

# OBSERVATIONS ON PROPOSED AMENDMENTS TO THE CHILEAN COMPETITION LAW

Competition Day

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# AMENDMENTS TO CHILEAN COMPETITION LAW

## STRUCTURE OF PRESENTATION

- ◉ INTRODUCTION
- ◉ CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER
- ◉ CRIMINALISATION
- ◉ CONCLUSION

# AMENDMENTS TO CHILEAN COMPETITION LAW

## INTRODUCTION

- ◉ IN RECENT YEARS THERE HAS BEEN INCREASED ENFORCEMENT ACTION AGAINST CARTEL BEHAVIOUR IN CHILE
  - *POULTRY TRADERS ASSOCIATION*
  - *ASPHALT*
  - *BUS SERVICES*
  - *TISSUE*
- ◉ THERE IS NOW A FUNCTIONING LENIENCY REGIME; AND POWERS TO CONDUCT DAWN RAIDS ETC.

# AMENDMENTS TO CHILEAN COMPETITION LAW

## INTRODUCTION

- ◉ BUT IS THE SYSTEM TRULY EFFECTIVE?
- ◉ IN PARTICULAR, ARE THE SANCTIONS FOR INFRINGEMENT SUFFICIENT?
- ◉ ARTICLE 26 OF DECREE 211: A CEILING ON THE LEVEL OF FINES THAT CAN BE IMPOSED
- ◉ SEE *IOANNIS, JENNY* ETC.: GREATER DETERRENCE REQUIRED

# AMENDMENTS TO CHILEAN COMPETITION LAW

## INTRODUCTION

- ◉ ANTI-CARTEL LAWS DO NOT WORK WITHOUT EFFECTIVE SANCTIONS
- ◉ THE ‘VIRTUOUS CIRCLE’
  - EFFECTIVE SANCTIONS = INCENTIVE TO BLOW THE WHISTLE = DETECTION OF CARTELS = IMPOSITION OF EFFECTIVE SANCTIONS = INCENTIVE TO BLOW THE WHISTLE ...
  - INEFFECTIVE SANCTIONS = NO INCENTIVE TO BLOW THE WHISTLE = NO DETECTION OF CARTELS = NO IMPOSITION OF EFFECTIVE SANCTIONS ...

# AMENDMENTS TO CHILEAN COMPETITION LAW

## INTRODUCTION

- ◉ THIS EXPLAINS THE PROPOSED AMENDMENTS TO STRENGTHEN THE LAW
- ◉ I WILL NOT DISCUSS THE IMPORTANT PROVISIONS ON MERGERS
- ◉ BUT:
  - PROPOSED AMENDMENT TO ARTICLE 3
  - PROPOSED CRIMINALISATION

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ CURRENT ARTICLE 3 PROHIBITS AGREEMENTS BETWEEN COMPETITORS THAT CONFER MARKET POWER AND FIX PRICES ETC.
- ◉ THE FUTURE ARTICLE 3 WOULD PROHIBIT SPECIFIC ‘HARD-CORE’ INFRINGEMENTS IRRESPECTIVE OF MARKET POWER
- ◉ A ‘PER SE’ APPROACH

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ HOW DOES EU LAW TREAT THIS ISSUE?
- ◉ ARTICLE 101(1)-ARTICLE 101(3) TFEU
  - ARTICLE 101(1) PROHIBITS AGREEMENTS THAT HAVE AS THEIR ‘OBJECT OR EFFECT’ THE RESTRICTION OF COMPETITION
  - ARTICLE 101(3) PROVIDES AN EFFICIENCY DEFENCE FOR AGREEMENTS - WHETHER THEY RESTRICT BY OBJECT OR EFFECT



# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ ‘OBJECT’ RESTRICTIONS ARE OBVIOUS, HARD-CORE RESTRICTIONS OF THE KIND REFERRED TO IN YOUR ARTICLE 3
- ◉ THERE HAVE BEEN MANY CASES ON OBJECT RESTRICTIONS IN THE COURT OF JUSTICE IN RECENT YEARS
- ◉ SEE IN PARTICULAR *CARTES BANCAIRES V COMMISSION* (CASE C-67/13 P, 2014)

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ DOES THE COORDINATION REVEAL IN ITSELF A SUFFICIENT DEGREE OF HARM TO COMPETITION?
- ◉ NOTE THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN *EXPEDIA* (CASE C-226/11, 2012)
  - THERE IS NO NEED FOR ANY QUANTITATIVE ASSESSMENT OF AN AGREEMENT THAT IS RESTRICTIVE OF COMPETITION BY OBJECT

