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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

UNILATERAL DISCLOSURE OF INFORMATION WITH ANTICOMPETITIVE EFFECTS (E.G. THROUGH PRESS ANNOUNCEMENTS)

-- Chile --

14 February 2012

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2011.

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English - Or. English

1. Legal provisions

1. According to the provisions of the Chilean Competition Act ("Act" or "DL 211"), in order to find an infringement of the law's provisions for a unilateral disclosure of sensitive information, there is no need to prove an explicit "agreement" among competitors.

2. Unilateral disclosure of sensitive information having anticompetitive effects may be framed as a tacit agreement or a concerted practice, as an invitation to collude, or as a unilateral conduct having anticompetitive effects.

3. Different sections of the Act allow for these different framings.

4. Regarding 'unilateral conduct having anticompetitive effects', the broad provision of Article 3 section 1, expresses: "*Whoever executes or enters into any act*, … **individually***, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized with the measures indicated in Article 26 hereof, notwithstanding any preventive, corrective or restrictive measures that could be ordered in each case, with regard to said acts*, …". The provision has been traditionally construed as requiring market power.

5. As to the framings of 'tacit agreement' or 'concerted practice', Article 3 section 2 a), expresses: "Among others, the following shall be considered as acts, agreements or conventions that hinder, restrict or impede free competition, or which tend to produce said effects: a) Express or **tacit agreements between competitors**, or **concerted practices** between them, which confer to them market power and which consist of fixing sale prices, purchase prices, or other commercial terms and conditions, restricting output, allocating territories or market quotas, excluding competitors, or affecting the results of tender processes (bid rigging)."

6. Finally, regarding 'invitations to collude', even though such behavior is not considered by the provisions of the Act, it could be argued that punishing attempts or failures of committing an unlawful conduct is a criminal law principle applicable to administrative law infringements such as violations to the Competition Act[1].

7. No matter what framework is chosen for analyzing unilateral disclosure of information, in Chile, in order to be punishable, the potential effects of the conduct –whether its own or those risen by the concurrence of a hypothetical subsequent reaction of a competitor– should be proven and assessed.

2. Enforcement practices

8. Since the enactment of Law N°20.361/2009 which reinforced effectiveness of investigations in cartel behavior (introducing leniency, wiretapping and raids powers), FNE's[2] efforts in enforcement have been oriented towards high impact cartel cases with direct evidence. Unilateral behavior has been

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1 The Competition Tribunal ("TDLC") gave grounds in favor of arguing that attempts or failures of committing an unlawful agreement are punishable. Analyzing a conduct consisting in using an agreement with regards to a specific target as a *test case* in order to further extend the anticompetitive agreement to other targets, the TDLC held: "…*it is not proven that coordinated actions have actually taken place* ***or were attempted***...". TDLC, October 19th, 2011, Ruling N° 113/2011, Rc. 48°.

2 FNE is the acronym for Fiscalía Nacional Económica, the Competition Agency in Chile in charge -in the enforcement field- of investigating, prosecuting and litigating competition law cases before the TDLC and other tribunals.

identified as part of the evidence grounding FNE's complaints in some cases but the FNE has not assessed these unilateral conducts in isolation, but as a component of coordinated behavior among competitors. However, before these legal amendments were enacted, concerted practices and tacit collusion were used as theories of the case when proofs were limited to circumstantial evidence. In the final section of this contribution cases illustrating both periods are summarized.

3. Policy guidance

9. In 2011, in order to clarify core concepts and promote compliance with competition law in the field of trade associations (TAs), the FNE issued an advocacy document on competition law and TAs[3]. The document conveyed the FNE's vision in matters of competition law concerning collaboration between competitors, recommendations on commercial practices formulated by TAs, formal aspects and content regarding TAs meetings, boycott infringements, criteria and conditions for TAs membership, essential services offered by TAs to members and non-members, self-regulation by TAs, standards setting, advertising, standard contracts and general marketing conditions. For each of these issues, the document provides specific recommendations to guide TAs and their members.

10. Though the document covers primarily information exchanges among competitors participating in a TA, those criteria are useful for guidance for competitors when deciding unilaterally to disclose information. For instance, the document explains that the following is considered competitive sensitive information: information concerning pricing policy (current or future prices), costs structures, outcome volumes (current or future), expansion and investment plans, imports policy, information regarding market shares, clientele lists, discounts policy, payment conditions, marketing strategies, and design and content of bid for tenders. Companies should be careful when disclosing such information.

4. Cases

4.1. Complaint for cartel case in the poultry industry (2011)

11. In a complaint for cartel conduct in the poultry industry submitted by the FNE in 2011, one of the facts considered by the FNE was a press interview of one of the defendants' CEO. In this interview, this CEO expressed: "*Fighting against Super Pollo* [one of its competitors]... *what for? It is better to coexist. As the idiom says, if you cannot beat your powerful enemy, join him. We have a strong trade association along with Ariztía and Agrosuper* [its competitors] *through which we have been able to reach agreements regarding which part of the market belongs to each one. We will not jeopardize our reputation for a 1% more"*[4].

12. However, as explained above, this unilateral act was not used in isolation, but as part of a set of evidence that also include information gathered during a search in companies' premisessuch as e-mails between competitors, among others. All the above is supporting a cartel accusation.

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3 A preliminary draft was presented for public comment and consultation and preceded by a study conducted by a university research center specialized in regulation and competition, who reviewed the practice of case law by antitrust authorities in Chile over a 35 year period, including also foreign literature. During the consultation period, the FNE received comments and observations from approximately 30 TAs, including business associations and professional associations, and simultaneously held work meetings with the most important TAs in the country.

4 Translated from an interview in "El Mercurio", "Revista del Campo" supplement, April 16th, 2007; quoted by the FNE's complaint for cartel conduct in the poultry industry, available at: http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20FNE%2030%2011%202011.pdf ¶ 40.

4.2. Private health insurance (ISAPRES) case (2007)

13. In 2005, the FNE submitted charges against the major private health insurance companies (ISAPREs), accusing them of colluding to reduce the coverage of their marketed health plans, harming their affiliates. As a matter of fact, until May 2002 plans offering 100-80 coverage (i.e. 100% coverage in hospitalizations and 80% in ambulatory services) represented 96.7% of Isapres' sold plans. In 2004, after a serial of constant reductions by each defendant Isapre, 100-80 coverage plans reduced to only 7.5% of the sold plans whereas 90-70 plans reached 90.6% of the total. These changes in the available plans in the market translated, additionally, in increases in Isapres' benefits that had no other justification.

14. The accusation was dismissed in a divided ruling, by the TDLC and by the Supreme Court. However, it is worth noting that the TDLC analyzed different factors that could be indicating a collusive agreement, notably the frequent interaction among competitors and high degrees of transparency of information on competitors[5].

15. Various opportunities for interactions among competitors within their trade association were identified, going beyond the regular meetings of the association (e.g. technical committees, meetings of the companies' chairmen meetings, etc.). In addition, the TDLC identified that employees of the marketing branches of companies had easy access to the information of health insurance plans marketed by competitors.

16. The above mentioned interactions, in addition to public information provided by the Regulator as well as the constant reciprocal monitoring among the companies translated into high degrees of transparency in the market.

17. The aforementioned factors (interactions among competitors and transparency) supported the thesis of parallelism. However, the TDLC held that proving parallelism was not enough to establish a collusive agreement. The lack of plus factors led the TDLC to discard the accusation.

5 TDLC, Ruling No 57/2007, Rc. 69 and ff. Spanish text available at: http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=794&GUID=