



Asia – Pacific
Economic Cooperation



National Economic Prosecutor's Bureau
Government of Chile

Vertical Restraints in Chilean
Antitrust
Exclusive Dealing Case Study

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I. Background

- Competition Law and Competition System
- Legal framework for vertical restraints
- FNE's analysis of vertical restraints

II. Exclusive dealing cases

- *PM vs Chile Tabacos*
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- *FNE vs Compañía Chilena de Fósforos*

III. Conclusions



Chilean Competition Law and Competition System

- **Legal Body:** Decree Law N° 211/1973, as amended, by Law N° 19.911/12004
- **Goal:** To promote and defend the free competition in markets
- Defines the scope of the anti-competitive illicit: “...*any deed, act or contract that prevents, restricts or obstruct free competition, or that tends to produce these effects*”
- Persons targeted by law: any private or public, **without exemptions**

The Chilean Regulatory Framework



Chilean Competition Law and Competition System

- **The Competition Agency:** FNE, governmental agency that has investigative powers but no remedial ones.
- **The Competition Court:** (Court of Defense of Free Competition TDLC), replacing the old Antimonopoly Commissions. In operation from 2004 on, as part of the judiciary system. It assesses the claims and the non-contentious presentations and consultations from the competition agency or any private or public person. Has remedial powers in case of findings, being able to fine or to impose sanctions; to order to stop the offending conduct and propose the Government to modify laws and rules wherever the competition is affected.
- **The Supreme Court**



Vertical Restraints

- **When analyzing vertical restraints the FNE takes the following steps:**
 - Defining and delimiting the relevant market
 - Finding a dominant position
 - Analyzing the agreement
 - Analyzing the effects

- **Rule of reason:** Agreements' current or potential effects on markets must be proved for sanctioning vertical effects. No *per se* infringements.



Chilean Competition Policy and Vertical restraints

- **Art 3 of DL 211**
- **Vertical restraints involve but are not limited to the following conducts:**
 - Fixing purchase or sale prices
 - Tying and Bundling
 - Allocating market zones or quotas
 - Among others



Facts

Initiated by PM in the TDLC.

PM claimed:

- CT had a dominant position in the cigarette market [97,1%] and had abused its dominance by:
 - Refusing to deal
 - Refusing credit
 - Withdrawing competitor's products, promotional and advertizing material from sales points.
 - Economic incentives conditioned to exclusive dealing
 - Celebrating exclusive dealing contracts with mayor selling points

Exclusive Dealing: *PM vs Chile Tabacos*



CT argued:

- PM had not been able to enter due to bad marketing strategies
- The existence of important structural barriers inherent to the tobacco industry (i.e) taxes.
- No market foreclosure due to the existence of independent wholesale distributors
- CT subscribes no exclusive dealing contracts only *exclusive merchandizing and publicity*

The ruling TDLC

- **Separate analysis** for each conduct and distribution channel.
- **Structural barriers** where found irrelevant for the analysis (as both parties are subject to them in equal terms).
- **Strategic barriers**, exclusive merchandizing and publicity clauses resulted in entry barrier and in practice operate as refusal to deal clauses.
- **Ruled in favor of PM** in all its claims, ordering CT to abstain from exclusionary conducts and to pay a fine.



Conclusions

- Exclusive merchandising and advertizing provisions are not deemed anticompetitive at the outset.
- In this particular case those provisions impeded the sales of competing products.
- In practice those clauses operated as exclusive dealing provisions.
- Resulted in entry barriers for competitors.



Facts

Initiated by FNE in the TDLC

FNE claimed:

- CCU had a dominant position [83%] in the market of *Beers for immediate consumption* in the national territory.
- Had abused its dominant position by:
 - Exclusive provision contracts with hotels, restaurants, bars and discotheques
 - Exclusive advertizing and merchandizing contracts with hotels, restaurants, bars and discotheques.

CCU argued :

- the objected provisions or business practices where in compliance with competition laws “*Image clauses*”

Exclusive Dealing: *FNE vs CCU*



The Settlement

- An agreement was reached between the parties in the conciliation phase of the trial:
 - CCU will not establish, with its sales points, vertical exclusivity or exclusionary incentives;
 - CCU will not subscribe exclusive publicity contracts with sales points with a duration over 3 years;
 - CCU withdraws existing exclusivity contracts (the above mentioned “Image contracts”);
 - CCU states that the agreement has been subscribed on good faith and thus will not incur in other conducts which entail similar effects.

Civil law suit

- PM filed the case in a Civil Court on 14 July 2008; the Civil Court must base its judgment on the Supreme Court’s decision.

Conclusions *Exclusive dealing clauses, subscribed by dominant undertakings that generate entry barriers will be deemed anticompetitive.*

Exclusive Dealing: *FNE vs Compañía Chilena de Fósforos*



Facts

Initiated by The FNE in the TDLC

FNE claimed:

- CCF had a dominant position [90%] in the market of commercialization of security matches on the national territory.
- Had abused its dominance by:
 - Pressure and reiterated threats to foreign providers of a competing undertaking.
 - Unlawful and abusive use of judicial and administrative recourses.
 - Rebates conditioned to exclusivity
 - Exclusionary economic incentives

Comercial Canada Chemicals also filed a complaint

CCF argued:

- They were not dominant in the relevant market, the market definition should include “other lights” (cigarette lighters and others)
- Rejected all other claims.

Exclusive Dealing: *FNE vs Compañía Chilena de Fósforos*



Conclusion

- The case is now pending at the TDLC
- In the final ruling the market definition will play a crucial role as CCF claims to have a very low participation in the market (contrasted by the 90% attributed to them by the FNE).
- Also important will be proving the existence of a “boycott” to prevent the entry of Commercial Canada Chemicals into the Chilean market.

Exclusive Dealing: *Other investigations*



- **Coca-Cola:** Parties voluntarily asked for revision of their contracts with distributors. No formal investigation opened
- **Cervecería Chile:** Case closed parties withdrew the exclusionary causes from their contracts.



Conclusions



- It is essential to determine dominance in the relevant market.
- Chile has no thresholds based on market shares or other indicators.
- We have not dealt yet with borderline cases where dominance may be more questionable.
- Dominance will be assessed by balancing a number of economic factors.
- There are *no* “*per se*” infringements in Chilean antitrust
- All vertical restraints will be analyzed on a case by case basis under the rule of reason.
- Regarding exclusive dealing there have been good judicial outcomes, improvement in competition advocacy, and settlement solutions for market players.



Thanks for your attention

Further information

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