

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO
DETECT CARTELS**

-- Note by Chile --

This note is submitted by Chile to the Competition Committee FOR DISCUSSION under Item X at its forthcoming meeting to be held on 30-31 October 2013.

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ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS

-- Note by Chile --

1. Cartel detection policy and tools

1. Since 2009, when a legal provision on leniency was introduced in the Chilean competition law, the Fiscalía Nacional Económica (hereinafter, "FNE", the Chilean Competition Agency) has made efforts to encourage leniency applications as a method for detecting cartels. To date, however, proactive methods for detecting collusion remain as an important source of cartel investigations and cases in Chile.

2. In fact, even though some of the cartel cases currently pending before the Competition Tribunal ("TDLC") were initiated following complaints by private parties, or referrals from other governmental agencies, those complaints or referrals in general did not provide relevant cartel information to the FNE but demanded a major effort from the FNE in terms of investigative activities.

3. The FNE, and in particular, its Anti-Cartel Unit, has focused on proactive methods of uncovering cartel conduct. Special resources have been invested by the FNE for this purpose. Most importantly, the FNE has invested in highly qualified staff, comprised half by lawyers and the other half by economists.

4. In terms of formulating an optimal cartel detection policy, the FNE has made the decision to perform market screenings in the context of ongoing investigations within the Anti-Cartel Unit, as opposed to creating a separate intelligence unit. The idea behind this decision is to undertake outcome-oriented market analyses, i.e. studies that ultimately could lead to a case and eventually to sanctions imposed by the TDLC.

5. The application of this policy has resulted in investigations that have uncovered domestic cartels related to consumer goods. When an agency is focused primarily or only on receiving leniency applications, there is a possibility that its portfolio of investigations could be centered more heavily on international cartels.

6. A notable example of the FNE's proactive efforts is the poultry cartel matter currently pending before the TDLC. In that case, the FNE's Investigations Division assessed certain information that, together with public input price data, allowed the FNE to perform industry wide screenings, the results of which were used as support for requesting judicial warrants for performing raids.

2. FNE's experience with screenings

7. Increasingly, the FNE has invested in reinforcing its Anti-Cartel Unit in order to use different economic tools in the detection analysis and to be able to perform market screening. Regarding the application screens, the first step of the analysis is to detect markets that may be prone to cartel conduct. Based on theoretical and empirical literature on collusion (e.g. Ivaldi, *et al*, 2003, Motta 2004), the FNE has focused its attention on markets with a small number of players, homogeneous products, barriers to entry, transparency, and frequent interaction among competitors. The FNE also applies other criteria when

deciding if an industry will undergo an in-depth analysis, such as markets currently being investigated in other jurisdictions or markets involving highly sensitive consumer products.

8. Once the analysis of structural market characteristics is performed, by economists within the Investigation Division, they become ready to perform a behavioral screening. These screenings aim at analyzing the evolution of the pattern of economic data—prices, quantities, market shares, demand shifters, cost shifters—to identify “suspicious” behavior. In some specific cases, the analysis is backed by econometric studies. Some details on FNE’s behavioral screenings exercises are provided in what follows.

9. Analysis of potential market division and/or stability in market shares: The likelihood of market division (allocation of tender entities, allocation of territories, allocation of products, etc.) is evaluated on the basis of the value of contracts awarded to each bidder and the evolution of those values over time relative to the same evolution regarding other competitors. In addition, particularly for cases in which there is not a complete market division (100% vs. 0%), evolution of market shares over time need to be examined as well, since stability on market shares is an indicator of weak competition.

10. Evolution over time of average prices offered (and average margins, if such information is available): The main purpose of this screening is to identify a pattern change in prices to identify any structural breaks (e.g., change in average prices levels or in the variance of individual prices offered in each tender). These pattern changes allow the identification of potential competitive and collusive periods. This kind of screening can be complemented with an econometric analysis based on a test for structural breaks (e.g. Chow test).

11. Average prices vs. dispersion indicator (standard deviation or variance coefficient): Another kind of behavioral screening the FNE has performed involves the analysis of average prices of contract awards and the variance over time. This orientation assumes that in collusive markets average prices of awards should be higher and show a lower dispersion (Rosa Abrantes, *et al* 2005).

12. Ratio of cost changes vs. price changes: When information on companies’ costs is available or public information on major productive inputs is reliable, behavioral screenings can be performed which are aimed at identifying whether variations in costs have translated into variations in prices submitted (assuming that in a competitive market the ratio should be close to 1:1).

13. A complementary econometric model could quantify the degree of transfer and determine how variations in costs are reflected in prices (pass-through in short run and long run). It is important to consider that in this kind of econometric analysis it is necessary to distinguish between the periods when the input cost increases and those in which input cost decreases, because prices tend to adapt differently in a collusive scenario. Asymmetric pricing is associated with negative cost shocks being passed along to consumers more slowly than positive ones.

14. Another structural econometric screening that the Anti-Cartel Unit has applied includes estimating the demand curve to see whether real prices or markup are close to competition (Bresnahan methodology for homogeneous products; in case of differentiated product we consider estimating a competitive benchmark and comparing the behavior of suspected colluders using estimation of discrete choice model demand or AIDS methodologies).

15. As to the outcomes of the use of these techniques so far, these screening exercises have been used in the analysis of several unrelated industries. In two industries, in which suspicious patterns were identified, a more accurate analysis was performed. Eventually, these findings led to the initiation of cartel investigations.

16. It is important to note that the application of these screening techniques becomes public only when the results are presented before the TDLC if the FNE brings a case. Before that, the exercise is done internally by the Anti-Cartel Unit to decide whether to proceed with a full investigation.

3. Increasing awareness of public procurement officials and screens in public procurement

17. The FNE has undertaken significant competition advocacy efforts towards public procurement officials since 2008. In a joint initiative with the OECD and the Competition Bureau of Canada (2008-2010) the FNE led an interagency taskforce involving public entities that deal with public procurement processes in a campaign for increasing awareness and training public procurement officials in prevention and detection techniques.

18. As part of these outreach initiatives, advocacy materials have been produced. An updated version of the guidelines and checklists for preventing and detecting bid rigging in public procurement, "*Compras Públicas y Libre Competencia*," was issued by the FNE in 2011.¹ A major innovation of this version was the introduction of a very detailed, step-by-step recommendation chart on what should be done by public procurement officials when they encounter suspicious patterns, both during the prevention phase and the detection stage.

19. In all of these initiatives the OECD Guideline for Fighting Bid Rigging in Public Procurement and other efforts the OECD has made in the area have been particularly helpful.

20. Notwithstanding the complaints or referrals from other public entities, in recent years the FNE has focused its efforts more on direct detection, using resources to access the relevant data for performing screening exercises. In April 2011, the FNE and the government procurement body (Dirección de Compras y Contratación Pública "Chilecompra") entered into a cooperation agreement that allows the FNE to monitor the tenders through the database available in Chilecompra's technology sources. The data includes relevant information of procurement tenders managed by public entities since 2007. In addition, other information is available, including *ex ante* estimated prices or expenses, evaluation criteria and their grading, technical and economic annexes, etc.

4. Final remarks

21. On the basis of the information available to the FNE, and following the internal prioritization criteria, the FNE has focused its screening efforts on sensitive industries. Therefore, consumer sensitive markets and industries that are prone to collusive behavior have been prioritized.

¹ The document is available in Spanish, here: <http://www.fne.gob.cl/promocion-de-la-libre-competencia/herramientas-de-promocion/>; click on "Compras Públicas".

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