

HORIZONTAL AGREEMENTS AND ECONOMIC EFFICIENCIES

Competition Day, FNE Chile

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HORIZONTAL AGREEMENTS AND ECONOMIC EFFICIENCIES

STRUCTURE OF PRESENTATION

- ◉ THE GLOBAL FIGHT AGAINST CARTELS
- ◉ BENEFICIAL HORIZONTAL AGREEMENTS
- ◉ THE 2016 AMENDMENT OF ARTICLE 3(A) OF THE CHILEAN DECREE LAW 211
- ◉ IS IT POSSIBLE TO CLAIM AN ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A ‘HARD-CORE’ CARTEL IN CHILE?
- ◉ CONCLUSION

HORIZONTAL AGREEMENTS AND ECONOMIC EFFICIENCIES

THE GLOBAL FIGHT AGAINST CARTELS

- ◉ LAW AND PRACTICE TODAY IS HOSTILE TOWARDS CARTELS GLOBALLY
- ◉ INITIATIVES OF THE OECD, ICN ETC.
- ◉ NEW SYSTEMS OF LAW (HONG KONG, PHILIPPINES, NIGERIA ...)
- ◉ ENORMOUS FINES (EG IN 2017 EUROS 1.945 BILLION IN THE EU)
- ◉ WORLDWIDE ENFORCEMENT, EG *CAR PARTS, MARITIME CARRIERS*)

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THE GLOBAL FIGHT AGAINST CARTELS

- ◉ INCREASING FOCUS ON THE RESPONSIBILITY OF INDIVIDUALS AS WELL AS UNDERTAKINGS
 - CRIMINALISATION, INCLUDING BOTH FINES AND IMPRISONMENT
 - EXTRADITION (*PISCIOTTI V GERMANY*, 2017)
 - DIRECTOR DISQUALIFICATION (UK *REAL ESTATE AGENTS*)
- ◉ THE RISE OF DAMAGES ACTIONS
 - EG THE EU DAMAGES DIRECTIVE

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BENEFICIAL HORIZONTAL AGREEMENTS

- ◉ BUT OF COURSE NOT ALL HORIZONTAL COOPERATION IS BAD
- ◉ FOR EXAMPLE, IN SOME CIRCUMSTANCES:
 - R&D AGREEMENTS
 - PRODUCTION JOINT VENTURES
 - JOINT SELLING (*RACECOURSE ASSOCIATION V OFT*)
 - GROUP PURCHASING (*GOTTRUP-KLIM*)
 - AVIATION ALLIANCES
 - STANDARDISATION AGREEMENTS

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BENEFICIAL HORIZONTAL AGREEMENTS

- ◎ THE FACT THAT HORIZONTAL AGREEMENTS MAY BE BENEFICIAL CREATES AN OBVIOUS TENSION
 - CLARITY IS NEEDED AS TO WHAT IS **BAD**
 - BUT THE LAW SHOULD NOT PROHIBIT (OR APPEAR TO PROHIBIT) COOPERATION THAT IS **GOOD**
- ◎ HOW TO CREATE THE RIGHT BALANCE? IS THERE A DANGER OF DISINCENTIVISING BENEFICIAL COLLABORATION?

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THE 2016 AMENDMENT OF CHILEAN DECREE LAW 211

- ◎ THE 2016 AMENDMENT CLEARLY WAS A STRENGTHENING OF CHILEAN COMPETITION LAW IN VARIOUS WAYS
 - MANDATORY NOTIFICATION OF SOME MERGERS
 - CONTROL OF CERTAIN CROSS-OWNERSHIP ETC.
 - HIGHER FINES
 - AMENDMENTS IN RELATION TO DAMAGES

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THE 2016 AMENDMENT OF CHILEAN DECREE LAW 211

