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Global Forum on Competition

IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Chile

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Chile --

1. Existing tools for international co-operation

1.1 Formal mechanisms

1. Twenty years ago Chile initiated a trade policy aimed at opening foreign markets to Chilean exports and reducing barriers to imports by means of signing bilateral trade agreements (BTAs). Most of the BTAs agreed so far consider provisions on competition policy and some of them extend the corresponding provisions to include cooperation for enforcement.

2. Duties, obligations and rights with regards to competition policy contained in the BTAs and Association Agreements (AAs) most frequently include: positive and negative comity¹; notification²; consultation³; coordination in law enforcement⁴; and information sharing⁵.

3. The following chart summarizes the scope of rights and duties considered by chapters on Competition Policy included in several BTAs and AAs signed by Chile:

¹ According to *Positive Comity*, a country should give full and sympathetic consideration to another country's request; that is, open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests. *Negative Comity* or principle of abstention encourages countries that are conducting law enforcement activities to consider how they might conduct them so as to avoid or minimize harm to the other countries. OECD (1999) CLP Report on Positive Comity DAF/CLP(99)19.

² A country should notify or communicate its law enforcement and investigation activities to the other when such activities may affect substantially the other party's relevant interests; when the enforcement or investigation activities concern restraints to competition that may have direct and significant effects in the other party's territory; and, when anticompetitive conducts have taken place mainly in the other party's territory.

³ A country may submit consultations to the competition authority of the other party when relevant interests of the requesting country are negatively affected in the other party's territory.

⁴ A country may communicate to the competition authority of the other party that it pretends to coordinate law enforcement activities in relation to a specific case.

⁵ The extension of this duty is broad and general and varies among agreements. It includes, among others, exchange of information regarding sanctions and remedies in cases affecting the other party's interests and the grounds for their imposition; general law enforcement activities; and, the enactment of exemptions.

Country	Notification	Information sharing	Consultation	Comity	Coordination in enforcement
Peru	X	X	X	X	X
EU	X	X	X	X	X
Korea	X	X	X	X	X
EFTA	X	X	X	X	X
Mexico	X	X	X		
P4	X	X	X		
U.S.A.	X	X	X		
Australia	X	X	X	X	
Canada	X	X		X	X

4. In addition, the Chilean competition agency (*Fiscalía Nacional Económica* or “FNE”)⁶ has agreed several Memorandums of Understanding (MOUs)⁷ and other agency-to-agency agreements with foreign competition authorities aimed at building trust between agencies and at providing a more specific framework for operating when cooperation is needed.

5. These instruments consider similar provisions to the BTAs’ chapters on competition, but in addition they provide for specific and detailed provisions on notifications, information sharing and coordination in law enforcement activities. If a formal proceeding for requesting cooperation is used, these agency-to-agency instruments would be invoked in the first place, before BTAs competition chapters.

6. The following chart summarizes the scope of rights and duties considered by MOUs agreed by the FNE:

Agency/Country	Notification	Information sharing	Coordination in enforcement
CB/Canada – 2001	X	X	X
CFC/Mexico – 2004	X	X	X
CADE-SDE-SEAE/Brazil – 2008	X	X	X
SC/El Salvador – 2009		X	X
CNC/Spain – 2009		X	
DOJ-FTC/USA – 2011	X	X	X

1.2 *Informal mechanisms*

7. Informal mechanisms of co-operation are usually the outcome of person-to-person relationships developed between different competition authorities’ heads and high officials and are the tool most frequently used on a day-by-day basis in order to request co-operation from foreign authorities in cartel prosecution.

8. In the case of the FNE, these informal mechanisms have facilitated in the past the exchange of information regarding a transnational cartel case. However, formal investigations with joint dawn raids with another competition authority have not taken place so far.

1.3 *OECD instruments on co-operation*

9. The OECD instruments on co-operation are not used very frequently to support co-operation activities. However, they have been used by the FNE as a benchmark for defining internal procedures in its investigations, when cross-border issues may be involved.

