

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

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

-- Note by Chile (FNE) --

27 October 2015

This document reproduces a written contribution from Chile (FNE) submitted for Item 3 of the 122nd meeting of the Working Party No. 3 on Co-operation and Enforcement on 27 October 2015.

*More documents related to this discussion can be found at:
www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm*

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HYPOTHETICAL SCENARIO AND SUGGESTED QUESTIONS

-- Chile (FNE) --

Hypothetical Scenario:

1. Alpha Corporation and Beta Corporation are organized under the laws of Country A and have factories in Country A where they manufacture Component X, a piece of high-tech hardware used in electronic products. Alpha and Beta agree to charge higher prices for Component X sold to finished product integrators. These integrators are organized under the laws of Country B and have factories in Country B where they incorporate Component X into finished electronic products sold in Country C.
2. Some or all of the anti-competitive overcharge on Component X is passed on by the integrators to purchasers of the finished product in Country C. Alpha and Beta are aware that Component X is incorporated into finished products sold in Country C and Alpha and Beta discuss market conditions and track sales of the finished products in Country C.
3. In responding to the questions below, delegates should feel free to address any modifications to the scenario that raise other issues that in their view need to be considered when dealing with cartels involving intermediate goods.

Assume You Are Country A:

- 1. What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?*
- 2. If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*
- 3. Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?*

Assume You Are Country B:

- 1. What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?*
- 2. Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country B?*
- 3. If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*
- 4. Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?*

Assume You Are Country C:

- 1. What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action against Alpha and Beta?*
- 2. Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country C?*
- 3. Is your analysis any different if Alpha and Beta have had contacts with finished product purchasers in Country C, including negotiations regarding Component X pricing?*
- 4. Is your analysis any different if, contrary to the facts outlined above, the finished products are sold around the world and Alpha and Beta are unaware or indifferent to whether the finished products are sold in Country C?*
- 5. Is your analysis any different if the integrators are wholly-owned subsidiaries of the finished product purchasers in Country C?*
- 6. If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*
- 7. Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?*

4. On 2010, Chile's National Economic Prosecution office (“Fiscalía Nacional Económica” or “FNE”) brought price-fixing charges before the country’s Competition Tribunal against two refrigerator compressor manufacturers, Whirlpool - through the company’s subsidiary Embraco - and Tecumseh Do Brasil, the so-called ‘Tecumseh’ case.

5. This case represented a landmark to our enforcement agency, since it was the very first proceeding launched under the leniency programme (known in its Spanish acronym as *delación compensada*) introduced by the 2009’s amendment of the Chilean Competition Act, Decree Law No. 211 of 1973 (“Competition Act”).

6. In the context of the leniency scheme, Tecumseh’s senior executives, the secretary and the assistant to the president of that company, deposed before the Chilean Consulate in the city of Sao Paulo, providing emails and relevant evidence of meetings being held in Brazil, in which both companies agreed price increases to customers in several countries in Latin America, including Chile.

7. As it was determined by the Competition Tribunal, both companies conspired to inflate prices on intermediate goods between the years 2004 and 2008. Due to its collaboration with the FNE during the investigation, Tecumseh was granted immunity, while Whirlpool was condemned to pay a USD \$10 million fine. In this scenario, Whirlpool brought an appeal before the Chilean Supreme Court, claiming lack of jurisdiction and *res judicata*, amongst other allegations. The final verdict was issued on September 24, 2013 and even though the Supreme Court reduced by half the fine imposed to Whirlpool in first instance, it upheld the Competition Tribunal’s decision on these two relevant subjects.

8. First, Whirlpool claimed that Chilean Courts lacked of jurisdiction to judge over the international cartel, considering the infringement was executed abroad by foreign companies, without any linking connection to the national territory.

9. The Supreme Court considered that the object of domestic competition law was to protect competition in Chilean markets and thus it ruled: “*It is clear that our Courts do have jurisdiction to rule over conducts that have produced effect in Chile or had the ability to do so, regardless the place they were executed or held*”. The Court moreover acknowledged that accepting Whirlpool’s allegation would imply that such infringing conduct would be excluded from control and sanction by the courts of the country, notwithstanding it was materialized in Chile.

10. The above is consistent with the Competition Tribunal’s decision on this regard: The collusive agreement was partially executed in Chile: the parties engaged in communications with Chilean clients and applied the increased prices in Chile, which had effects in the Chilean market of refrigerators, where compressors are a relevant input. Therefore, it was concluded that “*the object of the present dispute is related to the Chilean market*” and hence that local Courts have a Constitutional duty to rule on it.