- ◎ THE AMENDMENT ALSO STRENGTHENED THE RULE AGAINST HARD-CORE CARTELS
 - ARTICLE 3(A) USED TO PROHIBIT CARTELS THAT CONFER MARKET POWER
 - THE AMENDED ARTICLE 3(A) PROHIBITS ‘HARD-CORE CARTELS’ - PRICE FIXING, OUTPUT LIMITATION, MARKET SHARING AND BID RIGGING IRRESPECTIVE OF MARKET POWER
 - OTHER CASES WOULD STILL REQUIRE EFFECTS ANALYSIS

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THE 2016 AMENDMENT OF CHILEAN DECREE LAW 211

- ◉ THE ARTICLE 3(A) AMENDMENT MEANS THAT NO **QUANTITATIVE ASSESSMENT** IS REQUIRED OF THE EFFECTS OF A HARD-CORE CARTEL ON THE MARKET
- ◉ THIS SIMPLIFIES ANTI-CARTEL ENFORCEMENT FOR THE FNE
- ◉ CF *EXPEDIA* IN EU LAW: NO **QUANTITATIVE ASSESSMENT** REQUIRED FOR OBJECT RESTRICTIONS

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IS IT POSSIBLE TO CLAIM AN ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A 'HARD-CORE' CARTEL IN CHILE?

- ◉ DOES THIS MEAN THAT HARD-CORE CARTELS ARE *PER SE* ILLEGAL?
- ◉ IN US LAW CERTAIN HORIZONTAL AGREEMENTS ARE *PER SE* ILLEGAL
- ◉ IN THE EU EVEN AN OBJECT RESTRICTION UNDER ARTICLE 101(1) CAN BE DEFENDED UNDER ARTICLE 101(3) - IF THE EVIDENCE IS CONVINCING

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ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A 'HARD-CORE' CARTEL IN CHILE?

- ◉ THERE IS NO ARTICLE 101(3) IN CHILE
- ◉ SO IT WOULD SEEM THAT IT IS NOT POSSIBLE TO ARGUE EG THAT PRICE FIXING ETC. MIGHT BE SAVED BY AN EFFICIENCY DEFENCE
- ◉ IS THERE A DANGER THAT THIS MIGHT INHIBIT CERTAIN TYPES OF BENEFICIAL COLLABORATION?

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ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A 'HARD-CORE' CARTEL IN CHILE?

- ◉ QUERY WHETHER IT IS POSSIBLE TO ARGUE THAT AN APPARENTLY ILLEGAL AGREEMENT IN FACT IS PRO-COMPETITIVE, SO THAT IT DOES NOT FALL WITHIN THE HARD-CORE LIST?
- ◉ WHAT IF THIS IS OBJECTIVELY NECESSARY TO DO SOMETHING PRO-COMPETITIVE?

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ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A 'HARD-CORE' CARTEL IN CHILE?

- ◉ COULD **OBJECTIVE NECESSITY** PREVENT AN AGREEMENT FROM FALLING WITHIN THE HARD-CORE LIST IN THE FIRST PLACE?
 - EG *VISA, MASTERCARD* IN THE EU: AGREEMENTS TO FIX THE PRICE OF THE MULTILATERAL INTERCHANGE FEE BETWEEN BANKS - THIS WAS FOUND TO BE A KIND OF PRICE FIXING, BUT NOT A RESTRICTION BY OBJECT, ONLY BY EFFECT

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ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A 'HARD-CORE' CARTEL IN CHILE?

◉ AGREEMENT NOT HARD-CORE?

- EG AGREEMENTS BETWEEN EU POST OFFICES ON 'TERMINAL DUES' - NOT A RESTRICTION BY OBJECT (BUT RESTRICTIVE BY EFFECT) - (*REIMS II*)
- EG *GOTTRUP-KLIM*: GROUP PURCHASING WITH A RESTRICTION ON PURCHASING THROUGH A COMPETITOR ORGANISATION - PRO-COMPETITIVE RATHER THAN ANTI-COMPETITIVE

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ECONOMIC EFFICIENCY AS A JUSTIFICATION FOR A 'HARD-CORE' CARTEL IN CHILE?

◉ AGREEMENT NOT HARD-CORE?