⁶ The Chilean Competition Law System is composed by two Competition Authorities: the FNE which is an administrative body which main duties in cartel cases are to conduct investigations and litigate cases before the Competition Tribunal. The Competition Tribunal or *Tribunal de Defensa de la Libre Competencia* is a judicial body in charge of managing judicial proceedings and adjudicating in cases, with specific and exclusive jurisdiction on competition law issues.

⁷ These MOUs are available in Spanish in this link: <http://www.fne.gob.cl/internacional/participacion-internacional/>

2. Types of co-operation

2.1 Type of cooperation requested

10. In a transnational cartel case in 2010, the FNE requested information with regards to the investigations initiated by competition authorities abroad. The scope of the information requested in this case included the conduct investigated, the firms involved, the dates and duration, the evidence collected, the existence of an immunity applicant, etc. The use of a previous waiver from parties involved was part of the protocol applied.

2.2 Type of cooperation received

11. The FNE received part of the information it requested, including confirmation of the existence of investigations. When a proceeding before the Competition Tribunal was initiated, foreign authorities co-operated in accelerating the legal serving of the complaint.

2.3 Stage of the proceedings when the co-operation takes place

12. The FNE requested the cooperation during the investigation, after approving the immunity request and when the submission of a complaint was very likely. At that stage, investing resources on getting in touch with foreign authorities with the main purpose of obtaining additional information in order to support the case was considered justified.

13. However, the general view of the FNE is that, in most cases, the earlier the contact is made, the better. This may allow receiving input -at an early stage- of the different theories of the case under review and thus defining the corresponding investigation strategies. An early contact also avoids any interference in the investigations steps of each agency, an issue that could become difficult to solve when coordination is adopted later.

14. In the transnational cartel case above mentioned, the co-operation took place by means of meetings between officials and conference calls with case handlers in several other jurisdictions in order to present and exchange views on each other's investigations in the same sector.

3. International vs. regional co-operation

15. Cooperation initiatives in cartel investigations are not frequent. Our experience so far has led us to request cooperation in cartel enforcement to authorities investigating the same sector but not necessarily located geographically close to Chile. This seems to be a consequence of the global character of markets in our time.

16. The FNE has not been requested to cooperate in specific cases of cartel enforcement activities, and only it has been informally requested to report on a transnational cartel case once it was made public.

17. The FNE participates in regional networks of competition authorities such as the Interamerican Alliance and the *Red Iberoamericana de Competencia*. Even though these networks are useful for general exchange of views about current developments on competition policy and law in our countries, they do not play yet a significant role in the case of co-operation in law enforcement purposes. This is mostly because the latter usually occurs among smaller numbers of authorities (most frequently in a bilateral context) and when, in addition, specific characteristics of sectors investigated are common as well as when trust relationships between agencies is already built.

4. Identifying gaps and improving the current frameworks

18. The main challenges in transnational cartel prosecution are jurisdictional issues due to the cross-border character of anticompetitive effects and the problems arising when evidence is located abroad. In order to overcome these challenges, younger agencies need more experience in dealing with international cartels. With some exceptions, the prosecution of international cartels is a task undertaken by competition authorities in developed countries because scarcity of resources is a relatively less significant problem. The authorities from these jurisdictions should take a leading role in fighting international cartels, inviting younger authorities to participate, coordinating efforts in joint investigations and enforcement activities.

19. The Chilean competition system has proven effective in dealing with international cartels. Indeed the first immunity application was submitted by a participant in a transnational cartel case in 2010. The immunity applicant in this case received total immunity and during the procedure before the Competition Tribunal, issues of extraterritorial application of the law have been raised. The Competition Tribunal's ruling on this case is about to be issued.

20. This experience illustrates very well what was mentioned above. Several jurisdictions were investigating the case at the time proceedings began in Chile, where the case was motivated by a leniency program applicant. Once foreign authorities had taken notice that they were facing an international cartel probably having effects in different jurisdictions, a good practice may have suggested that these authorities promoted the initiation of joint investigation. The success of a coordinated enforcement against transnational cartels depends on the leading role by some competition authorities more than on anything else.

21. Another problem that may arise is the different nature (administrative/judicial) of procedures used by the agencies involved as well as the degrees of progress, at each given point in time, for each of these procedures. The outcomes of judicial and administrative procedures may be different in terms of facts, duration and other features of the cartel conduct. The burden of avoiding potential differences is on the parties collaborating to the investigation, who should not behave strategically before different authorities.

