish text available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_07_2004.pdf

4 Resolution No. 634/2001, Resolution No. 638/2002 and Resolution No. 729 / 2004.

5 The rules are directed to pharmaceutical production laboratories, pharmacies, warehouses, distribution centers and importers of pharmaceutical products.

13. In 2005, the FNE examined the compliance of these rules over a random sample of 17 pharmaceuticals. Based on its findings, the FNE brought a case before the TDLC, which after a due process sanctioned pharmaceutical companies with several fines for the violation of the general instructions[6], a decision affirmed by the Supreme Court[7].

14. After these events, in a non-adversarial procedure, pharmaceuticals requested before the TDLC the abrogation of the general instruction on transparency. The TDLC dismissed this petition while stating, among other considerations, that the goal of this general instruction was to enhance competition of pharmaceuticals sales to final consumers, and that was the reason why the publicity of prices and other commercial terms was required. Thus, more transparency was achieved and so was the possibility for small retail pharmacies to compete fairly with strong retail pharmacy chains was enhanced"[8] (Decision No. 12, Ground 3). Thus, the transparency provisions are still enforceable, even though it is not fully economic efficiency-oriented but also fairness-oriented, protecting the traditional channel (mostly small and medium sized enterprises), as was previously identified in the 2004 OECD/IDB peer review.

15. Banking credit card-management: **FNE v/s Transbank**. Transbank is a facility owned by the Chilean banks since 1986, which operates a multi-sided platform where, on the one side, manages a network of more than 60 thousand affiliated merchants; and on the other side, administrates all banking credit cards issued in the country (Visa, Mastercard, Magna, American Express and Diners Club) as well as debit cards (same cards used to accessing the banking ATM network), with national and international coverage (Electron and Maestro). In addition, Transbank also manages '*Webpay'*, the Internet payment service, and supplies the acquiring and operating services for cards issued by some large retailers.

16. In this scenario, as a platform administrator for credit cards, during 2001 and 2002 Transbank was the sole supplier to the commercial stores accepting payment cards of computer facilities and operating terminals for its business. It was accused of an abuse of a dominant position by imposing a discriminatory pricing structure to card issuers and predatory and discriminatory prices to stores that accepted bank-issued cards. Although the case began in 2003 before the former 'Comisión Preventiva Central' (CPC) which issued the preliminary decision, it was not completely decided until 2005, when the TDLC issued its decision[9]. In its final ruling, the TDLC imposed Transbank a fine for its discriminatory conduct, also approving a partial settlement between the FNE and Transbank, which established a self-regulation scheme ('Plan de Autorregulación', PAR) to be periodically overseen by the FNE. The PAR scheme ensures that the charges made by Transbank to both the merchant side and affiliated card issuers are based on an objective pricing mechanism -linked to economic criteria such as volume of transactions, average ticket value and risk associated to each type of merchant- and has been applied onwards by the firm. The scheme for tariffs and charges is publicly available for customers on Tansbank's website[10].

17. The agreement reached by the FNE and approved by the TDLC, enhanced price transparency and was an instrument aimed at preventing abusive tariffs charged by Transbank to both the merchant side and affiliated card issuer.

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6 TDLC Ruling No. 33/2005. Spanish text available at: www.tdlc.cl/DocumentosMultiples/Sentencia_33_2005.pdf

7 Supreme Court, 18.05.2006, file 6359-2005.

8 TDLC Decision N° 12/2006. Spanish text available at: http://www.tdlc.cl/DocumentosMultiples/Resolucion-12-2006.pdf

9 TDLC, Ruling No 29 /2005. Spanish text available at: www.tdlc.cl/DocumentosMultiples/Sentencia_29_2005.pdf

10 For instance, https://www.transbank.cl/tbk_t_2.asp

3.2 Cases where excessive transparency has been identified as a potential risk for competition

18. There have also been cases where the TDLC has expressly recognized the risks of excessive transparency.

19. For instance, it stated that "...it is feasible to appreciate ... a number of factors that may be consistent with a collusive agreement: (a) the existence of a small number of competitors, (b) the frequent interaction between the undertakings, (c) a remarkable transparency of information about the competitors, and (d) the presence of entry barriers to market." (TDLC, Ruling No 57/2007, Gr. No. 69) in re FNE vs. Private Health Insurance Companies case[11].

20. In this case, the FNE submitted charges against the major private health insurance companies (or ISAPREs), accusing them to collude for reducing the percentage of coverage of the benefits of their marketed health plans[12] harming their affiliated. Although the FNE's case did not succeed -because of insufficient evidence for satisfying the standard of proof of the existence of an agreement-, the TDLC endorsed the FNE's position that information flows regarding the companies' sales teams and periodical reports about the insurers and their insurance plans disclosed by the sector regulator, were an expeditious information channel leading to parallel conducts[13].

3.3 Information exchanges between competitors

21. As was stated in the first chapter, information exchanges among competitors could adopt several forms. In the following case review, we would like to highlight those differences revealed from recent cases prosecuted by the FNE.

22. **The AM Patagonia case**. In 2006, the FNE brought a case before the TDLC against AM Patagonia, which was a privately held corporation of specialists physicians formed in Punta Arenas, a southern region of Chile. This entity grouped 84 physicians who work in that region (from a total of 204). For some medical specialities, the physicians who were part of the corporation had a dominant position (or even a monopoly) in the relevant market. The case focused on a price agreement -unifying their tariffs by speciality and other conditions of medical benefits-, which was agreed upon as individual professionals during the corporation's shareholders meetings. In fact, since its constitution, the entity clearly stated that one of its goals would be to get enough countervailing power for bargaining about their tariffs with the private health insurance companies, negotiating as a block, with common prices based upon the "...excellent geographical position in which we are". All the evidence came from their meetings, acts and videos they recorded. The decision on this case was issued by the TDLC in 2008[14], fining the physicians for price agreement. However, in the judicial review, the Supreme Court reduced the fine adducing proportionally to the effects of the conduct in the market, and the short period during which the conduct was performed.

23. **The AGMital case**. In 2006, the FNE brought a case before the TDLC against AGMital, a local transport trade association. The alleged anticompetitive behaviour was a price agreement among the associates intended to exclude a non-associated entrant by charging a predatory tariff in the same route, besides threatening him. Members made shifts to put pressure on the entrant, so that they could share the

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11 TDLC, Ruling No 57/2007. Spanish text available at: www.tdlc.cl/DocumentosMultiples/Sentencia_57_2007.pdf

12 It is mandatory for formal workers to contract a health insurance plan, given the Chilean social security scheme.

13 TDLC Ruling 57/2007, Gr. 75.

14 TDLC, Ruling No 74/2005. Spanish text available at: www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1726&GUID=

predatory losses. The information exchange among competitors -the associated ones- was, therefore, the mechanism for designing and implementing the agreement. The TDLC ruled the case in 2010[15], fining the trade association.

4. Final remarks

24. The cases described above show that exchange of information among competitors is also an important issue for competition authorities in Chile, having been subject to important enforcement actions and decisions. In particular, as many other jurisdictions have previously done, the FNE is currently facing the challenge of instilling competition principles in the business community in general and, in particular, within trade associations. As an important step in these efforts, the FNE is currently in the process of drafting a guideline on competition principles for trade associations with the aim that their individual members understand their obligations under the Competition Act. This guideline will include practical steps that the trade associations can take in order to reduce the risks of breaching the DL No 211. Its official release is scheduled for November 2010.

[15] TDLC, Ruling No 102/2010. Spanish text available at: www.tdlc.cl/DocumentosMultiples/Sentencia_102_2010.pdf