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HEARING ON OLIGOPOLY MARKETS

-- Note by Chile --

16-18 June 2015

This document reproduces a written contribution from Chile submitted for Item 5 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/oligopoly-markets.htm.

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CHILE*

1. General Framework

1. In the Chilean Competition Act, letter a) of article 3 prohibits “explicit agreements, tacit agreements, or concerted practices between competitors, with the objective of fixing prices, limiting production or allocating market shares or zones”; no mention of consciously parallel practices is made, therefore the practice is considered lawful. The problem with this distinction lies in the fact that the effects of consciously parallel practices on consumer welfare may be exactly the same of those produced by an explicit or tacit agreement. The tools that competition policy should use to address this problem are not clear.

2. Additionally, the 2009 reform of the Competition Act introduced the figure of collective abuse of dominant position as a prohibited conduct -in letter b) of article 3-. This reform also introduced a leniency program and gave intrusive powers to the National Economic Prosecutor’s Office.

3. Finally, it is worth mentioning that our law acknowledges the possibility of proving an illicit agreement between competitors with circumstantial evidence.

4. There are no other legal dispositions that might help solve competition illicit behaviors in oligopolistic markets.

5. This is the legal framework under which the Chilean Competition Authorities -the National Economic Prosecutor’s Office (FNE, Fiscalía Nacional Económica) and the Competition Tribunal (TDLC, Tribunal de Defensa de la Libre Competencia)- have had to deal with the competition problems that have arisen in markets with oligopolistic traits.

2. Oligopolistic markets and Cartels

6. The following cases, regarding cartels with circumstantial proof, were solved before the FNE was equipped in 2009 with intrusive powers and a leniency program:

- *Wholesale fuel distributors*: the FNE accused the four largest wholesale fuel distributors in the country of tacit collusion in the period between February 2001 and September 2002. In this case, there was no direct evidence of an eventual agreement. The available evidence consisted of price parallelism, an increase in the companies’ margins, and anomalous or different behavior of an independent distributor. In 2005, the TDLC ruled in favor of the accused companies, considering that the available evidence was insufficient, indicating that a reasonable alternative explanation of the observed data existed. The Supreme Court confirmed the decision.
- *Exporters Association versus Shipping Agencies*: the Exporters Association (Asoex) accused six shipping agencies of the coordinated imposition of charges that had no apparent legal or economic justification. This case had no direct evidence of an eventual agreement; the only available evidence was the simultaneity and parallelism of the conduct. Despite the lack of

* Jointly submitted by FNE and TDLC.

direct evidence, the TDLC ruled against the defendants in 2006, reasoning that besides an agreement between the agencies, each one of them abused of the power they had over individual exporters, who were captive once they hired the respective shipping line. It is worth noting that, at that time, the conduct of collective abuse of dominant position did not exist in the Law. The Supreme Court overturned the decision, considering that evidence of an agreement was insufficient.

- *Private Health Insurance Companies (Isapres)*: In 2002, the FNE started an investigation on parallel conduct of five private health insurance companies (Isapres), consisting of the reduction of benefits of health plans. As in the previously described case, there was no direct evidence of an eventual agreement. Nevertheless, indicators other than sheer parallelism and simultaneity of the conduct were present, such as a simultaneous reduction of advertising and sales force expenditures, key factors in intensity of competition. In 2007, in a divided ruling, the TDLC ruled in favor of the defendants, considering that the circumstantial evidence was not sufficient. This case is particularly interesting, because the ruling and the minority vote used different methodologies to analyze the evidence. While the majority vote analyzed each piece of evidence on its own merit, as well as a reasonable explanation for each of them, the minority vote also analyzed all the evidence holistically, concluding that there was no reasonable alternative explanation to the evidence considered as a group of facts. The Supreme Court confirmed the decision, in a divided ruling, with similar arguments as the TDLC.

3. Oligopolistic markets and Collective Dominance

7. Regarding possible abuses of collective dominant position -conduct sanctioned under the legal reform of 2009-, no cases have been presented before the TDLC. Other than the difficulty of defining this conduct, lack of cases regarding this matter may also be due to a shift of focus by the FNE towards the persecution of cartels and the gathering of direct evidence, using intrusive powers and the leniency program.

4. Oligopolistic markets and Merger Control

8. In relation to merger control, the analysis of coordinated risks has been increasingly important in the cases presented before the Competition Tribunal, particularly in those cases involving oligopolistic markets.

9. Unfortunately, the analysis used to determine potential coordinated risks is focused on qualitative information, in contrast to unilateral risks, where the FNE and the TDLC have advanced in the use of more quantitative tools. In this line, the Horizontal Merger Guidelines published by the FNE, presents a list of factors mostly of qualitative nature, such as the number of players, market share symmetries, homogeneity of the products, price transparency, etc.

10. Merger control is a useful tool to avoid the creation or expansion of oligopolistic structures. Nonetheless, this tool operates preventively and not in respect to consolidated oligopolistic structures, which are common in Chile. Naturally, the effectiveness to resolve the risks created by oligopolistic structures depends to a great extent on the way the remedies are structured, and that these consider the existence of coordinated risks.

11. The following two cases were highly discussed; both were solved in 2012:

- *Shell – Terpel merger*: the TDLC decided not to authorize the merger of these wholesale fuel distributors. In its analysis, the Tribunal considered the high concentration in the wholesale and retail liquid fuel distribution segments, existing barriers to entry and barriers to expansion of competitors as the factors to block the merger. An important part of the identified risks of the merger were risks of coordination, given the high market

concentration and other qualitative market characteristics, such as product homogeneity, low demand price elasticity, and ease of monitoring prices.

The decision was overturned by the Supreme Court, who considered that blocking the merger was not proportional to the risks of coordination –since the leader had 60% of the market. However, conscious of the existence of coordinated risks, the Supreme Court ordered the divestment, using auctions, of some fuel stations, aiming to stimulate the entry of independent label fuel stations that more frequently break coordination equilibria in oligopolistic markets.

- *SMU – SDS (supermarket chains) merger*: In 2012, the TDLC authorized the merger of two national supermarket chains, imposing a series of structural and behavioral remedies. These remedies mainly focused in mitigating the coordination risks that this merger generated, because after it, the three main players in the industry had almost symmetric positions in a market with stable demand and constant price monitoring.

Thus, the TDLC ordered several remedies, among others, the divestment of a number of stores in geographic markets that presented unilateral risks. However, considering that the Tribunal also accepted the existence of coordinated risks in the supermarket sector, it was ordered that the stores be sold as one package and including the brand, prohibiting any player with more than 25% in the market to acquire the divested package. This measure was confirmed by the Supreme Court, in spite of the opposition of one of the retail chains affected by the prohibition.

5. Oligopolistic markets and Other Proceedings

12. There are various non-sanctionatory proceedings that can be used to debilitate oligopolistic structures using regulation of certain conducts.

13. An example is the non-adversarial process initiated by the Telecommunications regulator (Subtel) that aimed to limit the participation of the incumbents in the public tender for the allocation of radio electric spectrum for the offering of 3G services. Although the Competition Tribunal decided not to limit the participation of the incumbents, the Supreme Court, resolving an appeal, established certain restrictions to their participation that contributed to the entry of new players.

14. In addition, the Competition Tribunal has the power to recommend regulatory modifications after a public and transparent non-adversarial proceeding, which implies a deep understanding of the market under review. The result of this process is the recommendation to the President of the Republic to modify norms (laws and regulations) that are contrary to competition or to dictate norms that increase competition.