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Working Party No. 3 on Co-operation and Enforcement

RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Note by Chile --

15 June 2015

This document reproduces a written contribution from Chile (TDLC) submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement on 15 June 2015.

More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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-- Chile (TDLC) --

1. Enforcing competition law is quite a difficult task. On the one hand, the authority must be very careful when intervening in markets. A wrong decision of the agency could cause serious damage to markets, and therefore to social welfare. On the other hand, the magnitude of this task is enormous because competition agencies, unlike sector regulators, must supervise what is happening in all markets, which is almost impossible.

2. For these reasons, some jurisdictions have entrusted private companies to “cooperate” with the competition authorities in enforcing the law. Theoretically, private firms should have incentives to prosecute anticompetitive behaviors and seek compensation of damages; therefore, they could become “co-enforcers”. In the United States, this approach has had amazing results. Since the very beginning, the antitrust system has allowed private parties to sue firms or economic agents seeking compensation for damages. The law provides real incentives to private parties because they can sue for treble damages.

3. Allowing private parties to sue firms for anticompetitive acts is very efficient for antitrust agencies, because it allows them to set their priorities and focus on the most important markets and the biggest cases.

4. The Chilean competition system (“the System”) has a strong tradition in public enforcement but not in private enforcement. In fact, since the introduction of the first antitrust law in 1959, the institutional design has contemplated a public agency in charge of enforcing competition provisions, and it did not consider private enforcement until 2003.

5. Before the 2003 law reform (Law N° 19.911), private parties were not allowed to bring cases directly before the Commissions¹; they had to present their claims to the National Economic Prosecutor’s Office (“FNE”), which could decide whether or not to bring the case before the Commissions. Although the legal system theoretically allowed private parties to sue firms in parallel before civil courts for seeking compensation for damages, that was very uncommon before the case was resolved by the Commissions, because these bodies had the knowledge and expertise to state what behavior should be considered anticompetitive or not.

6. Law N° 19.911² introduced some changes related to private enforcement. First, it granted private parties the right to bring competition cases directly to the Competition Tribunal. However, private parties cannot seek compensation for damages; they can only pursue the imposition of sanctions. In order to obtain compensation for damages, private parties must initiate a new procedure before the civil courts, after the competition trial is completed. Second, the Law established a shorter procedure for compensation of damages before the civil courts. Third, it considered a kind of fast track to pursue compensation of damages; private parties don’t have to prove the illegal conducts in civil litigation -the Competition Court’s decision proves that-; they have to prove damages and the causality between damages and anticompetitive behaviors.

7. In spite of the changes introduced by the Law N° 19.911, there are still not so many incentives for private enforcement under the Chilean competition system: the path is very long and expensive since private parties must face two trials and succeed in both, in order to get compensation for damages.

¹ Before the creation of the Competition Tribunal, competitions cases were resolved by administrative bodies called Preventive Commissions and the Judiciary Body called Antitrust Commission.

² This Law created the Competition Tribunal, which replaced the previous Commissions.

8. Notwithstanding, after reviewing the data of the cases resolved by the Tribunal since the legal reform mentioned above come into effect –March 2004-, we can conclude that private parties have used enthusiastically their right to sue firms for anticompetitive behaviors. Effectively, from 2004 until today, the Competition Tribunal has resolved 146 contentious cases, of which 101 were originated by private parties; that is 69% of the total contentious cases that have been solved by a Competition Tribunal decision.

9. It is worth noting that most of the cases brought by private parties relate to issues of abuse of dominant position and unfair competition. This is not unusual, because in those situations competitors are very aware about what is happening in markets; therefore, they can easily detect anticompetitive behaviors. On the contrary, it is very difficult for private parties to bring a cartel case before the Tribunal, because they don't have the powers and tools to investigate them and to gather evidence of collusion -powers that the FNE currently has-.

10. It is too early to conclude whether private enforcement has allowed the FNE to focus on important cases, specifically prosecuting cartels. However, data shows that only in 10% of cases initiated by private parties the agency participated in the trial as a co-litigator. In addition, since the enactment of the Law N° 20.361 in 2009, which established a leniency program and granted investigative powers, such as dawn raids, the number of cases related to cartels presented to the Tribunal by the FNE has increased in 0%.

11. It is also interesting to examine the success rate of private enforcement. In cases of abuses of dominant position initiated by private parties, 14 of them (33%) finished with some kind of sanction or measure, while in 29 of them (67%) firms were acquitted. This point is very relevant since according to the law, private parties must obtain a favorable decision in order to be able to seek compensation for damages in civil courts.

12. This explains why so few cases that have been resolved by civil courts.

13. In addition to these problems, private parties must face other challenges in civil courts. As was said before, the core of the discussion in civil litigation relates to the amount of damages -notably expressed in market share losses- and the causality between damages and anticompetitive behaviors, issues that are very difficult to prove, and with which civil courts are not familiar.

14. The data confirms this diagnosis. Before Law N° 19.911, very few cases were presented before the civil courts. One of the few examples of a “success experience” in this matter, was a lawsuit initiated by a local airline against the largest national airline, requesting compensation for damages caused by predatory practices. After 9 years of civil litigation, the local firm obtained reparation related to direct damages and lost profits; the Supreme Court did not consider non-pecuniary damages.

15. After Law N° 19.911, the situation has changed, albeit not dramatically. While it is true that we have observed an increase in the number of cases initiated by private parties before civil courts, the difficulties of proving damages and the causality between damages and anticompetitive behaviors seems to continue.

16. Indeed, since March 2004 there have been no more than 10 civil cases, most of them originating from abuse of dominant position and unfair competition behaviors. As we have mentioned above, in those situations the directly injured parties -generally competitors- are more aware about what is happening in markets and have more incentives and information to sue for compensation for damages. Only in two cases, the directly injured parties have obtained compensation for damages, including lost profits.

17. Finding civil cases originated in cartel convictions is less likely. In these events, the directly injured are several people -consumers of a specific product or service- and, therefore, the cost of litigation is very high, even before considering the difficulty of proving damages. Nonetheless, after a famous cartel case in pharmaceutical industry, the National Consumer Agency (“Sernac”) has taken up this matter and has presented a class action before the civil courts, seeking compensation for damages of consumers. After this case, the government proposed a bill which pursues to facilitate the presentation of class actions seeking compensation for damages in cartel cases. This bill is currently in Congress.

18. Summarizing, the Chilean Competition System has introduced improvements in order to incentive private antitrust enforcement, but it is desirable that private parties can seek the compensation for damages in only one procedure.