- EG THE *RACECOURSE ASSOCIATION V OFT*: JOINT SELLING OF THE MEDIA RIGHTS TO HORSERACING NOT A RESTRICTION OF COMPETITION BY OBJECT OR EFFECT - A PRO-COMPETITIVE WAY OF ACHIEVING WHAT COULD NOT HAVE BEEN ACHIEVED INDEPENDENTLY
- EG AGENTS *MUTUAL V GASCOIGNE* - THE 'ONE OTHER PORTAL' RULE NOT RESTRICTIVE BY OBJECT OR EFFECT

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CONCLUSION

- ◉ THE AMENDED ARTICLE 3(A) CONTAINS AN EXPLICIT RULE AGAINST HARD-CORE RESTRICTIONS MEANING THAT THERE IS NO REQUIREMENT FOR EFFECTS ANALYSIS
- ◉ SUCH AGREEMENTS ARE THEREFORE PRESUMPTIVELY ILLEGAL, IRRESPECTIVE OF MARKET POWER
- ◉ AND THERE IS NO EXPLICIT EFFICIENCY DEFENCE

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CONCLUSION

- ◉ THEREFORE THE AMENDED ARTICLE 3(A) CONTAINS A *PER SE* RULE AGAINST HARD-CORE RESTRICTIONS MEANING THAT THERE IS NO REQUIREMENT FOR EFFECTS ANALYSIS
- ◉ BUT IS THAT THE END OF THE MATTER?
- ◉ QUERY WHETHER AN OBJECTIVE NECESSITY ANALYSIS CAN PREVENT CHARACTERISATION OF THE AGREEMENT AS HARD-CORE?

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CONCLUSION

- ◉ WOULD NOT SUCH AN APPROACH PROVIDE A TYPE OF EFFICIENCY DEFENCE, ALBEIT WITHOUT AN ARTICLE 101(3) PROVISION?
- ◉ COMPARE ARTICLE 102 TFEU - ABUSE IS FORBIDDEN AND THERE IS NO ARTICLE 102(3)
- ◉ BUT THE COURT OF JUSTICE RECOGNISES AN OBJECTIVE NECESSITY/EFFICIENCY DEFENCE

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CONCLUSION

- ◉ SEE EG THE COURT OF JUSTICE IN *POST DANMARK I* AND *INTEL V COMMISSION*
- ◉ IN AN ARTICLE 102 CASE THE OBJECTIVE NECESSITY/EFFICIENCY ‘DEFENCE’ PREVENTS THE ABUSE FROM BEING AN ABUSE!
- ◉ SO IN THE AMENDED ARTICLE 3(A) CAN THE OBJECTIVE NECESSITY/EFFICIENCY PREVENT THE HARD-CORE AGREEMENT FROM BEING HARD-CORE?

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CONCLUSION

- ◉ IN THIS CASE IT IS CHARACTERISATION OF THE AGREEMENT THAT IS ESSENTIAL
 - COMPARE ‘OBJECT’ RESTRICTIONS IN THE EU; ‘SERIOUS ANTI-COMPETITIVE CONDUCT’ IN HONG KONG
- ◉ ARTICLE 3(A) ON THIS VIEW PRESUMES HARD-CORE CARTELS TO BE UNLAWFUL (‘PER SE UNLAWFULNESS’)
- ◉ BUT THE BURDEN THEN REVERSES TO THE PARTIES TO PROVE OBJECTIVE NECESSITY

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CONCLUSION

- ◉ NOTE THAT IN THE *RACECOURSE ASSOCIATION* CASE THE COMPETITION APPEAL TRIBUNAL EXPLICITLY HELD THAT THE BURDEN WAS ON THE PARTIES TO PROVE OBJECTIVE NECESSITY
- ◉ IT CAN BE EXPECTED THAT AN OBJECTIVE NECESSITY/EFFICIENCY ‘DEFENCE’ OF THIS KIND WOULD BE RARE
- ◉ BUT ‘NEVER SAY NEVER’!

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THANK YOU FOR YOUR ATTENTION!