11. Second, the Supreme Court rejected the claimant’s allegations of *res judicata* on the grounds that “no foreign jurisdiction can judge or impose sanctions to events that occurred in Chile that have affected the national market”. The above supports the Competition Tribunal’s ruling which states that the conducts pursued abroad - in this case by Brazilian authorities - relate to restrictive practices affecting competition in the Brazilian market, and thus the facts subjected to trial in Chile and the relevant market involved differ substantially from those assessed by the relevant authorities in Brazil.

12. The aforementioned jurisprudence gives us a fairly recent example of the most probable judicial treatment of the hypothetical scenario assuming Chile is either “Country B” or “Country C”.

13. As discussed, the key factors for bringing an enforcement action in Chile are the following:

- (a) An infringing conduct according to Article 3, of the Competition Act: “Any person that enters into or executes, either individually or collectively, any action, act or convention that impedes, restricts or hinders competition, or tends to produce such effects”.
- (b) That the misconduct materialized, at least partially, in national territory; and
- (c) That the misconduct affected Chilean markets.

14. Therefore, in terms of the hypothetical scenario, it is not relevant whether the final products (refrigerators or electronic products) are sold in Chile or just assembled in the country, since in both cases it is evident that competition in a Chilean market is affected. According to the Competition Act it is irrelevant whether the affected parties are the “integrators” or end consumers. This analysis is not modified by the fact the integrators are wholly-owned subsidiaries of the finished product purchasers.

15. As noted, the fact that Alpha and Beta’s executives have held meetings in Chile is not a decisive element. Certainly, if the companies engaged in communications within the country, the fact that the conduct was materialized in Chile and intended to restrict competition in domestic markets will be even more unquestionable and probably easier to prove. But as seen in the *Tecumseh* case, such infringement would still be enforceable despite being no evidence of meetings held in Chile.

16. If the case is that Alpha and Beta have had contacts with finished product purchasers in Chile, this would be considered as evidence of the conduct being, at least, partially implemented in Chile, as in *Tecumseh*. This could be a fact to be taken into account when filing a case to the Competition Tribunal.

17. Likewise, the conduct would still be enforceable if Alpha and Beta are unaware whether the finished products are sold in Chile, to the extent that there is sufficient data showing that the infringement has indeed restricted competition in our local market.

18. Furthermore, the existence of prior sanctions being imposed at this conduct on other jurisdictions should not be crucial in bringing an enforcement action in Chile. Notwithstanding, it could be relevant evidence concerning the cartel that should be taken into consideration, as far as the abovementioned requirements are met.

19. Regarding the determination of an appropriate sanction, the Competition Tribunal and the Supreme Court must apply the legal criteria pursuant to Article 26 of the Competition Act:

“To determine the fines, the following circumstances, among others, will be considered: the economic benefit obtained as a result of the violation, the severity of the conduct, the reoffending nature of the offender, and, for the purposes of lowering the fine, the collaboration the latter provided to the Fiscalía before or during the investigation”.

20. As it can be seen, the Competition Tribunal and the Supreme Court are not legally mandated to consider sanctions imposed in foreign jurisdictions. However, this it is formally possible, based on the open-clause wording “among others”).

21. Indeed, to this date our jurisprudence has never considered fines imposed abroad when determining an appropriate sanction in a particular case. For instance, in *Tecumseh*, the sanctions imposed to Whirlpool in Brazil (a USD 53 million fine) were explicitly acknowledged at the Competition Tribunal's final ruling, but were not taken into consideration when determining the relevant fine, which was founded exclusively through the estimation of the excess illegal gains obtained by the cartel and to its length, amounting to approximately USD 10 million. This is consistent with the fact that, according to the Tribunal, the only infringement submitted to trial was the collusion affecting the Chilean market, which as stated, was considered to *differ substantially* with the conduct sanctioned in Brazil.

22. Finally, the assessment of the hypothetical scenario assuming Chile is country "A" is quite difficult, considering Chilean competition law requires the infringing entities to be 'economic agents' - i.e. purchasers or sellers of goods or services in Chile - and thus that the conduct affects a Chilean market. Moreover, since to this date no similar cases have occurred under Chilean jurisdiction, there is no settled jurisprudence in this regard.