

Recent developments of Cartel Regulation in Chile

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I) Chilean Cartel Regime

Chilean Cartel Regime

1. Cartels in Chile are not a criminal infraction.
2. Cartels can be sanctioned with fines up to 26 MM US approx. (post October 2009).
3. Fines (and other sanctions) are imposed by a specialized Court with exclusive competition in competition cases before the Tribunal de Defensa de la Libre Competencia or Competition Court (TDLC).
4. Fiscalía Nacional Económica or National Economic Prosecutor's Office (FNE) is the government agency in charge of the investigation and prosecution of competition's infractions, but any private party may also submit a suit.
5. Damages actions due to competition law infringements may be filed at a Civil Court, after a final condemnatory judgment by the TDLC.

II) Recent Developments of Cartel Regulation in Chile

Recent Developments of Cartel Regulation in Chile

Amendments to the Chilean Competition Act introduced by Law N° 20.361, published in the Official Gazette on July 13th, 2009.

It was the legislative response aimed at adjusting the Chilean regime to international competition standards.

Recent Developments of Cartel Regulation in Chile

→ Which were the main improvements in cartel regulation introduced by Law N° 20.361?

- i) Statute of Limitations increased in Cartel Cases: from 2 to 5 years, which shall not start running while the effects ascribed to such conduct persist in the market.
- ii) Maximum fines in Cartel Cases increased: from US 17 MM to almost US 26 MM.
- iii) A provision on Leniency was introduced article 39 bis. Leniency is available whether before an investigation has started by the FNE or after its initiation, and until the FNE files a complain before the TDLC. Full immunity to the first one to come in, and a fine reduction to the subsequent companies (up to 50% of the highest fine requested by the FNE to the TDLC):
 - In July 2010, FNE filed a complaint before the TDLC against an international cartel in the market for refrigerator compressors (Whirlpool and Tecumseh Do Brasil participated in the price fixing cartel since 2004);
 - Being the whistleblower, Tecumseh was the first company to benefit from full immunity from fines under the Chilean leniency program.

III) FNE's Special Powers for Cartel Investigations

FNE's Special Powers for Cartel Investigations

- n.1) Enter public or private premises, and if necessary, force entry and break into;
- n.2) Search and seize all kinds of objects and documents that permit proving the existence of the violation;
- n.3) Authorize interception of all types of communications, and
- n.4) Order any company that supplies communication services to provide copies and records of communications transmitted or received by them.

FNE's Special Powers for Cartel Investigations

→ More Powers, More Controls:

- i. Only in serious and qualified cases in investigations aimed at proving cartels. In the authorization, the specific measures must be specified in detail as must be the time during which they will be performed as well as the people to whom those measures could affect.
- ii. Prior Double jurisdictional approval granted by:
 - a. Competition Court through a grounded petition.
 - b. The relevant Magistrate of the Court of Appeals shall verify the existence of precise and serious background information regarding the existence of collusion, gathered by the FNE.
- iii. In the event that the FNE does not comply with any of the requirements or formalities aforementioned, the affected parties may file a complaint before the Magistrate of the Court of Appeals.

FNE's Special Powers for Cartel Investigations

- Other restrictions in regards to the possibility regarding the use of information obtained by virtue of these powers as evidence in trial before the TDLC:
- i. The evidence cannot be used in the procedure before the TDLC in the event that the performance of such powers was carried out in cases not provided in the Act, or when the conditions foreseen for the performance of powers were not complied, and would have been so declared by the Magistrate of the Court of Appeals referred to therein.
 - ii. Information obtained by performing the powers aforementioned cannot be used by the FNE in any other investigation, unless there is a new court authorization.

IV) Application of New Powers in current FNE Cartel Cases

Application of New Powers in current FNE Cartel Cases

- In June 2011 FNE filed two complaints against cartels in the transportation sector using for the first time information obtained through wiretapping.
- First Case: FNE accused three bus companies of collusive agreements to allocate and fix prices on the bus route between Santiago and Curacaví.
- FNE's second accusation: 4 of the most important companies in the intercity bus transportation market, agreed to block the access of other relevant competitors into terminals throughout Chile, preventing or hindering them to enter in at least 4 of the most populous cities in the country.
- Intercity Bus Transportation Regulation in Chile requires that bus companies shall start and finish their specific routes in a Terminal. Over more, it is mandatory to have a ticket office in the respective terminal, in order to operate in it.
- Cartel objective: to block "Linea Azul" (relevant competitor) into accessing to Bus Terminal ticket Offices in 4 of the most touristic cities in Chile, impeding consequently their entrance in the city.

Application of New Powers in current FNE Cartel Cases

→Evidence in regards to the anticompetitive agreement

Eduardo Tapia: “¿Me enteré por ahí que el Línea Azul va a entrar al terminal de Antofagasta?”.

Pablo Von Breitenbach: “¿El Línea? No, no. Creo que andan haciendo fuerzas por todos los lados, pero no, estamos peleando hasta la muerte de que no sea así. Por lo demás el lunes tenemos reunión con Enrique, así que”.

Eduardo Tapia: “Si, es que el Herman me llamó recién, porque yo ando en Antofagasta y me dijo, jefe sabe que, el Línea Azul entra en, y el Herman siempre sabe todo”.

Pablo Von Breitenbach: “No, si me habría dicho don Luis Pedro”.

Eduardo Tapia: “Si, pero cómo va a entrar dije yo”.

Pablo Von Breitenbach: “No, no, no, es que lo que pasa es que el Camus se fue de espalda, digamos. Andan haciendo fuerza, nosotros, con decir, hace 20 días atrás tuvimos una reunión con Enrique y con Cristián y algo mencionaron, pero ellos están claros de que no pueden entrar”.

Eduardo Tapia: “¿I’ve heard that Linea Azul is going to enter Antofagasta’s Terminal?”.

Pablo Von Breitenbach: “¿Linea Azul? No, no. I’ve heard they’ve being trying to, but no, we’re fighting until death fot it not to happen. Over more, we are going to meet with Enrique on Monday, so.”

Eduardo Tapia: “Yeah, Herman just called, because I’m in Antofagasta and he told me, “boss you know what, Linea Azul will enter into, and Herman always knows everything.”

Pablo Von Breitenbach: “I don’t think so, Mr. Luis Pedro would of told about it.”

Eduardo Tapia: “Yeah, but how would they get in? I said to myself.”

Pablo Von Breitenbach: “No, no, no, the thing is that the Camus Terminal has no chance. They’re trying to make the arrangements, but about 20 days ago we met with Enrique and Cristián, and they mentioned something about it, but they know Linea Azul cannot get in.”



V) Impact of New Regulation in Cartel Prosecution in Chile

Impact of New Regulation in Cartel Prosecution in Chile

→ Although the application of FNE' new powers in cartel prosecution is still in its infancy in Chile, and in a period of adjustment and understanding by both the FNE and the TDLC, these powers have demonstrated -in the short term- that they are an efficient and important tool in order to prove collusive acts between competitors.

→ These new tools for cartel enforcement help not only for cartel detection and investigation, but besides, it is expected that they will deter future collusive behaviour in Chile.

→ However, it cannot be understood as a basic requirement in cartel cases, disregarding other proof, for instance, economic evidence.

Creating a Competition Culture



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