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ IN OTHER WORDS, THERE IS NO NEED TO SHOW (THE CREATION OF) MARKET POWER IN AN OBJECT CASE UNDER ARTICLE 101(1)
- ◉ SO, TO THAT EXTENT, THIS IS THE SAME AS UNDER THE CHILEAN PROPOSED AMENDMENT
- ◉ **BUT** EVEN AN OBJECT RESTRICTION CAN BE DEFENDED UNDER ARTICLE 101(3)

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ IN PRACTICE IT IS HIGHLY UNLIKELY THAT AN OBJECT RESTRICTION WILL SATISFY THE REQUIREMENTS OF ARTICLE 101(3)
- ◉ FOR EXAMPLE, HOW CAN A SECRET PRICE FIXING CARTEL LEAD TO ECONOMIC EFFICIENCY?
- ◉ BUT, AS A MATTER OF LAW, IT IS AT LEAST OPEN TO THE PARTIES TO RUN AN ARTICLE 101(3) DEFENCE

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ WHAT WOULD THE POSITION BE UNDER THE NEW ARTICLE 3 IN THE CASE OF THE MULTILATERAL INTERCHANGE FEE IN THE VISA AND MASTERCARD SYSTEMS?
- ◉ TREATED AS ‘EFFECT’ RESTRICTIONS IN THE EU
- ◉ HELD TO SATISFY ARTICLE 101(3) IN THE VISA DECISION OF 1999

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ PRESUMABLY THE ESTABLISHMENT OF A MIF WOULD BE 'PRICE FIXING' UNDER THE PROPOSED ARTICLE 3
- ◉ BUT HOW COULD THE PARTIES RUN AN EFFICIENCY DEFENCE?
- ◉ ALSO WHAT ABOUT AVIATION ALLIANCES SUCH AS *SKYTEAM* (AIR FRANCE/KLM, ALITALIA, DELTA)? OBJECT RESTRICTIONS, BUT PERMITTED

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ INTERESTING TO COMPARE OTHER SYSTEMS OF LAW ON THIS
- ◉ SOUTH AFRICAN COMPETITION ACT 1999
  - SECTION 4(1)(A) - PROHIBITS AGREEMENTS THAT SUBSTANTIALLY LESSEN COMPETITION SUBJECT TO AN EFFICIENCY DEFENCE
  - BUT SECTION 4(1)(C) - **A PER SE PROHIBITION OF HARD-CORE CARTEL PRACTICES**

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

### ◉ INDIAN COMPETITION ACT 2002

- SECTION 3(1) PROHIBITS AGREEMENTS THAT **APPRECIABLY** RESTRICT COMPETITION
- SECTION 3(3) PROVIDES THAT CERTAIN HARD-CORE CARTEL AGREEMENTS SHALL BE **PRESUMED** TO APPRECIABLY RESTRICT COMPETITION (CF *EXPEDIA*)
- BUT THERE IS A PROVISIO THAT PERMITS A LIMITED EFFICIENCY JUSTIFICATION



# AMENDMENTS TO CHILEAN COMPETITION LAW

## CIVIL CASES: REMOVAL OF THE RULE ON MARKET POWER

- ◉ THE NEW ZEALAND COMMERCE (CARTELS AND OTHER MATTERS) AMENDMENT BILL PROPOSES AMENDMENTS TO THE COMMERCE ACT 1986
- ◉ THE BILL CLARIFIES WHAT CARTEL CONDUCT IS PROHIBITED AND **INTRODUCES CRIMINAL SANCTIONS FOR HARD-CORE OFFENCES**
- ◉ THE BILL PROPOSES EXEMPTION FOR CARTEL PROVISIONS REASONABLY NECESSARY FOR ‘COLLABORATIVE ACTIVITY’

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

- ◉ EVIDENCE SUGGESTS THAT EVEN VERY HIGH FINES DO NOT DETER CARTELS
- ◉ IN THE EU THE COMMISSION ADOPTS ABOUT SIX OR SEVEN DECISIONS ON AVERAGE EACH YEAR, AND THE ANNUAL FINES REGULARLY EXCEED €1 BILLION
- ◉ INDIVIDUAL CARTELS HAVE BEEN FINED MORE THAN €1 BILLION
  - *CAR GLASS; CATHODE RAY TUBES*

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

- ◉ IF FINES DO NOT DETER, IT IS NATURAL TO CONSIDER DEPRIVING THE INDIVIDUALS CONCERNED OF THEIR PERSONAL LIBERTY
- ◉ US LAW IS VERY ACTIVE IN THIS RESPECT TODAY
- ◉ UK LAW INTRODUCED A CRIMINAL CARTEL OFFENCE IN 2003
- ◉ MANY OTHER COUNTRIES HAVE DONE/ARE DOING SO (BRAZIL, AUSTRALIA, SOUTH AFRICA ...)

