Consumers’ redress for cartel infringements in Chile: 
the aftermath of the retail pharmacies cartel case

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I. Introduction

The retail pharmacies cartel case the National Economic Prosecutor’s Office (FNE) brought to trial in 2008 marked a milestone in cartel prosecution in Chile. For the first time, a member of a price-fixing scheme confessed its participation in a three party agreement aimed at ending a price war period involving over 200 medical drugs.

In 2012, the Competition Tribunal (TDLC) ruled against the defendants imposing a US$ 19 million fine (approx.) to each of the two companies that litigated the case. FASA, the defendant that had settled, paid around US$ 1 million. In September 2012, the Supreme Court upheld TDLC’s decision.1 2

The retail pharmacies cartel case, also for the first time, raised concern in the public about consumers’ redress for overcharges imposed by cartel behavior.

Due to procedural limitations, an actual judicial discussion on damages was not brought to trial while the government proceeding was pending.3 In addition, procedural rules in Chile do not provide for class actions, a mechanism available only for consumer law infringements in the Consumers’ Protection Act. Thus, in order to claim redress, consumers were in a rather weak situation. With regards to FASA (the company that settled) consumers were better positioned and some got redress promptly through a non-judicial proceeding.

This brief summary addresses the creative attempts to obtain compensation for consumers following the successful government cartel case.

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3 The impact of the case seems well illustrated by the Congress enactment in July 2009 of a Competition Act amendment aimed at reinforcing the anti-cartel toolkit by introducing leniency, wiretapping, dawn raids and increasing fines, among others. The corresponding Bill of amendment had been submitted to Congress in 2006.

There is no actual legal prohibition to proceed before the end of the government case. However, defendants may raise several defences against a damages action based on facts which qualification as a competition law infringement is still pending, which makes this alternative barely feasible. In addition, without a concluding competition law decision, plaintiffs would not benefit from a legal provision in the Competition Act (article 30) which extends significant res judicata effects from the competition law ruling to the damages claim trial.
II. Breach of compensation commitments openly offered by FASA, the company that settled with the FNE

After the settlement in the competition law proceeding between the FNE and FASA was publicly announced, the consumers’ agency (SERNAC) and other bodies pushed FASA towards ensuring compensation to cartel victims. FASA eventually offered to the public a “voluntarily based plan for restitution and compensation” to consumers. A fund of US$ 4.3 million was made available by FASA to reimburse 100% of overcharges in 220 medical drugs sold during the cartel period.4

FASA’s plan for redress, as amended, provided an amount equivalent to 75% of the fund in restitution and compensation mechanisms that promptly reached harmed consumers. However, the remaining 25% was subject to litigation. SERNAC claimed that non-compliance with 100% investment according to commitments by FASA was an infringement to provisions in the Consumers’ Protection Act that constrained suppliers to freely modify their offers’ terms and conditions.5 FASA defences were eventually dismissed and, in November 2014, a Court of Appeals ruled in favor to SERNAC, imposing a US$ 1 million fine and an additional US$1 million in damages.6

III. Class action according to Consumer’s Protection Act initiated by SERNAC against the three cartel members

In 2013, after the competition law proceedings against the cartel had reached a final decision by the Supreme Court, SERNAC initiated a class action proceeding aimed at compensating consumer victims of the pharmacy cartel.7 The case is still proceeding before a Civil Judge, but two major issues have been the subject of decisions by the Court of Appeals: (i) Can Consumers’ Protection Act proceedings be used by SERNAC to collectively claim consumers’ damages due to competition law infringements? (ii) In order to have legal standing for such a claim, is it a requirement for SERNAC (or other plaintiffs) to have been a party before the Competition Tribunal in competition law proceedings?

By a ruling issued by the Santiago Court of Appeals in December 2013, it was held that SERNAC’s powers include the authority for ensuring compliance with legal and regulatory provisions associated with consumers’ rights and for making submissions in proceedings where general consumers’ interests may be at risk. Such a broad authority provided SERNAC with sufficient legal standing for the current action particularly if considered that “the main purpose of competition legal regulations is to protect consumers’ interest”.8 In addition, the court held that not being a party before the Competition Tribunal did not imply a lack of standing before the Civil Judge. Right to redress for competition law infringements cannot be construed as limited to victims that had made submissions in competition law proceedings, particularly in a case where collective or diffuse consumers’ interest is involved, as is the scenario in cartel cases.

5 Class action according to Consumer’s Protection Act initiated by SERNAC before a Civil Judge (1er Juzgado Civil de Santiago), Docket No. C-37607-2009. SERNAC’s complaint was first dismissed by the Judge but thereafter his ruling was overturned by the Court of Appeals.
7 Class action according to Consumer’s Protection Act initiated by SERNAC before a Civil Judge (10mo Juzgado Civil de Santiago), Docket No. C-1940-2013.
IV. The Significance of the Retail Pharmacy Cases

Some of the developments already described have now been included in a new Bill amending the Competition Act recently submitted to Congress by the President of the Republic.9 The Bill through an amendment to the Consumers’ Protection Act, proposes introducing a provision which explicitly allows for the use of class action proceedings when a competition law infringement harms collective or diffuse consumers’ interest. It also states that being a party in the competition law proceedings is not a requirement for having legal standing for the class action proceeding before the Civil Judge.

However, this case also clearly shows that cartel victims do not play a leading role in the competition law system. The compensatory function seems to be secondary for authorities in charge of public enforcement of competition law and the conception that private enforcement may also play a significant role in deterrence seems completely absent. The proposed Bill does not appear particularly audacious in the reforms it proposes for cartel victims redress: there is nothing beyond what courts have already held. The lack of concern on victims by competition authorities has been remedied in part by a pro-active consumers’ protection agency.

Another lesson this case brings to the table is how asymmetries in consequences create incentives in favor or against future cooperation in cartel cases. From the point of view of fines, the company that cooperated got a relatively inexpensive settlement paying US$ 1 million vis-à-vis the companies that litigated that paid US$ 19 million each, a wished asymmetry. However, from the point of view of compensation, the company that cooperated has already paid almost US$ 5 million vis-à-vis the companies that litigated which have made no payments so far, and since it is not clear whether its cooperation or the paid amounts will be of any value before the Civil Judge, as currently the three companies currently face in equal terms the risk of an adverse award in damages.

Consistency in asymmetric legal consequences in different fields (administrative fines and remedies, compensation and criminal prosecution)10 needs to be considered to effectively push companies and executives towards cooperation in cartel detection and prosecution.11

In the following months, the legislator once again will have the chance for aligning these incentives. Hopefully, this time consumer voices will be heard.

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10 In a criminal trial initiated by the Criminal Prosecutor (a body different from the FNE), currently ongoing, the criminal liability of several retail pharmacies executives which participated in the cartel (including two executives from FASA, the company that cooperated) is currently under discussion. Charges are based on the infringement of an old provision of the Criminal Code never used before, rather than an infringement of a provision in the Competition Act. It is not clear that this particular scenario was something the legislature or the competition community expected.
11 The new Bill improves consistency in asymmetric consequences in the fields of administrative fines and remedies, and criminal prosecution, but no asymmetry is proposed regarding the burden of compensation.