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**LATIN AMERICAN COMPETITION FORUM**

**Session III - Competition Issues in the Groceries Sector: Focus on Conduct**

-- Contribution from Chile --

**23-24 September 2015, Montego Bay, Jamaica**

*The attached document from Chile (FNE) is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 23-24 September 2015 in Jamaica.*

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# LATIN AMERICAN COMPETITION FORUM



23-24 September 2015 • Montego Bay • Jamaica

## Session III - Competition Issues in the Groceries Sector: Focus on Conduct

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### -- CONTRIBUTION FROM CHILE (FNE) --

Although no specific study has been made of the Chilean food sector to date<sup>1</sup>, an analysis of the market was completed as part of legal proceedings brought before the Tribunal de Defensa de la Libre Competencia (TDLC), the Chilean competition regulator, by the Fiscalía Nacional Económica (FNE), the Chilean competition agency, for abusive practices and operating as a cartel. The relationship between suppliers and retailers was also examined by the FNE, particularly with the launch of the Guide for the Analysis of Vertical Restrictions. Progress made by institutions in Chile on the issues of competition in the retail food sector in the past five years will be considered below.

#### 1. Conciliation Agreement between the FNE and the main bottlers of Coca-Cola (Embotelladora Andina S.A. and Coca-Cola Embonor S.A.), among others

1. On 22 November 2011, the TDLC approved the agreement signed between the FNE and Embotelladora Latinoamericana, Embotelladora Castel, Industrial y Comercial Lampa S.A., Sociedad Comercial Antillanca, Embotelladora Andina S.A. and Coca-Cola Embonor S.A., ending the trial which had begun against the latter two companies – the main bottlers of Coca Cola Company in Chile<sup>2</sup>.

2. In this document, Andina and Embonor agreed not to provide any kind of incentive in their “traditional channels” (warehouses and bottling companies) that would prevent these channels from commercialising rival products. They also agreed not to establish incentives to exclude cheaper brands for sales staff or managers at Andina and Embonor.

<sup>1</sup> Unlike reports completed in other countries, for example, “*The Economic Impact of Modern Retail on choice and innovation in the EU food sector*” (European Commission, 2014) and in, “*Informe sobre las relaciones entre fabricantes y distribuidores en el sector alimentario*” (Comisión Nacional de los Mercados y la Competencia, 2012) [Report on the relationships between manufacturers and distributors in the food sector (National Commission for Markets and Competitions, 2012)].

<sup>2</sup> See Conciliation Agreement: <http://www.fne.gob.cl/wp-content/uploads/2011/11/Acta-Conciliacion.pdf>.

3. These companies also agreed to allocate 20% of their cold storage equipment in shops with no third party or cold storage facility of their own to the display of products from competitors with no more than a 15% market share, for a period of five years.

## 2. Conciliation Agreement between the FNE and Unilever Chile S.A.

4. In the context of legal proceedings for abuse of a dominant market position by means of practices that excluded other brands in the washing powder detergent market, the TDLC approved a Conciliation Agreement between the FNE and UNILEVER CHILE S.A on 30 April 2014.<sup>3</sup>

5. Although the agreement emerged as a result of conduct in the washing powder detergent market, it was extended to consumer products in the food sector, like mayonnaise and ketchup in the supermarket channel, and tea in the “traditional channel” (which, in this case, included wholesalers, sub-wholesalers, district warehouses and grocery stores). Therefore, the commitments made by each party in this agreement can act as a good basis for the kind of distributor/wholesaler conduct desired by institutions aiming to create the conditions for free competition.

6. The responsibilities and commitments of Unilever Chile in this conciliation agreement will be extendable to the commercialisation and distribution of all product groups manufactured, imported or marketed by the company in which their market share of national sales, by value, is equal to, or more than:

- 60%, regardless of the market share of other operators. If the market share is less than 60%, but more than 50%, the threshold of 50% will be applied if the second largest operator in the market has less than half of the market share of Unilever. This rule will apply to all product groups, except detergents.
- 60%, regardless of the market share of other operators. If the market share is less than 60%, but more than 50%, the threshold of 50% will be applied if the second largest operator in the market has a market share of less than 30%. This rule will apply exclusively to detergent products.

7. The agreement will be valid for 10 years, and among Unilever’s responsibilities – a report of which must be provided to the FNE annually along with a report prepared by an external consultant – it is worth noting the following:

1. **Exclusivities:** Unilever agreed to declare invalid any agreement or incentive aimed at the exclusivity of sales in any distribution channel, referring to both supermarkets and to wholesalers and sub-wholesalers in the “traditional channel”. Similarly, Unilever will not be able to offer any incentive, discount or bonus aimed at establishing the sales exclusivity of Unilever brands. This is the only requirement imposed for an indefinite period.
2. **Bonuses or retroactive discounts:** Unilever agreed not to apply or finance incentives, bonuses or discounts with its clients based on the meeting of retroactive sales targets, including, but not limited to, targets for sales growth, relative sales growth, or market share.
3. **Controlled distribution projects:** If Unilever decides to finance various distributors’ sales teams (generally wholesalers and sub-wholesalers) in the traditional channel – known as “controlled distribution projects” – it will only be permitted to do so for one distributor in a geographic area, preventing market domination in the same area. Unilever will also be required to establish contractual clauses clearly outlining the right of the distributor to have a sales team

<sup>3</sup> See Conciliation Agreement: [http://www.fne.gob.cl/wp-content/uploads/2014/04/acue\\_xx\\_2014.pdf](http://www.fne.gob.cl/wp-content/uploads/2014/04/acue_xx_2014.pdf).

distinct from the team financed by Unilever, allowing the distributor to distribute brands or products from other suppliers at any time.