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

### ◉ BUT THIS DOES REQUIRE VERY CAREFUL CONSIDERATION

- WHICH OFFENCES SHOULD BE CRIMINALISED?
  - THE UK BASED THE OFFENCE ON ‘DISHONESTY’ - PROVED TOO DIFFICULT IN PRACTICE; RECENTLY DROPPED
- WHO SHOULD BE THE PROSECUTING AUTHORITY? - THE COMPETITION AUTHORITY OR SOMEONE ELSE?
  - STRONG ARGUMENT FOR GIVING THIS FUNCTION TO THE SPECIALIST COMPETITION AUTHORITY

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

### ◎ ISSUES TO CONSIDER

- WHAT IS THE RELATIONSHIP BETWEEN THE CRIMINAL OFFENCE AND THE OFFENCE COMMITTED BY COMPANIES?
- CAN TWO INVESTIGATIONS BE CONDUCTED IN PARALLEL? SHOULD THE CRIMINAL OFFENCE PROCEED FIRST?
- WHAT IS THE STANDARD OF PROOF IN A CRIMINAL AS OPPOSED TO A CIVIL CASE?
  - UK: BEYOND REASONABLE DOUBT (CRIMINAL);  
BALANCE OF PROBABILITIES (CIVIL)

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

### ◎ ISSUES TO CONSIDER

- HOW IS THE EVIDENCE COLLECTED?  
DIFFERENT STANDARDS FOR CRIMINAL CASES?
  - RIGHT TO SILENCE; PRIVILEGE AGAINST SELF-INCRIMINATION
  - RIGHT TO THE PRESENCE OF A LAWYER
  - MUST CAUTIONS BE ISSUED TO INDIVIDUALS?
  - RECORDING OF EVIDENCE
  - ARE MORE INTRUSIVE POWERS AVAILABLE FOR THE CRIMINAL INVESTIGATION THAN FOR THE CIVIL ONE?

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

### ISSUES TO CONSIDER

- SHOULD THE TEAM CONDUCTING THE CRIMINAL INVESTIGATION BE ENTIRELY SEPARATE FROM THE ONE CONDUCTING THE CIVIL ONE?
- THIS DOES HAPPEN IN THE UK
- CONSIDER THE RESOURCE IMPLICATIONS OF THIS!
- IMMUNITY/LENIENCY - HOW DO THE INTERESTS OF INDIVIDUALS AND COMPANIES RELATE TO ONE ANOTHER?

# AMENDMENTS TO CHILEAN COMPETITION LAW

## CRIMINALISATION

### ◎ ISSUES TO CONSIDER

- DOES A CORPORATE LENIENCY APPLICATION EXTEND TO INDIVIDUALS?
- DO INDIVIDUALS REQUIRE SEPARATE LEGAL REPRESENTATION FROM THE COMPANY?
- WHAT HAPPENS IN THE EVENT OF DISAGREEMENT BETWEEN THE INDIVIDUAL AND THE COMPANY?
- CAN INDIVIDUALS BE EXTRADITED TO/FROM CHILE?



# AMENDMENTS TO CHILEAN COMPETITION LAW

## CONCLUSION

- ◉ EXPERIENCE SHOWS THAT THERE ARE MANY CARTELS
- ◉ AND THAT SEVERE SANCTIONS ARE REQUIRED TO ACHIEVE THE NECESSARY DETERRENT EFFECT
- ◉ HOWEVER THERE ARE MANY ISSUES TO CONSIDER!
- ◉ NOT LEAST THE POSSIBILITY OF EFFICIENCY JUSTIFICATIONS FOR AGREEMENTS

# TOWARDS THE IMPLEMENTATION OF THE DAMAGES DIRECTIVE

THANK YOU FOR YOUR ATTENTION!