5. Information sharing

5.1 Barriers to information sharing

22. The main barriers to information sharing are two. On the one hand the absence of significant levels of trust in the requesting agency's work makes the exchange of information unlikely, particularly in the absence of waivers obtained from the investigated parties. On the other hand, a separate barrier can be identified in the risk perceived by the holder of the information that their investigation or other strategic enforcement decisions could be jeopardized if they respond affirmatively to the request.

23. In cases where information or documents are formally requested to the FNE by any person on the basis of the Freedom of Information Act, the law considers a communication to the parties potentially affected before sharing the information and grants them the right to oppose such a request. This can be understood as a requirement to request a waiver from the party in order to proceed with an exchange of information with other authorities. Nevertheless, this general regulation has to be interpreted in light of the specific provisions on exchange of information between competition authorities that treaties, agreements and other international commitments may statute.

5.1 Admissible character of evidence obtained abroad

24. The Competition Act provides for a very broad criterion on admissible evidence. In the past, condemnatory rulings by the Competition Tribunal have been supported, among others, by decisions issued by foreign authorities, as additional circumstantial evidence.

5.2 Confidential information

25. It is relevant to make a distinction between the treatment of confidential information by the FNE during investigations and its treatment once a proceeding has been brought before the Competition Tribunal.

26. The FNE may request the authorization of the President of the Competition Tribunal in order to omit the notice to the investigated party; otherwise it is obliged to communicate the initiation of an investigation. Besides, the FNE can instruct not to grant access to the records of the investigation to the investigated party provided that such instruction is communicated to the President of the Competition Tribunal. In its cartel investigations, the FNE usually issues both safeguards, as a general practice. In addition, FNE's officials have the legal obligation to keep confidential all information, data and background information that they may become aware of in the execution of their duties. The violation of this legal obligation is punished as a crime. Thus, even though there are no specific provisions regarding the protection of confidentiality of information obtained from abroad, the legal framework used by the FNE for cartel investigations gives a strong protection for such confidential character.

27. With regards to proceedings before the Competition Tribunal, in 2009 an amendment to the Competition Act introduced a provision on the confidential and private features of information submitted. According to this provision, the Competition Tribunal may qualify information as "private" or "*reservada*" forbidding access to this information to persons which are not involved in the corresponding proceeding. On the other hand, the instruction of "confidential" character of information submitted by a party, means that not even the other parties in the proceeding have access to the information. The latter qualification is reserved for documents containing formulas, strategies, trade secrets, or any other element, the dissemination of which could significantly affect the competitive performance of the holder. However, the Competition Tribunal may order to submit a public version of the document qualified as "secret" or "confidential", in order to allow the other party or parties to comment on or to challenge the document and hence ensuring their rights of defense. Again in this case, there are no specific provisions in the Act regarding the protection of confidentiality of information obtained from abroad, but the framework is secure enough. Besides, the Competition Tribunal is about to issue an internal procedural regulation ("*Auto Acordado*") aimed at specifying this legal provision on the 'secret' and 'confidential' character of the information. As was suggested by the FNE in the draft notice and comment period, it would be a good opportunity to introduce some specifics regarding documents obtained from abroad in order to reinforce protections to confidential information sharing.

5.3 Information received in the context of leniency applications

28. In the case of information received by the FNE under the leniency program in force in Chile since 2009, a specific provision in the Act refers to the confidential character of this information. Hence, the FNE can instruct confidentiality of specific documents in order to protect the identity of the applicant or other persons that collaborated in the investigation, to preserve sensitive commercial information and to ensure the effectiveness of the investigations. In proceedings before the Competition Tribunal there are no safeguards additional to those already mentioned for confidential and secret information.

29. As to exchanges of information provided as part of the leniency program, the FNE has indeed requested waivers from companies in order to facilitate the information exchange with other agencies investigating the same cartel. For future international cartel cases it is expected that the FNE will request waivers, as a general practice since, according to our experience, waivers demonstrated its importance in helping the exchange and hence the effectiveness of cartel investigations in cross-border cases.