4. **Presence on the shelves:** For a three-year period, Unilever will not be permitted to form agreements, make payments or offer discounts in exchange for the display of its products on the shelves of distribution centres (in supermarkets, for example) aimed at using more space than their 90% market share. At the end of this period, Unilever has committed to not paying, agreeing or offering discounts for shelf space greater than their share of the market in the product groups commercialised by the company.
5. **Additional commitments:** Finally, the parties agreed to extensive measures to publicise the agreement, including the establishing of a good practice manual for shelf-stackers in sales outlets.

### 3. **Legal action by the FNE against chicken producers Agrosuper, Ariztía and Don Pollo, and their trade association, APA, for collusion in the market.**

8. The “Pollos” chicken producer case was the most high-profile example of companies operating as a cartel in the food sector. Following an investigation that included the use of intrusive searches and the seizure of documents on the premises of APA and of Don Pollo, on 12 January 2011, the FNE brought a case against the poultry companies on November 2011, accusing them of introducing and implementing an agreement to limit their production, controlling the amount produced and supplied to the national market, and assigning themselves quotas in the production and commercialisation of chickens, the main source of protein consumed in Chile.

9. According to the FNE, the accusation of operating like a cartel was based on the permanent exchange of sensitive, strategic and detailed business information among the three accused companies, under the umbrella of the APA, a trade association that was also responsible for monitoring the functioning of the agreement.

10. On 25 September 2014, the TDLC ruled in favour of the FNE<sup>4</sup> and ordered the poultry companies to pay fines totalling approximately USD 61 million for having been part of a cartel that controlled the production quotas in the industry for at least ten years. For the first time since its inception, the TDLC ordered the break-up of a trade association – the Asociación de Productores Avícolas, which was formed by these companies and promoted and coordinated the agreement between the signatories – in its ruling. It should be mentioned that a ruling on this case is still pending from the Chilean Supreme Court.

### 4. **Guide for the Analysis of Vertical Restrictions<sup>5</sup>**

11. This Guide is part of the advocacy work that the FNE does<sup>6</sup> and provides details of the guidelines that will govern the work of the Prosecutor’s Office – non-binding for the TDLC or the Supreme Court – by assessing the mechanisms that regulate commercial conditions agreed or imposed between companies operating at different stages in the chain of production, like companies which supply retailers, for example.

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<sup>4</sup> See Ruling No. 139/2004: [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_139%202014.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_139%202014.pdf).

<sup>5</sup> See <http://www.fne.gob.cl/wp-content/uploads/2014/06/Guía-Restricciones-Verticales.pdf>

<sup>6</sup> It is worth noting that the Guides mentioned are the result of at least two years’ work gathering *suggestions from lawyers, economists and foreign institutions supporting free competition*.

12. The Guide distinguishes between two types of vertical restrictions: intra-brand restrictions that only affect the commercialisation of products from the supplier establishing the restrictions; and inter-brand restrictions that affect third parties, i.e. the supplier's competitors. In the first of these, the document mentions the examples of fixing a minimum resale price, assigning territories to the distributor and the single distributor requirement, among others. The second of these refers to exclusivity agreements between a supplier and a distributor, the application of discounts by volume, payment for access to shelf space or the minimum purchase requirement.

13. The FNE will conduct the analysis of the vertical restrictions in three stages. In the first of these, the market share of the companies responsible for the behaviour will be outlined, with the understanding that the larger the share, the greater the probability of vertical restrictions creating significant anti-competitive effects and risks. This is how it was established that if the market share of the companies involved exceeds 35% in the market concerned, the investigation will continue to the next two stages: assessing the anti-competitive effects of the mechanism in question and establishing the efficiencies arising as a result of the mechanism.

14. With regard to the effects on competition, the Guide first considers the promotion or facilitating of collusion, or coordination between suppliers and distributors where there is *inter-brand* competition. Restrictions like fixing resale prices, the preferential client clause, or the allocating of exclusive territory, for example, can be used by distributors as mechanisms for dividing up the market or coordinating prices. A common supplier might also be used to exchange information between distributors competing further downstream, thereby facilitating the implementation, coordination and monitoring of distribution penalty mechanisms within a cartel ("hub and spoke collusion"). Furthermore, vertical restrictions can be used as an instrument for maintaining or increasing an individual or collective dominant market position, whether by preventing the entry of potential competitors into the market or stopping the expansion of existing competitors.

15. Among elements to be considered in the analysis of the effects and risks of anti-competitive behaviour are *competition conditions in the market*, including: market concentration in markets where parties operate, market shares and competitive position of the parties, market entry conditions, "cumulative" effect of restrictions, position occupied by parties' competitors; market position of parties' clients, existence of economies of scale, learning curves or network externalities, presence of economies of scope, degree of industry maturity, search and comparison costs, etc. The characteristics of the vertical restriction itself will also be taken into account, for example: the extent of the restrictions, clients affected by the vertical restriction, duration of the restriction, implicit vertical restrictions, etc.

16. Lastly, vertical restrictions can be used as a pro-competition tool designed to improve vertical coordination between economic agents, increase efficiency in the vertical structure, and improve the level of competition between the vertical structure and the structure of company rivals. In this regard, the most common externalities that vertical restrictions try to correct are: (i) double marginalisation, referring to the problem of vertical coordination in the fixing of prices paid by end consumers, (ii) the "free rider" effect, relating mainly to the provision of services to the end consumer, and (iii) the "hold-up problem", relating to the sub-implementation of specific investments. These will be considered in any analysis of competition to be conducted by the FNE.